

**You Make the Call. . .**



Volume 11, Number 2

{Fall/Winter 2009}

### ***Alternative Dispute Resolution***

*Cayo v. Valor Fighting & Mgmt. LLC, 2009 U.S. Dist. LEXIS 103067 (N.D. Cal. Oct. 20, 2009).* An insurance broker moved for a determination that its settlement agreements with mixed martial arts fighter Richard Cayo and event promoter Valor Fighting & Management (VFM) were made in good faith, thereby satisfying claims that had or could be brought against the insurance company due to its alleged failure to procure a policy that would cover any liabilities associated with a VFM-sponsored event. Cayo brought claims against VFM, the insurance broker, and two insurance companies after he suffered injuries in a match at the event and VFM failed to assume liability for them, which was required under their contractual agreement. Cayo's claims against the broker arose out of a separate contract between VFM and the host facility, under which VFM was obligated to obtain insurance coverage for any liabilities associated with the event. Cayo alleged he was the intended beneficiary of their agreement and that he could recover against the broker in tort if the broker had, in fact, failed to procure a policy for the promoter; however, due to uncertainty about whether a policy had been secured, Cayo also brought breach of contract claims against the insurance companies that opposed the broker's motion.

Despite the opposition, the District Court granted the broker's motion. In approving the settlement with Cayo, the court emphasized that the insurance companies were not challenging the good faith of the agreement, but only the broker's proposed order to bar any future claims against it. It noted that state law already protected companies' interests by continuing to allow claims based on express indemnity agreements. In approving the settlement with VFM, the court concluded that state law did not require the promoter to file a cross-claim before settling with a co-defendant and that the insurance companies failure to show the combined amount of the settlements was not rationally related to the broker's share of Cayo's injuries.

*Hicks v. HSIInternational Sports Mgmt., Inc., 2009 U.S. Dist. LEXIS 103138 (D. Or. Oct. 27, 2009).* A California-based sports management company and one of its agents moved to compel arbitration of claims brought against it by one of its clients, Kevin Hicks, a professional track and

field athlete. Hicks brought suit when the management company failed to enter him in enough events to satisfy his endorsement contract with Nike and retained and cashed a \$12,000 payment that he received from Nike after he unilaterally terminated the representation agreement. The agent first approached Hicks following a collegiate track race in Florida and later induced him to give up his remaining amateur eligibility and become a professional athlete. Hicks signed a representation agreement with the management company. This agreement entitled the company to keep 15% of his earnings from competitions, appearance fees, bonuses, and endorsement deals; however, it also allowed Hicks to terminate the agreement at any time. Subsequently, the management company negotiated a long-term endorsement contract with Nike, under which Hicks would earn at least \$450,000 if he competed in a designated number of sanctioned events. Neither the company nor the agent was licensed to act as an athlete-agent in California, Oregon, or Florida when either the representation or endorsement agreements were negotiated or signed. After the company failed to enter him in enough events to satisfy the Nike agreement, Hicks informed them that they could no longer endorse checks on his behalf. One month later, he terminated the representation agreement. The District Court granted the defendants' motion and held that the arbitration clause in the representation agreement was sufficiently broad to encompass Hicks's claims regarding its enforceability, not just his claims arising out of it.

*Jeffers v. D'Allessandro*, 681 S.E.2d 405 (N.C. Ct. App. 2009). Former professional football player Patrick Jeffers appealed a trial court's decision that compelled arbitration of his claims against the Carolina Panthers and the court's subsequent judgment affirming an arbitrator's award dismissing those claims, which arose out of the surgery performed on his knees by the team's physicians. Jeffers tore the anterior cruciate ligament (ACL) in his right knee during a 2000 preseason game. He agreed to allow one team physician to repair the tear and a second team physician to perform minor arthroscopic procedures on his other knee. Following the procedure, Jeffers was able to rehabilitate his right knee, but suffered weakness in his other knee and pain and swelling in both knees. After playing in a few games the following season, the Panthers released him in 2002. Jeffers brought tort claims against the team for its decision to retain the second team physician, who allegedly performed additional, unauthorized procedures during the surgery that resulted in the deterioration of his knees and prematurely ended his career. After the trial court granted the team's motion to compel arbitration, an arbitrator dismissed Jeffers's grievance because it was not filed within the time limit set forth in the NFL Collective Bargaining Agreement (CBA).

The appellate court affirmed, holding that Jeffers's claims were pre-empted by the Labor Management Relations Act (LMRA) and subject to arbitration under the terms of the CBA. The court emphasized that any state law claim that was substantially dependent upon the application of the provisions of a CBA was pre-empted by the LMRA and determined that Jeffers's claims were entirely dependent upon a duty allegedly violated by the team's physician that did not exist independent of the CBA. The court reasoned that any duty the Panthers had to use reasonable care in retaining the physician arose only because the team hired him and that the duty to hire him arose solely from the CBA. The court also noted that Jeffers did not have to contend the team failed to comply with the specific provisions of the CBA in order to find his claims were pre-empted, emphasizing that most labor contracts include implied rights and that an arbitrator would likely conclude that the agreement at issue required teams to not only retain physicians, but competent physicians. Finally, the court found there was no reason why the arbitration award

should not be confirmed. It noted that Jeffers's claims were subject to arbitration because they involved the application of the CBA's medical rights provision.

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*Liger v. New Orleans Hornets NBA Ltd. P'ship*, 2009 U.S. Dist. LEXIS 85733 (E.D. La. Aug. 28, 2009). The New Orleans Hornets' employees and team moved for approval of a confidential settlement agreement reached on claims that the employees brought against the team under the Fair Labor Standards Act (FLSA) in order to recover overtime pay. The District Court approved the agreement, holding the settlement was a fair and reasonable resolution of a bona fide dispute over FLSA provisions. The court emphasized that settlements needed to resolve a bona fide dispute over something more than the FLSA's coverage, but found the parties' dispute as to damages sufficiently pleaded on the basis that there was genuine uncertainty over the outcome of the claim. It also noted there were disputes about whether the team's practices fell under an exception to the FLSA and the applicable statute of limitations. The court determined the settlement was fair and reasonable because (1) there was no evidence of fraud or collusion between counsel, (2) the litigation could become uneconomical if the class of employees was decertified, (3) several significant substantive issues had yet to be decided, (4) the employees' probability of success on the merits was not exceptionally high, (5) the settlement amount fell within the range noted by the parties, and (6) each employee was advised of the terms and amount of the settlement and there were no absent class members.

*Nat'l Union Fire Ins. Co. v. Las Vegas Prof'l Football Ltd. P'Ship*, 2009 U.S. Dist. LEXIS 108315 (S.D.N.Y. Nov. 17, 2009). National, an insurance company, brought a claim against Las Vegas Professional Football (LVP) to require LVP to adhere to the arbitration clause in its insurance contract with National. The court held that the two arbitration clauses in the contract were valid because the Federal Arbitration Act fosters a liberal federal policy that favors arbitration. Furthermore, the court found that the parties agreed to a broad arbitration clause, which covered not only the payment schedule, but also, practically speaking, nearly all terms in the insurance contract. As a result, the court ordered LVP to comply with the request for arbitration.

*Pressler v. Duke Univ.*, 685 S.E.2d 6 (N.C. Ct. App. 2009). Duke University and one of its employees appealed a trial court's interlocutory order that denied their motion to stay proceedings pending arbitration of defamation claims brought against them by former Duke Lacrosse coach Mike Pressler. The University and Pressler entered into a three-year contract in June 2005 that incorporated by reference the school's dispute resolution policy. Under the policy, all disputes arising out of Pressler's employment were subject to arbitration. However, in 2006, Pressler resigned in the midst of allegations that members of the lacrosse program had raped a stripper at a team party. As part of Pressler's settlement package, all obligations arising from earlier agreements between the parties were cancelled, and both parties agreed not to make disparaging comments about each other. None of the terms in the settlement mentioned the arbitration of any claims arising in the future or the school's dispute resolution policy. Subsequent to the settlement, a Duke employee made allegedly slanderous remarks about Pressler to a Newsday reporter, and another unnamed University official made allegedly false statements about Pressler's employment to the Associated Press. The appellate court affirmed,

holding there was competent evidence to support the conclusion that there was no longer a valid arbitration agreement between the parties when the alleged defamation took place. It emphasized that Pressler's settlement package included a mutual release cancelling all obligations arising out of his 2005 employment contract and that the coach was only subject to the University's dispute resolution policy through the now-cancelled agreement.

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*Scott D. Boras, Inc. v. Sheffield*, 2009 U.S. Dist. LEXIS 99326 (S.D.N.Y. Oct. 23, 2009). The District Court issued an order to athlete agent Scott Boras requiring him to show cause why his petition to confirm an arbitration award against his former client, Major League Baseball (MLB) player Gary Sheffield, should not remain under seal. Boras argued that the matter should remain sealed because (1) both he and Sheffield had agreed that all arbitration matters would be kept confidential; (2) both he and Sheffield relied on that agreement, as well as the MLB Players' Association regulations promoting confidentiality in those proceedings; (3) the petition and the award contained highly confidential information; and (4) the media would widely disseminate the information contained in the petition if it were made available. The Court concluded that the presumption in favor of public access outweighed Boras's concerns about confidentiality as to all matters except proprietary business information. It directed him to re-file the petition with only that information redacted.

*Streeter v. Oakland Raiders*, 2009 Cal. App. Unpub. LEXIS 8260 (Oct. 16, 2009). The Oakland Raiders appealed a trial court's decision to deny their petition to compel arbitration of claims brought against them by former team employee George Streeter after the team fired him just eight months after it had allegedly offered him employment for a term of one year. After he was fired, Streeter sought to find out if he had any legal recourse against the team. A friend within the NFL put him in contact with the league's counsel on litigation matters. There was a factual dispute over how much Streeter was informed about the league's dispute resolution process during their conversation, but he was advised to write a letter to NFL Commissioner Roger Goodell. Streeter informed the commissioner that he was seeking relief for his grievance under the guidelines established by the league to protect workers. Shortly afterwards, the league's counsel wrote to Streeter and the Raiders with the subject line of the letter entitled Dispute Certified for Arbitration. It claimed that Streeter's letter to the commissioner had requested arbitration of their employment dispute. Just over a month later, the league's counsel emailed Streeter to inform him that an arbitrator wanted to schedule a conference call. Streeter claimed this email made him realize that his dispute would be resolved through a procedure that he did not want to use. He hired an attorney who informed the arbitrator that the NFL did not have jurisdiction over Streeter's dispute with the Raiders. Less than three weeks later, Streeter filed the present suit.

The appellate court affirmed, holding there was no error in finding that Streeter had not agreed to submit his dispute to the league's dispute resolution process or waived his right to object to it. The court found that Streeter did not have a pre-dispute understanding that his grievances would be submitted to arbitration because there was no written agreement governing the terms of his employment. It also determined that his communications with the NFL did not show intent to initiate the dispute resolution process. Even though he had referred to the league's guidelines in

his letter to the commissioner, he did not refer to the policy, let alone indicate that he agreed to it. Finally, the court concluded that Streeter's delay in objecting to the process was justified, emphasizing that his early communications with the league's counsel had convinced him that the dispute resolution guidelines were not binding.

### ***Antitrust Law***

*Deutscher Tennis Bund v. ATP Tour, Inc.*, 2009 U.S. Dist. LEXIS 97851 (D. Del. Oct. 19, 2009). The ATP Tour moved for an award of attorneys' fees after it successfully defended itself against federal antitrust and state law claims brought by the national governing bodies for tennis in Germany and Qatar. There was no allegation that those claims were frivolous or filed in bad faith; however, shortly after the lawsuit was initiated, the ATP Tour enacted a new bylaw purporting to entitle it to attorneys' fees if it was victorious in legal disputes with its members. The District Court denied the motion because the association's bylaw did not fit within the narrow contractual exception to the general rule governing attorneys' fees, especially when it would be contrary to the policies underlying antitrust laws. The court emphasized that it found no cases in which a bylaw formed the basis for awarding attorneys' fees when the bylaw itself was not even at issue in the dispute. More importantly, it found no cases in which a court awarded attorneys' fees to a private defendant in an antitrust lawsuit. The court noted that treble damages had been authorized by statute to encourage private enforcement of antitrust laws and that allowing defendants to obtain attorneys' fees would thwart the effect of that incentive.

*Ky. Speedway, LLC v. NASCAR*, 588 F.3d 908 (6th Cir. 2009). Kentucky Speedway (KYS) was the owner of a racetrack, which was built for the purpose of acquiring NASCAR races. Although KYS hosted several race events, it was unable to secure a coveted Sprint Cup race, which are handed out by NASCAR via its sister company, ISC. Unable to acquire a Sprint Cup race, KYS filed an antitrust suit against NASCAR and claimed that NASCAR and ISC violated antitrust laws by colluding to prevent KYS from obtaining a Sprint Cup race.

The Sixth Circuit dismissed KYS's antitrust claim because KYS failed to define the appropriate market. KYS's expert witness was unable to apply the appropriate Daubert test, and instead applied his own, unacceptable, variant. The Sixth Circuit held that because it would be unable to use the expert's testimony, KYS would be unable to define the relevant market to succeed on its antitrust claim.

The Sixth Circuit also noted that KYS's claim faced serious challenges because KYS would need to be able to further demonstrate that ISC and NASCAR colluded in denying KYS a Sprint Cup race. KYS would also need to demonstrate that the failure to acquire a Sprint Cup race constitutes an antitrust injury. For these reasons, the Sixth Circuit dismissed KYS's antitrust claim.

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*O'Bannon v. NCAA*, 2009 U.S. Dist. LEXIS 122205 (N.D. Cal. Dec. 11, 2009). The defendant NCAA brought this motion for change in venue to move the claim from the Northern District of California to the Southern District of Indiana, where the NCAA is based. The underlying case involved an antitrust claim that alleged that the NCAA created an unreasonable anti-competitive effect by allowing third parties, such as video game maker EA Sports, to use the likeness of NCAA student athletes without consent. The court denied the change in venue motion for two main reasons. First, the NCAA was already litigating another, companion case in the Northern District of California. As a result, this case did not add substantially to the NCAA's inconvenience. Second, the plaintiff, a former UCLA student athlete, was likely to call UCLA personnel as witnesses. Having the case heard in California reduced the inconvenience to the witnesses.

*Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 2009 U.S. Dist. LEXIS 84801 (W.D. Pa. Sept. 15, 2009). A racecar tire manufacturer (HRTC) and a motor sports sanctioning body (DMS) moved for summary judgment on federal antitrust claims brought against them by another racecar tire manufacturer (STA). STA filed the lawsuit after the HRTC entered into contracts with sanctioning bodies for dirt oval track racing, including DMS, that made the HRTC the exclusive provider of racing tires for many of their series governed by single tire rules. Through these contracts, HRTC was alleged to have obtained an illegal share of the market for the sale of race tires in sanctioned dirt oval track events in violation of §2 of the Sherman Act. The STA also claimed the adoption of single tire rules was the result of a conspiracy between the HRTC and the sanctioning bodies to eliminate competition in violation of section one of the Sherman Act; however, the STA supported single tire rules as a general matter because they have significant benefits for racing and the STA bid for many exclusive contracts along with the HRTC. Sanctioning bodies that have or plan to adopt a single tire rule typically send out requests for proposals to racecar tire manufacturers before entering into an exclusive arrangement. The DMS took this approach before entering into all but one of its contracts with the HRTC, which consistently made better bids than the STA. The sole arrangement that contained no proposals took place after sanctioning bodies met to discuss adopting a single tire rule for all sanctioned Sprint car races. After that meeting, the DMS contacted the HRTA, and eventually it and several other sanctioning bodies entered into contracts with the tire manufacturer. Under those arrangements, the HRTA agreed to become the exclusive provider of right-rear tires for Sprint car races in exchange for the promulgation and enforcement of single tire rules. The STA claims its sales of those tires dropped approximately 95% after those contracts were signed.

The District Court granted the defendants' motion, holding that the STA could not prove it suffered any antitrust injury as a result of DMS's decision to adopt single tire rules and enter into exclusive contracts with the HRTC. Even though it accepted the STA's broad definition of the relevant market, the court found the exclusive dealing arrangements did not violate §2 of the Sherman Act because they did not include a coercive element that prevented the STA from competing against the HRTC to enter into its own single tire contracts. Although the DMS did not contact the STA before entering into its sprint car deal with the HRTC, there was no evidence that the STA was prevented from making its own proposals to sanctioning bodies. The court also determined that the adoption of single tire rules did not violate section one because sanctioning bodies had been using them for years and they have significant pro-competitive effects in dirt oval track racing. Most importantly, the court concluded that the STA lacked

standing to bring its claims because the sole injury suffered was the result of competition for exclusive contracts. Even though the STA lost, there was no injury to competition itself, which is required to bring antitrust claims.

### ***Bankruptcy Law***

*In re Dewey Ranch Hockey, LLC*, 414 B.R. 577 (D. Ariz. 2009). The NHL and a limited partnership owned by Canadian billionaire Jim Balsillie made separate bids to purchase the Phoenix Coyotes out of bankruptcy. The NHL's bid was \$140 million, reduced by funds that the league had advanced to the club since late 2008 in order to cover its operating losses. The league also promised to keep the franchise playing at its current home through the 2009-2010 season while it looked for a local purchaser. Balsillie's bid ran anywhere from \$52.5 million to \$72.5 million dollars higher than the NHL's bid, depending on whether the City of Glendale accepted a \$50 million offer to terminate the club's lease agreement so he could move the franchise to Hamilton, Ontario. Although Balsillie originally wanted to move the team prior to the 2009-2010 season, he indicated that he would be willing to keep it in Arizona until the following year; however, awarding the team to Balsillie without approval of the league would violate the NHL's bylaws, which prohibit the transfer of ownership or relocation of a franchise without the consent of at least 75% of the league's owners. Balsillie sought approval in the months prior to the auction date, but the league rejected his application, citing character issues. It claimed that he had engaged in bad faith negotiations during two previous attempts to acquire a franchise and that his conduct during the bankruptcy litigation had subjected the NHL to public ridicule. Even if the league had approved his application, there were doubts about whether he could still relocate the franchise. In addition to the restrictions in the bylaws, the NHL Constitution grants each member club the right to veto any proposed relocation that would infringe its territorial rights, which extend to any area within fifty miles of the city in which a team is located. Under that definition, the Maple Leafs would have territorial rights over Hamilton, which is located just forty miles from Toronto. In addition, the Coyotes's lease agreement with the City of Glendale appeared to lock it into playing in Glendale through 2035. The contract provided that Glendale could seek specific performance to ensure the club's home games were played in its new arena, which was built in exchange for the team's commitment to stay in Arizona.

The Bankruptcy Court denied Balsillie's bid with prejudice and denied the NHL's bid without prejudice. In assessing Balsillie's bid, the court noted that the bankruptcy laws allowed it to sell an asset free and clear of any purported interests that were subject to a bona fide dispute. Assuming that the interests of the NHL and the City of Glendale were subject to such a dispute, the court could not accept Balsillie's bid. It emphasized that other laws required courts to provide adequate protection to all interests and that the proceeds of a sale would not protect the league's right to determine who can own a franchise and where those franchises will be located. In turning down the NHL's bid, the court emphasized that the league could not select the unsecured creditors it would pay in full, thereby preventing the debtor and former Coyotes coach Wayne Gretzky from recouping their personal loans to the team. The court found the proposed distribution inconsistent with one of the prime policies of bankruptcy law: treating similar creditors equally. The league failed to give a compelling reason for its inconsistent treatment.

*Curreli v. Lawrence (In re Lawrence)*, 2009 Bankr. LEXIS 3398 (M.D. Fla. Oct. 29, 2009). A partner in a company that leased and operated a motorsports speedway over a six-month period in 2006 moved to discharge his former partner's claim for \$43,000 in indebtedness as part of his Chapter 7 bankruptcy case. The alleged indebtedness arose from a series of questionable acts committed by the debtor while serving as the company's managing member. According to their oral partnership agreement, both partners had a 50% interest in the company, with the debtor responsible for conducting day-to-day operations at the speedway and his co-partner responsible for investing the capital needed for business operations; however, the company conducted its racing events on a cash-only basis, and the debtor did not maintain precise records of the amount of money paid out to employees or winning drivers. Just a month after they began hosting events, the co-partner alleged that the debtor was mishandling the company's revenues, and their relationship deteriorated over the next five months. After the company ceased operations, the co-partner initiated a lawsuit against the debtor, alleging several causes of action. Before those claims could be adjudicated, the debtor filed for bankruptcy.

The Bankruptcy Court granted the motion to discharge, holding the co-partner failed to establish that the alleged indebtedness arose from actions that he committed in a fiduciary capacity, as defined by federal bankruptcy law. The court found that the debtor owed the company and his co-partner certain fiduciary duties under state law, but that none of them rose to the level required to prevent the discharge of a debt under the bankruptcy code. It emphasized that a fiduciary relationship could not exist without an express or technical trust and concluded the co-partner could not establish that their business venture included the necessary elements. The court noted that the partners' oral agreement failed to segregate the capital contributions and revenue, failed to identify the beneficiaries of those funds, and failed to create affirmative duties as to how they would be handled.

### ***Constitutional Law***

*Beaudoin v. White*, 2009 U.S. Dist. LEXIS 121418 (E.D. Mich. Dec. 31, 2009). Plaintiff was licensed by the State Racing Commission of Michigan for, inter alia, selling feed and training horses. Plaintiff allegedly held back a horse at a race in 1974. For that, he was sentenced to federal prison. In 2000, plaintiff was banned from Michigan racetracks by a ruling of the Board of Stewards, who was in charge of regulating horse racing. Plaintiff, arguing pro se, brought several claims against the Board's decision and the individual members on that Board. The plaintiff alleged that the Board took these actions in order to cover up the crooked nature of horse racing in Michigan. The defendants filed for summary judgment.

First, the court dismissed many of the plaintiff's claims on the grounds that the Michigan six-year statute of limitations for personal actions had already run. The court also dismissed the plaintiff's malicious prosecution claim because the Board's decision did not constitute a criminal prosecution as understood in Michigan law. Lastly, the court dismissed plaintiff's due process claim. The plaintiff's application for license was denied on two occasions, but the court made the distinction that those license applications were not for renewal, but for the initial grant of a license. As a result, the plaintiff did not have a property interest in the license application.



Furthermore, even if the plaintiff had a property right, the court believed that the plaintiff received all the process he was entitled to in the form of a hearing before the licensing Board.

*Betts v. New Castle Youth Dev. Ctr.*, 2009 U.S. Dist. LEXIS 81182 (W.D. Pa. Sept. 8, 2009). A development center that runs a treatment program for individuals in the state's juvenile justice system and several of the center's employees moved for summary judgment on Eighth and Fourteenth Amendment claims brought against them by a program resident and his mother after he suffered catastrophic injuries in a collision with another resident during a supervised game of tackle football at the facility. The residents were not provided any protective padding to wear during that game, or any previous game, even though they played tackle football on a regular basis. The District Court granted the defendants' motion, holding the claims against the development center and the individual defendants acting in their official capacity as employees were barred by the Eleventh Amendment. The court also held that both the Eighth and Fourteenth Amendment claims against the individual defendants acting in their individual capacities failed as a matter of law. After analyzing the Eighth Amendment claim, the court determined the defendants' conduct not only failed to amount to a serious constitutional deprivation, but also failed to show deliberate indifference to a substantial risk of harm. In assessing whether there was a deprivation, the court emphasized that allowing the resident to play football, even without protective equipment, did not deny him basic human needs, because he was not compelled to play and was aware of the risks inherent in the sport. It noted that football involves contact at all levels of play and that the defendants' conduct would likely not meet the requirement for negligence under the circumstances. In assessing whether there was deliberate indifference, the court emphasized that the predicate risk of harm must be objectively serious, and that the inherent risks of a sport like football could not be considered intolerable. More importantly, it found there was a lack of evidence to suggest that the defendants knowingly and unreasonably disregarded those risks. After analyzing the Fourteenth Amendment claim, the court similarly concluded that there was a lack of evidence suggesting that the defendants acted with deliberate indifference to the resident's right to bodily integrity, under either the traditional or state-created danger theory of recovery.

*Bruno v. Town of Framingham*, 2009 U.S. Dist. LEXIS 108729 (D. Mass. Nov. 20, 2009). Bruno worked as the coach of the varsity girls' soccer team for Framingham High School. He had a heated argument with a city Parks and Recreation official over the safe movement of soccer goals at the conclusion of practice. As a result of this heated argument, the Parks Department issued a no trespass order. Also, the Athletic Director (AD) and Bruno entered into an agreement whereby, inter alia, Bruno would not voice his opinions regarding his dispute with the parks department. Sometime later, Bruno conducted two interviews with local media concerning the safety of the soccer goals. In the first interview, Bruno was accompanied by the AD and did not discuss Bruno's dispute with the parks department. In the second interview, Bruno, without approval, criticized the parks department in violation of the agreement. As a result, the school suspended Bruno for four games. Bruno resigned from his position shortly thereafter, but changed his mind and tried to rescind his resignation. His request was denied and another person was hired to be the soccer coach.

Unable to reclaim his coaching position, Bruno brought a myriad of federal and state constitutional claims. First, he argued that the suspension violated his free speech rights when the

school punished him for speaking out about the safety of the soccer goals. The court disagreed with Bruno as to the first interview because he was speaking in his official capacity as a soccer coach when he participated in that interview. As to the second interview, Bruno was not speaking in his official capacities as a public employee, but rather as a private citizen because this second interview was not approved by the AD. Nonetheless, the court held that Bruno's free speech rights were not violated because the safety issue to which Bruno gave the interview was not a substantial or motivating factor in the suspension.

Bruno's state claims were also denied. He argued that the school's actions violated the Massachusetts Whistleblower Act; however, the court disagreed on the basis that although the town may have been an employer under the Act, Bruno failed to demonstrate that his protected activity, primarily the interview, was a substantial or motivating factor in the decision to suspend him. Also, Bruno's civil rights claim was defeated because he was unable to demonstrate an actual deprivation of constitutional rights.

*Enclave Arlington Assocs. Ltd. P'Ship v. City of Arlington, 2009 U.S. Dist. LEXIS 105783 (N.D. Tex. Nov. 10, 2009).* The plaintiff owned a 348-unit apartment building, the Enclave, in Dallas, Texas. The defendant city approved plans for construction of the Dallas Cowboys Football stadium, which was located near the Enclave. Once the stadium was completed, several residents of the Enclave complained about noise and traffic problems, which led to several residents submitting notices of intent to move out. In response, the plaintiff brought claims against the city for violations of Fourth Amendment rights, of Fifth Amendment rights, of Due Process Clause rights, and for private nuisance.

The court dismissed the Fourth Amendment claim because the plaintiff failed to demonstrate a seizure that meaningfully interfere[d] with its possessory interests. While the additional traffic and noise were disruptive or inconvenient, such interferences were not sufficient for a Fourth Amendment claim.

The court also dismissed the Fifth Amendment claim because the additional traffic did not constitute a physical taking, but only a residual effect of the completion of the new stadium. Furthermore, the court held that the stadium construction constituted a public purpose because it was approved under statutory law that indicated a public presence. Also, the court noted that the authority of the city to regulate traffic fell within the city's police power and, as a result, there was no taking of property under the Fifth Amendment.

The court also dismissed the plaintiff's Due Process claim. The court held that the regulation of traffic is rationally related to the city's interests in maintaining safe roads. Lastly, the court dismissed the private nuisance claim because the city never waived its immunity to tort suits brought against it. As such, because there was no violation of the Fourth or Fifth Amendments, the city retained its immunity against the private nuisance claim here.

*Ladd v. Uecker, 2009 Wisc. App. LEXIS 931 (Dec. 8, 2009).* Ladd challenged the decision of the trial court to uphold the restraining order that prevented her from attending games that Brewers Baseball announcer Bob Uecker called. Her claim was that the commissioner's order violated her constitutional right to travel. The Court of Appeals for Wisconsin rejected Ladd's argument

largely on the basis that the restraining order was reasonable under the circumstances, given Ladd's repeated harassment of Uecker. Also, the court pointed out that reasonable restrictions on one's right to travel do not violate the constitution as long as those restrictions are narrowly crafted to protect the person being harassed. Here, the restraining order prevented Ladd from attending only those games Uecker called on the radio.

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*Lopera v. Town of Coventry*, 2009 U.S. Dist. LEXIS 83320 (D.R.I. Sept. 11, 2009). Four police officers employed by the Town of Coventry moved for summary judgment on Fourth Amendment, Fourteenth Amendment, and state law claims brought against them by former members of a high school boys soccer team after the officers subjected them to a search for allegedly stolen property in front of an angry mob of students and adults following a road game at Coventry High School (CHS). The town and its current and former police chiefs also moved for summary judgment on Fourteenth Amendment claims brought against them for failing to train the officers. Following the game, the team's coach was intercepted on his way to the team's bus by a large group of CHS football players who proceeded to accuse members of the team of stealing electronic devices from the CHS locker room. The coach responded by searching the bags of every member of the team on the bus, but he found none of the allegedly stolen items; however, by the time the search was completed, the football players had been joined by at least thirty more individuals, comprised of CHS students and adults. The mob began shouting racist remarks at the team and claimed it would not disperse until the missing items were turned over. Shortly afterwards, the four defendant police officers arrived on the scene. The coach informed the officers of the situation, including his search of the players' bags; however, the officers wanted to conduct their own investigation, and the coach consented to another search of the team. The players were ordered off the bus and told to stand with their backs against the bus while the officers searched their belongings. Some members of the team were also subjected to pat downs. The entire search lasted approximately one hour, but at no point during that time did the officers make an effort to disperse the mob, which continued verbally assaulting the players. Once again, none of the allegedly missing items were discovered.

The District Court granted the motions on all of the plaintiffs' claims. It held the officers were entitled to qualified immunity on the Fourth Amendment and state law invasion of privacy claims, and that a reasonable jury could not conclude their conduct was racially motivated, which foreclosed the plaintiffs' § 1983 equal protection claim and state law racial profiling and ethnic intimidation claims. In assessing the Fourth Amendment and invasion of privacy claims, the court found that the law regarding permissible public school searches was not so clearly established as to give the officers notice that a chaperoning coach could not consent to a search of his players in loco parentis. It emphasized that if the officers reasonably believed they could rely on the coach's consent, then they were entitled to immunity from liability for their subsequent acts. The court also noted that a written police policy and a state law regulating the interrogation of minors could not clarify the federal constitutional law issues. In assessing the equal protection and state law claims based on racial discrimination, the court found that nothing could be inferred from the facts that suggested the officers singled out the plaintiffs. It noted that the coach had informed the officers that the team was under suspicion and the search only took place following his consent. The court held that the police chiefs could not be found liable for

failing to train the officers because, even assuming a constitutional violation occurred, there was no history of abuse in conducting searches of public school students that would suggest they were deliberately indifferent to the plaintiffs' rights. Finally, the court held the Town of Coventry could not be found liable for failing to train the officers because, again assuming a constitutional violation occurred, there was no evidence that the officers' actions were predicated by a known, widespread policy or custom that was deliberately indifferent to the plaintiffs' rights.

*Menard v. La. High Sch. Athletic Ass'n*, 2009 La. App. LEXIS 2187 (Dec. 23, 2009). Menard, a seventeen-year-old high school football player, challenged the Louisiana High School Athletic Association's (LHSAA) decision not to waive its transfer rule so that Menard could participate in football during his senior year. The court held that it lacked subject matter jurisdiction with regards to the transfer rule as the LHSAA's internal regulations did not constitute state law; however, the court did take jurisdiction over Menard's Due Process and Equal Protection Clause claims. The court dismissed the Due Process Clause claim, stating that participation in interscholastic athletics constitutes neither a procedural nor a substantive due process right. The court also dismissed the Equal Protection Clause claim on the basis that the transfer rule's purpose to prevent high schools from freely recruiting athletes constituted a rational basis to satisfy scrutiny under the Equal Protection Clause.

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*Mora v. Westville Corr. Facility*, 2009 U.S. Dist. LEXIS 99118 (N.D. Ind. Oct. 23, 2009). A former Westville Correctional Facility (WCF) inmate moved for relief from a decision granting the motion to dismiss claims that he brought against the WCF, two state services departments, and the hospital where he underwent surgery after he broke his leg while participating in a soccer game at the facility. The plaintiff alleged that the injury occurred because the WCF did not provide inmates with protective equipment to use in those games, and that he was now suffering from pain and walking with a permanent limp due to negligent medical treatment. The District Court denied the motion, which was the plaintiff's third attempt to receive relief from the judgment. The court emphasized that the plaintiff failed to prove that either prison officials or hospital employees were deliberately indifferent to his medical needs, which was necessary to sustain his § 1983 claims.

*Paoli v. State*, 2009 U.S. Dist. LEXIS 77844 (D. Del. Aug. 27, 2009). The State of Delaware and Delaware Tech College (DTC) moved for summary judgment on federal procedural due process claims brought against them by a college softball player after she was suspended from school for offering drugs to a teammate and breaching the school's violence-free policy. Following each incident, DTC sent her a complaint that detailed her alleged violations, and, within a month, she received a letter from the school's counsel informing her that it had scheduled a hearing on them; however, on the day of the hearing, the plaintiff had a doctor's note delivered to the counsel's secretary. It was dated ten days earlier, and stated that she would be need to be off of school through the end of the week. Later that day, DTC learned that the plaintiff had been on campus during the time period for which the note excused her. Based on that information, the school determined that she could have shown up at the hearing and denied her request for a continuance. Since the plaintiff had failed to attend, the hearing was held in her absence and resulted in her suspension.

DTC informed her of that decision in a subsequent letter, which also contained instructions for filing an appeal. The plaintiff appealed, but a review panel denied her request to set aside the suspension. The District Court affirmed, holding that DTC did not violate the plaintiff's federal due process rights because it provided her with written notice of the complaints against her and the opportunity to defend herself in a hearing. The court found that the school had grounds to deny her request for a continuance and emphasized that she was still permitted to file an appeal. Thus, based on the totality of the circumstances, it concluded that DTC had satisfied the minimum requirements of due process.

*Sala v. Warwick Valley Cent. Sch. Dist., 2009 U.S. Dist. LEXIS 67353 (S.D.N.Y. July 29, 2009).* A public school district, its superintendent, and its high school football coach moved for summary judgment on claims brought against them by the father of a football player after his son was dismissed from the team in the middle of the season and then played only sparingly when he was later reinstated through a court order. The dismissal took place after the player had run-ins with both law enforcement and school authorities earlier in the season. In the first incident, the player and three of his teammates were caught drinking and in possession of a small amount of marijuana at his parents' home. When none of his teammates claimed ownership of the drugs, the player was arrested and later suspended from the team for the remainder of the season. Following an appeal, the district and the player's father entered into a settlement agreement, reducing the suspension to four weeks as long as the player adhered to the school's code of conduct; however, just a few weeks later, the player was observed speeding in the school's parking lot following a game. When a school employee urged him to slow down, the player allegedly responded in a profane manner. Later, he was ticketed for remaining in the lot past curfew. The following week, the coach kicked the player off the team. On another appeal to the district, the player's father was given an opportunity to defend his son's latest actions. But he failed to present any evidence to support his allegations, and the superintendent sustained the decision. The player's father, after filing the instant lawsuit, obtained a permanent injunction that forced the school to place his son back on the team. The school complied with this order, but the coach chose to limit the boy's playing time, despite previously acknowledging him as one of the stars of the team.

The District Court granted the defendants' motion, holding that the player's father could not prove his constitutional rights were violated or that the defendants breached the settlement agreement. In assessing the procedural due process claims, the court did not discuss whether the player had been deprived of a protected interest because the defendants had afforded his father all the process that was due. It determined that the player had been given an opportunity to be heard throughout the appeals process and that he had been properly notified of the reasons supporting the district's decision. In assessing the substantive due process claims, the court emphasized that the player did not have a constitutional right to participate in interscholastic athletics, and that, even if he did, the defendants' conduct was not egregious enough to be actionable. After analyzing the First Amendment retaliation claim, the court concluded that there was no evidence linking the father's decision to initiate the lawsuit and the coach's later decision to limit the boy's playing time. It noted that the coach had provided legitimate reasons for his decision, which was entitled to a great degree of deference from the court. Finally, in dismissing the breach of contract claim, the court emphasized that the settlement agreement only created conditions precedent to the player's reinstatement, not a bar that immunized him from his future transgressions.

*Shand v. Martin*, 2009 U.S. Dist. LEXIS 69989 (E.D. Mich. Aug. 11, 2009). University of Michigan Athletic Director William Martin moved for summary judgment on tort and First Amendment claims brought against him by David Shand after he was fired from his job at an Ann Arbor radio station that owned rights to broadcast the university's football games. Shand alleged that Martin threatened to terminate those rights if the station did not fire him after he made controversial on-air comments related to university employees, including his ex-wife. Representatives from the radio station claimed Shand was fired only because of complaints that the station had received about his comments.

The District Court granted the motion, holding Shand failed to proffer any admissible evidence suggesting that Martin played a role in the station's decision to terminate Shand. The court emphasized that Shand could not establish the existence of a civil conspiracy, noting that statements made by one of the station's representatives to Shand and his wife were not admissible statements made by a co-conspirator because (1) the allegations contained in those statements were not substantiated by other independent evidence and (2) the statements could not further the alleged conspiracy because they were made after the station had already made its decision to fire Shand. In addition, the court could not link statements made about Martin's role in convincing the station to prevent Shand from broadcasting a charitable golf outing to Shand's termination; however, the court refused to impose sanctions on Shand and his attorney for statements they made connecting Martin to the radio station's decision. The court determined that Shand's reliance on an anonymous caller's information was reasonable because there was no evidence available to suggest the call did not take place.

*United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009). The federal government appealed three district court orders related to the government's seizure of drug testing records and urine samples for hundreds of Major League Baseball (MLB) players from an independent business that administered a MLB drug-testing program approved in the 2002 collective bargaining agreement. Under the program, all urine samples and drug testing records were to remain anonymous and confidential, and unless more than five percent of the players tested positive for performance-enhancing substances during the first year of the program, there would be no testing in future seasons; however, that same year, the government began investigating BALCO, which was later found to have provided performance-enhancing substances to several prominent athletes. During that investigation, the government learned of several players who had tested positive under the MLB program. Subsequently, the government obtained two warrants. The first warrant, issued in the Central District of California (CDC), allowed the government to search the MLB administrator's facilities, but the search was limited to the drug-testing records of the ten players for whom the government had probable cause. The second warrant, issued in Nevada, allowed the government to seize the urine samples of players from a laboratory in Las Vegas. The government also obtained subpoenas, issued in the Northern District of California, which required the MLB administrator to produce the drug testing records for the samples the government just seized. Because the government exceeded the scope of the CDC warrant, both the MLB administrator and the MLB Players Association (MLBPA) moved for the return of the drug-testing records and urine samples, except for the materials related to the ten identified players and to squash the subpoenas. The courts in all three districts granted the motions, chastising the government for failing to follow the procedures specified in the CDC warrant.

The Court of Appeals affirmed two of the orders and dismissed the third order as untimely; however, in assessing the third order the CDC noted that all factual determinations and issues resolved against the government also bound it in the other two jurisdictions. In that case, the court held the government did not comply with the directive to segregate all information related to the ten players as to which it had probable cause from information related to other players because the initial screening of the data on the MLB administrator's computers was conducted by the investigating agents instead of specially-trained computer personnel. In affirming the order from Nevada that mandated the return of the urine samples, the court emphasized the preclusive effect of the CDC order and a previous order from the Northern District of California. The Northern District's order found the failure to segregate the data was illegal when both types of data were included in a directory viewed by case agents. The court determined that the plain view doctrine could not apply to the information contained in the directory or else the government would have an incentive to seize as much material as possible and that the plaintiffs could rely on rule 41(g) of the Federal Rules of Criminal Procedure to obtain the return of seized material. It noted that the MLBPA was likely to suffer irreparable harm if the additional seized materials were not kept secret and that the government could not benefit from its own wrongdoing by retaining illegally obtained evidence. Finally, in affirming the order to quash the subpoenas issued in the Northern District of California, the court concluded that it was not an abuse of discretion to find the subpoenas unreasonable in light of the unlawfully seized evidence. It also recognized that the subpoenas were only an insurance policy designed to keep the plaintiffs from litigating the legality of a previously obtained order that purported to give it access to all drug testing records and urine samples in the MLB administrator's possession.

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### ***Contract Law***

*Adderley v. NFL Players Ass'n, 2009 U.S. Dist. LEXIS 115741 (N.D. Cal. Nov. 23, 2009).* In the first Adderley case, the Court approved the settlement between Adderley, who was representing all similarly situated retired NFL players, the NFLPA, and the NFL. The settlement agreement provided that retired NFL players who signed the proper group licensing authorization (GLA) form on time would have the money generated from the licensing of the retired players group rights divided among those who signed the GLA. There was an objection made on the grounds that certain players were improperly excluded from the agreement. The court, however, determined that those excluded players had ample time to fill out the appropriate form. Furthermore, the court noted that the scope of the release in the settlement agreement had been narrowed in order to protect the interests of the absent class members.

*Adderley v. NFL Players Ass'n, 2009 U.S. Dist. LEXIS 115742 (N.D. Cal. Nov. 23, 2009).* In the second Adderley case, the defendants challenged not the damage amount awarded to the plaintiffs, but rather the amount of attorney's fees requested. As a result of the class action lawsuit brought by the retired NFL players, which claimed that the NFLPA breached its licensing contract and violated its fiduciary duties, the NFLPA settled with the retired players for

\$26,250,000. The retired players attorneys moved for attorney's fees in excess of nine million dollars. The court believed that this was excessive for several reasons.

First, the court held that the number of attorneys present throughout the trial was unnecessarily excessive. Although only three attorneys were needed during most of the trial, there were routinely eight or more present on a daily basis. The court also held that the attorney's fees should be reduced due to the poor performance of plaintiff's counsel. While the damage amount was significant, the court highlighted two problems with plaintiff's counsel's work. First, counsel ignored a key piece of evidence, an email chain between EA Sports and the NFLPA, which would have significantly aided plaintiff's case. Second, counsel failed to present an alternative damage theory. The court specifically noted that the lack of an alternative theory led to only \$7.1 million in damages for breach of fiduciary duty. This amount, again, while significant, was not as significant as it would have been, if not for counsel's failures. Ultimately, the court approved \$4,930,000 for fees and \$1,600,000 for expenses, a reduction of nearly \$2.5 million from that requested.

The court did, however, grant counsel's request for extra compensation to Adderley, the lead plaintiff in the case. The court hesitated to give the extra award because it argued that such extra payment might act as an incentive to entice the lead plaintiff to support a marginal settlement. In this case, however, the court granted the payment, not as an incentive, but as compensation for the unusually high burden the trial placed on Adderley. As a result, he was given an extra \$10,000 as compensation.

*Bires v. WalTom, LLC, 2009 U.S. Dist. LEXIS 87091 (N.D. Ill. Sept. 23, 2009).* An auto racing team that runs a driver development program moved for summary judgment on seven of eight claims brought against it by current NASCAR Nationwide Series driver Kelly Bires. Bires alleged that the team entered into an oral driving agreement with him and then later forced him to enter into a written agreement with different terms, including a provision that entitled the team to 25% of all royalties earned or received by Bires as a result of his activities in the racing industry over the next ten years. Bires also moved for judgment on the pleadings as to four of those claims. Bires joined the team's program in late 2005 in hopes of securing a driver position in the ASA Late Model Series (ASALMS) the following season. In December 2005, Bires signed an agreement that prohibited him from negotiating for a driving position on another team for a period of forty-five days. He alleged that he had no choice but to sign the agreement based on the surrounding circumstances. As a result, Bires claimed that he forfeited opportunities to secure other employment. Late in the same month, Bires received a telephone call from the team's owner that purportedly included a formal offer to drive for the team the following season. He claimed that later conversations solidified the terms of his employment and altogether resulted in an oral contract to drive in the ASALMS in 2006. According to Bires, the team never indicated that its promises would not be binding until a written agreement was signed, or that he would have to make future royalties payments. Nevertheless, the team presented him with a written driving agreement late in the following month. Bires initially refused to sign it, but later relented because it would have been too late to find another full-time driving position for the 2006 season. The team estimated that it could earn up to \$7 million pursuant to the royalties provision, and it appeared likely based on Bires' early performances. After capturing rookie of the year



honors in his only season with the team, he made over \$850,000 with other race teams over the next two years when he competed in high-level NASCAR series.

The District Court granted each parties' motion in part. After assessing Bires's claim under the state's wage assignment statute, the court granted the team's motion, emphasizing that the royalties provision was not a wage assignment because it was not used to secure an existing debt; however, the court granted Bires's motion on his ensuing two claims, holding that the contract was null and void because it lacked adequate consideration and constituted an illegal restraint of trade. It found the royalties provision amounted to a restrictive covenant under state law and that Bires' one-year tenure as a team driver was insufficient consideration to enforce that type of clause. Moreover, the court determined that the covenant itself was unreasonable, rendering the provision illegal under state law. The court emphasized that the royalties provision imposed a large penalty upon Bires if he continued to compete as a driver and that its scope was not properly limited. Not only did it extend for up to nine years beyond the term of his employment with the team, but also applied to activities that were not directly connected with the team's racing activities. In addition, it failed to include a geographic restriction, and there were doubts as to whether it actually served to protect the team's legitimate business interests. The court moved on to deny the team's motion on Bires's unconscionability claim, noting there was a dispute over the costs incurred by the team during the 2006 season. The court also denied Bires's claim that alleged a violation of the state's consumer fraud act, which was not based exclusively on the alleged breach of the oral agreement between the parties. Finally, based on its previous conclusion that the entire contract was null and void, the court directed the parties to file position papers as to how the remaining claims would be affected.

*Brotherson v. Prof'l Basketball Club, L.L.C., 2009 U.S. Dist. LEXIS 100257 (W.D. Wash. Sept. 4, 2009)*. The entity that owns the NBA's Oklahoma City Thunder, Professional Basketball Club (PBC), filed an objection to a class notice proposed by former season ticket holders of the now-defunct Seattle Supersonics as part of the lawsuit that they brought against PBC after it allegedly violated the state's consumer protection law when it moved the team following the 2007-2008 season and breached contracts, which gave season ticket holders the right to renew their tickets for future seasons. The owner also moved for additional discovery to depose an additional allotment of absent class members and the season ticket holders' damages expert. The District Court found the objection irrelevant and then granted the motion in part for additional discovery. In assessing the objection, the court determined that renewing sponsorship season ticket holders should also get the notice and that PBC could prove whether or not they were appropriate members of the class at trial. In assessing the motion for additional discovery, the court emphasized that discovery ended nearly one year earlier and that PBC had not offered good cause to reopen it to depose absent class members. The court noted that whether the class members wanted to renew their season tickets was irrelevant because the court had previously determined that it would only recognize a defense based on objective criteria, such as whether a class member had the means to pay for renewal or whether the price of comparable tickets at the Ford Center, the home of the Thunder, was higher or lower than the price of the Supersonics seats; however, the court allowed PBC to depose the damages expert, who had supplemented a previous report, which suggested that half of the class would not have renewed based on comparative ticket prices with a revision that contradicted his previous conclusions. The court found it necessary for PBC to be able to depose him about the reasoning behind his revision.

*City of Jackson v. Hersh*, 2009 Tenn. App. LEXIS 591 (Aug. 25, 2009). The City of Jackson appealed a trial court's decision, which found its previous order was a final judgment that prevented the city from recovering prejudgment interest and attorney fees after it prevailed on a breach of contract claim brought against the owner of the municipality's minor league baseball team. The city entered into a stadium use agreement with the owner, which required the team to pay surcharges on all of the tickets it sold at games. When the owner failed to comply with the agreement, the city sued for \$175,000 in unpaid surcharges. It initially sought prejudgment interest and attorney fees when it brought the claim. Following the institution of the lawsuit, the court entered a consent order allowing the owner to complete his planned sale of the team to a third party. The order required the third party to forward the sale proceeds to the court to hold in escrow until the issues between the city and the owner were resolved. The court ultimately found for the city in the amount of \$112,000, but did not address its prior request for prejudgment interest and attorney fees. Subsequently, the court found its order dismissing the owner's remaining counterclaims against the city was a final judgment, and that the City's motion to assess prejudgment interest and attorney fees was barred as untimely. The appellate court reversed, holding the trial court erred in concluding its previous order was a final judgment because (1) the request for prejudgment interest and attorney fees was a separate claim, not part of the amount of recovery for damages, and (2) the owner's motion to release the funds held in escrow had yet to be resolved. Based on those conclusions, the court found it did not have jurisdiction to hear the appeal and remanded the case back to the trial court.

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*Giacomelli v. Scottsdale Ins. Co.*, 354 Mont. LEXIS 640 (Dec. 8, 2009). Giacomelli and another jockey were injured during a horserace. The company that conducted the horserace, Alliance, leased the racetrack from the county. Pursuant to that agreement, Alliance purchased insurance from Scottsdale Insurance. The insurance had an exception for special event participants and athletic or sports participants. The jockeys sued Alliance, who then contacted Scottsdale Insurance. Scottsdale refused to pay the insurance on the basis of the two exceptions. The jockeys settled their suit against Alliance, who then transferred any claims it had against Scottsdale to the jockeys. The district court granted summary judgment in favor of Scottsdale. The jockeys appealed that decision.

The central issue for the court was whether Montana law mandates those who are licensed to conduct horse races to have insurance that covers jockeys, which would invalidate the two exceptions in the insurance policy at issue here. The court concluded that the term exhibitor under the statute did not include jockeys because jockeys are participants in the race. As a result, the court upheld the district court's judgment.

The court also rejected the jockeys' argument that the exceptions in the insurance policy were ambiguous. The jockeys argued that there was a split of opinion in the courts as to whether exceptions like the ones at issue here were ambiguous. The court held that such differences in court opinions were not determinative, but are only one factor to consider when determining whether the exception is ambiguous. As a result, the court held that other factors, including the plain language of the exception itself, weighed in favor of finding the exception not ambiguous.

Lastly, the jockeys argued that there was a reasonable expectation that the insurance contract would cover injuries to the jockeys. While the court agreed that Alliance and the jockeys expected the insurance to cover these injuries, such an expectation was not reasonable. In particular, the Court pointed to the two exceptions listed in the insurance agreement as demonstrating Scottsdale's intent not to cover any injuries to jockeys.

*Halpern v. Greene, 2009 N.Y. Misc. LEXIS 2385 (Sup. Ct. Sept. 15, 2009).* Undeclared middleweight boxer Joe Greene and his father moved to dismiss claims brought against them by the boxer's unlicensed former managers after Greene allegedly breached their management agreement and his father took over as his manager. The plaintiffs met Greene in 2005 when he was an aspiring amateur boxer. Shortly afterwards, they induced him to enter into a management agreement, under which they provided him with substantial financial assistance and support over a two-year term. During that time period, Greene boxed his way into the top ten of the world rankings. In 2007, the parties renewed the management agreement for another three years, under which the plaintiffs agreed to pay Greene's father over \$20,000 for his involvement in his son's career. Later that year, the plaintiffs sought to hire a promoter to give Greene better exposure in the boxing community; however, Greene's father persuaded the boxer to demand a \$40,000 signing bonus, and the promoter balked. As a result, the plaintiffs had to secure the requested bonus from another source. Over the next year, Greene's father took steps to supplant the plaintiffs as his son's manager, minimizing contact between the parties and dealing with the promoter one-on-one. At one point, he prohibited the plaintiffs from seeing his son following a fight in Madison Square Garden. Nevertheless, the plaintiffs continued to pay the boxer's training expenses. By the time Greene cut off communications with the plaintiffs, they had spent more than \$225,000 on his career and had yet to be paid any commissions under the latter management agreement.

The court granted the motion in part. First, the court held the plaintiffs' claims for breach of contract and tortious interference with contract were barred because the management agreement could not be enforced. It emphasized that state law required all boxing managers and promoters to be licensed and that all contracts entered into with unlicensed individuals were void as a matter of law. The court noted that licensing requirements enacted to generate revenue would not defeat a contract, but that the regulations at issue were not designed for that purpose. Instead, they paralleled the federal Muhammad Ali Act, which was designed to protect professional boxers from exploitive and unethical management practices; however, the court refused to dismiss the plaintiffs' unjust enrichment claim, emphasizing that some of the plaintiffs' financial contributions were allegedly unconnected to their role as Greene's managers. If true, those payments would be recoverable because the state regulations were designed to act as a shield, not as a sword for the boxer's personal gain.

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*Ivy Soc'y Sports Group, LLC v. Baloncesto Superior Nacional, 2009 U.S. Dist. LEXIS 65193 (S.D.N.Y. July 28, 2009).* The national governing body (NGB) for basketball in Puerto Rico, a men's professional basketball league located in that country, and the league's former president moved to transfer a lawsuit brought against them by their former licensing agent, which alleged that the league breached their representation agreement and that both the NGB and the league's

former president tortiously interfered with it. The representation agreement provided that the agent would negotiate all licenses originating outside of Puerto Rico and required the league to pay the agent a fee equal to 35% of any arrangement it negotiated in principle prior to the agreement's expiration. The agent alleged the league failed to compensate it for a contract it negotiated with Nike just prior to the expiration of their agreement and that both the NGB and the league's former president interfered with that agreement by prematurely cutting the agent out of those negotiations.

The District Court granted the defendants' motion, concluding it was in the interest of justice to transfer the lawsuit to the District of Puerto Rico because there were material non-party witnesses located there and the locus of operative facts giving rise to the agent's claims originated there. The court, as it regarded the convenience of the witnesses, emphasized that none of the agent's listed non-party witnesses resided in New York. The court, as it regarded the locus of operative facts, noted there was no evidence that any act significant to the tortious interference claim took place in New York, and that the agreement allegedly breached was negotiated and executed in Puerto Rico.

*Landco Equity Partners, LLC v. City of Colorado Springs, 2009 U.S. Dist. LEXIS 68525 (D. Colo. July 28, 2009).* Real estate developers moved for a protective order to avoid producing documents related to the potential settlement of claims they brought against the city of Colorado Springs and its public facilities authority (PFA) after they allegedly breached an economic development agreement (EDA) related to a project to update the U.S. Olympic Committee's (USOC) headquarters. After being awarded the project bid, the developers entered into an EDA with the defendants, under which they agreed to sell a number of floors in the future headquarters building to the city. In exchange, the city agreed to convince the PFA to issue municipal bonds to purchase the space. The developers alleged the city breached the EDA by failing to make an effort to issue the bonds or purchase the space and by failing to provide funds it had committed for the costs of temporary office space that the developers had made available to the USOC. During settlement negotiations, a local newspaper submitted an open records request, seeking all documents exchanged among the parties over the course of the litigation.

The District Court granted the motion in part by holding that the public's interest in settling the case outweighed any presumption of access to the information, especially when the public would eventually gain access to all discussions and communications related to the city's approval of any settlement. The court noted that the state's open records law did not typically grant the public access to communications related to litigation strategy and that there were significant privacy interests implicated by the requested material. It also emphasized that the documents would never have been exchanged if the parties were not attempting to resolve their dispute; however, the court found that a few of the city's documents also contained unprotected information, so only a portion of them was protected by the order.

*Luzzi v. ATP Tour, Inc., 2009 U.S. Dist. LEXIS 87405 (S.D. Fla. Sept. 23, 2009).* The ATP Tour moved to dismiss claims brought against it by several European tennis players after they signed a brief consent form that they thought pertained only to the ATP anti-doping policy, but actually purported to bind them to the organization's rulebook, which was later relied on to suspend them from competition and fine them for gambling on the sport. After acquiring

the players' online wagering records, the ATP began administrative proceedings against them, including two hearings in Florida. After the conclusion of those hearings, the players brought suit in the Southern District of Florida, seeking a declaratory judgment that the consent form did not bind them to all of the provision in the ATP rulebook, they did not enter into a contract with the ATP, and the ATP breached its fiduciary duty to them.

The District Court denied the motion by holding that the players sufficiently alleged that venue was proper in the Southern District of Florida and that the ATP breached a fiduciary duty to them. The court, in assessing whether the venue was proper, noted that the ATP was a Delaware corporation and that a substantial part of the events giving rise to the players' claims occurred in the Middle District of Florida; however, the fact that ATP members sponsor two yearly tournaments in the Southern District appeared on the surface to be sufficient under the venue statute. The court concluded as to the breach of fiduciary duty claim that the allegations that the ATP was formed to protect the players' interests and intended to educate them about its rules was enough to survive the motion, especially when the existence of a duty is heavily predicated on the relationship of the parties and the type of transaction involved.

*Lynwood Redevelopment Agency v. Angeles Field Partners, LLC, 2009 Cal. App. Unpub. LEXIS 9770 (Dec. 10, 2009).* Lynwood Redevelopment Agency (Agency) had four of its members also sitting as acting members of the Lynwood City Council. During their time on the Council, those members of the Agency conducted negotiations with the Angeles Field Partners (AFP) to contract for a redevelopment project, which included a new NFL stadium. Although the reasons are not clear to the court, the four council members were recalled from their position on the Council, most likely as a result of the obvious conflict of interest; however, after the members were recalled, but before the new council members could be sworn in, the four members voted to approve the contract with AFP. The new members of the Council, having replaced the recalled members, brought suit against the previous Council's decision to approve the contract with AFP. The question for the court was whether this approval could be maintained.

The California Appellate Court overturned the trial court's decision to strike down the approval for three reasons. First, the new council members were not yet sworn in at the time of the approval. As a result, the four members were still active council members. Second, the court found no violation of the Brown Act on the basis that the Council does not have standing to sue itself for violations of the Act. Third, the court rejected the appellants' argument that the contract was unconscionable. The court held that the appellants were using a contract theory to try and vindicate social policy, which is impermissible under contract law.

*M'Baye v. World Boxing Ass'n, 2009 U.S. Dist. LEXIS 69139 (S.D.N.Y. July 29, 2009).* The World Boxing Association (WBA), a match promoter, and a boxer's attorney moved for summary judgment on claims brought against them by the number-one-rated contender for the WBA super lightweight title, M'Baye, after he was not given the opportunity to fight for the title within the period of time stipulated by the WBA rules. The WBA rules provide that a WBA champion must periodically defend his title against the number one rated contender and prevent him from signing an agreement to defend the title or actually defend the title against another boxer within sixty days prior to the date he must engage in a mandatory defense; however, champions may avoid the mandatory defense rules by seeking a permit to schedule a non-

mandatory fight from the WBA championship committee. The committee may issue a permit if the non-mandatory fight would unify the world titles of various associations or be of great significance to the boxing world. M'Baye brought his claims after being denied the opportunity to box for the title on three separate occasions due to the WBA's decision to issue special permits to the super lightweight division champion. On the first two occasions, boxers represented by the defendant match promoter were allowed to fight for the title instead. On the third occasion, the then-champion was represented by the defendant match promoter and signed an agreement to fight a unification bout within the sixty-day period in which he was supposed to engage in a mandatory defense without first seeking a WBA permit. The WBA championship committee later voted to grant a permit on the same day the request was made. M'Baye sought to enjoin the third fight in state court. After the suit was removed, the attorney for the then-champion claimed the boxer did not sign the contract to participate in the match until the WBA issued its permit.

The District Court granted the WBA's motion in part, but granted the motions of the promoter and its attorney as to all the claims against them. In assessing the WBA's motion, the court first concluded that M'Baye's claim under the Ali Act could not be sustained because the law only bars associations from arbitrarily changing a boxer's ranking, not from granting exceptions to allow other fighters to box for the title instead; however, the court refused to dismiss M'Baye's breach of contract claim, determining a reasonable jury could find the WBA was not allowed to issue permits for the latter two fights, that M'Baye's right to box for the title was adversely affected, or that his reasonable expectations were not met by being repeatedly bypassed. The court emphasized there was significant evidence that suggested the WBA acted in bad faith in interpreting its own rules. In granting the promoter's motion, the court found it could not be held liable for tortious interference with contract because there was no evidence to suggest it intentionally and illegally convinced the WBA to breach its own rules and permit other boxers to fight for the title ahead of M'Baye. In granting the attorney's motion, the court also found there was no evidence to suggest tortious interference with contract and dismissed the state law claim related to the attorney's misrepresentation about when his boxer signed the contract for the unification bout because M'Baye could not demonstrate he was harmed by the claim. The court noted its decision to deny M'Baye's request to enjoin the fight did not rely on the attorney's representation.

*Montclair United Soccer Club v. Count Me In Corp.*, 2009 U.S. Dist. LEXIS 83535 (W.D. Wash. Sept. 14, 2009). The CEO of a Washington corporation (CMI), which provides online registration services for youth sports organizations, moved for summary judgment on claims brought against him by a New Jersey youth soccer organization after the funds owed to the organization were commingled with CMI's own operating funds and CMI failed to pay remittances to the organization when they became due. In the alternative, the CEO also moved for partial summary judgment on the organization's claim for unjust enrichment and for a declaratory judgment that punitive damages were not available on the organization's claim for tortious interference with its contract with CMI. Finally, the organization moved for partial summary judgment on its claims for conversion, unjust enrichment, and deceptive trade practices under state law. Under their client service contract, CMI was supposed to collect all of the registration fees for the organization's activities and then remit those payments to the organization twice a month, minus agreed-upon transaction fees; however, it failed to remit approximately \$210,000 in fees paid during the spring, summer, and fall of 2008. When

organization officials contacted CMI in October 2008, the CEO informed them that the corporation was having cash flow problems, but expected to remit the fees it collected through August by the end of the week. Shortly thereafter, the CEO informed the corporation's employees that clients' funds had been commingled with CMI's own operating funds in order to pay operating expenses. Those expenses were primarily tied to developing a new software technology. CMI eventually forwarded some of the promised fees to the organization, but was still \$117,000 short when this lawsuit was initiated. As part of the lawsuit, the organization also brought claims against CMI and its parent company, but they were stayed after the corporation filed for bankruptcy. The software technology developed by CMI was later sold to a new company, but the CEO was still able to benefit from it because he was a part owner of that entity, deriving a salary of approximately \$180,000 per year.

The District Court granted the CEO's motion in part and denied the organization's motion without prejudice. The court, in assessing the CEO's motion, held there was a genuine issue of fact as to whether he could be shielded from personal liability by the business judgment rule. The court emphasized that there were doubts about whether his management decisions were made in good faith and with the reasonable care, skill, and diligence required to demonstrate proper oversight of CMI's finances because (1) he failed to submit evidence showing that he had discussed the commingling and use of client funds with his advisors, (2) he used client funds for a project that he stood to benefit from, (3) he knew about CMI's remittance problems at least one year prior to disclosing them to clients, and (4) he lied to the plaintiff organization about the reason for the remittance problems; however, in assessing the CEO's alternative motion, the court found the organization's claim for unjust enrichment was barred. The court emphasized that those claims had to arise out of a valid contract under state law and that the organization did not have the requisite direct contractual relationship with the CEO. The court also concluded that the organization could not collect punitive damages on its tortious interference claim, noting that those damages were unavailable unless authorized by a state statute. Finally, in assessing the organization's motion, the court noted that the CEO might be held liable for conversion and deceptive trade practices under the responsible corporate officer doctrine; however, those claims required the court to assess CMI's liability, which it could not do while the stay remained in place.

*Nat'l Jockey Club v. Ganassi*, 2009 U.S. Dist. LEXIS 62235 (N.D. Ill. July 21, 2009). Both parties brought numerous in limine motions on their claims and counterclaims in a lawsuit filed by the National Jockey Club (NJC) after Chip Ganassi, a former auto racing driver and current team owner, executed a personal guaranty that secured a loan provided to the Chicago Motor Speedway (CMS) and then allegedly breached it when the CMS ceased operations and defaulted on the loan. The NJC and Ganassi's limited liability corporation formed CMS with the purpose of transforming NJC-owned Sportsman's Park into a facility for both horse and auto racing. Construction was financed through a \$60 million loan. NJC and CMS entered into a lease agreement under which CMS would be responsible for paying off the loan as it came due. Ganassi personally guaranteed CMS's obligations under the lease up to \$22.5 million. That amount was subsequently reduced to \$10.5 million. Following its default, NJC filed for bankruptcy and reached a settlement with the owner of the note on the distribution of any proceeds it may recover in this case. Ganassi's argued that payments he made under the lease should have been used to offset the guaranty. The guaranty did not specify if any payments

would decrease Ganassi's obligations under it, but did include a clause that required NJC and CMS to use their best efforts to eliminate the guaranty as the loan security as soon as acceptable to the lender.

The District Court granted some of the motions, but denied most of them with prejudice. After determining NJC had standing to bring its claim, the court began by ruling on the club's various motions. It granted the first motion to bar evidence relating to Ganassi's counterclaim that NJC converted money paid by Ganassi to CMS for its own use because Ganassi acknowledged it would not be proceeding on that claim; however, the court allowed Ganassi to present evidence that NJC misappropriated the money. The court denied the second motion to bar evidence of damages outside of Ganassi's claim for the return of its \$28 million investment in CMS. It emphasized that Ganassi sought return of the investment as part of its position in response to NJC's claim and that the counterclaims were instead connected with a variety of accounting errors, resulting in other damages. The court granted the third motion to bar evidence relating to damages for various counterclaims in part and denied it in part. It denied NJC's motion as to damages for breach of contract, unjust enrichment, and breach of fiduciary duty for the same reason it denied the second motion; however, it granted the motion as to damages for fraud in part, preventing Ganassi from requesting restitution. The court emphasized that restitution is only available for damages if the injured party claims it is a victim of fraud when it was induced to act. Ganassi was contending that NJC's fraud took place after they had entered into the contract. Finally, the court denied the motion as to damages for rescission of the contract without prejudice and noted that NJC had yet to weigh in on the consideration it provided to Ganassi under their agreement. The court denied the fourth motion to bar evidence relating to the best efforts clause in the guaranty. The court emphasized that the clauses were enforceable under state law and the clause at issue sufficiently articulated NJC's obligations. In conclusion, the court partially granted motions to bar the opinions of two Ganassi witnesses by emphasizing that neither witness could offer legal opinions about the meaning of effect of any language in their agreement or the propriety of any NJC practice based on its interpretation of that language and that neither witness could offer overlapping testimony on accounting matters.

Next, the court turned to Ganassi's various motions. It denied the first motion to bar parol evidence related to construction cost overruns, which was not directly addressed in the lease. The court noted that Ganassi conceded he was responsible for half the costs assessed to CMS, and that the contract was ambiguous as to whether NJC or CMS was obligated to pay for construction costs. The court denied the second and third motion related to the amendment to the guaranty that modified Ganassi's lease obligations, emphasizing that the amendment was admissible as parol evidence to show Ganassi's payments had, in fact, reduced the amount of the guaranty. The court also denied the next three motions to bar three NJC witnesses from providing their opinions about the effect of the amendment. It emphasized that NJC's attorney could testify because he was actively involved in discussions about the amendment, including conversations with Ganassi about his interpretation of it. The court found that challenges to the foundation of the opinions of the other two witnesses were best left for trial. The court denied the seventh motion to bar the testimony of a professional banker about whether Ganassi's payments reduced his obligations under the guaranty, noting the banker had extensive experience in the field and that his opinions would not be legal conclusions, but shed light on the expectations that professionals would have after assessing the guaranty and the amendment. Finally, the court



denied Ganassi's motion to bar NJC's witnesses from testifying about a statement that he allegedly made in reference to his obligations under the entire CMS project. It noted the statement could be relevant to Ganassi's counterclaim for fraud because NJC may use it to demonstrate why it made certain decisions to allocate CMS's costs between the parties. Moreover, the court emphasized that the statement was important parol evidence that could solve the main issue at trial: whether Ganassi was obligated for costs beyond his initial capital contribution to the project.

*Oshinsky v. N.Y. Football Giants, Inc.*, 2009 U.S. Dist. LEXIS 107608 (D.N.J. Nov. 17, 2009). Oshinsky, a season ticket holder for Giants and Jets Football, brought several challenges to the two football teams' requirement that season ticket holders must buy personal seat licenses (PSL) in order to have season tickets in the soon to be completed new Giants and Jets football stadium. His first claim was for a breach of contract in which he argued that he had a renewal right to continued purchase of season tickets, which was breached by the two teams' required purchase of PSLs. The court concluded that while Oshinsky may have a renewal right in his season tickets, there was insufficient evidence at the moment to determine whether the two teams breached that renewal right in any manner. As such, the court merely denied defendant's summary judgment motion.

Oshinsky also brought a §1 Sherman Anti-Trust Act claim, in which he alleged that the two teams actions constituted an unreasonable restraint of trade in two ways: (1) by illegally tying the purchase of season tickets to the purchase of a PSL, and (2) by colluding in the price and maintenance of the PSLs. The court dismissed his first claim on the grounds that he failed to demonstrate precisely how tying season tickets to PSLs constituted an unreasonable restraint of trade. His second claim was dismissed, similarly, for lack of any evidence of collusion between the two parties.

*Ottiano v. Prof'l Sports Authenticator*, 2009 U.S. Dist. LEXIS 103326 (D. Ariz. Nov. 4, 2009). Ottiano brought a breach of contract claim against Professional Sports Authenticator (PSA), a business that grades and values collectible sports cards. PSA argued that the U.S. District Court lacked the jurisdiction to hear the contract claim because the contract between PSA and Ottiano provided that the Superior Court of Orange County Florida was to have exclusive jurisdiction over any and all contract disputes. The U.S. District Court issued this order in favor of PSA on the basis that the contract itself provided that the plaintiff read and agreed to the terms of the contract and that the jurisdiction provision was one of the primary terms listed in the agreement. The District Court dismissed without prejudice so that the plaintiff could refile in the proper jurisdiction per the contract.

*SB Belkin, LLC v. HTPA Holding Co.*, 2009 Md. Cir. Ct. LEXIS 6 (Sept. 10, 2009). A minority investor in the holding company that owns the NBA's Atlanta Hawks and the NHL's Atlanta Thrashers sued the company in the midst of proceedings designed to evaluate the company's value, which would then be used to determine the payment owed to the investor as part of a buyout agreement. The parties negotiated the agreement (PSA) after it became clear the investor could no longer remain an owner due to his dispute with other stakeholders. The dispute revolved around the investor's decision to veto a trade for NBA player Joe Johnson, even though the majority of the other owners approved of it. The investor had the power to reject the deal

because the other owners had previously designated him as the Hawks Governor, an NBA-mandated position that comes with the sole authority to conduct transactions on behalf of a team. Following the veto, the other owners sought to remove him from that position. Although the investor was able to obtain an injunction barring that action, it was lifted when NBA Commissioner David Stern submitted an affidavit that approved of his removal. The parties executed the PSA shortly thereafter. According to its terms, anywhere from one to three investment banks would be used to determine the company's value; however, it limited the list of potential appraisers to a small group of firms with experience in mergers and acquisitions of professional sports franchises, and those firms were required to make a neutral evaluation of the company's worth. Belkin was responsible for selecting the first eligible bank, and upon receipt of its appraisal, either party could object within five days by delivering written notice to the other party. If neither party objected, then that appraisal would set the company's value. But if either party objected, the objecting party would select a second banker to conduct another appraisal. If either party then objected to the second appraisal, the NBA would select a third banker for one final appraisal. If the third appraisal was higher than both of the previous appraisals, the higher of the previous appraisals would establish the company's value. If it was lower than the previous appraisals, then the lower of the previous appraisals would establish the value. Once the price of Belkin's interest was determined, the holding company had sixty days to buy him out, or Belkin would have the option of buying out the other owners.

Upon Belkin's selection of the first appraiser, both parties made their best efforts to cloud its judgment, making it difficult for the firm to remain neutral. Moreover, both parties vigorously tried to determine the exact time that the appraisal would be communicated. One minute after receiving the report, Belkin formally objected to it. Belkin reasoned that by being able to select the first two banks, the first two appraisals were likely to be high, thereby mitigating the impact of a third evaluation; however, a short time later, the company also objected, informing Belkin which firm it had selected as the second banker. That same day, Belkin filed suit, claiming he was allowed to select the second banker under the terms of the PSA. While his claim was pending, he notified the company that he was hiring another banker to conduct the second appraisal. Ultimately, that appraisal was more than 10% higher than the first appraisal. The company responded by notifying Belkin that it would not recognize the second report as a valid appraisal under the PSA. The trial court concluded that there was no ambiguity in that agreement and that Belkin, as the first party to object, was allowed to select the second banker. Subsequently, Belkin obtained a summary judgment that the holding company had breached the PSA by either failing to jointly engage a third banker or failing to buy out his interest. An appellate court reversed, holding the terms of the PSA were ambiguous as to how the parties were to proceed if both parties objected to an appraisal. It remanded to the trial court to determine the intent of the parties in drafting those terms.

After the court examined the surrounding circumstances and all available extrinsic evidence, it held that the PSA was void and unenforceable because the parties did not come to a meeting of the minds on how to proceed if both parties validly objected to an appraisal. The court concluded that the individuals who negotiated the PSA never discussed the possibility of both parties objecting to the same appraisal and emphasized the lack of provisions governing how appraisals were to be communicated or how a party could object to them. In fact, there was nothing in the negotiations or PSA that suggested the parties believed a race to object would determine the

second appraiser. The court also refused to interpret any post-contract actions in assessing whether it should supply missing terms. It emphasized that both parties sought to influence the outcome of the appraisal process, which made the right to select future bankers a material issue. Because the conditions precedent to determining the buyout price had not been satisfied, the court left the parties to figure out how to proceed with the sale of Belkin's interest.

*Spirits of St. Louis Basketball Club v. Denver Nuggets, Inc.*, 2009 N.Y. Misc. LEXIS 3148 (Sup. Ct. Oct. 15, 2009). The NBA and its four former ABA franchises moved to dismiss breach of contract claims brought against them by the Spirits of St. Louis, one of the two ABA teams that did not survive the leagues' merger. The claims arose out of two agreements that the parties executed in 1976 as part of the settlement of two antitrust lawsuits brought against the defendants. The first agreement granted the Spirits the right to a share of the defendants' annual television revenues, and the second agreement gave the Spirits a mechanism to enforce that right. The Spirits alleged that the defendants breached the first agreement by refusing to pay the club its share of revenues from international and national cable broadcasts and also breached the second agreement by refusing to let it access the league's financial records. The court granted the motion to dismiss without prejudice because the claims were brought in the wrong forum. It pointed out that both agreements had forum selection clauses designating the Southern District of New York as the exclusive venue for disputes arising out of their terms, and that, in the absence of fraud or overreaching, those clauses would be enforced. The court also noted that jurisdiction did not need to be granted by an agreement, emphasizing that federal courts had previously inferred exclusivity in orders providing for future enforcement of a settlement order.

*Stillwater Cent. Sch. Dist. v. Great Am. E & S Ins. Co.*, 887 N.Y.S.2d 719 (App. Div. 2009). An insurance company appealed a trial court's decision to grant summary judgment to a school district on an indemnity claim that it brought against the company after it entered into a settlement agreement with a spectator who sued the district for negligence when she fell off the bleachers on a district-owned field while watching a Northeast Youth Football League (NYFL) game. An NYFL team, the Stillwater Battle, originally received permission to use the field after providing a certificate of insurance from the defendant company. The certificate listed the school district as an additional insured party. Subsequently, another NYFL team, the Mechanicsville Junior Red Raiders, sought permission to hold a game on that field. The district again sought a certificate of insurance, but the team successfully argued that the previously issued document covered all members of the NYFL. The underlying action occurred during Mechanicsville's game. The school district demanded that the defendant company indemnify it against the spectator's claim; however, the company failed to defend it or issue a written notice that denied coverage under the terms of the insurance policy. After settling with the spectator, the district filed suit and argued that the company was obligated to indemnify it under the terms of the policy.

The appellate court affirmed. It held that the district did not need a certificate of insurance from every team in the NYFL and that the company's failure to send a written notice that it was disclaiming coverage of the district due to an exclusion in the policy waived its ability to rely on that exclusion. The court emphasized that the insurance policy covered every member of the NYFL, not just the team that provided the certificate. Therefore, the district was protected when any of those squads played on the field. It noted that the district was excluded from coverage for

any injuries caused by its design defects or poor structural maintenance of the field, as well as injuries attributable only to its negligence; however, the court could not preclude it from coverage because the company failed to comply with applicable notice requirements. Although it had orally disclaimed coverage, the policy called for a written explanation detailing the specific reasons for denial.

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*Thompson v. Davis, 2009 Tenn. App. LEXIS 613 (Sept. 8, 2009).* A partner in a limited liability company (LLC), which owned and operated an Arena Football League (AFL) franchise, appealed a trial court's judgment on a jury verdict in favor of his two other partners on a claim that they brought against him for contribution after they paid off outstanding loans to the LLC with their personal funds upon selling the team back to the AFL. Although the partners created the LLC, they took out two loans in their individual names to fund the team while it was struggling to survive as the Oklahoma Wranglers. When the team was sold, the plaintiff partners provided their personal funds to the LLC to pay off the first loan and then bought the note on the second loan; however, the LLC had the funds to pay off the first loan without the plaintiff partners' personal contributions. Prior to the franchise's sale, the plaintiff partners also received disbursements from the LLC in order to repay them for amounts that they invested above and beyond the third partner's contributions.

The appellate court affirmed. It held that the doctrine of contribution applied and that the third partner was not entitled to avoid or offset his obligations on the loans. As to the first loan, the court emphasized that the plaintiff partners' contributions to the LLC were made for the purpose of paying off the note. As to the second loan, the court found that the distributions made to the plaintiff partners did not constitute distributions of capital, but repayment of their personal loans. It noted that the plaintiff partners' contributions did not increase their share of the business, which would have indicated the funds were an influx of capital.

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*Walker v. Southwest Basketball, LLC, 2009 Tex. App. LEXIS 9734 (Dec. 23, 2009).* Walker appealed the determination of the trial court that no contract existed between Walker and Southwest Basketball. Southwest is the primary owner of the NBA Development League's Forth Worth Flyers team. The contract was the subject of email communications between Walker and Southwest, in which the two parties discussed an amended operating agreement designed to accommodate a new investor in Southwest.

The Texas Appellate Court upheld the trial court's determination that these emails did not constitute a contract on the basis that the discussions amounted to only an offer. There was neither acceptance of the offer nor a meeting of the minds sufficient to support the finding of a contract. Rather, all that the two parties discussed was the offer, but it was never accepted.

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*White v. NFL*, 585 F.3d 1129 (8th Cir. 2009). The underlying dispute here is between the NFL Players Association (Association) and the NFL as to whether former Atlanta quarterback, Michael Vick, is entitled to keep the \$29.5 million bonus he received as part of his contract with the team. Vick pled guilty to federal dog fighting charges and was suspended indefinitely by the NFL. The District Court held that Vick was entitled to the bonus because it was already earned and not subject to forfeiture. The district court had jurisdiction over the case on the basis of the 1993 settlement agreement between the NFL and the Association, which was a result of the long standing antitrust dispute between the NFL and the Association. The Association appealed the decision of the district court on three grounds: (1) that the 1993 settlement agreement is no longer permissible, (2) that the district court judge failed to recuse himself in the Vick case, and (3) that the Vick decision should be overturned on the merits.

First, the Eight Circuit held that the circumstances had not significantly changed since the 1993 settlement agreement to the extent necessary to warrant a modification of the agreement. Rather, the court noted that when circumstances are expected to change from the outset of an agreement, such changed circumstances would only rarely provide a basis for modification.

Second, the court held that although the district court judge made statements to the press regarding the original 1993 agreement that were, perhaps, unwise, that such statements did not constitute evidence of a bias in favor of the NFL. The court further noted that the statements the district court judge gave, even if unwise, did not discuss the Vick case, but only the 1993 settlement agreement.

Lastly, the court held that the appropriate test to determine whether Vick was entitled to retain the bonuses was the years-performed test. As a result, the court upheld the trial court's determination that Vick met the provisions necessary to receive the bonuses and that such bonuses were not subject to forfeiture.

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### ***Court of Arbitration for Sport Decisions***

*Anderson v. International Olympic Committee*, CAS 2009/A/1545. Anderson and six other United States track and field athletes challenged the decision of the IOC to require the athletes to return medals they had won in the 2000 Sydney Olympic Games. The seven athletes were teammates on medal winning relay teams with Marion Jones, who was sanctioned for violations of the World Anti Doping Agency Code (CODE). In addition to the individual violations against Jones, which required her to return her Olympic medals, the IOC required her teammates to do the same. The issue for the CAS panel was whether the IOC's was prevented from requiring the athletes to return the medals under the three-year rule, Rule 25.2.2.4 of the 2000 Olympic Charter, which states that no decision taken in the context of the Olympic Games can be challenged after a period of three years from the day of the closing ceremony of such Games. The CAS held that the decision to award the seven athletes medals in the 2000 Olympic Games was not a decision by the IOC taken in the context of the Olympic Games. Rather, the CAS held

that the decision to award the athletes medals was a decision by the individual international federations as a consequence of determining the results of the competition. The IOC merely adhered to the rankings and results from the international federations. As a result, the three-year rule did not prevent the IOC's attempt to require the athletes to return their Olympic medals.

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*FIGC v. World Anti-Doping Agency, CAS 2008/A/1557.* The national governing body for soccer in Italy (FIGC) appealed a previous CAS award that imposed a one-year suspension on Italian soccer players Daniele Mannini and Davide Possanzini for violating the CONI Anti-Doping Rules. The FIGC claimed that new evidence had become available and that if the previous CAS panel had known that evidence during their initial decision, then they would have reached a different conclusion. Both Mannini and Possanzini were selected to take a drug test following a soccer match involving their team, Brescia, in Serie B. Before the players were able to report to the anti-doping control station, the Brescia coach and the Brescia president ordered them into the locker room for an important team meeting. The anti-doping control officer was invited to join them, but the door was blocked from the inside. The meeting lasted between ten and twenty-five minutes, after which the players proceeded to the control station and provided samples. Both tests turned out negative.

The CAS panel took into account the provisions of the Operating Instructions of the Anti-Doping Commission and the WADA International Standard for Testing and determined that athletes may violate the CONI Anti-Doping Rules if they do not promptly report to the control station and fail to remain within sight of their chaperone during the delay. It noted any other interpretation of the rules would give athletes an easy excuse to show up late and ample time to cheat. That panel concluded Mannini and Possanzini violated the rules because the control officer did not agree to allow them to attend the team meeting without supervision. It also concluded the players' dilemma could not constitute a compelling justification for the delay, noting it would have been illegal to punish them for skipping the team meeting to comply with the rules.

The new CAS panel vacated the previous award by re-confirming a CONI appeals panel's decision that found the Federal Court of Justice of the FIGC erred in determining Mannini and Possanzini could not be sanctioned for violating the Operating Instructions and imposed a fifteen-day suspension on the players. First, the panel determined the conditions for revising the previous award were met. The evidence produced showed that there was not only a lack of understanding, but also confusion about the requirement that players immediately proceed to the doping control station while being continuously chaperoned. The panel found it could impact the outcome of the case because whether the doping-control procedures the previous panel deemed applicable were properly applied and understood at the time of the test was relevant to whether an anti-doping violation occurred. Applying the test of diligence, the panel also found that the players were unable to produce evidence in the previous proceedings without any negligence on their part. It emphasized that the players were not aware that the Anti-Doping Commission was interpreting the in-competition testing procedures as advance notice tests that did not require chaperoning until after the previous award had been published. Further investigation stemming from that discovery also revealed that, as a general matter, Italian football players were not aware of their relevant obligations during the doping control process and doping control officers

had tolerated delays in testing and non-continuous chaperoning. Applying the anti-doping rules to a broader set of facts, the panel concluded that it should modify the previous award. It noted that neither of the players clearly understood whether they were being subject to an in-competition advance notice test or an out-of-competition test, or whether they had a duty to proceed to the doping control station and stay in contact with the chaperones at all costs. The panel also emphasized that the players could not be held responsible for their lack of knowledge because the anti-doping control procedures are combined in the Operating Instructions and WADA International Standard for Testing in a manner that is not easy to comprehend and that the players were not informed or educated as to those rules by the FIGC or their union.

*Hansen v. Federation Equestre Internationale, CAS 2009/A/1768.* Hansen, an Olympic level equestrian, appealed the decision of the Federation Equestre Internationale (FEI) to sanction him for four and one-half months for a violation of the anti-doping regulations. Hansen's horse, Camiro, tested positive for Capsaicin. Hansen's only challenge to the sanction was that he argued the substance was placed in the horse's urine sample after it had been collected. The CAS, however, found Hansen's argument unpersuasive. He was unable to provide any definitive explanation for how the prohibited substance appeared in the sample. He attempted to argue that the veterinarian who took the sample did not follow procedure, but the evidence was contradictory and unpersuasive. Hansen also argued that the CAS should institute a grey zone for this type of anti-doping offense. In other words, the sample should exceed a tolerable range of the substance in the horse's system before a doping violation is found. The CAS did not agree and held that it is not for the CAS to determine the underlying rule for what constitutes a violation; rather, the CAS's purpose is to determine whether that rule, as created by the international federation, has been violated. Ultimately, the CAS upheld the sanction as imposed by the FEI.

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*Gusmao v. Federation Internationale del Natation, CAS 2008/A/1572; Gusmao v. Federation Internationale de Natation, CAS 2008/A/1632; Gusmao v. Federation Internationale de Natation, CAS 2008/A/1659.* This CAS decision regards three independent challenges to the decisions of the FINA Doping Panel, each of which found that Gusmao committed a separate anti-doping rule violation. The CAS examined each violation individually to determine whether an anti-doping violation occurred and what sanction the CAS should impose. For the first two violations, the panel upheld the use of the IMRS testing technique, despite the athlete's objections. The panel upheld the third violation, which found that the athlete committed a doping violation by tampering with his test sample, because it found that the athletes provided a sample that was not his. Ultimately, the panel ordered a lifetime ban against Gusmao for the three separate violations.

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*International Association of Athletics Federation v. All Russia Athletic Federation, CAS 2008/A/1718; International Association of Athletics Federation v. All Russia Athletic Federation, CAS 2008/A/1719; International Association of Athletics Federation v. All Russia Athletic Federation, CAS 2008/A/1720; International Association of Athletics Federation v. All Russia*

*Athletic Federation, CAS 2008/A/1721; International Association of Athletics Federation v. All Russia Athletic Federation, CAS 2008/A/1722; International Association of Athletics Federation v. All Russia Athletic Federation, CAS 2008/A/1723; International Association of Athletics Federation v. All Russia Athletic Federation, CAS 2008/A/1724.* The IAAF brought this appeal to challenge the decision of the All Russia Athletic Federation (ARAF) to impose only a two-year sanction on each of the seven Russian athletes involved. The IAAF conducted an investigation into its suspicion that Russian track and field athletes were circumventing the anti-doping rules. As a result of the investigation, the IAAF found that the seven athletes involved here were providing urine samples that were not their own. The athletes, under the IAAF rules, requested a hearing before the ARAF. The ARAF found that the athletes had each committed a violation of the anti-doping regulations; however, it maintained that the athletes should only be subjected to a two-year sanction. The IAAF appealed this decision to the CAS, with responses from the ARAF and the athletes themselves.

ARAF claimed that the CAS had the power to overturn its ruling only if ARAF abused its discretionary power. The CAS rejected this argument and maintained that it had de novo review. The CAS found that the DNA evidence the IAAF relied upon to determine that the athletes committed a violation was sufficient. Nonetheless, it also found significant circumstantial evidence that also demonstrated violations, including the fact that the athletes had no legitimate explanation and that the tampering served to aid only the athletes. As a result, the CAS held that the IAAF had no need to provide specifically how the tampering occurred. The CAS ultimately concluded, by weighing all of the relevant evidence, including the severity of the offense and the athletes' cooperation, that the appropriate sanction was two years, nine months for each athlete.

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*IAAF v. RFEA, CAS 2009/A/1805 & CAS 2009/A/1847.* In consolidated appeals, the IAAF sought to overturn decisions of the RFEA, the national governing body for track and field in Spain, that concluded Spanish hurdler Josephine Onyia did not commit anti-doping violations when she tested positive for an allegedly prohibited substance following a third-place finish in a race in Switzerland and for a different, undisputedly prohibited substance following a first-place finish in a race in Germany eleven days later. The drug test that took place in Switzerland revealed the presence of an analogue of a banned stimulant; however, the WADA-accredited laboratory that conducted the test was unable to report its finding to the IAAF until after Onyia had participated in the second event in Germany. The drug test that took place in Germany revealed the presence of a negligible amount of clenbuterol, a steroid that is expressly included on the WADA Prohibited List. Onyia requested her B samples be opened, but testing confirmed the presence of the prohibited substances in both cases. Under IAAF rules, both adverse findings were brought in front of an RFEA disciplinary committee; however, the committee refused to sanction the athlete. After assessing the Swiss finding, the committee concluded that the substance detected could not be considered a banned substance under the Prohibited List. The committee also stated that Onyia would not be suspended even if the substance was banned. It found that the drug would have to be classified as one of the Prohibited List's Specified Substances, and that Onyia satisfied her burden of establishing that the use of the substance was not intended to enhance her performance. After assessing the German finding, the committee



concluded that the banned substance was not detected at a level required under the WADA technical documents and that its presence could have caused by Onyia's ingestion of contaminated meat.

The CAS panel reversed, holding that Onyia committed a single anti-doping violation when she tested positive for both substances and was therefore suspended from competition for two years. The panel assessed the Swiss finding and found that the substance detected did not have to be expressly included on the Prohibited List to be illegal. The CAS panel found that the substance was analogous to another listed substance because it had a similar chemical structure and related biological effects. The panel also noted that the substance detected could not be considered a Specified Substance merely because it was analogous to a substance that was. But more importantly, it determined that Onyia would not be entitled to a reduced sanction in any event because she failed to establish how the substance entered her body. As it related to the German drug test, the panel found that the presence of clenbuterol at any level would result in an adverse finding and that the RFEA had misinterpreted the WADA technical documents. The panel noted that the documents only established the minimum levels that laboratories would have to reach to maintain their accreditation and that the German laboratory had detected clenbuterol at an even lower concentration than was required. Finally, the panel found that Onyia could not argue that exceptional circumstances mandated a reduced sanction because there was no evidence to suggest the banned substance entered her body through contaminated meat.

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*International Tennis Federation v. Gasquet, CAS 2009/A/1926; World Anti-Doping Agency v. Gasquet, CAS 2009/A/1930.* The International Tennis Federation (ITF) appealed the decision of its tribunal to sanction Gasquet, a professional tennis player, for only two months and fifteen days for violation of the anti-doping policy due to a positive test for a trace amount of cocaine. Gasquet challenged the appeal and claimed that the decision of the ITF Tribunal should be upheld. He argued that the reason for the trace amount of cocaine in his system was that he had spent the night prior to the drug test at various nightclubs in France kissing a woman who had, herself, been a habitual cocaine user. The CAS panel concluded, when applying the balancing of probability test, that the only logical explanation for the cocaine in Gasquet's system was the physical interaction with this woman and ruled out the possibility that one of his drinks had been spiked. The CAS concluded that Gasquet bore no fault or negligence, as he did not suspect, nor could he have known with the utmost caution, that he ingested the trace amount of cocaine; however, the CAS upheld the original ruling from the ITF-Tribunal, which concluded that he bore no significant fault, because Gasquet challenged only the appeal from the ITF, not the ITF tribunal's original decision to sanction him for two months and fifteen days.

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*Iourieva v. International Biathlon Union, CAS 2009/A/1931.* Iourieva and Akhatova appealed the International Biathlon Union's (IBU) anti-doping violation for the presence of recombinant EPO (rEPO) in both athletes' systems. The two athletes challenged the violation largely on the grounds that the Technical Document (TD), which establishes a uniform or harmonized method for the identification of recombinant erythropoietins and analogues, was not properly followed

by the testing laboratory in violation of the International Standards of Laboratories (ISL). The central issue, however, was which TD was the applicable one. A new TD for rEPO was drafted and enacted in 2009, which replaced the previous TD from 2007. The athletes' A samples were tested in 2008, under the 2007 TD; the athletes' B samples, however, were tested in 2009 under the 2009 TD. The Panel held that the appropriate standard to follow was the 2009 TD because under Article 6.1 of the 2006 Anti-Doping Rules, the laboratories were obligated to use the standards currently in force at the time of the analytical procedure to be performed on the sample. CAS upheld this result in large part in order to maintain a uniform system of anti-doping rules.

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*Kop v. International Association of Athletics Federations, CAS 2008/A/1585; Kop v. International Association of Athletics Federations, CAS 2008/A/1586.* This is a two-part doping violation arbitration, both involving the IAAF and Sureyya Kop and her trainer/coach, Yucel Kop. There are two central issues here: (1) whether the CAS has jurisdiction in this case; and (2) whether the sanctions imposed on the two Kops should be reduced or eliminated.

The panel concluded that, with respect to both Kops, the CAS had jurisdiction in this case. The panel held that both had exhausted all alternative remedies. Also, while the Turkish Athletic Federation (TAF) did not specifically allow for CAS arbitration, the language of the TAF Constitution refers to the rules of the Federation and International Federation. The panel interpreted this language to refer to the necessity to have global unified rules, which are preserved ultimately through CAS arbitration.

As it related to Mr. Kop, the panel eliminated his sanction as the panel found that there was no evidence presented that demonstrated he violated any anti-doping or disciplinary rule while he was Mrs. Kop's trainer. As it related to Mrs. Kop, the panel first held that this was, in fact, Mrs. Kop's second violation. The first violation occurred a few years before; the second, which was at issue here, was found to be a violation as there was the presence of two banned steroids, the presence of which Mrs. Kop was unable to explain. Because the panel held that Mrs. Kop committed two separate violations of the anti-doping code, the panel reversed the decision of the Youth and Sport Arbitral Tribunal, which had reduced the sanction from lifetime to four years. Consequently, the panel instituted a lifetime ban against Mrs. Kop.

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*Mutu v. Chelsea Football Club Ltd., CAS 2008/A/1644.* Romanian soccer player Adrian Mutu appealed a decision of the FIFA Dispute Resolution Chamber (DRC) that ordered him to pay English Premier League soccer club Chelsea over £17 million as compensation for breaching his employment contract without just cause during the protected period when he tested positive for cocaine in October 2004. Chelsea acquired Mutu from an Italian club under a transfer agreement in August 2003 for £22.5 million. Subsequently, Mutu and the club entered into an employment contract running from August 2003 until the end of June 2008. The contract included a signing bonus of £330,000, to be paid in five installments, two of which were paid prior to Mutu's breach. Chelsea also agreed to pay Mutu's agent £500,000, also to be paid in five installments, of

which two were made prior to the breach. One week following the positive drug test, Chelsea terminated Mutu's contract. Shortly afterwards, he was suspended for seven months by the English Football Association, the national governing body for soccer in England. FIFA adopted the sanction in order to give it worldwide effect.

Chelsea sought damages from the DRC for the wasted costs of acquiring Mutu, the cost of replacing him, the unearned portion of his signing bonus, and various other benefits that he had received. Applying Article 22 of the FIFA Regulations for the Status and Transfer of Players, the DRC assessed the objective criteria listed and concluded that the unamortized cost of the transfer payment, the unamortized amount of the signing bonus, and the unamortized amount of the full agent's fee should be added together to determine the appropriate amount of compensation owed. Although it also could have considered the remaining value of Mutu's employment contract, the DRC declined to add it to the amount of compensation owed because Chelsea had immediately terminated his contract. The DRC also declined to impose a sporting sanction based on the specificity of the sport, noting that Chelsea's final compensation request did not incorporate such an award. It calculated the amount of compensation owed at just less than  $\square$ 17.2 million.

The CAS panel upheld the DRC's determination of the total amount of compensation owed, but its calculations differed in a material manner. First, the panel determined that applying the criteria listed in Article 22 was consistent with English law, which also governed the dispute pursuant to Mutu's contract. The CAS panel noted that English law allows compensation for costs incurred by clubs that reasonably rely on a promised performance, but end up wasted when a breach occurs. The panel pointed out that the loss incurred was not remote because it was within the reasonable contemplation of both parties when the contract was executed. It also found that Chelsea's claim was not precluded by its choice to terminate the contract because English law does not limit an innocent party's choice of remedies following the other party's breach and the duty to mitigate damages only arises after a decision is made. Finally, the panel emphasized that the criteria listed in Article 22 was not contrary to European Community law, and even if it was, Mutu would still be liable for damages under English law. It noted that applying the criteria could not constitute a discriminatory measure based on nationality because the regulations do not consider the nationality of a player involved as a triggering element, and could not constitute an anti-competitive practice because large compensation payments are directly proportional to the amount of damage caused.

The panel also noted that large payments do not prevent players from exercising their freedom of movement. To calculate the amount of compensation owed, the panel affirmed that the unamortized cost of the transfer fee, the unamortized amount of the signing bonus, and the unamortized amount of the agent's fee were appropriate criteria to consider; however, it calculated the amounts due under each of those criteria differently than the DRC. First, the panel noted that the contract covered only 58.5 months, not the full five-year period applied by the DRC. Thus, all of the unamortized amounts used had to be raised accordingly; however, the panel also recognized that when an installment method is provided, only the unamortized amount of the payments actually made could be used to determine the compensation owed. As a result, Mutu's liability on the signing bonus and agent's fee would actually be reduced. But the panel also noted that the DRC failed to consider other unamortized acquisition costs, such as portions of the club's solidarity contribution, transfer levy, and fees to its own agents. Therefore, it

concluded that it could still grant the relief requested by the club: the full amount of compensation already awarded by the DRC.

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*PASO, CAS 2009/C/1875.* The Pan American Sports Organization (PASO), a regional association of national Olympic committees, sought an advisory opinion on whether the creation of the Pan American Judo Confederation (PAJC) and the substitution of that new entity for the Pan American Judo Union complied with the PASO Statute, allowing it to officially recognize the PAJC as the regional association of national governing bodies for the sport of judo. PASO also sought an opinion on the scope of the decisions it makes when applying the Statute. The CAS panel held that both of the creation and substitution of the new entity complied with the Statute and that the scope of the decisions made by PASO pursuant to it bound all of the organization's members.

As to the first question, the panel emphasized that none of the provisions in the statute created an obstacle to the creation of new regional associations of national governing bodies. As to the second question, the panel noted that there was no direct answer in the Olympic Charter or the statute, but that the creation of a new association would not make sense if it could not be recognized and carry out the same functions as currently constituted associations. The panel maintained that the principles of equality and universality, present in both the Charter and the Statute, suggest a substitution in a democratic manner would allow PASO to recognize a new regional association. Finally, the panel concluded that associations of national governing bodies like the newly constituted PAJC must accept PASO's directives because the organization's Statute establishes that it is the highest authority of the Olympic Movement in the region.

*Pechstein v. International Skating Union, CAS 2009/A/1912; Deutsche Eisschnelllauf Gemeinschaft e. v. International Skating Union, CAS 2009/A/1912.* Pechstein, a German speed skater, appealed the determination of the International Skating Union (ISU) that she had committed a doping violation. Pechstein's blood samples demonstrated an abnormally high percentage of reticulocytes (%retics). Pechstein initially raised several sub-challenges to the ISU's decision, each of which was subsequently rejected by the CAS. Those challenges included retroactive application of the 2009 CODE (the positive test was from before 2009), the process by which the blood samples were collected, chain of custody of the samples, the particular equipment used to conduct the blood tests, and the maintenance of the database that stored the blood test information.

As it concerned the central issue here, whether Pechstein's elevated %retics constituted a doping violation, the CAS found that her blood test, which registered 3.4%, was abnormally high considering the standard 0.4% to 2.6% range. The CAS also rejected the argument that Pechstein had a naturally high %retics. The CAS found, upon examination of Pechstein's previous seventeen tests, that even if she did have a naturally high percentage, the test in question still constituted an abnormally high percentage. Lastly, the CAS was concerned that perhaps Pechstein's elevated levels were due to a blood disorder, not a doping violation. Yet, after extensive testing performed on Pechstein, no blood disorder could be found. In conclusion, the

CAS upheld the two-year suspension on Pechstein and required her to turn over any awards, medals, and winnings that had been given during the time frame in question.

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*S.C. Fotbal Club Timisoara S.A. v. FIFA, CAS 2008/A/1658.* S.C. Fotbal Club Timisoara S.A., a Romanian soccer club, appealed a FIFA decision that ordered the Romanian Football Federation (RFF), the national governing body for soccer in Romania, to deduct six points from the total the club earned in the 2008-2009 Romanian Liga 1 season for failure to comply with a CAS award that ordered the club to change its color scheme by a designated deadline for violating the intellectual property rights of SC FC Politehnica Timisoara S.A., another Romanian soccer club. S.C. Fotbal Club Timisoara S.A. also appealed the RFF decision that implemented the FIFA order. In 2006, CAS settled an intellectual property dispute between the appellant, then acting under the name CS FCU Politehnica Timisoara, and SC FC Politehnica Timisoara S.A. by ordering the appellant to change its name and color scheme because they created a risk of confusion between the two clubs. The appellant changed its name, but not in a manner that satisfied SC FC Politehnica Timisoara S.A. Thereafter, it filed a complaint with FIFA. When FIFA dismissed the complaint, SC FC Politehnica Timisoara S.A. again appealed to the CAS, which applied Article 71 paragraph 1 of the FIFA Disciplinary Code (FDC) and imposed a fine on the appellant. The CAS also ordered the appellant to change its name and eliminate violet from its color scheme by June 30, 2008 or six points would be deducted from the team's total pursuant to FDC Article 71, paragraph 2. Subsequently, the appellant adopted its current name, and, five days before the deadline, requested uniforms with a new color scheme, which replaced violet with mauve. It also instructed its online manager to substitute the new name and color scheme on its official website, although the change was not made until the fall.

On July 5, the RFF confirmed the changes in the club's name and color scheme and told its representatives to inform FIFA about the club's compliance with the CAS award; however, five days later, the deputy secretary to the FIFA Disciplinary Committee sent a letter to the appellant that claimed the committee had been informed that the club had not complied with the CAS award. Both the RFF and the appellant responded by faxing letters to FIFA that claimed the club was in compliance. Without referring to those letters, FIFA asked the RFF to forward the club's official uniform. The RFF complied with the request, but sent the wrong kit, even though the appellant had previously provided the federation with one of its new uniforms. Shortly afterwards, the deputy secretary sent a letter to the RFF that claimed the club had failed to properly change its color scheme, based on an analysis of the club's uniforms and official website. The letter asked the RFF to deduct six points from the total that the team earned during the Romanian Liga 1 season. One day later, the RFF issued a decision implementing the FIFA request. The appellant appealed the decision of the deputy secretary to the CAS, as well as the RFF decision that implemented it. Subsequently, the appellant also filed an appeal with the FIFA Appeal Committee. The committee rejected the appeal because the club did not file it within the time limit provided by the FDC and failed to pay the appeal fee.

The CAS panel reversed the FIFA and RFF decisions and ordered the RFF to restore six points to S.C. Fotbal Club Timisoara S.A.'s league total. First, the panel determined it had jurisdiction to rule on the appeal against the FIFA decision, finding the deputy secretary's letter constituted a

formal decision made by the FIFA Disciplinary Committee and qualified as a final decision subject to appeal because all of the club's internal remedies were exhausted under the FDC. The panel noted that any FIFA decision issued under Article 71 could be immediately appealed to the CAS. Second, the panel set aside the FIFA decision and held that its decision was enforceable, but that the club complied with its obligations under the prior CAS award in time. The panel noted that there was a discrepancy between the club's stated obligations in the 2006 CAS award and the later award that established the June 30 deadline. It concluded that the club's compliance could only be measured by whether its new color scheme eliminated violet, regardless of whether changing the color to mauve was a practically indiscernible change. The panel also noted that FIFA was provided with the wrong uniform kit to evaluate and that the club had informed its online manager that its website needed to be changed prior to the deadline. Finally, the panel set aside the RFF decision, noting its effect was inexorably tied to the FIFA decision.

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*Seroczynski v. IOC, CAS 2009/A/1755.* Polish kayaker Adam Seroczynski tested positive for a banned substance following his fourth-place finish in an event at the 2008 Summer Olympics in Beijing. It was his first doping violation. Subsequently, an IOC Disciplinary Committee disqualified him from the race and ordered the International Canoe Federation to modify the results of the event. The CAS panel upheld the IOC Disciplinary Commission's sanction. The CAS panel concluded that Seroczynski's procedural rights were not violated and that the analytical findings did not include a false positive. After assessing various witnesses' statements and testimony, the panel determined the Beijing laboratory did not depart from the WADA International Standard for Testing, and that the low concentration of the banned substance in the athlete's body could not be the result of tainted food. It noted that the food controls performed during the Games were immaculate and that Seroczynski was the only athlete to test positive for the designated substance. More importantly, the panel emphasized that IOC rules mandated the disqualification of his results, even if there was an absence of fault or negligence on the athlete's behalf.

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*United States Anti-Doping Agency v. Joshua O'Neil, North American Court of Arbitration for Sport Panel (2009) (George, Arb.)*. This CAS panel decision examined three separate issues of regarding the case of Joshua O'Neil, a 24-year old world-class judo athlete, who tested positive for ritalinic acid, a metabolite of methylphenidate, which is prohibited under the 2009 World Anti-Doping Agency Code (Code).

First, whether O'Neil was entitled to a reduction in the standard two year suspension under Article 10.4, or in the alternative, 10.5.2 of the Code. O'Neil claimed that he took the Ritalin tablet two days prior to his judo competition, not with the intent to achieve a competitive advantage, but in preparation for an upcoming firefighter exam. The panel was not convinced, holding that a quick log-on to the USADA DRO for the drugs ... would have provided a clear answer that Ritalin is a prohibited substance.

Second, whether O'Neil is entitled to a reduction in the sanction on the basis that the sanction disproportionately affects O'Neil's future Olympic chances because he will not have enough time to accumulate competition points for the 2012 Olympics. The panel was not persuaded here because Article 10.5.2 states that the schedule of sporting events is not a factor to consider under proportionality.

Third, whether O'Neil is entitled to have the sanction imposed retroactive to when his positive sample was collected. The panel agreed. It cited specifically that O'Neil admitted his mistake and was forthright with the panel in his testimony. Therefore, the sanction was set retroactive to the date when the positive sample was collected.

### ***Criminal Law***

*Junta v. Thompson*, 2009 U.S. Dist. LEXIS 75826 (D. Mass. Aug. 25, 2009). Thomas Junta moved for a writ of habeas corpus after he was convicted of involuntary manslaughter for killing a fellow youth hockey parent during a fight following a practice involving their sons. During Junta's trial, the prosecution did not disclose information about prior writings and statements made by the doctor who performed the autopsy on the decedent. The District Court denied the petition for a writ. It held that the doctor's prior writing and statements could not have been used to impeach his trial testimony about the decedent's cause of death. The court applied the Brady Standard articulated by the U.S. Supreme Court and found the prosecution's suppression of the evidence did not violate the Due Process Clause of the Fourteenth Amendment because it was not favorable to Junta. The court emphasized that the doctor's prior written abstract on arterial tears was not inconsistent with his testimony that the fatal rupture of one of the decedent's arteries was caused by multiple, substantial blows to the head. Instead, the abstract merely indicated that a similar injury could possibly be sustained by a single minor blow, a fact that the doctor repeated at trial. The court relied on similar reasoning in finding that comments made by the doctor during a previous conference presentation were also consistent with his testimony. Although the doctor suggested during the presentation that a minimal blow could cause the type of injury suffered by the decedent, the court noted that the nature of the lecture did not require him to elaborate on the exact cause of the decedent's death. Finally, the court pointed out that the doctor's prior statements were similar to statements that had already been used to impeach him at trial.

*People v. O'Neil*, 887 N.Y.S.2d 705 (App. Div. 2009). High school track and field coach Kason O'Neil appealed a trial court's judgment on a jury verdict convicting him of third-degree sexual abuse and endangering the welfare of a child for engaging in sexual contact with a member of his team while driving her to a practice with two other students. O'Neil met the alleged victim when she was fourteen-year-old freshman and helped her become the school's best long-distance runner; however, prior to the start of her junior year, her family moved to another county, forcing her to change schools. Shortly thereafter, she accused O'Neil of raping her on several occasions between the middle of her freshman year and the spring of her sophomore year. She claimed those acts took place in O'Neil's office, which was located in the boys' locker room at the school. The coach was charged with five counts of rape in varying degrees, nine counts of criminal

sexual conduct in varying degrees, six counts of third-degree sexual abuse, and one count of endangering the welfare of a child. Seven of those counts were dismissed following the state's case, which was based almost entirely on the testimony of the victim. Although O'Neil was subsequently convicted of the two counts associated with the alleged incident in his car, he was acquitted of the remaining charges.

The appellate court reversed, holding that his conviction for sexual abuse was against the weight of any credible evidence, and that, when combined with acquittal on the remaining charges, the jury had no justification for finding that he had acted in a manner that endangered the victim's welfare. The court noted that neither of the other two students in his car during the alleged incident had seen O'Neil touch the victim or heard her complain about his conduct. More importantly, the court found the victim's reliability was manifestly suspect and emphasized that she had provided far more details about the alleged rapes than the incident in the car; however, she could not inspire confidence in her credibility as to those events. The court noted that her testimony about both the rapes and the car incident was inconsistent with the allegations contained in the indictment and that multiple witnesses claimed she was both untruthful and manipulative. Finally, the court gave credence to the testimony of other students and adults associated with O'Neil, who claimed that he had a clean reputation as a coach.

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*State v. Clay, 2009 Ohio App. LEXIS 4718 (Oct. 23, 2009).* High school football coach James Clay appealed a trial court's judgment on a jury verdict convicting him of sexual battery for engaging in a sexual relationship with a fifteen-year-old student who had been entrusted to him as a mentor following her parents' divorce and assisted him in his coaching duties. One day a week, following football practice, the student would go home with Clay to participate in a bible study. Following those sessions, she would spend the night at his house, and then return to school with him the following day. On some of those occasions, they engaged in sexual conduct. In addition, Clay recorded a CD of sexually suggestive love songs and gave it to her. When the police became aware of this conduct, they recorded a telephone call between Clay and the student, in which he claimed to have discarded videotapes of their illicit encounters.

The appellate court affirmed the conviction. It held that the trial court did not commit a reversible error when entering judgment on his verdict. First, the court found that the indictment was effective because it did not need to allege a culpable mental state for a strict-liability offense. It noted that the statute imposing liability did not specify any degree of culpability needed to find a defendant guilty. Second, the court found that the alleged under-representation of African-Americans in the jury venire was due to a systematic exclusion of them. It emphasized that the Ohio Supreme Court had approved using lists of registered voters when imposing jury duty and that African-Americans only composed two percent of the county's population. Third, the court concluded that the recorded telephone conversation and the testimony of four witnesses, including the student's father-in-law, was admissible to show a scheme, plan, or system in committing the crimes, even if it also demonstrated conforming conduct. It noted that the student's actions on the videotapes and the testimony concerning her inappropriate behavior around Clay provided essential background information about the conduct that occurred between them. Finally, the court determined that evidence regarding Clay's



alleged grooming of the student constituted opinion evidence that could only serve as proof of propensity; however, it found that Clay failed to object to that evidence, and that the error would not have affected the outcome of the case.

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*United States v. Battista*, 575 F.3d 226 (2d Cir. 2009). James Battista, a co-conspirator in the NBA gambling scandal involving former referee Tim Donaghy, appealed a district court's judgment on his guilty plea for conspiracy to transmit wagering information that ordered him to pay restitution to the league as a victim of the offense under federal law. Under the conspiracy, Donaghy provided picks on NBA games to a middleman, who then relayed those picks to Battista to place bets. In exchange, Battista paid Donaghy a fee for every correct pick. The NBA sought restitution in the form of (1) the compensation it paid to Donaghy for games in which he had a financial interest, (2) the compensation it paid to employees to review the tapes of the games Donaghy refereed, and (3) attorney fees incurred in assisting the government in its investigation of the case. The district court ordered Battista, Donaghy, and the middleman to pay over \$217,000 in restitution.

The Court of Appeals affirmed the order. It held that restitution was properly imposed under the Victims and Witnesses Protection Act (VWPA), which enables courts to impose restitution for crimes that may or may not be covered under the Mandatory Victims Restitution Act (MVRA), another federal law. In assessing whether the NBA could recover under the VWPA, the court noted that the league was a victim, as statutorily-defined, because it was harmed not only by Battista's use of the nonpublic information he received, but by his role in the conspiracy, which encompassed the acts of his co-conspirators. The court also noted Battista's external financial obligations were not so great as to exempt him from paying and that shielding him would prevent the court from according equal treatment to his co-conspirators, who were ordered to pay mandatory restitution because their crimes fell under the MVRA. Finally, the court determined the NBA's attorney fees were recoverable because the VWPA allows victims to seek restitution for expenses related to participation in the investigation of his offense.

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### ***Disability Law***

*Barron v. PGA Tour, Inc.*, 2009 U.S. Dist. LEXIS 107194 (W.D. Tenn. Nov. 16, 2009). Barron was a professional golfer on the PGA Tour. He suffered from a physical impairment that resulted in atypically low levels of testosterone. As a result, he was proscribed Propranolol and Testosterone to maintain a normal level of testosterone to enable him to have a normal sexual life, not suffer from fatigue, and to maintain his immune system. The drugs he took, however, were not allowed under PGA Tour rules. Barron applied for an exemption, which was denied by the PGA. After testing positive during a PGA event, Barron was suspended from the tour for one year. He challenged his claim under the Americans with Disabilities Act (ADA) and under state contract law.

Barron sought a preliminary injunction, which the court denied because he was unable to demonstrate that the PGA Tour failed to provide him with a reasonable accommodation under the ADA, even though he was found to have a disability under the Act. The PGA provided Barron with the ability to request an exemption and the right to appeal that determination. Although Barron was not provided with an exemption did not mean he was not afforded a reasonable accommodation.

Barron also brought several state contract law claims. He first argued that the drug-testing program constitutes an unconscionable contract under Tennessee law. The court disagreed and stated that there was nothing to suggest that the terms of the program were so oppressive as to be unconscionable. Barron also brought a claim that the decision to deny his exemption requests was arbitrary and done in bad faith. The court noted that while Barron suffered from a serious condition, the program afforded him numerous opportunities to appeal the decision, not all of which Barron availed himself. Also, the court noted that the sanction was imposed retroactively to enable Barron to participate in the highly touted 2010 Q-School.

*Melendez v. Morrow County Sch. Dist., 2009 U.S. Dist. LEXIS 108299 (D. Or. Nov. 19, 2009).* Melendez brought a myriad of claims against the Morrow County School District, the District Superintendent, and the Irrigon High School Principal under the Americans with Disabilities Act, under Oregon's Whistleblower Law, and for wrongful termination. The sports nature of this case is two-fold. First, after being hired, Melendez unsuccessfully tried to get a position as a sports coach at the school. He was told to try out, but he was humiliated when a younger Caucasian man was hired. Second, Melendez also witnessed an incident where a high school coach physically abused a male student athlete. He later disclosed this to school officials and the teacher was subsequently reprimanded.

During Melendez's time at the school, he suffered from anxiety, depression and insomnia. He received treatment for these conditions, but at times suffered to the point of hospitalization. In addition to being unable to secure a coaching position, Melendez was subjected to performing janitorial tasks that were not typically assigned to a staff member in his position. Melendez believed that this was retaliation for disclosing the incident involving the coach's physical abuse of a student. Melendez had several meetings with school officials regarding the incident and his treatment at the school. Although Melendez did not feel as though these meetings resolved his concerns, he was given a position as assistant coach of the boy's basketball team.

Shortly after being given the position, however, Melendez was required to take, as all employees were, an aptitude test. He was late to the test because two other employees, who were going to drive with him, left to take the test without waiting for Melendez allegedly because of racial animosity towards him. As a result of the failed test, Melendez was required to transfer to an Alternative Education Program. He continued in his coaching duties but continued to have problems with his medical conditions. Melendez repeatedly failed the aptitude test and was not given an extension for his disability. He was later dismissed for failing to pass the test. He subsequently passed the test, but was not rehired by the school district.

As it related to Melendez's disability claim, the court held that Melendez presented sufficient evidence to satisfy all the elements of the disability claim. Specifically, it noted that insomnia

can constitute a disability under the ADA, he was qualified for the position, and he could present evidence demonstrating that he was unable to pass the aptitude test because the School District did not afford him a reasonable accommodation for his disability.

Melendez also brought claims for disparate treatment. The court stated that he was able to make out his prima facie burden of disparate treatment, including that he was denied a coaching position several times on the basis of his race. In response, the court held that the School District was unable to provide a non-discriminatory reason for its actions. Specifically, it could not offer a non-discriminatory reason for Melendez's transfer to the Alternative Education Program.

Melendez's whistleblower claim also survived summary judgment. The court held that there was substantial evidence that he had reported child abuse by the high school coach. Furthermore, the court stated that this reporting, combined with the discriminatory treatment, could maintain a claim under the state's whistleblower statute.

*Eames v. Southern Univ.*, 2009 U.S. Dist. LEXIS 97452 (M.D. La. Oct. 16, 2009). Southern University moved to dismiss federal and state law claims brought by a disabled individual who wished to secure access to the school's football and basketball programs after the University failed to comply with its commitment to resolve issues related to the accessibility of its facilities, which was prompted by the individual's complaint to the Office of Civil Rights. The individual alleged that the University's failure to make necessary alterations continued to deprive him the opportunity to participate in or benefit from those athletic activities. He brought suit under both the Americans with Disabilities Act and the Rehabilitation Act, as well as two state laws, seeking a permanent injunction to prevent the school from avoiding compliance with its commitment and damages associated with its prior violations.

The District Court denied the motion. It held that (1) the individual's claims were not barred by the statute of limitations, (2) he could seek damages for intentional discrimination under the federal laws, and (3) he could seek specific performance as a third-party beneficiary of the University's commitment. The court assessed whether the complaint was time-barred and held that his claims were not facility accessibility claims, but program accessibility claims. Therefore, they did not begin to accrue on the date of the University's last alterations to the facilities. The court found that a different interpretation would destroy the requirement to provide meaningful access to programs because government entities could merely move them between non-compliant facilities. The court assessed whether damages were available and found that the university had knowledge of the individual's disability. The court further found that the university's breach of the commitment would continue to deny him access to the athletic programs. Finally, the court assessed whether the individual qualified as a third-party beneficiary and found that a party could be found to have implicitly stipulated to provide a benefit under state law. The court also determined that the circumstances in this case allowed for it. It noted that the purpose of the commitment was to benefit disabled individuals and that the University knew the plaintiff's access to its programs depended upon its compliance. Moreover, by fulfilling the commitment, the university knew it would be relieved of potential legal liability for its treatment of those persons.

## *Discrimination Law - Age*

*Rickert v. Midland Lutheran Coll.*, 2009 U.S. Dist. LEXIS 78886 (D. Neb. Sept. 2, 2009). Midland Lutheran College (MLC) moved for summary judgment on disability and age discrimination claims brought against the school by its former women's volleyball coach after MLC failed to hire her in a full-time capacity or as the Student Activities Director and dropped the part-time positions that she previously held while she was being treated for breast cancer. MLC informed the coach when she was hired it hoped to eventually make the position full-time; however, it also stated it would offer the position to all potential applicants when that time occurred. Subsequently, the coach was also hired as the school's part-time Student Activities Director (SAD), giving her full-time employment at the school. Three years later, she was diagnosed with cancer; however, she never missed any work, and her subsequent chemotherapy treatments only required minor deviations from the volleyball team's normal practice schedule. Yet, shortly afterwards, MLC decided to make the SAD position a full-time job, and the plaintiff chose to drop her extra duties so she did not have to resign as the volleyball coach in the middle of the season. As a result, she also lost her office in that department. At the time, the school was also renovating its athletic facilities. Office space was scarce, forcing several coaches to work in small, converted areas. Unable to find immediate room for the plaintiff, the athletic director asked her to work from home until space became available. Eventually, the department secured her an office in a house located three blocks from the athletic facilities, but near residential halls, giving her easy access to student-athletes; however, the office lacked amenities that she deemed necessary for her to communicate with her players and the rest of the school's coaching community. To prevent the plaintiff from losing her medical benefits, the school also upgraded her to a two-thirds time position, asking only that she hold some camps and club tournaments to raise money for the program.

During this time period, MLC was also implementing a plan to strengthen its overall athletic program. As part of the plan, the school adopted an NCAA coaching model, wherein coaches would give up their teaching duties and work within the athletic department full-time. As a result, it decided to make the volleyball coach a full-time position. Rather than give the full-time job to the plaintiff, the school opened up the position to all interested applicants. MLC established a search committee to make a recommendation, just as it had when it hired two of the three other coaches brought in during the current athletic director's tenure. The plaintiff was one of five applicants identified as a candidate for the position. All five applicants interviewed with the committee and met with the current volleyball players, whose opinions were given weight in the ultimate recommendation. The only reference to age during the entire process was one committee member's reference to another candidate's youth as a positive trait, and there was no evidence the plaintiff's cancer was identified as a potential issue. The plaintiff ended up being the committee's fourth choice.

The District Court granted the defendant's motion. It held that the plaintiff's cancer did not render her disabled under federal or state law and that MLC's conduct both before and during the process of hiring a full-time volleyball coach was not a pretext for age discrimination. The court assessed the disability discrimination claims and found that the cancer did not cause a physical or mental impairment that substantially limited her ability to work. The court also found that the school did not perceive her to have an impairment. It noted that the school did not limit her

overall employment opportunities, emphasizing that MLC selected her as a finalist for the full-time volleyball coach position and that the committee identified her ability to work through cancer as a positive trait that inspired her co-workers. In assessing the age discrimination claims, the court determined that MLC had legitimate, non-discriminatory reasons to hire a full-time volleyball coach by using a search committee and to choose another candidate, and that the plaintiff could not establish those reasons were a mere pretext. It noted that MLC was in the midst of revamping its entire athletic program and that the search committee considered both objective and subjective factors when weighing the candidates and making its recommendation. The court emphasized that the plaintiff was considered an average coach with questionable recruiting skills and that her teams had consistently performed worse as her tenure wore on. Moreover, any emphasis on another candidate's youth was not sufficient to prove intent to discriminate, especially when the committee ultimately ranked a third candidate who was similar in age to the plaintiff ahead of a younger applicant. Finally, the court found MLC conducted itself appropriately after the plaintiff lost her position as Student Activities Director. By telling her to conduct camps and tournaments, it helped ensure she was identified as a two-thirds time employee and could keep her benefits. The court also determined that her substandard office arrangements had nothing to do with her age.

### ***Discrimination Law - Race***

*Beal v. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 108195 (D. Md. Nov. 18, 2009). Beal, the mother of a student at Governor Thomas Johnson High School, attended a track and field event between Johnson High and Middletown High School. At the event, Beal remarked to a parent of Middletown High that it was too bad the officials penalized a Johnson High athlete and that a Middletown High student won instead. The parent and others, perhaps because of the mistaken belief that Beal was the mother of the penalized student, became aggressive towards Beal. Later, several police officers demanded that she leave. Later still, Beal received trespass letters from school officials.

Beal brought suit against the County Board of Education, the Superintendent, and several others claiming a violation of her state and federal civil rights; however, because Beal did not file a response brief in time and that when she did, it was incomplete, the court dismissed her claim on the basis that [a]n opposition that fails to state any reasons is no opposition at all.

*Floyd v. Amite County Sch. Dist.*, 581 F.3d 244 (5th Cir. 2009) . High school principal Charlie Floyd appealed a district court's decision to grant summary judgment to the local school district, the school board, and various board members on both federal race discrimination claims and state law claims that he brought against them after he was fired for allegedly allowing white students to participate in a private track and field training program that he held on district property. Floyd was serving as both the principal and track coach of the predominantly African-American school when the board gave him permission to operate the program in the summer of 2002; however, he failed to notify the board that he would be inviting white students from private schools in the community to participate. Later that summer, the board adopted a policy that prevented school administrators, like Floyd, from holding more than one position in the

district. As a result, Floyd resigned as the school's coach to keep his job as principal. That fall, Floyd was fired as principal after an investigation by the district superintendent revealed that he was improperly performing his job duties. In response, Floyd sued, claiming his termination was the result of his decision to allow white students to participate in the track program. He introduced evidence indicating that the president of the board was biased against him for assisting those students.

The Court of Appeals affirmed. It held that Floyd failed to raise a genuine issue of material fact that he was discriminated against on the basis of his race when he was fired and that the district court did not err in dismissing any of his various state law claims. The court assessed Floyd's federal race discrimination claims and found that Floyd failed to assert that he was fired because he associated with the white students. Instead, the evidence only showed that the board president was angry that Floyd allowed those students to participate. The court noted that Floyd's attorney admitted animus about mixing races would have cost his client his job regardless whether he were black or white. The court dismissed Floyd's state law claims for breach of contract and intentional infliction of emotional distress because good cause existed for his termination and the defendants' alleged conduct was not outrageous enough to shock the conscience.

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*Williams v. U.S. Tennis Ass'n*, 2009 U.S. Dist. LEXIS 57663 (N.D. Cal. July 7, 2009). The United States Tennis Association (USTA), its Northern California branch, and a tennis club that hosted a USTA tournament moved to dismiss federal race discrimination claims and state law claims brought against them by a youth tennis player and her mother after the USTA entities and the club allegedly failed to respond appropriately to their complaints about the actions of another player and her family following a match. In addition to the claims arising out of the response to those complaints, the plaintiffs alleged the USTA entities create an unsafe environment at tournaments for African-Americans and arbitrarily enforce their rules and regulations when dealing with African-American members. The plaintiffs' lawsuit was initiated after one of the tennis player's opponents allegedly called her derogatory names and threw an ice pack at her during a tournament match, then assaulted and threatened the plaintiffs with her mother the following day. The plaintiffs claimed that neither of the USTA entities or the club assisted them when the assault took place, and that the defendants failed to provide adequate security during the event. In addition, they claimed that the defendants retaliated against them when they reported the incidents.

The District Court partially granted the plaintiffs' motion by dismissing the federal race discrimination claims; however, it gave the plaintiffs leave to amend their complaint as pro se litigants and refused to rule on their state law claims by exercising supplemental jurisdiction. In throwing out the § 1981 claim, the court noted that the plaintiffs failed to identify any facts indicating that the defendants' conduct impaired a contractual relationship between the parties. Although the plaintiffs admitted during oral argument that they were parties to a membership agreement, the court emphasized that the complaint itself had to allege that the agreement created the contractual basis for their claim. In dismissing the § 1982 claim, the court relied on similar reasoning, noting that the plaintiffs failed to allege any property interests that the defendants impaired with their conduct. Finally, in tackling the § 1985(3) conspiracy claim, the

court emphasized that the plaintiffs failed to show that the defendants conspired in their conduct, or what, in fact, the alleged conspiracy was. It noted that allegations that the defendants acted similarly in response to the altercation between the tennis players were insufficient to infer a conspiracy.

*Williams v. USTA*, 2009 U.S. Dist. LEXIS 117640 (N.D. Cal. Dec. 17, 2009). Williams was the mother of a promising, African-American female tennis player. The plaintiff alleged that the defendants took numerous actions that violated the minor's federal and state rights. Specifically, the United States Tennis Association (USTA) was alleged to have conspired against the success of African-American tennis players by, inter alia, scheduling matches wherein the African-American tennis players are scheduled against each other in the early rounds of tournaments, making it less likely for their success in later rounds. The plaintiff also brought claims for breach of contract, assault, and racial discrimination.

Two issues, in particular, were before the court here. First, the court held that the plaintiff was not entitled to recovery for her claim under 42 U.S.C. § 1981 because she was unable to demonstrate that a contract existed between her and any of the defendants, save for the monthly membership dues paid to the local affiliate of USTA. In that instance, the court nonetheless maintained that the plaintiff was unable to show how she was racially discriminated against in the formation or execution of that contract.

Second, the court dismissed the plaintiff's claim under 42 U.S.C. §1985(3) for conspiracy to interfere with plaintiff's civil rights because the plaintiff had offered no specific evidence as to the conspiracy. All the plaintiff sought was the ability for her daughter to play in tennis tournaments free from threats of conspiracy. This, however, was not enough to sustain the claim.

After the court dismissed these federal claims, it dismissed without prejudice the plaintiff's state law claims because the only reason for the District Court's jurisdiction on those matters was due to the fact that the state claims were tied to the federal ones.

### ***Discrimination Law - Sex***

*Equity in Athletics, Inc. v. Dep't of Educ.*, 2009 U.S. Dist. LEXIS 121275 (W.D. Va. Dec. 30, 2009). Equity in Athletics (EIA) was a non-profit organization consisting of athletic boosters, coaches, fans, alumni, and parents. In 2007, James Madison University (JMU) eliminated ten athletic teams in an attempt to come into Title IX compliance under the three-part test. EIA challenged JMU's decision on numerous grounds. Ultimately, the court dismissed each of these claims for the following reasons.

EIA first challenged the constitutionality of the three-part test and claimed that it required unlawful gender-based quotas. The court concluded that the three-part test does not require gender based quotas and stated that a university can comply with Title IX by adhering to any one of the three parts of the test. Thus, the test does not prevent JMU from eliminating athletic teams in an attempt to maintain Title IX compliance. EIA next challenged that the three-part test

violated the equal protection clause. The court held that although gender may play a role in Title IX compliance, such a limited role does not violate the equal protection clause. EIA also challenged the three-part test on the basis that the Spending Clause does not allow Congress to coerce recipients of federal funds into performing certain tasks to ensure receipt of federal funds. The court held, however, that there was nothing unduly coercive about conditioning receipt of federal funds on Title IX compliance as such compliance can be secured by voluntary means.

EIA also argued that Title IX compliance should be based on actual interest in athletic participation, not on comparable undergraduate enrollment as the three-part test provides. The court maintained the principle that athletic interest is fostered by actual participation and that to allot participation based on actual interest would only reinforce gender roles that Title IX was enacted to combat. EIA also brought state law claims, many of which were dismissed under the Eleventh Amendment's immunity privilege. EIA's other state constitutional claims failed for many of the reasons listed above.

Finally, EIA challenged JMU's actions under Title IX itself. The court held that the first prong of the three-part test does not require exact proportionality of athletic opportunities. As a result, the 2% imbalance due to JMU's actions was permissible under Title IX. Also, EIA's claim that JMU's actions severely affected female athletic scholarships in violation of Title IX was dismissed for lack of standing. None of the EIA members were eligible to receive those scholarships that were lost.

*Labati v. Univ. of Miami*, 16 So. 3d 886 (Fla. Dist. Ct. App. 2009). Former University of Miami women's basketball coach Ferne Labati appealed a trial court's decision to grant summary judgment to the university on age and gender discrimination claims she brought against it after the school exercised its contractual right to buy out the final year of her contract. Labati also appealed the court's decision to award attorney's fees to the university in connection with those claims. The school offered several non-discriminatory justifications for making its decision. The appellate court affirmed the entry of summary judgment, but reversed the decision to award attorney's fees to the University. In reviewing the merits of the Title VII claims under the burden-shifting McDonnell-Douglas framework, the court determined the evidence failed to show that the school's reasons for buying out Labati's contract were a mere pretext for discrimination; however, it held the trial court abused its discretion in awarding attorney's fees to the university under state law, emphasizing that an award may only take place if the plaintiff's action was frivolous, unreasonable, or without foundation.

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*Maier v. Canon McMillan Sch. Dist.*, 2009 U.S. Dist. LEXIS 74342 (W.D. Pa. Aug. 20, 2009). A school district and its named employees moved for summary judgment on federal sex discrimination claims and state law claims brought against them by the parents of a high school softball player after she was coerced into a sexual relationship with a volunteer assistant coach. The plaintiffs' daughter first met the coach while playing for the school's recreational fall ball team in 2005. The following spring, she played on the school's junior varsity squad. Over that time period, the coach socialized with the plaintiffs and was a guest in their home. He also made telephone calls to their daughter on a phone issued by the district. Their sexual relationship



began at some point in the fall 2005, with activity occurring during and after school on school property and in the plaintiffs' home. In addition to their sexual activity, the coach gave the plaintiffs' daughter rides home from practice, despite a directive from the school principal that prohibited coaches from giving rides to players. The plaintiffs were aware of these rides and did not object. In February 2006, the plaintiffs discovered that their daughter was engaging in late night phone calls with the coach and notified the director of the school's softball program. She relayed that information to the principal. In a meeting held three days later, the school first learned of the coach's routine of driving the plaintiffs' daughter home from practice. Following the meeting, the school notified the coach that he was not to make further contact with softball players until the matter had been resolved. Subsequently, the district superintendent decided to formally terminate the coach from his position and requested that he resign from his IT job with the district. The coach resigned shortly afterward.

The District Court partially granted the motion. It held that the parents failed to raise a genuine issue of material fact that showed the defendants violated their daughter's Fourteenth Amendment right to bodily integrity by failing to adequately investigate, supervise, and train the volunteer coach or created an environment of sexual harassment that deprived their daughter of education opportunities in violation of Title IX. The court assessed the § 1983 claim against the individual school district defendants and found that the plaintiffs failed to show that any of the employees had actual knowledge of facts that pointed toward sexual abuse of their daughter, or, even if they did, that they were deliberately indifferent to it. The court noted that the director of the softball program knew only that the coach had previously spent the night at the home of another player with permission of her parents and that other members of the team reported he was acting differently with the plaintiffs' daughter. The court assessed the § 1983 claim against the district and found the plaintiffs failed to show that the district's policies and customs played a role in bringing about the abuse or that the district was deliberately indifferent to the possibility of it. The court emphasized that the district did not have to review and investigate all calls made by the coach on his district-issued phone and that the director of the softball program was not required to act on the report from other members of the team, especially when rumors run rampant in high school settings. The court also detailed that district employees were aware of the district's views on sexual harassment, which were spelled out in a written sexual harassment policy and the school's student handbook. Finally, in summarily dismissing the Title IX claim against the district, the court noted that the standard for liability was even tougher to meet than the standard under § 1983, because the employees had to have actual knowledge of sexual misconduct, not just knowledge of the risk of it. As a result of these decisions, the court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims and dismissed them without prejudice.

*Parker v. Ind. High Sch. Athletic Ass'n*, 2009 U.S. Dist. LEXIS 113395 (S.D. Ind. Dec. 2, 2009). Parker, the mother of two daughters aged sixteen and ten, brought Title IX and Fourteenth Amendment claims against the Indiana High School Athletic Association (IHSAA) and thirteen member schools on the grounds that the entities scheduled its boys sports in a more favorable way than its girls sports.

The court held that as it related to Parker's younger daughter, age ten, the claims must be dismissed for lack of standing because the injury suffered by the daughter is too speculative and

remote. The ten year old did not, at the time, participate in the sports program in question and thus, any possible harm would be remote and speculative.

The court held that against the thirteen member schools, the Title IX claim survived summary judgment on the basis that Parker was able to raise the genuine issue that scheduling the boys teams on the more favorable Friday and Saturday nights negatively impacted the girls athletic participation; however, the court dismissed the Equal Protection claim on the grounds that a potential Title IX claim would preclude the Equal Protection claim.

As these claims applied to the IHSAA, the court held that Parker failed to demonstrate that the IHSAA was a recipient of federal funds. As a result, IHSAA would not be required to comply with Title IX, absent such a showing. The court denied the motion to dismiss the Equal Protection claim on the grounds that Parker demonstrated sufficient evidence that IHSAA was sufficiently involved in the process of scheduling the boy's teams on the more favorable nights.

*Power v. Gilbert Pub. Sch., 2009 U.S. Dist. LEXIS 119322 (D. Ariz. Dec. 22, 2009).* Power was a member of the school's girls' varsity basketball team. During a team trip, the assistant head coach, who was also the husband of the head coach, made several sexually charged comments. Power informed the administration of these comments, and the assistant head coach was later dismissed. The head coach, also the wife of the dismissed assistant, along with several of the players allegedly harassed Power because she disclosed the assistant's comments. Power brought claims charging violations of Title IX and the Equal Protection Clause.

The court dismissed the Title IX claim on the grounds that the harassment in retaliation for Power's disclosure was not severe, but rather constituted typical juvenile behavior. Furthermore, the court held that even if the harassment were severe enough to satisfy Title IX, the claim would still be defeated because the school district's response was not clearly unreasonable given the circumstances. The school district nominated a person to investigate the allegations, and that person responded adequately. The court also dismissed Power's Equal Protection Clause claim on the basis that her retaliatory Title IX precluded the Equal Protection claim. Indeed, Power was unable to point to any case law that supported any legal basis for the ability to bring both claims

### ***Drug Testing Issues***

*Matter of Laterza v. N.Y. State Racing & Wagering Bd., 2009 N.Y. App. Div. LEXIS 9393 (Dec. 24, 2009).* Petitioner was a licensed horse trainer and owner. Following the race in question, the petitioner's horse was tested for the presence of banned substances. Two experts conducted tests on the blood sample and found the presence of rhEPO/DPO, a banned substance that increases the amount of red blood cells that blood can carry. On the basis of this evidence, the respondent suspended petitioner's license for five years and ordered a fine. The petitioner challenged the determination on two grounds. First, the respondent erred in allowing the expert to use a testing procedure that was not in accordance with accepted standards; and second, the test was not conducted until more than seven days after the race, in violation of the blood testing rules.

The court rejected the petitioner's first contention on the basis that the particular procedure used by the expert to detect the banned substance was in accordance with generally accepted scientific methodology. The court declined to use the Frye standard typically used to assess the admissibility of scientific evidence. As to the petitioner's second claim, the court found in favor of the petitioner on the grounds that there was nothing to suggest from the expert witnesses that the drug test was, in fact, performed within the required seven days. In fact, the court noted that the expert became aware of this requirement only upon cross-examination. The court concluded on this basis that the respondent's suspension and other sanctions could not be maintained.

*P'Pool v. Ind. Horse Racing Comm'n*, 916 N.E.2d 668 (Ind. Ct. App. 2009). A licensed horse racing trainer appealed a trial court's judgment affirming the Indiana Horse Racing Commission's (IHRC) decision to impose a six-year suspension and a \$30,000 fine upon him for violating IHRC rules when several of his horses tested positive for elevated levels of an anti-inflammatory medication at a 2006 meet and for making false and misleading statements to the IHRC executive director when he was investigating the use of that drug among trainers. IHRC rules prohibited the medication from being administered to a horse within one day of a race. Drug tests that indicated its presence in urine or blood at greater than specified levels would determine whether or not it was used within the banned period. After being informed that five of the trainer's horses had tested positive, the executive director interviewed him as part of his investigation, but did not mention the results of the tests. When he asked whether or not the trainer had administered any drugs to any of his horses at the meet, the trainer failed to mention his use of the anti-inflammatory. When asked to send medication records for all the horses he trained that competed in the meet, the trainer complied, but those records also failed to mention the use of the drug. After being notified that two more of the trainer's horses had tested positive, the executive director conducted another interview, this time mentioning that one of his horses had tested positive and asking for an explanation of the result. The trainer explained that he used the medication as part of a leg paint and that he bought the pre-made concoction from veterinarians; however, he failed to specify any vets who had sold him the paint. Later, the trainer provided two recipes for making the paint, but a study commissioned by the IHRC based on those recipes indicated that the anti-inflammatory would have been undetectable. Therefore, he was charged with administering the drug during the prohibited period and making false statements to the IHRC.

Just before his disciplinary hearing in front of the IHRC racing judges, three additional positive tests were announced, bringing the total number of violations to eleven. The racing judges imposed two sixty-day suspensions and \$2000 in fines and referred the charges to the IHRC for additional disciplinary action. The executive director then proposed the sanctions at issue, and the trainer appealed to an administrative law judge (ALJ). The trainer indicated he would call four veterinarians as experts on his preliminary witness list, but when those vets were contacted by the IHRC for depositions, two indicated they were not aware that they were expected to testify. The IHRC moved to exclude the listed vets as witnesses due to the trainer's failure to cooperate in discovery, and the ALJ granted the motion. Following a hearing, it recommended that the IHRC adopt the proposed sanctions. Shortly afterwards, the IHRC issued an order formally imposing them.

The appellate court affirmed, holding that the trainer was not denied due process during the IHRC investigatory and disciplinary proceedings. First, the court found that the IHRC's failure to provide prompt notice of the positive tests was not arbitrary and capricious, noting that the delay was entirely justifiable based on the IHRC's need to police the sport. Second, the court determined the sanctions were not arbitrary and capricious because the IHRC had the power to impose penalties above and beyond those imposed by the racing judges under state law. The court noted the IHRC could have imposed a maximum fine of \$55,000 under the circumstances and stripped the trainer's license, especially in light of the false and misleading statements he made to the executive director. In addition, the sanctions were consistent with those imposed for similar violations of the medication rules. Third, the court concluded that the ALJ did not abuse his discretion in preventing the trainer's proposed expert witnesses from testifying, emphasizing that state law gave the ALJ broad discretion to impose sanctions when the discovery process is abused. Finally, the court held the evidence was sufficient to support the IHRC's finding that the trainer made false and misleading statements, especially in light of the results of the commissioned study on his leg paint recipes.

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### ***Education Law***

*Heike v. Guevara*, 654 F.Supp. 2d 658, 2009 U.S. Dist. LEXIS 79140 (E.D. Mich. Sept. 2, 2009). The Central Michigan University (CMU) Board of Trustees, CMU women's basketball coach Sue Guevara, CMU Athletic Director Dave Heeke, and a CMU financial aid director moved to dismiss federal and state law claims brought against them by a former CMU women's basketball player after she was kicked off the team by Guevara and stripped of her athletic scholarship at the end of her sophomore season. Guevara's predecessor allegedly convinced the plaintiff to accept CMU's athletic scholarship by orally guaranteeing her an education; however, the plaintiff also received a letter from Heeke's predecessor stating that the renewal of her yearly scholarship was subject to the conditions listed in the Mid-American Conference and National Letters of Intent, which she subsequently signed. The plaintiff had a relatively smooth freshman year until Guevara took over as the head coach at the end of the basketball season. Guevara had been fired as the coach of the University of Michigan three years earlier, but it was not clear whether CMU investigated the reasons behind that decision. Six players left the program during the Guevara's seven-year tenure at the school, all due to poor relationships with the coach. That pattern apparently continued at CMU. Upon arriving, Guevara allegedly confronted the plaintiff about wearing make-up. And over the next eleven months, their relationship soured. According to the plaintiff, Guevara harassed her, singled her out for disparate treatment, and tried to force her to transfer, based in part because she was heterosexual. Guevara's actions also caused the plaintiff to suffer severe emotional distress, and, at one point, that distress manifested in a medical condition. When the plaintiff appealed the decision to revoke her scholarship to a university committee, Guevara claimed she was not meeting the program's expectations, although the coach never informed her of her alleged deficiencies.

The District Court granted the motion in part and allowed the plaintiff to submit supplemental briefs in an attempt to save two of her claims. It never assessed the plaintiff's Fourteenth Amendment claims against CMU, concluding that the University enjoyed Eleventh Amendment immunity from suit. The court emphasized that Congress only abrogated that immunity as to claims brought under federal statutes prohibiting discrimination, not claims brought under constitutional or state law. It also never assessed the official capacity claims against the individual defendants, concluding that the coach, athletic director, and financial aid director also enjoyed Eleventh Amendment immunity. The court emphasized that all official capacity claims based on state law or based on federal law and seeking monetary damages were barred in order to protect the principles of federalism. In the absence of immunity, the court noted that all of the plaintiff's claims against CMU and the individual defendants in their official capacities would still be barred because a state and its employees are not considered persons under § 1983. In assessing the negligent hiring and negligent supervision claims brought against Heeke, the court concluded that the athletic director would enjoy governmental immunity under state law based on the current complaint; however, the court gave the plaintiff leave to submit a supplemental brief to explain how Heeke's conduct in hiring and supervising Guevara amounted to gross negligence. Finally, when it assessed the defamation claims brought against all of the individual defendants, the court emphasized that the plaintiff failed to establish defamation per se under state law and that her failure to allege reputational damage or pecuniary harm would normally be fatal to her claim. It also found that the plaintiff failed to cite the alleged defamatory statements made by the athletic director and the financial aid director. Nevertheless, the court allowed the plaintiff to submit a supplemental brief that identified special damages and the comments made by those individuals. It also ordered the plaintiff to respond to the defendants' argument that all of their statements about her were either privileged or mere opinions.

*Heike v. Guevara*, 2009 U.S. Dist. LEXIS 103600 (E.D. Mich. Nov. 6, 2009). Heike was a female college basketball player at Central Michigan University (CMU). She was dismissed from the team and her scholarship was not renewed after there were disputes concerning Heike's effort on the basketball team that were raised by head coach Guevara. Heike brought several claims against Guevara, CMU's athletic director and the CMU financial aid office. The court held that the CMU athletic director was entitled to governmental immunity from Heike's negligence claims because she was unable to demonstrate that the AD's conduct, by failing to adequately supervise Guevara's actions, constituted gross negligence. As a result, the immunity privilege still applied to the AD. The court next held that Heike's defamation claims against the AD and the financial aid office were not plead with required specificity. All Heike was able to demonstrate was that Guevara made allegedly defamatory statements, not the AD or the financial aid office.

Heike's defamation claim against Guevara survived summary judgment on the basis that the absolute immunity privilege, which protects statements made in a judicial function. The court held that the hearing before the CMU committee as to the effort Heike put into the basketball team did not constitute a judicial function as understood by the immunity privilege because Michigan courts demonstrated a reluctance to extend the privilege beyond a traditional understanding of a judicial proceeding. Lastly, the court dismissed the defendant's summary judgment motion as to the defamation claims against Guevara that argued her statements were

not defamatory because they were opinions. The court stated that, at this time, there was insufficient evidence to determine whether the statements, in fact, constituted opinions or facts.

*Ind. High Sch. Athletic Ass'n v. Schafer*, 913 N.E.2d 789 (Ind. Ct. App. 2009). The Indiana High School Athletic Association (IHSAA) appealed a trial court's decision to award attorney fees to a former high school basketball player and his father after they were successful in obtaining a declaratory judgment that the application of certain IHSAA rules to his circumstances was unconstitutional and an injunction that prevented the IHSAA from prohibiting him from participating beyond his first eight semesters of high school. The IHSAA refused the player's request for additional eligibility under one rule, but affirmed on appeal under a different rule. Then, when the player challenged the decision in court, the IHSAA argued he was ineligible under a third rule. After finding the rules unconstitutional as applied, the court allowed the player to recover fees for over 490 hours of service because the IHSAA continued to litigate frivolous defenses well after the player had already graduated from school. The appellate court remanded, emphasizing its concern that the IHSAA was discouraging parents and student-athletes from challenging a denial of eligibility, but concluding that the trial court needed to further explain its decision to award fees. The court noted that the special findings of fact requested by the plaintiffs failed to specify what IHSAA litigation tactics were problematic. Instead, it couched its findings in conclusory statements. The court emphasized that just because the entire record provides support for awarding attorney fees did not allow it to ignore findings that do not support that judgment.

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*Ind. High Sch. Athletic Ass'n v. Watson*, 913 N.E.2d 741 (Ind. Ct. App. 2009). The Indiana High School Athletic Association (IHSAA) appealed the trial court's decision that found the IHSAA Review Committee acted arbitrary and capriciously when it ruled high school basketball player Jasmine Watson ineligible to play her senior season due to violations of the IHSAA rules and that also enjoined the IHSAA from enforcing its decision or applying its restitution rule against her new school. During her freshman, sophomore, and junior years, Watson lived and attended school in Elkhart, where she lived with her single mother and three other children in the family's six-bedroom house. She transferred schools during the summer prior to her senior year when her mother decided to move the family to South Bend. Several factors played a role in that decision. Although her mother was still employed at a plant in Elkhart, her salary had been nearly halved a year earlier due to a drastic reduction in work hours. As a result, she was unable to make the mortgage payments on the house, and her lender started foreclosure proceedings. She would have been able to keep the family in the home until November of Watson's senior year, but she began looking for another home because she wanted to avoid the risk that her children would have to change schools in the middle of the year. She attempted to locate another suitable place to live in Elkhart, but the houses that she qualified to rent were either too expensive, too small, or located in unsafe areas. Ultimately, she decided to relocate the family to her hometown, where she not only found a large home at an affordable rate, but support from the extended family that lived there.

Prior to the move, the head coach at Watson's former school assisted Watson's mother in her attempt to find a place to rent in Elkhart. At one point, he even convinced a homeowner to waive

a security deposit and offer his property at a reduced rate. In the event the family moved out of town, he offered to provide transportation to Watson so that she could still attend school in Elkhart. An assistant coach also invited Watson to live with her for the school year. Following the transfer, Watson sought immediate eligibility to play basketball at her new school based on the family's change in residence; however, under IHSAA rules, a student who transfers for primarily athletic reasons or as the result of undue influence must sit out a year, even if the student's family has changed residences. Watson's old school in Elkhart refused to approve her request because the head coach believed the transfer was motivated by athletic reasons and that she had been recruited to South Bend. The coach's beliefs were based on a comment by her mother, who told him that Watson was leaving, in part, because of her disappointment with the Elkhart program. He also alleged Watson's grandmother had made statements to others the previous spring that the family was looking for another school for her to play. Several other witnesses claimed they had heard that the coaches at Watson's new school were recruiting her during this time. The IHSAA Review Committee determined Watson's move violated the association's transfer rule or undue influence rule, or both.

The appellate court affirmed. It held there was no error in granting the injunction because Watson was likely to succeed on the merits of her claim when the IHSAA's ruling on her eligibility disregarded the basic facts and circumstances surrounding her transfer and the failure to prohibit the IHSAA from taking action against her new school would render its decision powerless. As a preliminary matter, the court determined the action was not moot, even though Watson's eligibility was no longer an issue, because the IHSAA could still apply its restitution rule in the event of a reversal, the case involved an issue that was of great public interest, and the situation was likely to recur. The court assessed the ruling on Watson's eligibility and found that the IHSAA placed too much emphasis on disputed, unsubstantiated hearsay statements, and disregarded the transportation problems Watson's family would endure by continuing to send her to school in Elkhart. More importantly, it found there was no way the IHSAA could establish that the transfer occurred primarily for athletic reasons, even if Watson's basketball future did play a role. The court found that conclusion would ignore the evidence that Watson's mother made a decision in the best interests of all her children, especially in light of her financial problem. In addition, the court admonished the IHSAA for ignoring the efforts of the Elkhart coaches to keep Watson in town and for questioning her mother's inability to find a suitable replacement home. It emphasized that the coaches' efforts were also clearly illegal under the IHSAA undue influence rule and that the family's decision to decline those favors could not be used as a basis for finding an athletically motivated transfer without resulting in an inconsistent application of the rule. The court affirmed the scope of the injunction and emphasized that the IHSAA acted arbitrarily and capriciously in determining that the coach at Watson's new school violated the undue influence rule. It noted that the allegations against the coach would not amount to undue influence even if they were true and that the IHSAA's decision to make that determination in the middle of an eligibility ruling made it proper to consider when entering the injunction.

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*Ky. High Sch. Athletic Ass'n v. Dailey*, 2009 Ky. App. Unpub. LEXIS 552 (July 2, 2009), appeal dismissed, 2009 Ky. App. Unpub. LEXIS 581 (July 10, 2009). The Kentucky High School

Athletic Association (KHSAA) appealed a trial court's decision to reverse a KHSAA Board of Control ruling that a high school athlete was ineligible to participate at his new school because he did not meet the bona fide change of residence exception to the association's transfer rule. The KHSAA bylaws mandated a one-year period of ineligibility for any athlete that failed to qualify under the exception. The appellate court dismissed the case due to lack of subject matter jurisdiction because the disputed issues were moot. The court emphasized that the athlete had presumably graduated, and that, in any event, the stipulated period of ineligibility had expired.

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*Ulliman v. Ohio High Sch. Athletic Ass'n*, 2009 Ohio App. LEXIS 3196 (July 31, 2009). The Ohio High School Athletic Association (OHSAA) appealed a trial court's decision to grant a preliminary injunction to a high school athlete that prevented OHSAA from enforcing its transfer rule to prohibit him from participating on the football team at his new school and taking adverse action against the school for allowing him to participate. The athlete transferred to a new school during the first semester of his sophomore year. That school was located in the district where his parents resided, but he was ineligible to play sports through his junior year due to poor grades. Following his junior year, he moved to his grandparents' home in another district and made the transfer at issue in this case. According to OHSAA, its bylaws barred the athlete from playing for one year from the date of his second transfer unless he could prove there was a change in custody to an individual living in the new school's district; however, the transfer rule states only that an athlete is considered to have transferred whenever he changes from the school he attended as a freshman to any other school. Based on that language, the trial court determined the bylaw did not apply to the athlete in this case, who was not transferring from the school he attended as a freshman.

The appellate court vacated the injunction and held that the athlete could not demonstrate a likelihood of success on the merits because the transfer rule applied to his case. The court found that OHSAA did not act arbitrarily or capriciously in enforcing that bylaw against the athlete. After determining the appeal was not moot because OHSAA could still penalize the school for allowing the athlete to participate, the court found that OHSAA's interpretation of the bylaw's language was not mistaken. The court noted that a private association's interpretation of its own rules is entitled to deference, especially when they appear ambiguous, and emphasized that the trial court's view failed to take into account the bylaw's purpose and the listed exceptions. The court recognized that it would be impossible to prevent athletes from shopping for schools if the rule applied only to initial transfers and that the OHSAA would not have needed to adopt several of its exceptions if that interpretation were correct. The court assessed whether OHSAA acted arbitrarily in applying the rule in this case. It noted that the association had consistently barred other athletes from participating in similar situations. More importantly, it found the fact that the change in custody exception was unavailable to the athlete in this situation did not indicate the exception was improperly adopted or not rationally based. Although the athlete was eighteen years old at the time of transfer, the OHSAA was not required to anticipate every situation in its rules.

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## ***Employment Law***

*Atkinson v. Lafayette Coll.*, 2009 U.S. Dist. LEXIS 81959 (E.D. Pa. Sept. 9, 2009). Lafayette College moved for summary judgment on a Title IX retaliation claim brought against it by its former athletic director, Eve Atkinson, after the school fired her following her decade-long crusade to bring it into compliance with the law's gender equity mandates. Shortly after she was hired, Atkinson began complaining that the school's athletic program did not comply with Title IX. Her complaints led the school to commission a self-study to evaluate its efforts to achieve gender equity. That study suggested several improvements, including those outlined in a gender equity plan developed by Atkinson. It was eventually submitted to the NCAA, and the school was provisionally certified as compliant with Title IX less than one year later; however, Atkinson continued to argue with the school's administration about a lack of funds to expand women's programs. The administration told her it was unwilling to allocate anymore funds to athletics and that she needed to work within the department's current budget to achieve and maintain compliance. As a result, Atkinson submitted a plan to eliminate four varsity sports. Rather than approve her suggestions, the school's Board of Trustees Committee on Athletics decided to conduct a study on the entire athletic department to determine whether it should drop to Division III. Atkinson opposed that type of change, and she called a meeting with student-athletes to ask for their support and assistance in advocating her stance. The completed study recommended staying in Division I and conducting another capital campaign for athletics. That campaign allowed Atkinson to hire three new coaches in women's sports and put the school in full compliance with Title IX; however, just seven months later, she was fired. The school's president claimed the athletic department needed new leadership, but he never cited Atkinson's specific deficiencies when she asked for them. Later, he indicated that concerns over her management style and poor judgment were the biggest reasons it decided to make the move.

The District Court granted the motion. It found that Atkinson failed to establish a prima facie case of retaliation or show the school's alleged reasons for firing her were a mere pretext for discrimination. After assessing the elements of a prima facie case, the court concluded that Atkinson could not prove that she had engaged in protected activity or that there was a link between the alleged activity and the school's decision to terminate her. When the court discussed the protected activity element it emphasized that Atkinson never engaged in protected activity that was outside the scope of her employment, which included ensuring Title IX compliance. It noted that her advocacy for Title IX compliance was not adverse to the school's interest, but was exactly what she was hired to do. The court also pointed out that Lafayette never opposed her efforts. Moreover, Atkinson's arguments following NCAA certification dealt only with extra funding and the school's divisional status, not shortcomings related to Title IX. When the court discussed the causation element, it determined that there was no evidence that Lafayette terminated Atkinson due to her views on Title IX. The court emphasized that she had been financially rewarded for her efforts in bringing the school into compliance. In addition, the court found a complete lack of temporal proximity between Atkinson's alleged Title IX complaints and the date of her termination. It noted that her advocacy for Title IX compliance ended at least seven months earlier and that, based on her long history of complaints, the school probably would not have waited a decade to fire her if it really opposed her views. In fact, Atkinson

admitted that she had no idea why she was terminated when the school made its decision. Finally, after considering whether the school's stated reasons for firing Atkinson were a pretext, the court concluded that the athletic director failed to offer an adequate rebuttal and emphasized that (1) the school's post hoc explanation could not ipso facto create a pretext, (2) that she had failed to depose individuals who had spoken with the school about her leadership and management skills or would be willing to vouch for her skills, and (3) that the school's criticism of her meeting with student-athletes did not have to do with the views that she expressed, but the manner in which she went about expressing them.

*Hall v. Sch. Dist. of St. Croix Falls*, 2009 Wis. App. LEXIS 903 (Nov. 24, 2009). Hall appealed the decision of the trial court, which confirmed the denial of worker's compensation benefits on the basis that Hall was not an employee of the School District. Hall worked as the assistant basketball coach, but he did not receive monetary compensation. The Wisconsin Appellate Court upheld the trial court. The court stated that an essential element to an employee-employer relationship is compensation for services rendered. Although the court noted that compensation does not have to be monetary, the court found unpersuasive Hall's argument that he received compensation via, inter alia, use of the school's training facilities. These benefits were incidental to his duties as assistant coach of the basketball team.

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*Jacobeit v. Rich Twp. High Sch. Dist. 227*, 2009 U.S. Dist. LEXIS 110302 (N.D. Ill. Nov. 25, 2009). Jacobeit was a physical education teacher in District 227. He also coached a variety of sports teams at District 227. He was also a white male, over the age of forty and suffered from syringomyelia, a recognized disability under the ADA. He was denied the position of head coach of the girls' basketball team in lieu of a younger, African-American female coach. He later accepted a position to be the assistant head coach of the same team, but was dismissed shortly thereafter for allegedly making racist comments towards the players. He brought several federal law claims against the district and against Rainey, the person who dismissed him from the coaching position. The defendants brought summary judgment claims in response.

Jacobeit's first claim was under Title VII. The court granted the summary judgment motion as to Rainey because he was not an employer under the Act. The district, however, failed to argue a basis for dismissal under Title VII and its motion was denied. Jacobeit's next claim was for racial discrimination in a contractual relationship under § 1981. The court held that Jacobeit provided sufficient evidence to withstand the motion as Rainey potentially fired Jacobeit on the basis of reverse discrimination. Furthermore, Rainey was not entitled qualified immunity as constitutional rights were clearly implicated and those constitutional standards were clear at the time, namely that a supervisor may not discriminate on basis of race. As it regarded the District, the court held that there was enough evidence to suggest that the district approved Rainey's decision to dismiss Jacobeit on racially motivated grounds. Thus, the district would be liable for Rainey's actions, under principles of agency. Jacobeit also raised equal protection claims under §1983. The court relied on the same analysis with regard to his §1981 claims, as the underlying law was substantially the same.

Finally, Jacobeit raised procedural due process claims. The court held that while there was no express contract granting Jacobeit a continued right to employment in the assistant coaching position, Jacobeit was able demonstrate that the district had a de facto tenure policy. As a result, Jacobeit arguably had a protected property interest. Also, the court noted that Jacobeit potentially had a liberty interest. Rainey disclosed to the community the reasons for dismissing Jacobeit, namely, the racial remarks he allegedly made. Furthermore, the court held that Jacobeit provided enough evidence to suggest that he had not received adequate process. The district argued that Jacobeit was bound by the terms of the CBA with the teacher's union, but the court determined that it was not necessary to exhaust alternative remedies before seeking remedy through one's due process rights.

*Knott v. Va. Beach Mariners, Inc.* 2009 Va. App. LEXIS 535 (Dec. 8, 2009). Knott, a professional soccer player with the Virginia Beach Mariners (VBM), was injured while playing a game. He suffered severe injuries to his lower back, which ultimately led to his retirement from soccer. He received numerous treatments on his injuries as well as treatment for shoulder and neck pain. He filed a claim for compensation for treatment he received on his shoulder and neck. The Uninsured Employer's Fund (UEF) argued that Knott was not entitled to compensation because he failed to file a claim specifically for the injuries to his shoulder and neck. The court overturned the UEF's decision on the basis that the shoulder and neck pain were a result of the injury sustained to his lower back. Furthermore, Knott complained of pain to his shoulder and neck as part of his treatment that was covered by the UEF. As a result, the Court reversed the UEF's decision.

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*Myers v. Roush Fenway Racing, LLC*, 2009 U.S. Dist. LEXIS 120652 (M.D. N.C. Dec. 28, 2009). Myers was an employee of Roush Racing. He was initially hired as a mechanic, but eventually became the crew chief of the Carl Edwards #99 car. After a period of time, however, Myers suffered a severe depressive episode, for which he was hospitalized. As a result, he missed time from work. He was demoted back to mechanic, for which he was paid substantially less money. Ultimately, he was dismissed from his position. He brought two claims under North Carolina law: one for violation of the Equal Employment Practices Act (EEPA) and one for violations of the Wage and Hour Act.

The court dismissed the EEPA claim on the basis that Myers was not an employee at will, which is required of the NC statute. Instead, Myers was an employee under the contract he signed with Roush Racing. Myers attempted to argue that that contract was unenforceable, but to no avail.

The court also dismissed his Wage and Hour Act claim. This act is designed to compensate employees for work actually performed. Here, Myers had not actually performed work for which he was not paid. Rather, he claimed that his demotion to mechanic from crew chief, which Myers argued was on the basis of his mental condition, resulted in monetary loss. The court nonetheless held that Myers was still paid for all the work he performed, even if that were less compensation as a mechanic as opposed to the crew chief. Thus, he was not entitled to any additional compensation under the Act.

*Purdham v. Fairfax County Sch. Bd.*, 2009 U.S. Dist. LEXIS 114682 (E.D. Va., Dec. 9, 2009). Purdham was employed by the Fairfax County School Board as a security guard. In addition, he was also the head coach of the golf team. He was paid a flat rate stipend for his coaching, which stayed the same no matter how many hours he devoted to his coaching duties. He brought suit under the Fair Labor Standard's Act (FSLA) claiming that he was owed overtime for the time he spent coaching the golf team. The District Court first held that the Fairfax County School Board was not protected from lawsuit by sovereign immunity because it was tied more closely with local matters, including the handling of local educational matters. The court nonetheless rejected Purdham's claim under FSLA because he did not qualify as an employee under the act. The court found that he better resembled a volunteer and, as such, was not entitled to overtime compensation for his coaching duties.

*Reece v. Event Staffing*, 2009 Mich. App. LEXIS 1622 (July 30, 2009). An Arena Football League (AFL) team and its insurer appealed a workers' compensation commission's decision in favor of a former AFL player on his claim for disability benefits for a shoulder condition that developed as a result of multiple tackle-related injuries. The player also appealed the commission's decision to include the compensation that he was paid for participating in training camp and the time that he attended camp in determining his average weekly wage. As part of its award, the commission found that the player was entitled to wage-loss benefits during the off-season. The appellate court affirmed in part, holding the commission's decision to include training camp time and compensation in determining the player's average weekly wage was appropriate, but it erred in granting off-season wage-loss benefits. The court emphasized that the player would not have earned wages playing professional football or engaging in other work for the team during the off-season, whether he was injured or not.

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### ***Intellectual Property Law***

*Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331 (Fed. Cir. 2009). A golf ball manufacturer appealed a district court's decision to grant summary judgment to the Callaway Golf Company (Callaway) on the manufacturer's claims of patent invalidity due to anticipation and to enter judgment on a jury verdict in favor of Callaway on seven of the manufacturer's eight claims of patent invalidity due to obviousness prior to assessing infringement claims brought by Callaway in its lawsuit against the manufacturer. Callaway owns four patents that contain nearly identical specifications and make claims to a three-layered, dual personality ball. The manufacturer produced three balls that also contained three layers. The Court of Appeals affirmed in part and vacated the permanent injunction previously entered against the manufacturer in remanding the case for a new trial. After the court determined that the district court did not err in interpreting the patents to require the hardness of the product's materials to be measured on the balls, the court also found that substantial evidence supported the jury's conclusion that prior patents did not necessarily disclose the hardness limitations present in Callaway's patents. It also found no error in the district court's decision to exclude testimony related to test balls produced to demonstrate obviousness and evidence of a re-examination of Callaway's patents before the

Patent and Trademark Office because the danger of unfair prejudice to the jury outweighed its probative value; however, the court held the manufacturer was entitled to a new trial on the issue of obviousness because the jury's verdict was irreconcilably inconsistent. It noted that the one claim in which the jury ruled for the manufacturer was dependent upon another claim in which it sided with Callaway, and emphasized that a jury could have rationally sided with either party on all of the asserted claims. In reversing the grant of summary judgment on the anticipation claims, the court found that a prior patent on a multi-layered ball had expressly incorporated by reference another patent on the use of cover materials identical to those identified by the Callaway patents. Therefore, it concluded there was a genuine issue of material fact as to whether a golf ball manufacturer could use the prior patent to create the golf balls identified in the Callaway patents without undue experimentation.

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*Con-Way, Inc. v. Conwayracing.com*, 2009 U.S. Dist. LEXIS 67111 (N.D. Cal. July 28, 2009). A worldwide business service provider that sponsors a team in the NASCAR Craftsman Truck Series moved for a default judgment in an in rem action it filed against a domain name for violating the Anticybersquatting Consumer Protection Act (ACPA). The domain name involved in a website that provided links to other websites offering goods and services associated with all forms of racing, including NASCAR. The service provider owns a variety of registered trademarks that either incorporate or are derived from the term Con-Way. When it contacted the domain name registrant via email, an individual responded offering to transfer the name for \$250. The registrant failed to appear, although it did receive actual notice of the lawsuit. According to the domain name registrar, the registrant has been located at a variety of international addresses through the years, but has never been based in the United States.

The District Court granted the motion and ordered the domain name registrar to transfer the domain name to the service provider. After the court determined that it could not obtain personal jurisdiction over the registrant and service of process was proper, it found the domain name created a likelihood of confusion with the service provider's marks. The court noted that Con-Way was associated with the sponsorship of a team in a NASCAR series. It also determined that the registrant registered and used the name in bad faith because it attempted to sell the name for a fee. The court concluded that the domain name evidenced intent to divert customers to a website that could damage the goodwill engendered in the service provider's mark, all in the name of commercial gain.

*Cummings v. ESPN Classic, Inc.*, 2009 U.S. Dist. LEXIS 17764 (S.D. Ill. Mar. 9, 2009), motion dismissed, 2009 U.S. Dist. LEXIS 63769 (S.D. Ill. July 25, 2009), motion denied, 2009 U.S. Dist. LEXIS 71937 (S.D. Ill. Aug. 14, 2009). After his initial motion for relief from judgment was denied due to lack of subject matter jurisdiction, former professional boxer Floyd Cummings voluntarily dismissed his appeal of a district court's decision to dismiss his claim against ESPN Classic for violating the state's right of publicity law when it re-broadcast a 1981 match between him and former heavyweight champion Joe Frazier. Cummings once again moved for relief. Instead of continuing to seek relief on the state's right of publicity law, Cummings asserted that his claim was governed by the Restatement of Torts and asked the court to vacate its judgment and apply the state's privacy rights laws. The District Court denied the motion and emphasized

that Cummings could not wait until the motion to dismiss had been ruled on and appealed to raise an alternative theory of liability or to seek leave to amend the complaint.

*DDB Techs., L.L.C. v. MLB Advanced Media, L.P.*, 2009 U.S. Dist. LEXIS 122890 (W.D. Tex. Dec. 30, 2009). DDB Tech (DDB) brought a patent infringement claim against the MLB for four patents, which collectively disclose a process of creating a video simulation of an MLB game for display on the Internet. The issue for the court was whether DDB had standing to bring the patent claim. MLB's argument was that DDB lacked standing because it was never the owner of the patent in the first place. Rather, MLB argued that the patent belonged to the Barstows former employer, Schlumberger, because the contract between the Barstows and Schlumberger provided for the transfer of patent ownership to Schlumberger. As a result, the Barstows could not have properly transferred the patent to DDB, which resulted in a lack of standing.

The court found that the agreement between the Barstows and Schlumberger provided that only those patents created during the Barstows employment that were of practical benefit to Schlumberger were transferred to Schlumberger. In this case, the court found that the patents at issue here were only of benefit to the Barstows. Thus, they were never transferred to Schlumberger, but in fact transferred to DDB. As a result, the court found DDB had standing to bring its patent infringement claim.

*Ferrari Importing Co. v. Unique Sports Prods., Inc.*, 2009 U.S. Dist. LEXIS 110742 (W.D. Pa. Nov. 27, 2009). Unique Sports Products (USP), a Georgia company, filed a complaint in the Northern District of Georgia against Ferrari for trademark infringement. USP claimed that Ferrari's use of a light blue color in its racquet grip tapes infringed upon the USP's trademark. The parties later entered into a consent order, in which Ferrari was enjoined from, inter alia, the use of the light blue color on grip tape. Later, USP obtained a trademark in the light blue color used in its grip tape. After several disputes between the parties as to whether Ferrari was, in fact, infringing upon the trademark, Ferrari filed this declaratory judgment action, seeking a declaration from the court that it was not violating the trademark on the basis that the trademark was invalid. Ferrari filed this action in the Western District Court of Pennsylvania. Almost simultaneously, USP filed an action for trademark infringement in the Northern District of Georgia. The issue before the court, however, was not the underlying merits of the trademark claim; rather, the issue was whether the Western District Court of Pennsylvania is the proper venue for the declaratory judgment action. USP filed a motion under two statutory sections: §1404(a), which authorizes a change in venue in the interests of justice and §1406(a), which authorizes a change in venue when the venue is improper.

As it related the §1406(a) claim, the court held that the venue is not improper where the declaratory judgment action brought in another forum pertains solely to a product outside the Consent Order. In this case, the complaint involves only the light blue color trademark infringement, which was a product outside the scope of the consent order. As a result, the venue was proper under §1406(a). As it related to the §1404(a) charge, the court had to balance a number of public and private factors. The court specifically noted that the Georgian court was already familiar with the claims involved in this action. As a result, it would be easier for that court to assess the merits of the claim than to restart, so to speak, in Pennsylvania. Furthermore, the court noted that USP was the party seeking to vindicate its trademark rights, which means

that the relevant evidence, including witnesses, are likely to be in Georgia, where USP is based. For these reasons, the court ordered the transfer of venue to the Northern District of Georgia.

*Frayne v. Chicago 2016*, 2009 U.S. Dist. LEXIS 92778 (N.D. Ill. Oct. 2, 2009). The United States Olympic Committee (USOC) and an entity formed to promote Chicago's failed bid to host the 2016 Games (Chicago 2016) moved for summary judgment on federal and state free speech and equal protection claims brought against them by Stephen Frayne after they instituted a WIPO proceeding against him in an attempt to acquire the domain name *chicago2016.com*. The defendants also moved for summary judgment on their Stevens Act and Anticybersquatting Consumer Protection Act (ACPA) counter-claims in the same suit. Frayne acquired the disputed domain name in 2004 through an online website. It was just one of over one thousand domain names pairing a city and a future Olympic year that Frayne registered over a six-year period ending in 2008. He claimed that he purchased the domains to provide forums for discussing issues related to hosting the Olympic Games; however, it was not until August 2008, after the defendants had initiated their WIPO proceeding, that he linked forum-generating information to the disputed domain. Prior to that point, the domain was being used as a parking page, although none of the revenues generated were forwarded to Frayne. Chicago 2016 registered a domain name that was substantially similar to the disputed domain just four days after Frayne's original registration. Later, both Chicago 2016 and the USOC obtained federally registered trademarks on Chicago 2016. Approximately six months after the USOC designated Chicago as its bid city for the 2016 Games, Chicago 2016 contacted Frayne to discuss obtaining the disputed domain. One month later, Chicago 2016 implicitly threatened him by mentioning a favorable WIPO ruling on the domain *madrid2012.com*; however, Frayne maintained that he intended to use the site as a forum and had no interest in selling. He then resisted similar overtures from the Tokyo organizing committee on his *tokyo2016.com* domain name.

The District Court granted the motion as to Frayne's constitutional claims, but denied it as to the defendants' counter-claims. The court held that there were genuine issues of material fact related to Frayne's knowledge that the domain name was being used as a parking page and the time that Chicago 2016 became associated with the Olympic Movement. The court assessed the counter-claims first and determined that Frayne's current noncommercial use of the domain name was not relevant to the Stevens Act claim, which was based on his pre-August 2008 conduct; however, it also noted that Frayne did not receive any revenue from its use as a parking page and ultimately concluded there was uncertainty whether he used or consented to the use of a protected mark, which was required to find Stevens Act liability. The court also found that domain names pairing a city and a future Olympic year were not automatically protected by the Act and also noted that nothing in the language or history of the statute suggested its scope ranged that far. It emphasized that a jury would have to determine when the term Chicago 2016 became associated with the USOC, thereby creating trademark rights. As it regarded the ACPA counter-claim, the court emphasized that the defendants' would again have to prove that the term Chicago 2016 was protected. In addition, the court found a genuine issue as to whether Frayne had bad faith intent to profit from that term. Finally, by granting the motion as to Frayne's claims, the court concluded that the defendants were shielded from liability under the Noerr-Pennington Doctrine and similar state law immunities. As for the federal law claims, the court emphasized that the WIPO proceeding was not a mere sham, especially when panels had previously held in favor of Olympic entities on identical domain name issues. Thus, even if those proceedings were initiated

in a discriminatory manner, Frayne's claims were barred. As for the state law claims, the court noted that the defendants could not single out one domain name holder if it was unrelated to protecting their trademark interests; however, it found no evidence to suggest that the USOC or Chicago 2016 acted with actual malice when they ignored other similar domain names, citing the lack of commercial content of those sites.

*Greenkeepers, Inc. v. Nike Inc.*, 2009 U.S. Dist. LEXIS 101101 (E.D. Pa. Oct. 29, 2009). Nike and the manufacturer that supplied the cleats for its golf shoes moved to compel discovery of a second cleat manufacturer's attorney fee arrangements, lost profits, and testing information before proceeding with a lawsuit that the second manufacturer brought against them for infringing its patent on small removable golf cleats. The District Court granted the motion in part and denied it in part, holding the defendants may have access to documents pertaining to fee arrangements following an in camera inspection, but were not yet entitled to any information on lost profits, and already had all of the plaintiff's testing information. In assessing whether the fee arrangements were discoverable, the court emphasized that the plaintiff's patent may be found unenforceable if its attorneys intentionally failed to disclose prior public sales of the plaintiff's cleats to the U.S. Patents and Trademarks Office (PTO). It found that the arrangements could supply the intent necessary to prove that the plaintiff's attorneys lied to the PTO. In assessing whether lost profits were discoverable, the court noted that the Federal Circuit had affirmed compensation awards based on several theories, including those based entirely on expert opinion. Therefore, it concluded that the plaintiff did not have to turn over its calculations until its expert reports were filed.

*Heisman Trophy Trust v. Smack Apparel Co.*, 2009 U.S. Dist. LEXIS 64523 (S.D.N.Y. July 17, 2009). The Heisman Trophy Trust (HTT) moved for partial summary judgment on its claim against an apparel company for breaching a settlement agreement arising out of a trademark infringement lawsuit and sought a permanent injunction to prevent the company from continuing to infringe and dilute its trademarks by manufacturing T-shirts that use a derivative of the word Heisman when referring to specific college football players. The District Court granted HTT's motion and entered the injunction. The court held the apparel company's use of the HTT's marks created a likelihood of confusion as to its products' origin or endorsement, which automatically established both a likelihood of success on the merits and irreparable harm. The court weighed the factors used to assess the likelihood of confusion. It noted that the strength of the Heisman marks in connection with promoting college football and the strong similarity between those marks and the marks used on the apparel manufacturer's product. It emphasized that the company's marks could create a false impression when viewed from a distance, especially when they used the same type of font that is used in the Heisman marks. The court also recognized the close competitive proximity between the parties' products, which are available both on websites and in retail stores that cater to college football fans. The court dismissed the company's parody defense. It emphasized that the T-shirts did not convey two simultaneous and contradictory messages because they failed to demonstrate that they were not, in fact, officially licensed products. Instead, they gave the impression that the marks' owner approved them. The court also dismissed the company's estoppel and laches defenses when it noted that the settlement agreement stipulated that HTT's failure to enforce its rights would not be construed as a waiver of its ability to enforce those rights in the future. The court refused to issue a decision related to the HTT's motion for attorney's fees until it submitted contemporaneous time records related to



each attorney's work, but emphasized that those documents could be filed under seal if necessary.

*John Daly Enters., LLC v. Hippo Golf Co., 2009 U.S. Dist. LEXIS 71155 (S.D. Fla. Aug. 13, 2009).* Professional golfer John Daly and his wholly-owned LLC moved for partial summary judgment on claims they brought against a golf equipment manufacturer after it continued to use Daly's name, likeness, and signature following the expiration of their endorsement and licensing agreements and failed to make all royalty payments under the licensing agreement. Under the endorsement agreement, Daly earned \$200,000 per year to make public appearances and display the manufacturer's logo on his clothing during tournaments; however, when the contract expired, the manufacturer continued to display his name and likeness on its website without permission. Under the licensing agreement, Daly earned royalty payments in exchange for the right to use his name, likeness, and trademarks in the sale of equipment. When that contract ended, Daly agreed to give the manufacturer three additional months to sell off its remaining merchandise linked to the golfer; however, the manufacturer continued to sell Daly-branded equipment beyond that three-month extension, and failed to make all royalty payments owed under the original agreement.

The District Court granted the motion as to the manufacturer's liability on all the claims, but denied it on the question of damages on those claims. In addition, it denied the motion for summary judgment on Daly's claim for alter ego liability stemming from a judgment obtained against the manufacturer's parent company in prior litigation. The court noted that the only trademark in existence at the time of the alleged infringement covered Daly's signature and swing logo in combination and that the merchandise that the manufacturer continued to sell only featured the golfer's signature; however, the court found the signature was enough to establish liability because it was a colorable imitation of the Daly mark that was likely to cause confusion. The court assessed the state law claim for unauthorized use of Daly's name and likeness on the website and found that the manufacturer could not rely on a fair use defense because the features were used in a manner that continued to constitute commercial exploitation to promote golf merchandise. When the court declined to establish damages on that claim, the court emphasized that the alleged fair market value of those features far exceeded the compensation that Daly was guaranteed under the endorsement agreement. Finally, when the court assessed the breach of contract claim, it determined that the manufacturer's admission that it failed to make royalty payments on sales following the expiration of the licensing agreement conclusively established liability.

*Leatt Corp. v. Innovative Safety Tech., LLC, 2009 U.S. Dist. LEXIS 75543 (S.D. Cal. Aug. 24, 2009).* The distributor of a neck brace for motorsports and the Chinese business entity that produced the product moved to dismiss claims filed against them by a South African safety device developer and its patent holder after two of the developer's former employees formed a partnership with the owner of a racing team to create and market the neck brace, which bore a strong resemblance to one of the developer's products. When the developer learned about the neck brace, it initiated arbitration proceedings in South Africa and obtained a preliminary injunction barring the former employees from continuing to exploit its alleged trade secrets; however, the racing team owner and the limited liability company formed by the partnership continued to promote the device within South Africa and other countries, including the U.S.

Thereafter, the developer brought suit against the company and the three defendants who brought the instant motion.

The District Court denied the motion as to the developer's misappropriation, unfair competition, and tortious interference claims, but granted the motion as to its claim for alter ego liability because the defendants were separate legal personalities and were only connected to the limited liability company through their business transactions. In assessing the misappropriation claim, the court found the defendants knew or should have known the neck brace was created through the use of improperly acquired information because they received a cease and desist letter that should have led them to discover the preliminary injunction entered in South Africa. The court upheld the unfair competition and tortious interference claims. It determined the developer sufficiently alleged that unlawful practices and also found that independently wrongful acts occurred because the developer already sufficiently alleged misappropriation of its trade secrets.

*Marcinkowska v. IMG Worldwide, Inc.*, 2009 U.S. App. LEXIS 18735 (Fed. Cir. Aug. 20, 2009). A former professional tennis player appealed a trial court's decision to dismiss claims that she brought against an Argentinean advertising agency and IMG, a sports marketing and management company, for allegedly infringing her patent on dual surface tennis courts, engaging in false advertising, and violating state law when they staged a match between Roger Federer and Rafael Nadal in Mallorca, Spain. The tennis court used in the match had a clay surface on one side of the net and a grass surface on the other side of the net. IMG promoted the exhibition on its website and controlled the rights to broadcast it in the U.S. The Court of Appeals affirmed, concluding that the advertising agency was not subject to personal jurisdiction on any of the player's claims and IMG did not violate any federal or state laws through its activities. The court assessed whether there was personal jurisdiction over the advertising agency and noted that the player had initiated all email correspondence between the parties in her effort to license her patent. When the court assessed the claims against IMG, the court emphasized that patent laws had no force or effect outside of the U.S. and that the tennis court created for the match was only used in Spain. Although that use was broadcast in the U.S., none of IMG's allegedly infringing activities was conducted within the country. The court also concluded that a statement on the IMG website asserting that the president of the advertising agency came up with the idea for the court was not an actionable misstatement because the Lanham Act protects only those inventions associated with goods or services.

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*Saso Golf, Inc. v. Nike, Inc.*, 2009 U.S. Dist. LEXIS 93027 (N.D. Ill. Oct. 5, 2009). Saso Golf moved to permit disclosure of Nike's confidential business information to its designated expert witness in a lawsuit that it brought against the Oregon-based corporation for producing two golf clubs that allegedly infringed its patents. A protective order had been entered that required both parties to limit disclosure of opposing party documents in order to avoid commercial injuries. Each party had the right to object to an opposing party's attempt to disclose materials to an expert that it did not currently employ. Saso Golf designated the owner of a Wisconsin-based golf industry-consulting firm as its expert; however, he had previously provided consulting services to golf club manufacturers that competed against Nike. Specifically, he was credited with designing a driver for another company that pitched it as an alternative to Nike's clubs in an

advertisement. Nevertheless, Saso Golf established that other experts were either unavailable or less useful.

The District Court granted the motion in part. The court held that the risk of the inadvertent disclosure of Nike's top-secret Computer Aided Design (CAD) files to competitors outweighed the expert's need to see them, but that the protective order adequately addressed Nike's concerns about its sales data and communications between its staff and vendors. When the court turned down the request to disclose the CAD files, it emphasized that the files provided a valuable blue print of Nike's club construction process and that the expert would have a difficult time suppressing that information in future discussions with the corporation's competitors. It also noted that the expert would have access to actual club heads, printed CAD drawings, and other information taken directly from those files. The court granted the request to disclose the sales data when it found that the information was highly relevant to the issue of obviousness, which would play a large role in determining if the patents were valid. It emphasized that Nike's commercial success could constitute evidence of non-obviousness and that the data was not likely to be retained by an expert.

*State v. Christley*, 2009 Ohio App. LEXIS 5557 (Dec. 17, 2009). Defendant was selling counterfeit t-shirts outside the Cleveland Indians Major League Baseball Stadium. He was convicted of trademark infringement, but appealed his conviction on the basis that the state had failed to demonstrate that he knew that the t-shirts he was selling were counterfeit. The court agreed and stated that there was insufficient time between the date of registration of the trademark and the date on which defendant was arrested for the defendant to know that he was selling counterfeit merchandise. Additionally, the court pointed out that the state failed to demonstrate how many t-shirts defendant sold and for how long he sold them. As a result, it was less likely that defendant knew he was selling counterfeit t-shirts.

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*Steele v. Turner Broad. Sys., Inc.*, 2009 U.S. Dist. LEXIS 74215 (D. Mass. Aug. 19, 2009), appeal denied, 2009 U.S. Dist. LEXIS 98739 (D. Mass. Oct. 13, 2009). All but one of the remaining defendants in a copyright infringement lawsuit moved for summary judgment on the claims brought against them by Samuel Steele after a song he wrote about the Boston Red Sox during their 2004 World Series championship season was allegedly used to create an advertisement promoting Major League Baseball post-season telecasts in 2007. Steele's song was well-known around Boston's Fenway Park, and he received a federal copyright to protect it in 2006. He also created a derivative version of the song that removed specific references to the Red Sox and allowed the names of other team and cities to be filled in. Steele claimed a TBS promo featuring a song by Bon Jovi infringed his copyright because the visuals were derived from Steele's song and the Bon Jovi song was based on those visuals, Steele's song, or both.

The District Court granted the motion. It held that there was no substantial similarity between Steele's song and either the promo's visuals or the Bon Jovi song to sustain his claims. The court used the ordinary listener standard and found there was insufficient musical or lyrical similarity between the songs. It emphasized that an expert report Steele submitted admitted there was a weak musical link and that the few phrases in Steele's song that were actually protectable were

eclipsed by the fact the Bon Jovi song was not about baseball. After the court compared Steele's work to the visuals from the promo, the court concluded that any similarities between the images and his protectable lyrics were the inevitable result of playing a song about baseball in an advertisement about the sport. It also found that the number of times the promo corresponded with the Bon Jovi song exceeded the number of times it corresponded with Steele's work. Finally, the court noted that Steele's concept of an adaptable song was not protected under federal copyright law and that his rights were not violated just because the promo's visual sequences appeared synchronized to his song's beat.

*U.S. Golf Ass'n v. ISaAC Scoring Sys., LLC, 2009 U.S. Dist. LEXIS 113858 (D.N.J. Dec. 7, 2009).* USGA brought a claim against ISaAC for trademark infringement. The ISaAC was using the USGA's trademark to market a golf handicapping system. ISaAC, at one point, contacted the USGA to see about using the mark in a non-infringing manner. Those negotiations broke down, and the USGA ultimately brought suit against ISaAC. ISaAC never answered the complaint or entered an appearance. As a result, the USGA moved for summary judgment. The court, here, however, wanted the USGA to show cause as to why it had personal jurisdiction over ISaAC. The court was concerned that ISaAC may not have enough minimum contacts with the state of New Jersey.

The USGA demonstrated that in addition to operating a commercial website in Texas, ISaAC had additional contacts with New Jersey. Specifically, ISaAC resold equipment through a New Jersey website. Furthermore, ISaAC sent marketing information to the USGA and had negotiations over the use of the USGA's marks. While the court found that it had jurisdiction over ISaAC, it ordered the USGA to refile its summary judgment motion to more specifically state its reasons for seeking default judgment, including any relief sought.

*U.S. Olympic Comm. v. Olympic Supply, Inc., 2009 U.S. Dist. LEXIS 68899 (D. Md. Aug. 6, 2009).* The United States Olympic Committee (USOC) and a construction equipment retailer petitioned the court to establish the effective date of an injunction against the retailer for violating the USOC's trademark rights. The parties previously reached a settlement regarding the nature and scope of the injunction, which barred the retailer from using the word Olympic in its business; however, the retailer sought a one-year grace period from compliance. The retailer emphasized that requiring a name change without time to absorb related costs would place an unreasonable burden on the company. On the other side, the USOC wanted the injunction to take effect immediately. It emphasized that it had warned the retailer of its infringement nearly three years earlier and had later informed the company that it would pursue an injunction without a transition period. The District Court set a transition period of six months before the injunction would take effect. It determined that this time period would balance the interests of both parties. The retailer would have the opportunity to efficiently dispose of its infringing inventory, and the USOC would have the injunction in place prior to the start of the Winter Olympics.

*Univ. of Ala. Bd. of Trs. v. New Life Art Inc., 2009 U.S. Dist. LEXIS 120238 (N.D. Ala. Nov. 2, 2009).* Moore was an artist who worked for defendant New Life Art. Moore created paintings that depicted famous scenes from notable University of Alabama football games. The two sides worked in relative harmony, a substantial period of which was governed by a licensing agreement; however, after the licensing agreement was terminated, the University of Alabama

brought a lawsuit against Moore under the Lanham Act for trademark infringement. Specifically, the university claimed that Moore's use of the Alabama School Colors constituted trade dress infringement.

The court first examined whether, under the Lanham Act, there was a likelihood of confusion between the Alabama mark and the mark used in Moore's paintings. The court focused in on the seven-factor test from *Frehling Enterprises* and noted that while color schemes can be protected as trademarks, the uniform colors in question here served the functional purpose of designating which team was which. The court also noted that evidence of actual confusion was weak. Nonetheless, the court presumed for the purposes of its opinion, that there was a factual dispute as to likelihood of confusion.

With that in mind, the court determined that there were a number of defenses available to Moore. First, he was protected from infringement under the Artistic Expression defense because the court believed his paintings constituted fine art. Furthermore, the use of the Alabama colors was incidental to the artistic expression Moore created. The court also noted that Moore could be entitled to a fair use defense because there was evidence of Moore's good faith in labeling his paintings as having been created by Moore. The court additionally provided a lengthy citation of persuasive case law that could potentially provide additional defenses to Moore.

Ultimately, the court's conclusions are somewhat cursory. The court was under the assumption that the parties were going to pursue the appeals process no matter what the court determined. As a result, the court attempted to set forth, as shown above, the basic contours of the law for those future deliberations.

*Univ. of Kan. v. Sinks, 2009 U.S. Dist. LEXIS 65207 (D. Kan. July 28, 2009).* An online retailer moved for judgment as a matter of law and to alter the trial court's judgment on a jury verdict in favor of the University of Kansas (KU) on trademark dilution claims that it brought against the retailer after it sold t-shirts incorporating the university's trademarks and fans attending KU athletic events complained that those shirts had a negative effect on the school's reputation. KU also moved for contempt sanctions and to amend the permanent injunction that was granted because the retailer continued to sell infringing shirts following the trial court's judgment. The District Court denied the retailer's motions and KU's motion for contempt sanctions, but granted KU's motion to amend the permanent injunction. After the court assessed the retailer's motion for judgment as a matter of law, it concluded that a reasonable jury could find the retailer's use of KU's athletic trademarks caused actual dilution through tarnishment and that those marks had achieved more than niche fame. The court noted that tarnishment could be established by reviewing the offending shirts in concert with fan complaints and that KU's marks enjoyed widespread recognition outside the context of collegiate sporting events. When the court denied down the retailer's motion to alter the judgment on the amount of damages awarded, it noted that the jury was entitled to rely on the profit assessments of KU's accounting expert over the sales estimates provided by the retailer, which were not supported by documentation; however, the court refused to assess contempt sanctions against the retailer after determining that it could have reasonably misunderstood the scope of the permanent injunction. The court determined that the injunction failed to specify that it also covered shirts similar to those that were previously found to have infringed KU's trademarks in a summary judgment order. For that reason, it amended the

permanent injunction to make clear that it prohibited the retailer from selling t-shirts found to infringing by either the jury or the court.

*World Sports Prods., Inc. v. Jugs Co., 2009 U.S. Dist. LEXIS 111012 (D. Utah Nov. 30, 2009).* This case is a Markman hearing regarding the claim construction of a patent owned by Jugs in a ball-throwing machine. World Sports Products (WSP) sought a declaratory judgment stating that it was not infringing on the patent, to which Jugs responded by filing a counterclaim for infringement. The court noted that these disputes could not be resolved without first determining the appropriate construction of the claims in the Jugs patent.

The court construed the disputed claims as follows. First, the ball projecting wheel was construed to mean a wheel capable of projecting a ball. Second, wall depth was construed to mean a measurement along a radius of a wheel from the outermost edge of the wheel to the outermost surface of the pneumatic tire. Third, footprint was construed to mean thickness as measured from the outermost edge of one sidewall of the pneumatic tire to the outermost edge of the opposite sidewall. Fourth, the term each driven rationally by an associated electric motor was construed to mean each ball projecting wheel is rotated by its own electric motor. The court also rejected the WSP's argument that there should be an implied ration of three to one of diameter to wall depth. The court held that the Jugs patent applicant did not make a clear and unmistakable disavowal of claim scope. As a result, the court was unwilling to imply a limitation on the scope of the patent. The court did not address the underlying merits of the patent infringement claim, but held that the claim construction above was to be used in later proceedings in this case.

### ***Labor Law***

*Eaton v. Football Nw., LLC, 2009 Wash. App. LEXIS 2627 (Oct. 19, 2009).* Former NFL player Chad Eaton appealed a trial court's judgment that affirmed an administrative order denying his request to re-open his first workers' compensation claim against the Seattle Seahawks and vacated another order granting his request to re-open his second claim against the team. Eaton joined the Seahawks in 2001 after playing for the New England Patriots for six seasons. During his final season in New England, he had sustained a right knee injury that required surgery, but was deemed fit to the play the following year. His first season in Seattle was relatively uneventful, but during his second year he re-injured his knee in preseason camp. Shortly afterwards, he filed a workers' compensation claim, and the Seahawks were ordered to pay him a permanent partial disability award. The following spring, he sustained yet another right knee injury during minicamp, causing him to miss the entire 2003 season. He filed a second workers' compensation claim, and benefits were paid once again; however, that did not stop his knee from continuing to cause problems. Including the surgery conducted following his latest injury, Eaton underwent five operations on his right knee between April 2003 and February 2004. His second claim was finally closed in July without a permanent disability award. Eaton would play nine games for the Dallas Cowboys that fall before retiring. In March 2005, he sought to re-open either of his previous workers' compensation claims against the Seahawks, hoping to get additional treatment on his knee.

The appellate court affirmed the judgment as to the first workers' compensation claim, but vacated the judgment as to the second claim and remanded for reconsideration. When the court assessed the second compensation claim, the court concluded that the trial court's findings and conclusions of law were too vague to dismiss Eaton's appeal. It noted that the condition of his knee had been characterized as representing a continuum of his pro football career, which suggested that his April 2003 injury was the result of an occupational disease. The court found this characterization problematic when there was no evidence that the department managing the claims or the Seahawks had considered the disease theory and that the administrative appeals judge had explicitly labeled it an industrial injury. The court also noted that Eaton's brief tenure with the Cowboys was identified as his last injurious exposure, even though there were doubts as to whether that rule would prevent his claim from being re-opened. It pointed out that the Washington Supreme Court had held that an employee's previous employer could not be relieved from liability if his last employer was located in another state, regardless if his latest work exposed him to dangerous conditions (such as an NFL football game). When the court affirmed Eaton's first compensation claim, it held that the trial court's findings were supported by substantial evidence and emphasized that there was no proximate cause between the earlier injury and the later aggravation. It noted that the expert testimony was not based on a clear understanding of the injuries that Eaton endured, and that the opinions rendered were merely theoretical.

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*Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009). The NFL, one of its vice presidents, and its drug policy administrator appealed a district court's decision denying their motion for summary judgment on state statutory claims brought against them by two of the league's players after they were suspended for four games for ingesting a banned substance contained in an over-the-counter weight-loss supplement called StarCaps. The players also cross-appealed the district court's decision to grant the defendants' motion for summary judgment on their state common law claims and confirm arbitration awards that upheld the suspensions. Both the league and the drug policy administrator found that StarCaps contained the banned substance. In 2006, several players tested positive after using the supplement, but the administrator chose not to discipline them; however, the vice president subsequently informed the administrator that he did not have the discretion to determine whom to discipline under the drug policy. Nobody warned the players that StarCaps contained a banned substance, even though the policy includes a strict liability standard. Instead, the vice president told the NFL Players Association (NFLPA) that the NFL would no longer allow players to provide endorsements for the supplement's distributor. The NFLPA subsequently sent a letter to player agents warning them that the distributor had been added to the league's list of prohibited companies. The NFL commissioner designated the league's chief legal officer to rule on the players' appeals at the arbitration hearing, although he previously gave legal advice to the NFL on its subject matter.

The Court of Appeals affirmed in all respects, holding that the players' state statutory claims were not barred by section 301 of the Labor Management Relations Act (LMRA), but that their state common law claims were pre-empted. The court also held that there was no statutory or judicially created reason for vacating the arbitration awards. When the court assessed the state statutory claims first, it concluded that pre-emption was not mandated because neither the state

law governing drug testing in the workplace (DATWA) nor the state law governing consumable products (CPA) required it to interpret the league's drug policy or other aspects of its collective bargaining agreement (CBA). The court noted that the NFL conceded that its procedures did not comply with the letter of the DAWTA and found that a court would only have to compare those procedures with the law's requirements to determine if a violation had taken place. It also emphasized that the league's standard uniform player contract established that the players were NFL employees and that the LMRA did not give the league the power to avoid any state regulatory law just to ensure uniform enforcement of the policy. The court found that the CPA claim was not barred for similar reasons. It did not need to determine whether the policy's ban on diuretics was a bona fide occupational requirement because those requirements were defenses to liability, and thus, not relevant to a section 301 analysis. The court also noted that the CPA's application to the use of products off an employer's premises or during non-working hours was irrelevant. It emphasized that there were no provisions in the CBA that suggested players were always on the clock in training camp, which is when the positive tests occurred; however, after assessing the state common law claims, the court determined that it would have to interpret the policy or CBA to determine whether the NFL owed the players a duty to warn against using StarCaps and whether the players were justified in relying on its silence. It noted that those issues would depend entirely on the parties' legal relationship and expectations and that would in turn require an examination of their contracts.

Finally, the court concluded that the arbitration award was not contrary to public policy, contrary to the essence of the drug policy, or rendered by a biased arbitrator. When the court assessed whether the award was contrary to the essence of the drug policy, it noted the provision prohibiting the vice president from influencing the administrator's decision whether to discipline players was added over one year after the alleged influence in this case. Even if it had applied, the court found the award still drew its essence from the policy. The court emphasized that the administrator's actions prior to hearing from the vice president were not an issue. When the court assessed whether the arbitrator who rendered the award was biased, the court found no evidence in any of the testimony at the hearings or in the arbitrator's rulings that suggested he was one-sided. The court also determined that the plaintiffs waived their right to object to his appointment because it was eminently foreseeable he would provide legal advice to the league. It also noted that both the NFLPA and the players actually requested him because of his involvement with the case. After the court assessed whether the award was contrary to public policy, it concluded that no fiduciary duty was breached because the administrator would have told any player who called him that StarCaps contained the banned substance and he had the discretion under the policy to send a general warning rather than a product-specific warning if he believed that all weight-loss products carried risks.

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### *Miscellaneous Issues*

*Callaway Golf Co. v. Screen Actors Guild*, 2009 U.S. Dist. LEXIS 118139 (S.D. Cal. Dec. 18, 2009). This case concerns the admissibility of expert witnesses in a case between Callaway Golf and the SAG. The defendants designated three expert witness who were to testify as to the amount of compensation certain professional golfers receive from television advertisements. The plaintiff objected to each one. The court held that two of the experts, John McGuire and John McGuinn, would be prevented from testifying as to the meaning of the television commercial agreements because the meaning of those agreements was a question of law for the court. Nonetheless, the court did not prevent McGuire and McGuinn from testifying as percipient witnesses, rather than experts.

Whether the third expert witness, Jon Albert, would be allowed to testify was an issue of whether he complied with federal procedural rules when he failed to completely disclose his qualifications with sufficient detail. The court dismissed without prejudice and ordered the defendants to produce a list of publications authored by Albert in the past ten years so as to disclose his qualifications in sufficient detail.

*Ed Tobergate Assocs. Co. v. Russell Brands, LLC*, 2009 U.S. Dist. LEXIS 103146 (D. Kan. Nov. 5, 2009). Plaintiff brought claims of patent infringement and false advertising against the defendant. Plaintiff owns a patent for a type of football shoulder pads. The defendant filed a counterclaim to seek a declaratory judgment stating that its manufacture and sale of its own shoulder pads did not infringe upon the plaintiff's patent. In order to resolve these claims, the court had to first decide the construction of the claims in the patent in dispute.

The court held that claims are to be construed as a whole, not as standing alone. Furthermore, the court held that it could consult both the patent prosecution history and any expert testimony, including testimony from the inventor. Ultimately, the court did not address the underlying merits of the claim, that is, whether the defendant actually infringed upon the patent. Rather, the court construed the claims such that they could be used in accordance with later proceedings.

*Fortuna v. Ill. Sports Facilities Auth.*, 2009 U.S. Dist. LEXIS 106227 (N.D. Ill. Nov. 12, 2009). This case involves plaintiff's request to sever and remand to state court his claims against the defendants. The plaintiff attended a Chicago White Sox baseball game during which he stopped at the concessions stands. While in the area, he was punched by another spectator. The spectator's friends also attacked the plaintiff until security arrived. The plaintiff brought federal civil rights and negligence claims against the White Sox Baseball Club, the MLB, the security service, and those that actually attacked him. After filing their own cross-complaint, the persons that attacked the plaintiff removed the case to the US District Court for the Northern District of Illinois. The plaintiff challenged this removal.

The court stated that the central issue was whether the plaintiff's complaint contained a federal question. The court held that there was nothing in the plaintiff's complaint that involved a substantial question of federal law. The defendants argued that the federal question could be

found in the defendants' cross-complaint. The court rejected this idea and stated that only when the federal question is found in the plaintiff's complaint can the case be removed to federal court. Since there was a lack of a federal question in the plaintiff's complaint, the court granted the plaintiff's motion to sever and remand to state court.

*Fuhr v. Sch. Dist. of Hazel Park, 2009 U.S. Dist. LEXIS 106740 (E.D. Mich. Nov. 16, 2009).* Fuhr brought claims against her employer, the School District of Hazel Park. He alleged gender and sex discrimination when the school district denied her the position of boys' varsity basketball coach; however, the central issue before the court here was not the merits of the underlying claim. The plaintiff, on her attorney's advice, sought to verify the employment background of the witnesses she planned on utilizing at trial. She hired a company, Global Verifications Services (GVS), to perform the background checks. GVS contacted the defendant's executives in order to complete the background checks. The plaintiff's attorney used this information to bolster the strength of the plaintiff's claims. The defendant alleges that these contacts constituted an unauthorized and improper communication by plaintiff's attorney with a party represented by another attorney, namely, the defendant's executives.

It is a violation of the Michigan Rules of Professional Conduct for an attorney, or attorney's agent, to contact a party represented by opposing counsel. The court noted that Michigan law holds an attorney accountable not only for the actions of the attorney, but also for the actions of any of the attorney's agents. As a result, plaintiff's attorney argued that GVS was not an agent. The court rejected this argument, in part because many of the forms GVS used when contacting the defendant's executives were to be returned to plaintiff's attorney. The Court ordered that any evidence obtained through the improper conduct was to be stricken from the record, the plaintiff and her witnesses were precluded from mentioning the GVS reference checks, the plaintiff's attorney be admonished for the improper contact, and reasonable attorney's fees be awarded to the defendant.

*Henry v. Beacham, 2009 Ga. App. LEXIS 1343 (Nov. 19, 2009).* Henry, a professional football player for the Denver Broncos, appealed the decision of the trial court to order that he fund a trust for Beacham's child, who Henry fathered. He claimed that the court went outside of its discretion in ordering the award in the first instance, and also on the basis that the amount of the trust, \$250,000, was excessive.

The court rejected Henry's claims. First, the court noted that the Georgia child support statutes are, in fact, only guidelines. The trial court had a good deal of discretion and the trust fund was within that discretion, especially given Henry's reluctance to pay child support in the past. Second, the court rejected Henry's argument that the amount of the trust fund was excessive. Henry was unable to demonstrate any miscalculation in the trust amount sufficient to demonstrate an abuse of discretion. Furthermore, Henry had recently signed a \$25 million contract.

*Herman v. Admit One Ticket Agency LLC, 912 N.E. 2d 450 (Mass. 2009).* Plaintiff appealed an appellate court's decision to reverse a judgment finding a licensed online ticket reseller violated a state law by offering to sell Red Sox tickets to him at a price higher than the limitations established by another state statute. The plaintiff claimed he was willing to pay the maximum

amount allowed by law for the tickets, but never purchased them after the reseller sought \$500 per ticket to a game against the Yankees and \$165 per ticket to a game against the Orioles. The tickets had a face value of \$85. State law proscribed unfair practices in conducting a business, and another state statute established that it was an unfair practice for a licensee to resell a ticket to a professional sporting event for more than \$2 above face value; however, that statute also established that a reseller could sell a ticket at a higher price if the excess amount was solely attributable to service charges.

The Massachusetts Supreme Court affirmed. It held that the plaintiff lacked standing to bring a claim under the state law because he failed to actually purchase a ticket. Although it noted that the state law could be violated without the actual sale of a ticket, the court emphasized that the statute allowed resellers to impose certain fees, including service charges, in every transaction, and that there were no stated restrictions on those fees. Therefore, it found that purchasers will be unable to establish they are able to pay for a ticket at a price consistent with the statute, and, in order to establish standing, they would actually have to purchase a ticket to maintain a claim for unfair practices under state law. In a vigorous dissent, Justice Cowan argued the majority confused the issue of standing with the amount of evidence necessary to prevail on the merits of the claim.

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*In Kon Park v. Korea Sports Council in U.S.A., 2009 Cal. App. Unpub. LEXIS 10312 (Dec. 29, 2009).* Kon Park was a member of the Korea Sports Council (Council), a nonprofit corporation that promotes amateur sports among Korean Americans. He brought suit against the Council and two of its members for allegedly violating the Council's election rules. The trial court granted a summary judgment motion for the defendants, which Park appealed. The appellate court held that Park's motion should be dismissed for mootness, as Park failed to state that he was damaged by the alleged election violations. Park stated that he never intended to run in the election.

*Nat'l Collegiate Athletic Ass'n v. Associated Press, 18 So. 3d 1201 (Fla. Dist. Ct. App. 2009).* The NCAA appealed a trial court's judgment in favor of the Associated Press and other news organizations on their public records claim that required it to disclose documents related to disciplinary action taken against Florida State University for providing improper academic assistance to student-athletes in violation of the association's rules. After the university reported its findings of a self-investigation, the NCAA initiated proceedings to determine how the university would be punished for its misconduct. Following a hearing in front of the Committee on Infractions (COI), the NCAA imposed a variety of penalties, which included vacating wins by the football team that inhibited former coach Bobby Bowden's quest to be the winningest coach in Division I history. The transcript from the hearing was not made available to the public and neither was the COI's subsequent response to the University's appeal; however, both of those documents were made available to lawyers for an outside firm hired to represent the university. They were placed on a secure website by the association, which required the firm to sign a confidentiality agreement that promised none of the information obtained would be disclosed. The lawyers viewed the transcript in preparing the university's appeal, and the COI's response just over a month later.

The appellate court affirmed. It held that the transcript and response were considered public records under state law, that the law did not violate the federal constitution and that the documents at issue were not exempt from disclosure under federal statutory law. The court concluded both of the documents were public records under state law because an agent of the state government received them. It emphasized that the state constitution gave the public broad rights to inspect governmental records, and that the state law enforcing those rights covered documents maintained on a secure website, as long as they contained material prepared in connection with official agency business. The court found the law firm qualified as an agent of the state, and that it viewed the documents in connection with its public function. The court also noted that the confidentiality agreement had no bearing on its determination because public records could not be transformed into private records just because a government agency promises not to disclose them. After the court assessed whether the documents were exempt from disclosure under federal law, the court emphasized that FERPA only protects educational records, which have been defined as records containing information directly related to a student.

The court concluded that the documents at issue only tangentially related to Florida State student-athletes, and that, even if there was a more direct connection, they were still not protected because every individual's identifying information had been redacted. Finally, after the court assessed whether the Florida public records law was unconstitutional as applied, the court concluded that the statute did not run afoul of either the Dormant Commerce Clause or the First Amendment. It emphasized that the law did not even deal with the subject of commerce, and that, even if it had an indirect effect, the impact would be heavily outweighed by the state's interest in promoting open government. The court also distinguished *NCAA v. Miller* on the ground that the public records statute was a law of general application, not a law designed to regulate the NCAA's disciplinary proceedings. Moreover, based on the variety of other state statutes that would be interpreted to provide the same or even better access, it found the law did not force the NCAA to conform its conduct to Florida's standards. The court dismissed the NCAA's freedom of association argument because the statute did not impair its ability to reject the values it wished to promote.

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*N.C. Dep't of Revenue v. Bill Davis Racing*, 684 S.E.2d 914 (N.C. Ct. App. 2009). Bill Davis Racing (BDR) appealed the determination of the trial court, which held that BDR was not entitled to tax credits under the State's Lee Act. BDR is a professional racing company that routinely participates in NASCAR racing events. The issue before the court was two-fold. First, whether the trial court erroneously went beyond its reviewing authority when assessing the decision of the Tax Review Board, which denied BDR the tax credit. The court held that the trial court went beyond its authority by including facts that were not included in the Assistant Secretary for the Tax Board's decision. Second, the court determined that the appropriate test to determine whether a business is entitled to the Lee Act tax credit (which depends on whether the business is classified as manufacturing) is a three-part test that examines, among other things, the relative percentage of the production costs. The court found that the trial court, and even the Tax Review Board, did not comply with this understanding. As a result, the court reversed and remanded to the trial court to rule in light of the three-part test.

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*Office of the Comm'r of Baseball v. Markell*, 2009 U.S. Dist. LEXIS 69816 (D. Del. Aug. 10, 2009), vacated, 579 F.3d 293 (3d. Cir. 2009). Professional sports leagues appealed a district court's decision to deny their motion for a preliminary injunction to prevent Delaware state officials from implementing a sports lottery involving single-game betting on nearly all collegiate and professional sporting events under regulations proposed pursuant to the Delaware Sports Lottery Act (DSL A). The leagues argued that the DSL A and the proposed regulations violated the Professional and Amateur Sports Protection Act (PASPA), a federal law that prohibits state-sponsored sports gambling; however, the PASPA contains an exception that authorizes gambling schemes in individual states to the extent those schemes were conducted between 1976 and 1990. In 1976, Delaware conducted a sports lottery that involved parlay betting on NFL games. In March 2009, the state governor asked the state's high court for its interpretation of a provision in the state constitution to determine if he could legally implement a sports lottery that was approved by the state legislature. That court concluded that the parlay betting authorized by the lottery was constitutional because chance was its dominant factor; however, it refused to pass judgment on whether the lottery could involve bets on single games.

The Court of Appeals vacated the district court's order denying the preliminary injunction. The Court of Appeals held that the DSL A and the proposed regulations violated the PASPA because they expanded the state's 1976 sports lottery scheme to cover new sports and single-game betting. After it determined that it had jurisdiction to look beyond whether the district court abused its discretion and assess the merits of the leagues' claim, the court determined the plain language of the PASPA exception allowed Delaware to conduct only a sports lottery scheme that was substantially similar to the scheme that was actually conducted in 1976, regardless of whether a larger scheme had been authorized at that time. It noted that minor alterations in the scheme would not violate the PASPA's language or undermine its central purpose, but found expanding betting to include single-game action and sports outside of the NFL would create the same problems the law was intended to combat.

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*Sec. & Exch. Comm'n v. Cuban*, 634 F. Supp. 2d 713 (N.D. Tex. 2009). Dallas Mavericks owner Mark Cuban moved to dismiss an insider trading claim brought against him by the Securities and Exchange Commission (SEC) after he received nonpublic information concerning a PIPE offering by a Canadian company and sold all his stock in that company without first disclosing that he intended to trade on the information. By selling his stock, Cuban avoided substantial losses when the stock price subsequently dropped. The company decided to inform Cuban of the offering because he was its largest known shareholder and thought he might be interested in participating. When the CEO of the company called him, Cuban allegedly agreed to keep any information that was shared confidential; however, he reacted negatively to the news because PIPE offerings create more shareholders. At the end of the conversation, he claimed he was screwed and could not sell. A few hours later, he contacted his broker and told him to sell all of his shares in the company.

The District Court granted the motion without prejudice to amend. It held that Cuban could not be held liable under the misappropriation theory of insider trading because his agreement with the CEO of the company only consisted of a duty to keep the information about the PIPE offering confidential, not a duty to refrain from using it for his personal benefit. The court noted that non-disclosure and non-use are both part of the duty that arises when a fiduciary relationship is established; however, it emphasized that an alleged tortfeasor must expressly or implicitly adopt both obligations when a relationship is created by an agreement for the requisite deception to exist. The court found the company could not have a legitimate and justifiable expectation that Cuban would not trade on the information disclosed because Cuban's comment that he could not sell only showed that he believed it was illegal for him to subsequently sell his stock, not that there was a non-use agreement between the parties. Finally, the court concluded that the SEC could not rely on its regulations to impose the required duty because it was only allowed to adopt rules that proscribe deceptive conduct and that Cuban's actions lacked deception in absence of a non-use agreement.

*Trs. of the Screen Actors Guild-Producers Pension & Health Plans v. NYCA, Inc.*, 572 F.3d 771 (9th Cir. 2009). Trustees of employee benefits plans appealed a district court's decision to dismiss claims they brought against golf equipment manufacturer TaylorMade and its advertising agent after the agent neglected to include TaylorMade's payments to professional golfer Fred Couples under an endorsement deal when calculating contributions it owed under a collective bargaining agreement (CBA) with the Screen Actors Guild (SAG). Under the CBA, the agent agreed to contribute a specified percentage of the gross compensation it paid to commercial actors to the benefits plans. TaylorMade was not a party to that agreement, but under its endorsement deal with Couples, it ensured it would make any payments required under an applicable CBA. In addition, TaylorMade recognized its agent was a signatory to the CBA with the SAG and that the use of talent on its behalf would be subject to terms of that agreement. The agent used Couples to produce golf advertisements, but split the cost of his services with TaylorMade, and referenced only its own payments to the golfer when assessing its contribution obligations under the CBA.

The Court of Appeals affirmed the district court's decision to grant summary judgment to TaylorMade and its agent on the trustees' state law claims, but reversed the grant of summary judgment to the agent on one of the trustees' ERISA claims. When assessing the ERISA claims,

the court first determined that TaylorMade could not be held liable under a joint employer theory because the law only provides a cause of action to enforce pre-existing obligations under a CBA, and TaylorMade was not a party to the SAG agreement; however, the court found the language in the CBA was ambiguous as to whether the agent was obligated to include the sum paid to Couples under his endorsement deal with TaylorMade in assessing its required contributions. It emphasized that the district court failed to consider evidence of the parties' practices in interpreting the ambiguous language and remanded for further proceedings. In assessing the state law claims, the court found that the trustees did not qualify as third-party beneficiaries of the endorsement deal with Couples or the agreement between TaylorMade and its agent. It emphasized that state law required the contracting parties to intend to confer a benefit on the trustees; it was not enough that they would have incidentally benefitted from any performance under those deals. The court noted that TaylorMade was required to indemnify the agent for required contributions under the CBA, but was under no affirmative obligation to contribute itself.

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*V.H. v. Hampton-Dumont Cmty. Sch. Dist., 2009 Iowa App. LEXIS 1721 (Dec. 30, 2009).* V.H., the mother of a minor female student, brought suit against the Hampton-Dumont School District alleging that the board of directors violated her daughter's rights by disseminating information relating to sexual contact between her daughter and the school's softball coach. The Iowa Appellate Court determined that notes the school superintendent kept during his investigation did not constitute confidential public records under Iowa law because the statute provides that public records can be kept in any medium, so long as they belong to a governmental entity. In this case, the notes were kept in the superintendent's office where his other official duties were carried out.

The court also held that the superintendent did not rely on these notes when speaking with the rest of the administrative staff. Instead, he relied on his own recollection of what V.H. and her daughter told him about the incident. Lastly, the court held that V.H.'s oral report to the superintendent did not constitute a report of abuse under Iowa law, such that the information in that report would have to be kept confidential. The court held the mother's report was not in writing and was not filed with a designated investigator. Furthermore, the Iowa privacy statute in question does not give rise to a private right of action for violations of confidential information.

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### ***Property Law***

*Lester M. Entin Assocs. v. Town of Harrison, 2009 N.J. Super. Unpub. LEXIS 2326 (App. Div. Aug. 28, 2009).* A property owner appealed a trial court's decision that affirmed the Town of Harrison Planning Board's (Board) approval of applications for the development of neighboring properties situated along the town's waterfront, highlighted by the construction of a stadium to serve as home of the New York Red Bulls. The applications were submitted by the town's redevelopment agency, the stadium developer, and the project's roadway contractor. Prior to the

Board's decision, the plaintiff submitted reports discussing safety concerns and the potential for crowd violence or terrorism if a stadium was erected. The Board responded by conditioning its approval of the stadium site plan on the developer's compliance with recommendations based on those reports. The developer was able to obtain waivers of standards included in the town's larger waterfront redevelopment plan, which allowed for flexibility in the design of the zone.

The appellate court affirmed. It held that there was no error in the review of the plaintiff's challenges to the Board's actions. It found the Board properly exercised jurisdiction over the redevelopment agency's application and a technical defect in the developer's application did not deprive the public of notice of ownership, which was required under state law. The court also determined that the Board did not arbitrarily approve the developer's site plan because it conditioned its actions upon recommendations based on the plaintiff's experts' reports. Finally, the court found the roadway contractor's decision to hire the Board's consulting engineer for a different project did not create a conflict of interest because the engineer disclosed the conflict and the Board retained another engineering firm to review the contractor's application.

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*Matter of Goldstein v. N.Y. State Urban Dev. Corp.*, 2009 N.Y. LEXIS 4090 (Nov. 24, 2009). The state of New York attempted to acquire land under its eminent domain power for the purpose of, among other things, the construction of a new stadium for the NBA's New Jersey Nets team. As part of that attempt, the condemnor for New York determined that the area in question was substandard and unsanitary. While parts of the area had already been determined to be blighted, there were still some areas that were not previously designated as blighted. The issue on appeal was whether these remaining areas were appropriately condemned by the state. The court held that the public taking requirements were not violated on the basis that the objections to the determination that the area was blighted amounted to nothing more than a reasonable difference in opinion. As a result, the court believed that the question was best left to the legislature, not the courts, to resolve.

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*Reese v. Mecklenberg County*, 685 S.E.2d 34 (N.C. Ct. App. 2009). The plaintiffs, taxpayers in Mecklenberg County, brought suit challenging the validity of a lease entered into by the defendants for the construction of a minor league baseball stadium. The plaintiffs challenged the ruling of the trial court's dismissal of the plaintiffs' request for a preliminary injunction. The court held that the lease of the property for the purpose of a baseball stadium constituted a county corporate purpose under North Carolina's Landbanking Statute and that recreational facilities, stadiums included, do not cease to be public purposes simply because the lease involved a private party. The court also held that there was no deviation from the appropriate use of the county's 2004 Park Bond because the disbursed money was ultimately repaid. Because the plaintiffs were unable to show likely success on the merits, the court held that the trial court properly denied the motion for a preliminary injunction.

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*State ex rel. Bd. of Regents for the Okla. Agric. & Mech. Colls. v. McCloskey Bros.*, 2009 Okla. LEXIS 103 (Dec. 8, 2009). Defendants were two brothers that purchased a rental house near Oklahoma State University. The university wished to create an athletic village in the surrounding community, which included the defendants' property. The two sides tried to work out an arrangement whereby the university would buy the property directly from the defendants; however, these negotiations stalemated. When they did, the Board of Regents for the university passed a resolution stating that the property should be acquired under eminent domain proceedings. The defendants brought several claims against the Board of Regents attempt at acquiring the property through eminent domain.

The first issue was whether the defendants, as landowners, had standing to argue that the Board of Regent's were properly constitutionally formed. The court held that the defendants' standing did not include this issue and, even if the defendants' had standing, the regents' actions were valid because they were acting as de facto regents. Specifically, the Board of Regents constituted a public corporation. As such, it had the authority to acquire property via eminent domain. Furthermore, standing in an eminent domain proceeding does not include standing to collaterally attack the legality of the public corporation's existence when that corporation is acting, as it was here, as a de facto corporation. The court also held that acquiring the property at issue for an athletic village constituted a valid public purpose under Oklahoma law and that the Board of Regents negotiated with the defendants in good faith.

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*State Farm Mut. Auto Ins. Co. v. Lincow*, 2009 U.S. Dist. LEXIS 112051 (E.D. Pa. Dec. 1, 2009). This case examines whether the four season tickets to the Philadelphia Eagles Football Club, held by the defendant, were exempt from garnishment. In an earlier case, the court entered a judgment of nearly \$5 million against a Dr. Forman. Forman claims that his season tickets are exempt from garnishment in payment of that damage amount because the tickets are held jointly with his spouse. The court held that under Pennsylvania law, property that is held as tenants by the entireties is not subject to garnishment. The court concluded that Mr. and Mrs. Forman held the season tickets as tenants by the entireties on the basis that the two intended to purchase the tickets this way, the tickets were paid from a joint banking account, and that the two frequented the games together. As a result, Forman's season tickets were not subject to garnishment.

*Walker v. Metro. Bd. of Parks & Rec.*, 2009 Tenn. App. LEXIS 897 (Dec. 30, 2009). Walker filed petitions for writ of certiorari with the intention of overturning the decision of the Metropolitan Board of Parks and Recreation and Board of Zoning Appeals (BZA) approving the Metropolitan Government of Nashville and Davidson County from entering into a lease with Belmont University for, among other things, a new sports complex. The court held that it was prevented from reviewing the decision of the Parks Board on the basis that a writ of certiorari only permits review of a final order or judgment. In this instance, when the Parks Board merely approved the lease, it did not have the authority to issue any final order or decision regarding the lease of the land. Furthermore, the court held that the Parks Board's decision was not a judicial or quasi-judicial proceeding subject to review under the requisite Tennessee statute.

The court, however, held that it did have a limited form of review over the BZA's decision to approve zoning. While the court had review, its review was limited to overturning only an arbitrary decision. Walker challenged the BZA's decision on several grounds. First, that the BZA incorrectly classified the sports complex as a recreation center as opposed to a stadium. The court held that the BZA did not act arbitrarily, but rather based its decisions on sound application of its own ordinances.

Walker also challenged the BZA's decision to grant a special exception permit by claiming that the decision was rendered without adequate input from the community. The court pointed out that while many objected to the BZA's decision, not all citizens objected. Furthermore, many, but not all, of the citizens' objections were reasonably incorporated into the BZA's decision. Walker also challenged the BZA's decision on the grounds that it was not supported by specific findings of fact. The court held that although there were no specific findings of fact, such findings could essentially be inferred from the administrative record. Although this record is erratic, it still constituted sufficient evidence to maintain the BZA's decision.

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### ***Tort Law***

*Abato v. County of Nassau*, 886 N.Y.S.2d 218 (App. Div. 2009). The County of Nassau, the property manager of the Nassau Veterans Memorial Coliseum, and the Long Island Industrial Hockey League (LIHHL) appealed a trial court's decision to deny their motion for summary judgment on negligence claims brought against them by a spectator at an LIHHL game after she suffered injuries when she was run over by other spectators in a scrum for a souvenir T-shirt tossed into the stands. The appellate court affirmed, holding that the defendants failed to demonstrate that they could not foresee the scrum or that it was a reasonably foreseeable consequence of attending the game. A concurring opinion emphasized that primary assumption of the risk could only be used as a defense against injuries caused by inherent risks, and that the spectator did not know T-shirts could be tossed into the stands because she had never attended a sporting event where that occurred.

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*Ackerman v. Paulauskas*, 2009 Mass. Super. LEXIS 154 (July 1, 2009). Assumption College and its athletic director moved for summary judgment on defamation claims brought against them by the school's former men's basketball coach after the athletic director made allegedly false statements to a local newspaper following the coach's resignation. The comments could be construed to suggest that the coach did not work long enough hours, did not have passion, did not project well in the community, and did not aid the school's fundraising efforts. The trial court denied the motion, holding the coach did not have to demonstrate the comments were made with actual malice because he was not a limited purpose public figure. It emphasized that the coach did not participate in any controversy that gave rise to the alleged defamation, regardless of the number of times he was quoted by the local newspaper during his tenure.

*Baker v. Major League Baseball Props.*, 2009 U.S. Dist. LEXIS 81982 (S.D. Cal. Sept. 8, 2009). Major League Baseball (MLB), MLB Properties, the MLB Players' Association, the San Diego Padres, and the World Baseball Classic, Inc. (WBC) moved to dismiss negligence and premises liability claims brought against them by a spectator at the 2006 WBC Championship Finals after he suffered a severe leg injury when he fell in a parking lot at PETCO Park. The spectator alleged that all five defendants were responsible for the management of the lots surrounding the stadium, some of which were used to house attractions relating to the WBC. Those lots included several raised surfaces, but there were no signs near those areas indicating the presence of a possible hazard. The spectator was walking through the attractions when he unknowingly stepped off a curb onto the parking surface and landed on his knee. The District Court granted the motion in part and denied it in part, noting there was no state law imposing strict premises liability, but holding the spectator's allegations were sufficient to state a claim for negligence. In assessing the negligence claim, the court emphasized that owners and occupiers of land are not relieved of all duties merely because a hazard is open and obvious. Although they may be obviated of the duty to warn, they may still have to remedy the danger if it is foreseeable that injuries could occur. The court noted the reasonable anticipation that the WBC attractions could distract spectators may have increased the necessity to take extra precautions.

*Baligian v. Hunterdon Cent. Reg'l High Sch.*, 2009 N.J. Super. Unpub. LEXIS 2823 (Nov. 12, 2009). Baligian, a fourteen year-old student, was injured while performing a cheerleading maneuver. She suffered an injury to her chin, which required stitches and further treatment to completely heal. She brought a claim under New Jersey's Tort Claims Act (TCA). The trial court granted summary judgment in favor of the defendant on the grounds that the TCA did not meet the TCA's verbal threshold. The Superior Court upheld the trial court's determination and also found that the injury did not meet the TCA's requirements. Specifically, the TCA requires that the injury be both permanent and substantial. Although the court did not deny that the plaintiff suffered severe pain from the injury, it maintained that there was no proof of permanent damage or that the plaintiff was unable to perform normal tasks as a result of the injury.

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*Balsamo v. Finkle*, 2009 Conn. Super. LEXIS 2120 (July 31, 2009). The parents of East Haven High School athletes moved for summary judgment on intentional infliction of emotional distress claims brought against them by the town's former athletic director after they allegedly threatened him with the power of their positions on the town's board of education. One of the parents was allegedly upset by the plaintiff's choice of a contractor to perform work on the high school field, and engaged in acts that delayed the installation of a new speaker system. The other parent allegedly claimed that he ran for the board to exact revenge on the plaintiff for an incident that occurred between them. In addition, both parents allegedly protracted the investigation of a sexual harassment complaint against the plaintiff even though he had already been cleared of any misconduct. The trial court denied the motion, holding that the parents' pattern of behavior may rise to the level of extreme and outrageous conduct based on the abuse of their positions on the board.

*Boyle v. Christina Sch. Dist. Bd. of Educ.*, 2009 Del. Super. LEXIS 441 (Nov. 30, 2009). Boyle was injured when he fell from the bleachers of a school gymnasium during an event conducted

by the Diamond State Wildcats (DSW). Boyle sued the school, DSW, the school board, and the school superintendent and principal under Delaware tort law. The court dismissed Boyle's claims against the school on the grounds that there was a hold harmless clause between DSW and the school, which the court found to be sufficiently clear and unambiguous. The court dismissed in part Boyle's negligence claims against the school defendants on the basis that the school, under Delaware Statute, has immunity from negligence liability for injuries on school property by reason of negligence in the maintenance of school property. The court held that the manner in which the bleachers were set up on the day in question constituted maintenance of school property under the statute; however, the court was unwilling to hold that the statute granted immunity from wanton or gross negligence. As a result, the court remanded on this issue. Finally, the court dismissed Boyle's claim against the school superintendent and principal largely on the grounds that Boyle failed to explain why these claims should be sustained.

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*B.R. v. Little League Baseball, Inc.*, 2009 Cal. App. Unpub. LEXIS 7652 (Sept. 24, 2009). A minor who played baseball in the East Baseline Little League (EBLL) appealed a trial court's decision to grant summary judgment to the Little League Baseball national organization on negligence claims brought against it by the boy after he was molested on multiple occasions by an EBLL employee, who was also a registered high-risk sex offender. The molestations took place at the EBLL facility, but not during the league's sponsored activities. The sex offender had been involved with the EBLL for a number of years, first as a volunteer umpire, and later as a team manager and coach. He was eventually hired as the EBLL umpire-in-chief, a paid position. The Little League Baseball national organization has an operating manual and regulations for local leagues to follow, but they do not give the organization control over their day-to-day operations. Each local league is responsible for selection and supervision of its volunteers and employees. Although the operating manual recommended that local leagues conduct background checks on those individuals, it did not yet require those checks when the events giving rise to this lawsuit took place. The EBLL did not require its volunteers or employees to fill out a written application or undergo a background check when the sex offender became involved with the program. The appellate court affirmed, holding the molestations were not the proximate cause of the national organization's breach of its duty to screen and supervise local officials for the benefit of the participants. The court emphasized that public policy considerations precluded the minor's claims when the connection between the offensive acts and the organization's breach were too attenuated. It noted that the minor was seeking to impose liability on an organization that merely chartered local leagues, and that the molestations took place on occasions well after a local league's activities had concluded.

*Brown v. Ohio Dep't of Rehab. & Corr.*, 2009 Ohio 4707 (Ct. Cl. 2009). An inmate in an Ohio prison brought a negligence claim against the state's department of rehabilitation and correction after he and other inmates were struck by lightning while participating in a softball game in the prison's recreation yard. The game was organized by the prison as part of recreational softball league. It was one of two contests taking place simultaneously on the yard's two fields. A prison employee was supervising the game in which the plaintiff was injured because the teams were vying for playoff positions. When the game began, weather conditions were fair, but light rain eventually started falling. At some point during the game on the other field, inmate umpires

claimed that they saw lightning and decided to stop the contest. The prison employee was informed of the decision, but did not stop the game he was supervising because it was in extra innings and he had not personally witnessed any lightning. A corrections officer patrolling the yard testified that she heard no thunder while the games were occurring, and another officer stationed in a watch tower only saw lightning in the distance during the moments before the incident occurred. A local meteorologist testified that the storm that produced the lightning was most likely of the pop-up variety that is difficult to predict. A local weather station recorded less than two-tenths of an inch of rain that day, suggesting that the storm probably developed and disappeared quickly, and that any lightning probably existed for only a brief period of time. The magistrate judge recommended entering judgment in favor of the state department of rehabilitation and correction, finding it was doubtful that lightning existed for an extended period of time or in an area close to the field prior to the incident. He noted that thunder was not audible, and that the decision made by the employee supervising the game was perfectly reasonable based on all the surrounding circumstances.

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*Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292 (Ind. 2009). The Clay City School Corporation (School) appealed the judgment that it was liable for the wrongful death of thirteen-year-old Kodi Pipes. Kodi blacked out during a basketball practice. His doctor did not clear him to participate in practice, but Kodi's coaches allowed him to participate without restriction. While participating in a running drill, Kodi collapsed and died. The central issue before the Indiana Supreme Court was whether the State of Indiana recognized a rebuttable presumption that a child aged seven to fourteen is incapable of contributory negligence. The court, relying largely on dicta from prior cases, held that such presumption existed. The court dismissed the appeal and upheld the jury verdict.

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*Cooper v. Unthank*, 2009 Ky. App. Unpub. LEXIS 883 (Oct. 16, 2009). Two high school basketball players and their mothers appealed a trial court's decision to grant summary judgment to the Community Pentecostal Church and its in-house academy on negligence and outrage claims brought against them by the players and their mothers after the academy's volunteer girls' basketball coach induced one of the players into a sexual relationship and sexually assaulted the other. Shortly after he was hired, the coach began calling one of the players and driving her home after practice. The player's mother believed the contact between her daughter and the coach was inappropriate and informed the school's principal, who assured that the coach would be supervised. The principal then met with the coach and told him to stop calling and giving rides to the players. But one week later, the coach and player had the first of two sexual encounters. Between those encounters, the team had a road game. Following that game, the coach lured the second player into the school's van and assaulted her. The coach, however, denied that an assault took place. Other members of the squad testified that the coach had made several sexual advances toward individual players, and one player had informed the principal that she suspected the coach was engaging in a sexual relationship with her teammate before it actually happened.

The appellate court affirmed in part and reversed in part, holding there was a genuine issue of material fact as to whether the academy had negligently retained the coach following reports of his conduct, but that there was no evidence of intent to inflict emotional distress that could sustain a claim for outrage. After assessing the negligence claim, the court emphasized that a jury should determine whether it was foreseeable that the coach would sexually abuse his players. It noted that the principal had been warned by both members of the team and one of the plaintiff mothers that the coach was engaging in inappropriate behavior. Although the principal had reprimanded him on one occasion, a jury could still conclude that her knowledge of his behavior made his subsequent action foreseeable, and required additional action to prevent it.

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*Corona v. State*, 100 Cal. Rptr. 3d 591 (Ct. App. 2009). A boxing referee and his wife appealed a trial court's decision to dismiss mandatory duty claims that they brought against the State of California, its Department of Consumer Affairs, and its State Athletic Commission (SAC) after the SAC licensed a boxer to compete in a match supervised by the referee without proof that he had tested negative for HIV. Following the match, the SAC's executive director notified the referee that the fighter had tested positive at some point in time, and that he needed to take precautions just in case he was exposed to the disease; however, the referee had already engaged in unprotected sex with his wife. The appellate court reversed with orders to enter judgment for the referee and his wife, holding the defendants were not entitled to governmental immunity because the SAC had a mandatory duty to ensure that all boxers provided a negative HIV test before being licensed. The court emphasized that the state statute governing boxing licensing did not give the SAC any discretion to waive the requirement, noting that its language made testing a condition precedent to approval. It also found that the statute imposing liability for mandatory duties trumped another statute granting licensing immunity, which was only intended to protect discretionary activity.

*Correa v. City of New York*, 890 N.Y.S.2d 461 (App. Div. 2009). The New York Yankees appealed a trial court's decision to deny their motion for summary judgment on a negligence claim brought against the team by one of its security guards after he suffered injuries during a game when he was struck by a foul ball that passed through a window in the screen behind home plate. The window had been opened to allow for the placement of a television camera, but the employee of a third-party defendant failed to secure the netting around it. The appellate court affirmed, holding the limited duty baseball rule, did not bar the guard's claim because there was a genuine issue as to whether the screen behind the plate was sufficient to provide adequate protection to the individuals seated behind it. The court found that the Yankees failed to establish that the third-party defendant was not retained by the club, and that, even if he was not, the team had a non-delegable duty to provide their employees with a reasonably safe place to work. It also emphasized that there was a genuine issue as to whether ball park employees could assume the risk that a proprietor would expose them to risks of injury beyond those inherent to the average spectator.

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*Crace v. Kent State Univ.*, 2009 Ohio App. LEXIS 5785 (Dec. 29, 2009). Crace was a cheerleader at Kent State University (KSU). She was seriously injured when she fell while performing a pyramid maneuver. She brought tort claims against KSU on the basis of the cheerleading coach's conduct. The trial court found for KSU, and Crace appealed that decision. The appellate court found that KSA was shielded from a tort claim under the primary assumption of the risk defense. The appellate court determined that, based on the expert testimony, injuries as a result of falls during cheerleading maneuvers are an inherent risk of cheerleading, such that KSU owed her no duty of reasonable care to protect her from those potential injuries. The appellate court also determined that the KSU coach did not act recklessly or intentionally by requiring the team to perform the difficult maneuver in question and instead deferred to the determination of the trial court that the coach acted within the proper athletic association guidelines.

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*Crespin v. Albuquerque Baseball Club, LLC*, 216 P.3d 827 (N.M. Ct. App. 2009). The parents of a spectator at a Albuquerque Isotopes minor league baseball game appealed a trial court's decision to grant summary judgment to the Isotopes, the City of Albuquerque, the Houston Astros, and Astros minor leaguer Dave Matranga on negligence claims arising out of injuries suffered by the spectator when he was struck in the head by a batting practice home run ball hit by Matranga. The spectator was sitting at a picnic table in an unscreened area beyond the left field wall, participating in a pre-game little league party. The picnic tables were situated so that the spectators were not facing the field, and batting practice began without a warning. The stadium included protective netting behind home plate, but no other area of the stands was screened.

The appellate court affirmed the decision as to the claims brought against the Astros and Matranga, but reversed the decision as to the claims brought against the Isotopes and the city. In assessing the claims against the latter defendants, the court declined to adopt the limited duty baseball rule, under which stadium owners and operators satisfy their duty of care to spectators by offering screened seating behind home plate that is sufficient to provide protection to as many spectators as may reasonably be expected to desire it in the course of an ordinary game. Instead, the court followed the minority approach, holding that the team and the City owed a general duty of reasonable care to all spectators, and whether they breached that duty should depend on the facts and circumstances in each case. It argued that there was no compelling reason to adopt the baseball rule under the state's comparative negligence regime, which could take into account the usual risks that spectators accept when they attend games. Applying the traditional tort law principles, the court deemed summary judgment inappropriate, emphasizing that a jury should determine whether the defendants breached their duty to the spectator by failing to screen the picnic area or warn that batting practice was underway. In dismissing the claims against the remaining defendants, the court noted that Matranga was merely practicing to perform in a manner consistent with the official rules of the game, under which his team would be rewarded for home runs.

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*Cusumano v. U.S. Over Thirty Baseball League*, 2009 N.J. Super. Unpub. LEXIS 2217 (App. Div. Aug. 13, 2009). A recreational league baseball player appealed a trial court's decision to grant summary judgment to the league and enter judgment on a jury verdict in favor of an opposing team and its coach on negligence claims brought against them by the player after he suffered a severe foot injury when a throw down base moved when he stepped on it during a game at a local public high school. The league was responsible for scheduling and assigning venues for all of its games, but was not responsible for obtaining use permits or supervising the contests. In the game at issue, the opposing team's coach provided the bases; however, he did not monitor how they were placed on the diamond. Although thrown down bases were common in league games, fixed bases were designed to be used at that venue. In fact, the league had previously purchased those bases for the field. But at the time of the game, they were in possession of the coach of another team that primarily played its home contests at the high school. As a result, the iron spikes to which those bases attached were left exposed, and the plaintiff's foot struck one when a substitute throw down bag moved. He stumbled, and broke his other foot trying to catch his balance.

The appellate court affirmed, holding the league owed no duty to the player to ensure that teams used proper bases on the fields, and the plaintiff failed to properly authenticate an alleged photo of the spike that he struck when he attempted to submit it as evidence. In assessing the league's liability, the court noted that the league's teams were responsible for setting up the field, and that the league did not supervise the games. Although the league may have purchased and provided fixed bases for the venue at issue, the court emphasized that the teams determined the type of bases used. In assessing the decision to prevent the jury from seeing the photo of the spike, the court noted that it was used to cross-examine the defendants' expert, even though it lacked proper foundation. The court emphasized that the plaintiff failed to establish where the picture was taken or when it was taken, which were especially pertinent when the spikes at the high school were often buried under the infield dirt.

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*Elie v. City of New York*, 2009 N.Y. Misc. LEXIS 2256 (Sup. Ct. Aug. 19, 2009). The St. Louis Cardinals moved for summary judgment on a negligence claim brought against the team and several other defendants by a spectator at a minor league baseball game after he suffered injuries when he was struck by a baseball bat that was propelled into the seats by a player on one of the franchise's former short-season Class A affiliates. The spectator was sitting approximately ten feet from the player when he lost control of the bat while allegedly horsing around during warm-ups. The trial court granted the motion, holding the team did not breach any duty it owed to the spectator because he assumed the risk of injury from the risks inherent in the event. It emphasized that almost all spectators consent to the danger that a loose bat may end up in the stands, regardless of when or how that result occurs. This view is consistent with the limited duty baseball rule, under which a team's duty to protect spectators is fulfilled by providing screening behind the plate.

*Farrell v. Hochhauser*, 884 N.Y.S.2d 261 (App. Div. 2009). A school district and two high schools appealed a trial court's decision to deny their motion for summary judgment on claims brought against them by a high school wrestler who competed for one of the schools and



contracted herpes while participating in a match against a student at the other school. The appellate court reversed, holding neither the district nor the schools breached any duty they owed to the wrestler because he assumed the risk of injury from the risks inherent in the sport. The court noted wrestling involves close contact between participants, and that both the plaintiff's coach and own expert admitted the possibility of contracting a disease through skin-to-skin contact was well-known throughout the sport. It also emphasized that the wrestler was aware skin diseases could be passed, and that the district informed him of the specific risk of contracting herpes both orally and in a packet that was distributed prior to the start of the season.

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*Green v. Rogers*, 917 N.E.2d 450 (Ill. 2009). The president of a local Little League program appealed an appellate court's decision to reverse a judgment dismissing two counts of defamation per se brought against him by the father of a program participant after the program board turned down his requests for coaching positions in back-to-back years because he allegedly engaged in a pattern of unacceptable behavior while serving as a manager, coach, and league director in previous seasons. Following the board's first decision, the president informed the plaintiff that he could still assist his son's team as a volunteer during practices and before games, and invited the plaintiff to call him if he wanted to discuss the decision any further. After the plaintiff's appeal was denied, the president contacted the plaintiff again, explaining that the board was not disciplining him, and that it would be willing to place his son on a team coached by one of the plaintiff's friends to give him the best opportunity to participate. Sometime later that month, the plaintiff, a practicing dentist and licensed attorney, was informed that a village trustee and village resident were claiming he had been kicked out of the program, due in part because of his inappropriate behavior toward children. One year later, following the board's second decision, he filed his complaint, alleging, on information and belief, that the president made defamatory statements about him during the board meetings to select coaches. According to the plaintiff, the president charged him with engaging in a long pattern of misconduct with children and had abused players, coaches, and umpires in the program.

The Illinois Supreme Court reversed, holding the plaintiff's allegations were not specific enough for the president to formulate a responsive pleading, and, even if they were, they did not amount to defamation per se. In assessing the sufficiency of the complaint, the Court not only found that the allegations were devoid of specifics on the statements, but that the plaintiff lacked a basis for his belief that the statements were actually made. It noted that plaintiffs alleging defamation per se must satisfy a higher standard of pleading, and that the plaintiff here made his allegations in a factual vacuum. The Court also emphasized that the plaintiff failed to distinguish between the statements made at each of the board meetings, suggesting his beliefs were based on inferences and assumptions. In assessing whether the allegations could amount to defamation per se, the Court determined that the statements the president was charged with making were reasonably capable of another, innocent, construction, especially when they were placed in context. It noted that the words abuse and misconduct have many different meanings, and that here they were used in the context of Little League coaching, suggesting their use was innocuous at best, and certainly not of the type that could impute a lack of integrity in the plaintiff's professions. The Court placed particular emphasis on the president's subsequent assurances that the plaintiff

would still be able to assist his son's team, which showed he was not accusing the plaintiff of anything other than the poor behavior that often infiltrates amateur athletics.

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*Haeg v. Geiger*, 2009 Minn. App. Unpub. LEXIS 1242 (Nov. 24, 2009). Haeg was injured during a golf tournament when she was struck in the face by a golf-ball. Haeg settled with the person who actually hit the golf ball. Geiger was the driver of the golf cart in which Haeg was seated when she was struck. She alleged at trial that Geiger acted negligently by, inter alia, not driving on the golf cart path. A jury found that Geiger did not act negligently and was not liable for Haeg's injuries. Haeg appealed that decision for several reasons. Haeg first argued that evidence of her settlement with the person who actually hit the golf ball should have been excluded. The court disagreed and noted that the trial court did not abuse its discretion under the Federal Rules for Civil Procedure by allowing evidence to be introduced that demonstrated the existence, but not the amount, of the settlement. The court also dismissed her other arguments for invalid jury verdict, damage amount, and jury instructions.

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*Hamilton v. Nochimson*, 2009 U.S. Dist. LEXIS 62644 (E.D. Pa. July 21, 2009). The former business manager of professional basketball player Richard Hamilton moved to transfer claims brought against him by the NBA star, or, in the alternative, to dismiss those claims for lack of personal jurisdiction. Hamilton originally hired the defendant as his personal assistant after being drafted by the Washington Wizards in 1999. Three years later, Hamilton was traded to the Detroit Pistons, and the defendant followed him to Michigan. Shortly afterwards, Hamilton and the defendant entered into a business arrangement, under which the defendant gained access to the player's bank account and credit cards. According to Hamilton, the defendant abused his power by appropriating approximately \$1 million through unauthorized transactions.

The District Court granted the motion, concluding it was in the interest of justice to transfer the claims to the Eastern District of Michigan. The court emphasized that the current venue was proper because a substantial part of the events giving rise to Hamilton's claims took place in Pennsylvania; however, it found the majority of private and public interests weighed in favor of a transfer. In assessing the private interests, the court noted that Hamilton brought the claims in a district that was not located in his home state, and that the defendant selected a forum where Hamilton resided for six months out of the year. More importantly, the court found that the majority of events giving rise to the claims took place in Michigan, and that the defendant, an Illinois resident, would face financial hardship trying to litigate the case in Pennsylvania. In assessing the public interests, the court noted that the first contract between Hamilton and the defendant was created in Pennsylvania, but concluded that Michigan had a far greater interest in litigating the matter. It emphasized that both Hamilton and the defendant spent the majority of their time in that state, and that the business arrangement that allowed the defendant to engage in the alleged events was also consummated there.

*Golden v. Milford Exempted Vill. Sch. Bd. of Educ.*, 2009 Ohio App. LEXIS 2962 (July 13, 2009). The Milford Exempted Village School Board of Education appealed a trial court's

decision to deny its motion to dismiss civil hazing and negligent supervision claims brought against it by a high school basketball player and his parents after he was pinned to the ground, punched in the face, and sexually abused by teammates prior to a practice. The appellate court affirmed in part and reversed in part, holding the Board was immune from liability for negligent supervision under state law, but that the player's civil hazing claim was pleaded sufficiently and the Board did not have a statutory defense to liability. In assessing the negligent supervision claim, the court found that the plaintiffs failed to demonstrate why the claim fit within one of the listed exceptions to the broad immunity conferred to it by statute. It emphasized that the trial court never addressed whether an exception to immunity applied, noting that court skipped a step in its analysis and only assessed whether immunity could be reinstated under the statute's listed defenses to liability. In assessing the civil hazing claim, the court noted that the plaintiffs may have a hard time proving the teammates' actions were performed as a means of initiating the player onto the team. Nevertheless, it emphasized that the plead facts gave the Board fair notice of each alleged element of a claim. In addressing immunity, the court found that one of the statutory exceptions applied to the claim, and that the Board would be unable to rely upon any of the listed defenses to liability. It noted that the Board did not allege that the actions of the team's coach were connected with a discretionary, policy-making decision, and that the coach did not have any discretion to encourage hazing activities among the members of the team. It also emphasized that the plaintiffs alleged the player's injuries were caused by recklessness, bad faith, or malicious conduct as to all of the Board's actions, and that those allegations were sufficient to survive a motion to dismiss.

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*Howze v. Carter, 2009 Ohio App. LEXIS 4597 (Oct. 14, 2009).* Peewee football cheerleading coach Keisha Howze appealed a trial court's decision to dismiss a negligence claim that she brought against the governing athletic association after she suffered injuries when she was attacked by a former cheerleading coach Trina Carter in a parking garage attached to the hotel hosting the association's annual banquet. A dispute between Howze and Carter over the discipline of Howze's daughter had caused Carter to resign her position in the middle of the season. Howze took over Carter's team and led them to second place in an annual cheerleading tournament. Carter did not attend the banquet, but her daughter was also a member of the program. During the event, Howze made public comments that could be construed as criticism of Carter. Carter was made aware of these comments when she arrived to pick up her daughter. The director of the association noticed her standing near the entrance to the banquet hall and immediately warned Howze, asking her not to leave until he had a chance to speak with Carter. However, while the director engaged Carter, Howze walked past them, apparently on her way out of the hotel. Carter and her daughter stuck around for at least five more minutes, and the director believed that Howze had safely left. But that was not the case. Howze, unconcerned with her safety, had stuck around for ten to fifteen more minutes to chat with other cheerleaders and their parents, and when she and daughter reached their car in the parking garage, Carter was waiting. After the two parties exchanged words, a fight ensued, during which Howze, the smaller woman, suffered several injuries.

The appellate court granted the athletic association's motion, holding its duty to Howze as an invitee was limited to warning and protecting her from harm in the vicinity of the banquet hall,

the only premises in its possession. It emphasized that Carter's actions took place in the parking garage, which was property owned and controlled by the City of Akron. The court also noted that the athletic association not only warned Howze of the possibility of danger but gave her the opportunity to exit the area safely. Finally, the court concluded that the association did not have a duty to provide security, and, even if it had, Howze's actions indicated she would not have sought out an escort to her vehicle.

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*Klutman v. Sioux Falls Storm*, 769 N.W.2d 440 (S.D. 2009). An Indoor Football League team appealed a trial court's judgment on a jury verdict in favor of a teenage boy and his parents on a negligence claim they brought against the team after the boy suffered devastating knee injuries while playing an informal game of touch football during a pre-season promotional event. The team invited all children in attendance to participate in the game, but did not require them to sign waivers or warn them about the condition of the field. During the game, the boy's foot allegedly got caught in a gap between two pieces of the synthetic turf that covered the field, causing permanent injuries that prevented him from engaging in other activities. The team did not have an established protocol for ensuring that turf was installed properly, even though it was common for gaps to exist. During trial, the team president admitted that the franchise began taping the seams in the turf the following season; however, a team trainer claimed that tape had also been used during games prior to the incident. The president had also previously sought funding for new turf because its current turf endangered players.

The South Dakota Supreme Court affirmed, holding there was no abuse of discretion in the decisions made at trial and the evidence was sufficient to support the jury verdict. First, the Court found there was no error in granting a motion to add the boy's parents as plaintiffs, emphasizing that the complaint put the team on notice that the boy sought reimbursement for medical expenses he incurred as a minor, and that the team did not object until after the amendment was made. It also noted that the team failed to provide a record related to the decision, and that there was no indication that part of the jury's award was associated with the services provided to the boy by his parents. Second, the Court determined there was no error in preventing a chemical engineer secured by the team from testifying as to his opinion about the cause of the boy's injuries. It noted that the engineer could be considered an expert on issues related to synthetic turf, but had no training, education, or experience in medical matters. The Court also emphasized that the boy's treating surgeon admitted he could not tell exactly how the injuries happened. Third, the Court found there was no error in refusing to issue a jury instruction on contributory negligence, noting that there was no open and obvious danger that the boy should have avoided. It emphasized that the team itself was arguing there was no gap in the turf that could have caused the injuries. Fourth, the Court determined that there was no error in allowing the testimony of the team's president to be impeached with evidence showing the team had subsequently taped the seams in the turf. It noted that evidence of subsequent remedial measures is admissible when offered to impeach, and, more importantly, that the team's actions did not actually constitute a remedial measure because it had also been taping seams prior to the event. Fifth, the Court held that there was no error in denying a motion for a new trial because the record did not contain the evidence needed to show the boy's injuries may not have been as severe as the plaintiffs articulated. Finally, the Court concluded that the evidence was sufficient to support the verdict.

because the team failed to warn the game's participants about the condition of the turf; the turf had a tendency to separate; there was no protocol for monitoring the condition of the turf; the team had labeled the turf dangerous when seeking a new field from the city; and, most importantly, the seams in the turf were not taped during the event.

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*McInturff v. Battle Ground Acad. of Franklin*, 2009 Tenn. App. LEXIS 862 (Dec. 16, 2009). McInturff brought suit against the Battle Ground Academy for injuries he sustained when struck by a baseball during a game. He was sitting outside the dugout when he was struck, in violation of league rules. He brought this suit against the Academy and the Tennessee Secondary School Athletic Association (TSSAA) and claimed that the defendants were vicariously liable for the conduct of the umpire in failing to uphold the league rules. The Court concluded that the defendants were not vicariously liable for the umpire's conduct because the umpires constituted an independent contractor, not an employee. In addition, the Court held that the umpires lacked apparent authority to act on the defendants' behalf. In sum, the Court dismissed McInturff's claims.

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*Milne v. USA Cycling, Inc.*, 575 F.3d 1120 (10th Cir. 2009). A bicycle race participant and the mother of another bicycle race participant appealed a district court's decision to exclude their expert's opinion on organizing and supervising races and then dismiss the gross negligence claim that they brought against the race's organizers, promoters, and supervisors after the race participants were struck by a vehicle during the race, causing serious injuries to the first participant and killing the second participant. Although the majority of the race took place on off-road paths, the first six miles were conducted on an open court road that participants shared with vehicles. It was on this opening stretch that the accident occurred; however, the entire race was governed by mountain bike racing rules adopted by USA Cycling, and those rules did not prohibit participants from crossing the center-line of a road. Open course races were also common in mountain bike racing, and the first participant admitted that roughly one quarter of the races in which he had competed were of this variety. The race at issue included an open course stretch at least the previous seven times it was conducted and no bicycle-vehicle accident had ever occurred. Both of the participants were considered expert racers with a significant amount of mountain bike racing experience. They had competed in the race at issue in prior years and were familiar with the course that was used. Prior to the race, they signed forms that purported to release the race organizers from liability for negligence and warned all participants that they assumed the risk of colliding with a vehicle. Nevertheless, race organizers took additional precautions to avoid the risk of an accident, including: (1) posting warning signs; (2) having attendants warn drivers in the area on the day of the race; (3) posting marshals throughout the course to supervise the event; and (4) ensuring there was personnel available to administer aid to injured participants. The accident occurred on a section of the course that was straight and wide, and the driver's vehicle was visible from at least thirty yards away.

The Court of Appeals affirmed, holding there was no abuse of discretion in excluding the plaintiffs' expert testimony on the standard of care in mountain bike racing, and that no

reasonable jury could conclude that the race organizers were grossly negligent. In assessing the decision to exclude the plaintiffs' expert testimony, the court found the expert was not qualified to render an opinion on the care that race organizers owe to participants, noting that he was not an experienced mountain bike racer, and his experience in supervising races on paved roads was not sufficient to provide him with expertise on the vastly different practices and rules used in the sport. And even if he was qualified, the court concluded that his opinions were unreliable because they were not based on studies analyzing the precautionary measures taken in mountain bike racing and the risks and benefits of those measures. After determining that federal law dictated the standard needed to grant summary judgment on the gross negligence claim, the court concluded that there was no evidence to suggest the defendants were indifferent to the possibility an accident might occur. It emphasized that the organizers took a number of precautions that were designed to prevent accidents, and that the lack of problems in the past showed there was no serious risk of one occurring.

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*Miulli v. Fla. High Sch. Athletic Ass'n*, 998 So. 2d 1155 (Fla. Dist. Ct. App. 2009). The mother of a high school baseball player appealed a trial court's decision to dismiss claims that she brought against the Florida High School Athletic Association (FHSAA) after her son died while participating in team activities due to an undetected medical condition. State law required the FHSAA to adopt rules requiring students to pass medical evaluations prior to participating in interscholastic athletics; however, the FHSAA's bylaws only addressed practices and competitions, not workouts or other activities associated with participation on a team. The appellate court affirmed, holding the state law did not provide a private right of action against the FHSAA for breaching its obligation to enact particular rules. The court noted that the statute at issue was located with several others related to the health and safety of students, but that only one of those laws provided for tort liability, suggesting the legislature did not intend to create a private right to remedy the breach of any other provision.

*Nolan v. Memphis City Sch.*, 2009 U.S. App. LEXIS 26975 (6th Cir. Dec. 11, 2009). Nolan participated on his school's basketball team. At times, due to poor grades, bad attitude, or conduct during practice, Nolan would be paddled by one of his two coaches. Tennessee has a statute that allows for paddling of students for disciplinary reasons. Nolan alleged that the paddling, which he claimed occurred two to three times a week while he attended school, resulted in psychological and physical pain. The jury found in favor of the defendants, the two coaches. Nolan appealed that decision to the Sixth Circuit on several grounds, but mainly on the fact that no reasonable jury could have come to this conclusion regarding Nolan's various claims, including substantive due process, negligence, and outrageous conduct claims. The Circuit Court rejected Nolan's appeals on the basis that the jury's verdict was largely a question of credibility. The court held that there was sufficient evidence for the jury to believe the defendants' version of the facts. Namely, the defendants claimed that they did not paddle Nolan as severely or as regularly as he alleged. The jury, the Court held, was free to determine which testimony was more credible, and as such, the jury verdict was not unreasonable.

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*O'Connor v. Syracuse Univ.*, 887 N.Y.S.2d 353 (App. Div. 2009). The father of a Syracuse University hockey player appealed a trial court's decision to grant summary judgment to the University, Slippery Rock University of Pennsylvania hockey player Matthew DiSanti, and Syracuse student Brian McNeil on negligence claims that he brought against them after suffering injuries when he attempted to keep McNeil from being pulled out of the stands and into a group of Slippery Rock players by DiSanti following a game between the schools. The Slippery Rock players were waiting in a pathway between the ice and the visitors' locker room at Syracuse's home arena when DiSanti shouted at McNeil, starting a physical altercation along the barrier between the pathway and the stands. During the fracas, DiSanti grabbed McNeil and attempted to pull him into the pathway. At that point, the plaintiff, who was standing next to McNeil, grabbed the student around the waist to try to keep him out of the danger. His efforts failed. Instead, both McNeil and the plaintiff were pulled across the barrier and piled on by Slippery Rock players. Although those players only struck McNeil, he escaped relatively unscathed, while the plaintiff broke his ankle and shinbone. The entire altercation, which only lasted a few seconds, was quickly broken up a University officer.

The appellate court affirmed in part and reversed in part, holding there was no evidence the University breached any duty it owed to the plaintiff, but there was a genuine issue as to whether the rescue doctrine allowed the plaintiff to recover against DiSanti and McNeil. In assessing the negligent supervision claim against the University, the court emphasized that the University owed the plaintiff a duty to exercise reasonable care in attempting to maintain safe conditions at the arena, which included the obligation to minimize foreseeable dangers arising from the acts of third parties; however, that duty did not extend to protecting spectators from the side effects of unexpected assaults, which is how the court characterized the altercation at issue. The court also noted that the University followed its written policies by requiring the use of barriers and stationing safety officers in the pathway, even though there had never been a physical confrontation between a player and a spectator. After assessing the claims against DiSanti and McNeil, the court determined that it was fair to infer that the plaintiff's motive in restraining McNeil was to keep him out of imminent danger. It emphasized that the rescue doctrine could apply regardless of whether the danger materialized, as long as the plaintiff's beliefs were reasonable. Based on the surrounding circumstances, the court concluded that it was reasonable for the plaintiff to believe that McNeil was in trouble.

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*O'Neill v. Univ. of Akron*, 2009 Ohio Misc. LEXIS 237 (Ct. Cl. Sept. 30, 2009). Daniel O'Neill brought negligence claims against the University of Akron and its cheerleading coach after he suffered a knee injury while attempting a stunt during a team practice. O'Neill was not a member of the cheerleading team, but was encouraged to attend practice to see if he would be interested in joining the squad. The coach claimed that she invited him to observe practice but not participate in any drills. She was supervising female cheerleaders at the other end of the team's practice facility when the incident occurred. O'Neill claimed that he was trying out for a position on the squad, and only agreed to try the stunt when the coach suggested it; however, he knew there was risk involved in performing it. Prior to the injury, one member of the team demonstrated the steps involved in performing the stunt, and O'Neill completed it two or three times with a spotter. Subsequently, two other cheerleaders began assisting O'Neill, and they were

spotting him on his fateful attempt. The court held that O'Neill's claims were barred by the doctrine of primary assumption of the risk. It emphasized that he appreciated the inherent risks in cheerleading, and that his injury resulted from conduct that was a customary part of the sport. The court noted there was no evidence that either the coach's supervision or the team members' conduct was reckless, and that O'Neill's claim that there was a defect in the floor mats was based on observations made after the injury occurred.

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*Podgorski v. Pizzoferrato*, 2009 Conn. Super. LEXIS 1886 (July 15, 2009), 2009 Conn. Super. LEXIS 2777 (Oct. 7, 2009). The Town of Glastonbury, its board of education, its high school athletic director, and the school's lacrosse coaches moved for summary judgment on negligence claims brought against them by one of the school's lacrosse players after he sustained injuries when he was struck by a ball thrown by one of his teammates at the school's field house prior to a practice. As a general matter, the players were prohibited from tossing balls around while waiting to be taken to the field; however, they broke that rule almost every day, sometimes while a coach observed. The school's coaches' handbook did not include specific mandates related to field house conduct, but required coaches to properly supervise players at practice. The plaintiff alleged that the lacrosse coaches not only failed to properly supervise the athletes, but failed to supervise at all. The court denied the defendants' motion, holding that they were not entitled to governmental immunity because the coaches had a ministerial duty to supervise the teams during practice. It emphasized that the policy in the school's coaches' handbook mandated some level of supervision, even if there was discretion as to what was proper. The court noted that the time between the players' arrival at the field house and the time they reached the field was within the scope of practice because they would not have been able to participate without changing their clothes and obtaining their equipment.

In an earlier decision in the same lawsuit, a rehabilitation provider and one of its physical therapists moved to dismiss apportionment claims brought against them by the defendant lacrosse player and his parents. The plaintiff had alleged that those defendants had cleared him to attend practice even though he sustained a head injury during the school's previous game, and that the player threw the ball at him even though he was aware of that injury. The court granted the motion, holding state law disallowed apportionment liability between parties liable for negligence and parties liable for their intentional acts. It noted that the rehabilitation provider and physical therapist were only being accused of negligence, while the defendant player's act was clearly purposeful.

*Rivkin v. Kennerson & Grant LLP*, 2009 Cal. App. Unpub. LEXIS 8028 (Oct. 7, 2009). Jonathan Rivkin appealed a trial court's decision to grant summary judgment to a law firm on legal malpractice claims he brought against it after the firm failed to introduce expert testimony that could raise a genuine issue of material fact in a negligence action he brought against a youth organization, a baseball school, and the City of Carlsbad when he suffered injuries while participating in a pitching exhibit run by the school at the organization's fair. The school placed the exhibit in a grassy area that included just fifteen feet of flat space from which to throw a ball before the ground sloped sharply upward. Instead of pitching from the flat space, or the sidewalk at the top of the slope, Rivkin chose to throw from the middle of the slope, which was



approximately the same distance from the exhibit as the distance from the mound to the plate in Little League events. During his second pitch, he slipped on the wet grass, causing a serious knee injury. The trial court held his action was barred under the doctrine of primary assumption of the risk; however, it never heard from Rivkin's expert, who asserted that the defendants unreasonably increased the risk of harm beyond the inherent risks of the sport. The appellate court affirmed, holding that Rivkin could not prove the firm's alleged negligence in failing to introduce expert testimony would have resulted in a more favorable judgment in his case. It emphasized that the trial court in the underlying litigation held there was no need to hear the expert's testimony because his opinions would only confirm matters that were already apparent and undisputed. The court noted that any conclusion that there were no safe alternatives from which to pitch would be purely speculative, especially when Rivkin's daughter pitched safely from the sidewalk above the slope.

*Roe v. Gustine Unified Sch. Dist.*, 2009 U.S. Dist. LEXIS 118880 (E.D. Cal. Dec. 22, 2009). Roe was a fourteen-year-old male student-athlete at the time of the incident. He was a member of the Gustine High School (GHS) football team. That team held an overnight football camp at another high school. At this camp, Roe alleged that he was the victim of several hazing incidents, including incidents of a sexual nature. Roe brought a total of fourteen claims against the individual student athletes who conducting the hazing, the high school administrators, the coaches, and the school district. He alleged violations of Title IX, his federal and state civil and constitutional rights, and also brought several tort and assault charges. The overarching issue before this court was whether to grant the school district and its administrators summary judgment on plaintiff's claims.

The first issue before the court was whether the defendants were immune from liability from the federal claims under the California Education Code. For several reasons, including the Supremacy Clause, the court held that the California statute did not immunize the defendants from liability for the plaintiff's federal claims. To do so would turn[] the law on its head. The second issue was the applicability of § 1983 civil rights claims against the various defendants. The plaintiff dropped his claims against the school district and the individual defendants in their official capacities because these were protected from liability under the Eleventh Amendment's immunity privilege. Additionally, the claims against the individual defendants in their personal capacities were dismissed under the qualified immunity privilege. The Court held that the school district and its administrators could not reasonably have known that the plaintiff's constitutional rights were being violated and thus, they were not liable for the invasion of those rights.

The court denied the motion for summary judgment as it related to the Title IX claims for sexual harassment. The court noted that there was sufficient evidence to prove each element of the claim. The camp was coordinated by the school district and operated by its administrators, including the coaches. As such, it was arguably under the substantial control of the School District. Also, the court held that the sexual harassment was severe enough that it could have impacted the educational opportunities of the plaintiff in the future (the plaintiff later moved to a different school district). The court further held that there was reason to believe the coaching staff had actual knowledge of the harassment because another student had been attacked in a similar way. The court held that knowledge did not require the coaching staff to have actual

knowledge of the plaintiff's injuries. Lastly, the court held that the question of whether the school district displayed deliberate indifference with regards to the incidents was a factual matter best left for the jury to decide.

As it related the plaintiff's state law claims, the court held that he could bring claims for only those actions of the coaching staff and administrators in their personal capacity. Nonetheless, the court held that the California Education Code granted immunity to the defendants because the football camp constituted an excursion under the Code. As a result, the plaintiff is held to have waived all state law claims against the school district for any injuries during the camp. Lastly, the court dismissed the plaintiff's Penal Code claim, which provides for a right of action for injuries arising from hazing. While the penal code grants that right, the plaintiff failed to plead the complaint with the required specificity.

*Rosenfield v. Hudson Valley Stadium Corp.*, 885 N.Y.S.2d 338 (App. Div. 2009). A spectator at a Hudson Valley Renegades minor league baseball game appealed a trial court's decision to dismiss negligence claims that she brought against the team, the architect that designed the team's stadium, and the County of Dutchess, which owns the stadium, after she suffered injuries when she was struck by a foul ball while seated in a picnic area of the stadium. The appellate court affirmed, holding the spectator's claims were barred by the limited duty baseball rule, under which stadium owners and operators satisfy their duty of care to spectators by offering screened seating behind home plate that is sufficient to provide protection to as many spectators as may reasonably be expected to desire it in the course of an ordinary game. The court emphasized that the spectator was not located behind home plate when she was struck, and did not show that she was unable to purchase a seat in that area.

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*Sellers v. Rudert*, 2009 Ill. App. LEXIS 1167 (Nov. 20, 2009). Sellers, a member of the Eastern Illinois University football team, suffered a neurological injury while participating in a football game. He brought negligence claims against both the athletic trainers and the coaching staff of the defendant university. The university argued that the plaintiff's claims were barred under sovereign immunity.

As it concerned the coaching staff, the court upheld the trial court's decision that sovereign immunity barred the claim. The coaches were working within the scope of their authority as coaches and that the Restatement (Second) of Torts imposed no professional duty on the coaches to use reasonable care to prevent Seller's injuries.

The court reversed and remanded the trial court's opinion with regards to the athletic trainers. The court found that the Athletic Trainers Act (ATA) created a standard of care, which included on-site injury and preventative care. Once the court determined that the athletic trainers owed Sellers a duty, the court remanded the case to the trial court to determine whether the trainers' actions violated that duty.

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*Umansky v. ABC Ins. Co.*, 769 N.W.2d 1 (Wis. 2009). The director of facilities for Camp Randall Stadium, the home of the University of Wisconsin football team, appealed an appellate court's decision to reverse a trial court judgment that granted summary judgment to him on a wrongful death claim brought by the parents and estate of an ABC television cameraman who died after he fell from a platform supplied by the school. The accident took place while the cameraman was setting up for a game the following day. There were no railings on the platform, even though the state adopted OSHA regulations that required railings for safety and made those regulations applicable to all public buildings of a public employer.

The Wisconsin Supreme Court affirmed, holding the director of facilities had a ministerial duty to provide railings on the platform, precluding him from enjoying immunity from liability. The Court noted that the director's job description made him responsible for complying with the state's safety regulations if they applied to his employer, and that the regulation at issue mandated railings in all circumstances. In assessing the scope of the duty, the Court emphasized that the director could not avoid liability simply because the individual injured was a private employee. It noted that nothing in the state laws indicated that his duty was only owed to public employees, and that reading the regulation in such a manner would frustrate its purpose of providing universal occupational safety protections.

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*Villegas v. Feder*, 2009 N.Y. Misc. LEXIS 2926 (Sup. Ct. Oct. 14, 2009). Ithaca College and a physician with a fellowship in sports medicine at the school moved for summary judgment on negligence claims brought against them by one of the school's football players after the physician cleared him to play prior to his freshman year and allowed him to continue competing that fall despite his complaints about ankle problems stemming from a wrestling injury that he suffered in high school. Prior to enrolling at the school, the player had undergone several months of physical therapy to rehab the ankle; however, in filling out the player's medical records, his personal doctor stated that he had no injuries that would inhibit his ability to participate in sports. Moreover, the doctor who operated on him following the injury did not caution him against playing. Upon arrival, the player underwent an additional series of medical evaluations, including one performed by the defendant physician. The physician was aware he had suffered an ankle injury, but did not have his medical records. Nevertheless, he cleared the player because his personal doctor had already evaluated him and a significant amount of time had passed since the injury. During his first few weeks of practice, the player suffered two minor injuries to the ankle. He did not miss any time, but went to see the physician again a month and a half later because the ankle was still bothering him. The physician still did not have the player's medical records, so he had to rely on the player's description of his prior injury to make a diagnosis. Ultimately, he recommended more physical therapy, but asked the player to return with his medical records. A few weeks later, he re-evaluated the player with the help of the records, and determined that the ankle was improving. He advised the player to continue his exercises and told him it could take up to a year before the ankle was fully healed. The player was able to finish out the season, practice in the spring, work as a custodian in the summer, then compete without complaint during his sophomore year; however, following that season, he complained that he had a limited range of motion and tenderness in the ankle, and went back to the doctor who had operated on him. He was diagnosed with an injury requiring another surgery.

The court granted the motion to dismiss, adopting an expert's opinion that the physician's treatment conformed to notions of the accepted standard of care and that it was highly unlikely that any of his acts were the proximate cause of the player's subsequent ankle injury. After assessing the physician's decision to originally clear the player, the court determined that he was entitled to rely on the player's representations alone based on the surrounding facts and circumstances. It noted that the physical limitations the player was experiencing were not evidence of an underlying condition given the surgery and the short amount of time that had passed since the injury occurred. After assessing the physician's later treatment, the court found that his evaluation and advice to seek more physical therapy was appropriate. It noted that nothing in the physical exam or the player's medical records indicated that x-rays or a referral to a specialist was needed. Most importantly, the court concluded that the player's intervening acts between the last time he saw the physician and his later diagnosis negated the possibility that the injury existed earlier. It emphasized that he would not have been able to participate in athletic activities through his sophomore season if the injury had been there when he was re-evaluated as a freshman. Although the player's expert argued that the physician would have discovered the injury if he had provided better treatment, the court found those conclusions speculative, and noted that he had failed to make the necessary causal connection.

*Vivyan v. Iliion Cent. Sch. Dist.*, 886 N.Y.S.2d 268 (App. Div. 2009). A spectator at an American Legion baseball game appealed a trial court's decision to grant summary judgment to the local American Legion post and the owners and operators of the field where the game was played on negligence claims that he brought against them after suffering injuries when he was hit in the head by a foul ball while seated in an unscreened area of the stands down the first base line. The defendants had placed a screen on the backstop behind home plate, where the danger of being struck by a ball was the greatest; however, there were no bleachers or other seats located in that area. The appellate court reversed and remanded, holding the limited duty baseball rule did not bar the spectator's claim because the defendants could not show that their screened seating was sufficient to provide protection for spectators that may reasonably be expected to desire it in the course of an ordinary game. In fact, no screened seating existed at all. The court emphasized that the availability of space behind the backstop did not automatically establish that the defendants satisfied their duty of reasonable care, and that whether the spectator assumed the risk of injury would have to be determined at trial.

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*Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237 (10th Cir. 2009). Wagner participated in a motorcycle race staged by the defendant. While coming around a particular turn on the racetrack during the race, Wagner lost control of his motorcycle and crashed into an unpadding portion of a concrete barrier. Wagner brought a tort claim for both negligence and wanton conduct on defendant's actions. The jury awarded \$2.6 million to Wagner after trial. Following the judgment, defendant moved for a judgment as a matter of law on the basis that Wagner failed to present evidence to support the jury's finding of wanton conduct. Although the trial court dismissed the judgment as a matter of law, it did reduce Wagner's damage amount to one million dollars in accordance with Kansas's statutory cap on non-economic damages. Both parties filed appeals.

The court first assessed the defendant's claim that there was insufficient evidence to support a finding of wanton conduct. Wagner claimed several actions constituted wanton conduct, two of which the court examined closely. The court determined that although there was significant risk in staging a motorcycle race of any kind, the defendant did not act with reckless disregard of that risk. In fact, the defendant took special precautions, including emergency medical staff on site, fire extinguishers, and others, given the nature of motorcycle races. The court also considered the defendant's conduct as it related to the specific risk associated with the turn in which Wagner crashed. The court held that there was no evidence to suggest that the defendant acted with a realization of imminence of danger by failing to take additional precautions at the turn in question. As a result, it did not need to address whether the defendant acted with reckless disregard of that risk. Finally, the court dismissed Wagner's counterclaims on the basis that the underlying wanton conduct claim against the defendant was defeated by the judgment as a matter of law.

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*Walls v. Bd. of Regents of Se. Mo. State Univ.*, 2009 U.S. Dist. LEXIS 62436 (E.D. Mo. July 20, 2009). The Board of Regents of Southeast Missouri State University (SEMSU) moved to dismiss a negligence claim brought against it by an SEMSU football player and his father after injuries the player suffered when he was attacked at a school-sponsored event were exacerbated when he collided with another player and landed on his head during practice. The school had cleared him to participate even though he was complaining about serious headaches stemming from the attack. The District Court granted the motion, holding there was no subject-matter jurisdiction to hear the claim because the Board was immune from suit under the doctrine of sovereign immunity. The court noted that SEMSU is considered an arm of the state under Missouri law.

*Ward v. Mich. State Univ.*, 773 N.W.2d 666 (Mich. 2009). A minor spectator at a Michigan State University hockey game and her parents applied for leave to appeal an appellate court's decision to reverse the denial of summary judgment to the University on a negligence claim brought against it by the spectator and her parents under the state's public building exception to government immunity. The claim arose out of injuries that the spectator suffered when she was struck in the head by a hockey puck that flew into the arena stands during a game. She and her parents argued that the University failed to install plexiglass to protect the section of the stands where she was seated. The appellate court held that the claim was barred because the plaintiffs failed to comply with the notice procedures mandated under state law.

Instead of granting the application, the Michigan Supreme Court vacated the appellate court's decision and remanded the case to reconsider the plaintiffs' appeal in light of its recent holding in *Chambers v. Wayne County Airport Authority*. In dissenting opinions, two justices admonished the majority for not affirming based on the Court's previous decision that compliance with the notice procedures in the state's highway exception to government immunity was a condition precedent to any recovery. The opinions emphasized that the exceptions were located in the same state statute and included virtually identical language, but that the Court was treating them differently. In a concurring opinion, a justice emphasized that the appellate court's decision was based on the Supreme Court's previous order in *Chambers*, which had been vacated.

*Weisberg v. Chi. Steel*, 2009 Ill. App. LEXIS 1337 (Dec. 31, 2009). Weisburg was an athletic trainer hired to provide training services to the defendant hockey team. He was seriously injured when hit in the head by a puck while in the bench area of the hockey rink. He brought an appeal of the trial court's decision that the contact sports exception, which allows for tort claims for injuries caused by willful, wanton, or intentional conduct, but not injuries due to ordinary negligence. The appellate court reversed and remanded, stating that because Weisburg is an athletic trainer, not a voluntary participant in the hockey practice, the contact sports exception does not apply. Furthermore, the appellate court determined that the purpose of the exception was to promote vigorous athletic competition, which would not be deterred because Weisburg was not an actual participant in this case.

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*Zaritsky v. New*, 2009 Conn. Super. LEXIS 1823 (July 6, 2009). A youth hockey player moved to strike a negligence claim brought against him in a lawsuit initiated by a referee after he suffered injuries when he was struck in the mouth by a stick swung by the player (or another unidentified player) during a game. The player alleged that the negligence claim was barred because participants in athletic contests only owe a duty to refrain from engaging in intentional or reckless conduct. The trial court denied the motion as untimely, emphasizing that it should have been filed at least three years earlier. The court also noted that the motion was filed several weeks after a certificate of closed pleadings should have been filed.

*Zayat Stables, LLC v. NYRA, Inc.*, 2009 N.Y. Misc. LEXIS 3158 (Sup. Ct. Nov. 18, 2009). Plaintiff, a professional horse rider, brought tort claims against the defendant, the owner of a horse race track. The plaintiff was injured when the race track officials started the race before the plaintiff was ready. The plaintiff was thrown from the horse and the horse was later injured when it attempted to jump the racetrack's inner fence.

The court dismissed the plaintiff's claims against the defendant because the risk that one may be thrown from a horse at the start of the race is an inherent risk of horse racing. Furthermore, the defendant's actions were not reckless and did not increase the risk of harm to the plaintiff. As a result, the court dismissed the claim under primary assumption of the risk and stated that the defendant owed no duty to the plaintiff to protect him against the inherent risks of horse racing.

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*Zeidman v. Fisher*, 980 A.2d 637 (Pa. Super. Ct. 2009). A recreational golfer appealed a trial court's decision to grant summary judgment to one of his playing partners on a negligence claim brought by the golfer after he suffered injuries when he was struck by a ball hit by the partner during a charity outing. Prior to the errant shot, the golfer drove over the crest of a hill that blocked the view of the green in order to ensure that the group ahead of them was out of harm's way. Subsequently, he began following the cart path back to the tee box, which ran alongside the fairway, to inform his partners that the green was clear. The golfer was not watching the tee box at this time; thus, he never saw his partner prepare to swing. He was less than 100 yards from the box, in full view of the partners, when the defendant took his shot.

The appellate court reversed, holding there was a genuine issue of material fact as to whether the golfer's negligence claim was barred by the assumption of risk doctrine or the no duty rule. In assessing the assumption of risk defense, the court determined that the golfer may not have consciously assumed the chance of being struck by a ball while he was driving back to the tee box because he did not anticipate that his playing partners would take a shot until they were assured the green was clear. In assessing the no duty defense, the court emphasized that participants are only shielded from liability for injuries caused by risks inherent in the sport, and that they still have a duty to avoid exposing their co-participants to other foreseeable risks of harm.

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### ***World Intellectual Property Organization Decisions***

*Board of Trustees of the University of Arkansas v. FanMail.com, WIPO Arbitration and Mediation Center (2009) (Badgley, Isenberg, Brown Arbs.)*. The University of Arkansas (Arkansas) brought a complaint against FanMail.com for its use of the domain name razorbacks.com. The Respondent operated a vanity email service, which allows one to purchase an email address such as johndoe@razorbacks.com. The panel was first concerned with the defenses of laches, estoppel and acquiescence. Arkansas waited thirteen years after the Respondant created the domain name to bring its complaint. Although the panel did not dismiss on these grounds, it believed that the significant delay worked strongly against Arkansas's claim, because the University was unable to explain the delay.

The panel also turned its attention to the three elements from paragraph 4(a) of the Uniform Domain Name Dispute Resolution (the Policy). First, the panel held that the domain name razorbacks.com was identical to the Arkansas's registered mark razorbacks. Second, the panel held that the respondent, as a seller of vanity email addresses, had the potential to possess rights or legitimate interests in the use of the domain name razorbacks.com in large part because Arkansas waited nearly fourteen years to bring its claim. Third, the panel held that there was insufficient evidence to demonstrate that FanMail registered and used the domain name in bad faith.

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*Federation Internationale de Football Association v. Javier Perez, WIPO Arbitration and Mediation Center (2009) (Ryan, Arb.)*. This is a WIPO Center decision involving respondent's use of a disputed domain name fifaworldcuptickets.com. FIFA brought claim against respondent after several supposedly failed attempts at independent resolution by the parties on the basis that the respondent's domain name was strikingly similar to FIFA's own website www.fifa.com. Respondant modeled its website after the official FIFA website, in an attempt to foster its ticket sales. FIFA argued, and the panel agreed, that the addition of worldcuptickets to the domain name was only a mere descriptor, and the respondent's domain name fully incorporated the FIFA trademark. Consequently, the panel held that there was a likelihood of confusion between the two marks, that the respondent had no rights in the domain name, and that the respondent must transfer the domain name to FIFA.

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*Fenerbahce Spor Kulubu Dernegi v. Maksimum Iletisim, WIPO Arbitration and Mediation Center (2009) (Khasawneh, Arb.)*. This WIPO Center decision stems from respondent's disputed use of the domain name fenerbahce.com and potential confusion with the complainant's domain names, including fenerbahce.org. The Center held that in order to bring a claim for domain name infringement under paragraph 4(a), a complainant must establish that (i) the disputed domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; (ii) the respondent has no rights or legitimate interests in respect of the disputed domain name; and (iii) the disputed name has been registered and is being used in bad faith.

The Center held that the Complainant had both a common law and registered trademark in the term Federbahce Spor Klubu. Additionally, and as a result, the Center found that the Respondent's domain name was identical to the Complainant's domain name. Furthermore, the addition of .com to the domain name was not sufficient to deter a likelihood of confusion. The Center held that the respondent had no rights in the trademark as the Complainant never transferred or assigned any rights to the respondent, even though an agreement existed between the two parties. The Center lastly held that the respondent used and registered the domain name in bad faith because the Respondant had a history of registered other football club's domain names in an attempt to commercially profit from said registration.

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*FIFA v. Carter, WIPO No. D2009-1232 (Oct. 28, 2009)*. The FIFA sought the transfer of the domain name fifaworldcup2010.com, which was registered by Chris Carter nine years earlier. The name resolved in a website controlled by a parking service with pay-per-click advertising links, including several that referenced South Africa and football. The website also featured an offer to sell the domain. FIFA owns registered international trademarks that incorporate the terms FIFA or World Cup, including at least one mark in the entire phrase FIFA World Cup. It also owns the domain name fifa.com, which resolves in a website that features information related to its soccer activities and past and future World Cup events, including the 2010 World Cup in South Africa. Carter had previously been involved in a series of cases in which he was accused of bad faith registrations.

The WIPO panelist transferred the disputed domain name to FIFA, finding the organization satisfied the three elements required under the UDNDRP. First, the panelist found the domain name was confusingly similar to FIFA's marks, noting that the number 2010 would most likely be understood as a reference to the year of the next World Cup event. Second, the panelist concluded that Carter had no rights or legitimate interests in the domain name, emphasizing that the domain was being used to take commercial advantage of FIFA's marks, and that the offer to sell was an attempt to unfairly capitalize on their value, which was solely attributable to FIFA's reputation. Finally, the panelist determined that the domain name had been registered and used in bad faith, noting that the term FIFA World Cup has been known worldwide since the early twentieth century, and that there was no legitimate way that Carter could have used the combination of those terms. The panelist also emphasized Carter's prior conduct, which created



an inference that he was deliberately attempting to use FIFA's marks for his own financial benefit.

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*Ladies Prof'l Golf Ass'n (LPGA) v. Soper, WIPO No. D2009-1101 (Sept. 30, 2009).* The LPGA sought the transfer of the domain name *lpgatour.com*, which was registered by Kevin Soper eleven years earlier, allegedly with the intent to create a non-profit website about the LPGA Tour; however, Soper did not have time to create the website, so he put the name up for sale four years prior to this action. He never attempted to sell the name to the LPGA, which had previously registered the name *lpga.com* and connected it to a website that is still used to promote the organization and its services. Nevertheless, the broker used by Soper attached the domain name to a pay-per-click (PPC) landing page, and he earned roughly \$1,000 per year from the golf-related links that placed on it. The LPGA owns registered trademarks in the terms LPGA and LPGA Tour. The latter mark was first registered after the domain name in dispute, but the association has been using it in commerce for over forty years.

The WIPO panelist transferred the disputed domain name to the LPGA, finding the organization satisfied the three elements required under the UDNDRP. First, the panelist found the domain name was identical to the LPGA's registered mark in the term LPGA Tour, and confusingly similar to the LPGA's registered mark in the term LPGA, which was completely incorporated in the name. Second, the panelist concluded that Soper had no rights or legitimate interests in the domain name, emphasizing that his stated intent to create a non-profit website about the LPGA Tour was not the type of concrete action that could establish evidence of a right. Finally, the panelist determined that the domain name was registered and used in bad faith, noting that Soper knew about the LPGA and his actions were designed to take advantage of the value of the LPGA's marks. The panelist also emphasized that Soper was responsible for ensuring that the PPC landing page did not take advantage of the LPGA's marks, regardless of whether he had control of the links placed on it.

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*Manchester City Football Club Ltd. v. Peeris, WIPO No. D2009-0686 (Oct. 2, 2009).* The Manchester City Football Club (MCFC), an English Premier League soccer team, sought the transfer of the domain names *manchestercityfc.com*, which was registered in 2002, and *mcfc.com*, which was registered in 2000, and were currently owned by an entity that had previously been found to have engaged in a business of buying domain names and selling them to interested third parties. The *manchestercityfc.com* name resolved in a parking page with pay-per-click advertising, including several Manchester City-related links. The *mcfc.com* name resolved in a website used by a parking service with similar links, and included an offer to sell the domain. The MCFC owns registered word trademarks in both Manchester City F.C. and MCFC, as well as two other domain names incorporating those marks. The owner of the disputed domain names contacted MCFC in 2008 and offered to sell them to the MCFC for £175,000. Later, it alleged that third parties were also making offers from the domains, and raised its asking price to £2 million. The owner also created the Mutwal Community Football Club (Mutwal Club) in 2005. It is a member of the Football Federation of Sri Lanka, and a vital part of the

Community Project program designed to help the country recover from the tsunami of December 2004.

The WIPO panelist transferred the disputed domain names to the MCFC, finding the organization satisfied the three elements required under the UDNDRP. First, the panelist found the domain names were identical to the MCFC's marks, which were fully incorporated into the names. Second, the panelist concluded that the domain owner had no rights or legitimate interests in the names, emphasizing that mcfc.com was not used by the owner prior to MCFC's objections, and that the Mutwal Club was created solely for the purpose of cybersquatting. The panelist noted that the domain owner acquired the manchestercityfc.com name for \$20,000 only to give it leverage in a possible deal with the MCFC, and that the mcfc.com name was never used to raise money for the Mutwal Club. Viewed in connection with later attempts to sell, the panelist found this sequence of events suspicious and not connected with a bona fide use of the domain names. Finally, the panelist determined that the domain names were registered and used in bad faith, emphasizing that they were acquired solely for their resale potential, which was directly connected to value of the MCFC's marks. In assessing use, the panelist noted that the names resolved in parking pages, and that the owner tried to induce the MCFC to buy them by lying about potential third party interest.

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*Nat'l Ass'n of Competitive Soccer Clubs v. Binler*, WIPO No. D2009-0957 (Sept. 7, 2009). The National Association of Competitive Soccer Clubs (NACSC), an entity that provides registration and sanctioning services for its member soccer clubs, leagues, and tournaments, sought the transfer of the domain name usclubsoccer.net, which was registered by Bruce Binler in 2007. The name resolves in a website used to promote two youth soccer tournaments, one of which was sanctioned by the NACSC in both 2006 and 2007. The NACSC operates a separate commercial website under the domain name usclubsoccer.org, but does not own a registered trademark in the term US Club Soccer. It attempted to register the term as a service mark in 2004, but the USPTO rejected its application because the term was not sufficiently distinctive. The USPTO emphasized that the alleged mark only combined a generic term describing the place where the services were provided with other generic terms describing the type of services provided. In response, the NACSC registered the mark on the USPTO's Supplemental Register, and filed another formal application with the office. The application was still pending at the time of this action.

The WIPO panelist denied the request, finding the NACSC could not satisfy the three elements required under the UDNDRP because it did not have service mark rights in the term US Club Soccer. It emphasized that registering the mark on the Supplemental Register does not establish a presumption that the mark is valid or that the mark is not generic. To the contrary, it implies that the mark is not distinctive. In assessing whether the NACSC had common law rights in the mark, the panelist found that the claimed term had not only failed to acquire a secondary meaning, but was incapable of acquiring one. It noted that the NACSC did not show how its decision to place the terms Club and Soccer together produced anything other than a description of the services it provided.

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*South African Football Ass'n (SAFA) v. Fairfield Tours (Pty) Ltd.*, WIPO No. D2009-0998 (Sept. 11, 2009). The South African Football Association (SAFA) sought the transfer of the domain name bafanabafana.com, which was registered by Fairfield Tours, a tour company which offers sport tours and allied services in South Africa and several neighboring countries. The tour company was not using the domain, but kept up the registration on a continuous basis. The SAFA has registered various trademarks in South Africa which incorporate the term Bafana Bafana, the internationally-recognized nickname of the South African national soccer team. The WIPO panelist transferred the disputed domain name to the SAFA, finding the association satisfied the three elements required under the UDNDRP. As a preliminary matter, the panelist determined that a letter addressed to the SAFA's legal representatives by the tour company should be admitted as evidence, noting the memorandum was not couched as a settlement proposal, but as an offer to sell the domain name at a price deemed fair by the company. As to the merits of the dispute, the panelist first found the domain name was identical or confusingly similar to the SAFA's trademarks, noting all of the SAFA's marks pre-dated the registration of the domain name, and that the term Bafana Bafana had been incorporated entirely into that name. Second, the panelist concluded the tour company had no rights or legitimate interests in the name, noting that the domain was registered only after the company was contacted by the South African Minister of Sport (SAMS), which emphasized that it needed permission from the SAFA to market the term Bafana Bafana. The panelist also pointed out that the company was unaware

that the domain name resolved to a website with Bafana Bafana references, and immediately took steps to clear those references upon request from the SAFA. Finally, the panelist determined that the domain name was registered and used in bad faith, relying in large part on the letter addressed to the SAFA's legal representatives. It noted that the company offered to sell the domain at a price far in excess of the out-of-pocket incurred, and that previous panels had determined the failure to use a domain is evidence of bad faith. The panelist also emphasized that the South Africa-based company must have known that the SAFA had rights in the Bafana Bafana nickname, especially after being contacted by the SAMS, and that the offer to transfer in exchange for trade associations with the SAFA, which was contained in the response to the complaint, also supported an inference of bad faith.

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*"You Make The Call..." is a newsletter published twice a year (spring, fall) by the National Sports Law Institute of Marquette University Law School, PO Box 1881, Milwaukee, Wisconsin, 53201-1881. (414) 288-5815, fax (414) 288-5818, [email](#). This publication is distributed via email to individuals in the sports field upon request.*

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