

## THE NATIONAL SPORTS LAW INSTITUTE CELEBRATES ITS 20TH ANNIVERSARY

2009 marks the 20th Anniversary of the creation of the National Sports Law Institute of Marquette University Law School. The 2009 issues of **For The Record** will include reports and perspectives from current and former leaders of the NSLI. The first perspective, from former Board of Advisor's Chair Clark Griffith was originally presented at the NSLI's 2008 annual conference on **Professional Sports: Current Issues and Their Implications**, held on Friday, October 24, 2008, at the Marquette University Alumni Memorial Union.



Clark Griffith

### The Importance of the Study of Sports Law and the Sports Law program at Marquette

By **Clark Griffith**, Commissioner, Northern League, and past Chair, National Sports Law Institute Board of Advisors

It is my considerable pleasure to address you this afternoon. I have had the honor of serving this organization for four years, the last two as Chairman of the Board of Advisors. More importantly, I am honored to have served after Attorney Ron Walter, from the Milwaukee Bucks, and before Attorney Casey Coffman, from Hicks Holdings, LLC, both leaders in the sports law community.

Today, I will discuss the importance of the study of sports law and the increasing importance of the National Sports Law Institute and Marquette's Sports Law program.

My path to this understanding has been long and not particularly straight. My first job in baseball with the Twins was the first year of the Major League Baseball Players Association. Needless to say, baseball executives of the day turned all the Union stuff over to the recent college graduate who seemed to have interest in the area. I learned an important lesson in my first year. In spring training 1967, while waiting for a table, I noticed Union Executive Director Marvin Miller and General Counsel Richard Moss in an adjoining room. Joe Cronin, American League president and a Hall of Fame shortstop and manager, was a member of our party and whispered to me "Come with me. Always be the big leaguer." We walked over and met Mr. Miller and Mr. Moss and I began a very long, friendly, argumentative, but cordial relationship with the two men who would introduce labor law to the Major Leagues. I learned that developing relationships is essential to deal making.

My introduction to sports law came through marketing and labor. When I was a young executive, I had this crazy idea that all major league logos should be sold centrally. This was not a very popular idea when I first proposed it to Commissioner Kuhn, and my audacity led to my becoming the head of the Major League Baseball Promotion Corporation, now MLB Properties.

Our first activity was to have the teams register their trade marks under the Lanham Act. One team said that this was foolish, because letting companies use our marks provided them with a lot of free publicity. I suggested that we would get more publicity and that we would be paid for it. Another team showed me a letter indicating that they had granted perpetual rights to the use of their marks to the biggest t-shirt seller in the Midwest. We had to buy back those rights at significant cost as the t-shirt seller understood

what he had even though the team did not. These situations brought me into contact with lawyers and the legal process and I found it fascinating.

My next experience was in negotiating stadium use agreements, which tied me to the legal process again. I learned about “use agreements” and “leases.”

The final straw that sent me to law school occurred one afternoon in an office nine stories over Sixth Avenue in New York. I was a member of the Player Relations Committee that managed player labor matters. I was in a conference room with five lawyers. One said to the other “That sounds like a §8(a)2 violation to me.” To which the other lawyer said, “No, that’s a §8(a)5 violation.” I heard that and decided that I had to know what it meant so that I could do the work better. I was in law school just over a year later.

I thought that I could go to law school full time and work full time. I did it, but I don’t recommend it. It was just after law school that I encountered sports law, which was unknown as a sub specialty in those days. The study of sports law is the study of that remarkable conflict between labor law, which encourages and embraces combinations restraining trade, and antitrust law, which finds such combinations, contracts, and conspiracies to be illegal. The conflict has been wonderful to watch as it has resolved itself over the seventy-four years from *Federal Baseball* to *Brown*.<sup>1</sup> Where among our cases can you find more lyrical descriptions of baseball than in Judge Smythe’s description of the game in his appellate court decision where he describes a game as being created by the players only to disappear (like a sunset) to be created again some other time and at some other place?<sup>2</sup> Clearly that is not the stuff of interstate commerce as it is incapable of being transported from place to place as each game is new. It is Smythe’s decision in *Federal Baseball* that was affirmed by Oliver Wendell Holmes, Jr.. How could he not? All of this occurred in the 1920s and continued into the 1970s. *Flood v. Kuhn* starts with a catalog of ninety-two former baseball players’ names—Eppa Rixey, Iron Man McGinnty, and Old Hoss Radbourne, and one umpire, Bill Klem.<sup>3</sup> Only sports allows Justices this levity.

The creation of unions is what really drove sports law, and when the football guys started suing each other, it really got moving. In a way, it begins when John Mackey started the long search for accommodation between labor and antitrust. The trial in Minneapolis started badly for the NFL when it was assigned it to NFLPA general counsel Leonard Lindquist’s best friend, Earl Larson, who found that the NFL was guilty of a per se violation.<sup>4</sup> Then 8th Circuit Court of Appeals Judge Donald Lay found that the rule of reason was appropriate, ruled against the NFL and laid down the Mackey rules.<sup>5</sup> Under the decision, the exemption applies where the contract deals with mandatory subjects of bargaining, is between the parties only, and is the product of bonafide arms length negotiation. Every sports law student learns to recite these rules by heart - at least in my class.

So it was settled that the labor exemption attached to negotiated contracts, but variations in that scheme took us to *McNeil, White*,<sup>6</sup> the convoluted settlements, and the bizarre scenario of a union de-certifying in a Judge’s chambers so that an antitrust case could be filed, then re-certifying to make a deal, then de-certifying again to sue, and finally re-certifying to make a deal. Where else do you find this drama in our jurisprudence? It doesn’t exist. You can only find it in sports law cases.

<sup>1</sup> *Federal Baseball Club of Baltimore, Inc. v. Nat’l League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

<sup>2</sup> *Nat’l League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681 (D.C. Ct. App. 1920).

<sup>3</sup> *Flood v. Kuhn*, 407 U.S. 258, 263 (1972).

<sup>4</sup> *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975).

<sup>5</sup> *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

<sup>6</sup> *McNeil v. NFL*, 790 F.Supp. 871 (D. Minn. 1992); *White v. NFL*, 41 F.3d 402 (8th Cir. 1994).

Not only are the sports law battles intellectually expanding, but we have our personal battles as well. The ying and yang between Judges Will and Easterbrook, and between the Bulls and the NBA in the WGN series of cases,<sup>7</sup> are examples of the drama of sports law that can only be duplicated in Tolstoy or Dickens. Of course, Judge Will dying in the process added a Greek tragic moment as well.

Then we have our insiders fights, my favorite being the squabble between Shira Scheindlin and Sonja Sotomayor. In the *Clarett* case, the two judges sat on the same bench in the Southern District of New York for several years and Sotomayor went on to the Second circuit court. When Maurice Clarett wanted to attack NFL restrictions so that he could play, he filed his case in that same Southern District. Of course I consider that to be a great error in that you do not want a player's case ending up at the Second Circuit. As happens on so many sports cases, the player wins at the trial level only to be reversed on appeal. (It just occurred to me that may be the reason I like this so much). The timing of the suit was such that a favorable decision by Sheindlin would put Clarett on the field before the Court of Appeals could act, dealing a *fait accompli* to the NFL. But when the decision was rendered by Sheindlin,<sup>8</sup> Sotomayor swooped in and invoked the non-statutory exemption for labor from antitrust and reversed her before poor Clarett could have his ankles taped.<sup>9</sup> The non statutory exemption won again and the drama of sports law continued.

Then again, there are those dramas that occur in the law that take on added significance in sports. This is where a litigant has no idea why he or she is in the court room. This happened with Umpires Association Director Richie Phillips who, when appearing in court on a motion argument, was asked by a judge why he was there, and said, "Well I hoped you'd think of something." He lost.

There is also the lawyer who told a team to renew its "lease" in October, because no one can enjoin a breach of a lease only to learn later that it was a "use agreement" that the team had and the arguments were all wrong. That one saved the Minnesota Twins from contraction.

My favorite case for bald faced temerity is the NCAA case where it had a classification of coaches known as the "Restricted Earnings Coaches."<sup>10</sup> That kind of label does not get you success in antitrust court rooms and it cost the NCAA a lot of money. Neither does arguing impasse when the union makes a counter offer, or arguing that salary arbitration is a permissive subject of bargaining, and not sufficiently related to wages, hours, and other terms and conditions of employment to be a mandatory subject of bargaining. That one lost too, but ended a strike in 1995.

That leads me to a consideration of why the NSLI is important to the sports community. First, it concentrates on its faculty and Board of Advisors, both leading thinkers in sports. Second, it takes that intellectual activity and produces learning that is distributed by a variety of means, including the *Marquette Sports Law Review*, and its web presence, that offers resources for sports lawyers worldwide.

In brief, sports law is the most exciting area of the law for students and practitioners, and the NSLI is the leading institution in furthering the study and practice of sports law. It has been my honor to serve and I look forward to my continued association. Thank you.

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<sup>7</sup> Chicago Professional Sports Limited Partnership & WGN v. NBA, 95 F.3d 593 (7th Cir. 1996).

<sup>8</sup> Clarett v. NFL, 306 F. Supp. 2d 411 (S.D. NY 2004).

<sup>9</sup> Clarett v. NFL, 369 F.3d 124 (2nd Cir. 2004).

<sup>10</sup> Law v. NCAA, 134 F.3d 1010 (10th Cir. 1992).