

# SURVEY

## 2008 ANNUAL SURVEY: RECENT DEVELOPMENTS IN SPORTS LAW

### INTRODUCTION

This survey reports on sports-related cases that were decided between January 1 and December 31, 2008. The survey was not intended to include every case related to sports law decided in the past year, but instead to provide summaries of some of the more significant and interesting cases. The intention behind this survey is to give the reader an understanding of the breadth and depth of the law as it is applied in the sports context and to highlight the developments in sports law in 2008. To aid the reader, the survey is divided into subsections based on particular areas of sports law.<sup>1</sup>

### ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution is a collection of extrajudicial means, including mediation and arbitration, by which conflicts can be resolved. In the international sports context, the Court of Arbitration for Sport (CAS), based in Switzerland, is a forum in which many sports conflicts are resolved. For many sports governing bodies around the world, use of this arbitration system is obligatory. For conflicts arising during the course of the Olympic Games, the CAS ad hoc Division resolves conflicts on-site in an expedited process. In part because of the CAS system, alternative dispute resolution has become an important development in international sports.

#### *Apollon Kalamarias FC v. Olympiacos FC*<sup>2</sup>

Apollon and Olympiacos played an official football match where Apollon fielded an ineligible player. The Disciplinary Committee of the Super League ordered the match replayed. The Appeal Committee upheld the match in Olympiacos' favor and deducted one point from Apollon's standing. CAS held it had jurisdiction because the Football Matches Regulations, Hellenic Football Federation (HFF), and FIFA, the international federation for football,

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1. The cases are listed in alphabetical order within each section.  
2. CAS 2008/A/1525, award of Apr. 21, 2008.

statutes fully recognize the jurisdiction of CAS. CAS also held that respondents lacked standing concerning the remedies requested because those with power to ratify final standings were not a party to this action. Intervening parties' requests were denied for failure to intervene at an earlier stage or to include factual or legal argumentation. Finally, CAS applied a three-factor test and determined that provisional remedies should not be granted. CAS noted there were three regulations that disallowed appellant's actions, appellant would have been relegated even if the requested measures were granted, and the risk of harm caused to appellant is limited while ordering a modification of the Super League standings might harm Respondent and other teams.

*Asian Handball Federation (AHF) v. International Handball Federation (IHF)*<sup>3</sup>

The AHF challenged the decision of the IHF to nullify the results from the Men's and Women's Qualifying Tournaments that the AHF organized and to host replay qualifying tournaments. From August 26-29, 2007, the AHF hosted the Women's Qualifying Tournament in Almaty, Kazakhstan. From September 1-6, 2007, the AHF hosted the Men's Qualifying Tournament in Toyota, Japan. After the results of the tournament, South Korea sent a letter objecting to the results. On December 17-18, the IHF held its semi-annual meeting and voted to cancel the results of the tournaments and ordered their replay. The replay tournaments took place on January 29-30 in Tokyo, Japan. For the men's tournament, the decision to cancel the results was based primarily on the selection of officials and the officiating during the Kuwait and South Korea match. The AHF chose two officials from Jordan who were not certified by the IHF to officiate international matches. During the first half of the match, the officials whistled the Koreans for forty fouls and the Kuwaitis none. After an IHF representative spoke to the officials at halftime, the referees did a better job of calling the match. However, the Kuwaitis won. There was a videotape of the match to view. Experts who viewed the tape verified that there was no justification for many of the calls that were made during the game. For the women's tournament, the match in question was between South Korea and Japan. Japan beat South Korea, which allowed Kazakhstan to win the tournament based on goal differential. South Korea and Japan both claimed that the officials were biased toward Japan. However, there was no tape of the match because no video taping of any kind was allowed during the tournament. CAS determined that the IHF did not follow

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3. CAS 2008/O/1483, award of May 20, 2008.

proper procedure because it did not provide a proper agenda to the meeting, did not furnish preparatory documents, and did not officially invite the AHF to the meeting. Therefore, the IHF decision on December 17, 2007 was null and void. However, CAS ruled that the AHF improperly selected the Jordanian officials to referee the men's tournament because they were not internationally qualified. In addition, CAS ruled that the mistakes made by the officials were the result of bias. The results of the game were not recognized. Because this was the decisive match of the men's tournament, the entire tournament could not stand. Due to the time constraints and scheduling conflicts of trying to host another tournament, CAS ruled that the replay tournament was valid. For the women's tournament, CAS ruled that the officials used were internationally qualified. In addition, there was no evidence of bias. Therefore, the original women's tournament was valid and those results stood.

*Australian Olympic Committee, Inc. (AOC) v. D'Arcy*<sup>4</sup>

The AOC alleged that Nicholas D'Arcy, an Australian swimmer, violated the terms of the 2008 Team Membership Agreement when D'Arcy, allegedly intoxicated, was criminally charged with assault following an altercation in a bar. CAS initially issued a Partial Award, which determined that D'Arcy's conduct was likely to, and did, bring him into disrepute. As a result, the Partial Award concluded that D'Arcy had breached Clause 2.2(6) of the AOC's Ethical Behaviour By-Law and had not met the continuing condition imposed by Clause 2(8) of the 2008 Team Membership Agreement. Because the Partial Award determined that the proper procedure laid down by Clause 2 of the Membership Agreement regarding the termination of an athlete's membership was not followed, the decision to terminate D'Arcy's membership from the 2008 Australian Olympic Team was set aside.

After the Partial Award, the parties were allowed to provide written submissions regarding whether the matter should be remitted to the AOC to exercise the discretion granted to it under Clause 2 of the Membership Agreement or whether the parties consented to having the CAS Panel exercise that discretion. D'Arcy submitted that CAS should exercise the discretion under Clause 2 of the Membership Agreement while the AOC requested that the matter be remitted to it for the exercise of discretion. CAS ordered remission to the AOC to decide whether the discretion of Clause 2 of the Membership Agreement should be exercised.

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4. CAS 2008/A/1539, award of June 2, 2008.

*Australian Sports Anti-Doping Authority (ASADA) v. Van Tienen*<sup>5</sup>

ASADA, on behalf of the Australian Weightlifting Federation (AWF), alleged that Belinda Van Tienen, an Australian weightlifter, violated the anti-doping policy of the AWF based upon: 1) a urine sample test administered to Van Tienen in June 2005 at the Mermet Cup Weightlifting event in the United States, and 2) admissions made by Van Tienen during an interview in the course of the AWF investigation that she had ingested Fortius Synephrine during the Mermet Cup, and that the probable inference should be drawn that Benzylpiperazine (BZP), which is prohibited, was contained in the substance. Multiple Australian weightlifters tested positive for BZP four months after the Mermet competition, and after an investigation commenced by the Australian Sport Anti-Doping Agency, Van Tienen was suspected to have taken BZP as well. Van Tienen's Mermet Cup A sample was retrospectively evaluated via analytical data from the screening performed on the samples, which were stored electronically. The reference standard of BZP was compared to the sample's retention time and chromatogram, and it was determined that Van Tienen did indeed have BZP in her system. Van Tienen argued that there was not sufficient evidence to permit, with a high level of comfortable satisfaction, the finding that Van Tienen violated the anti-doping rules because there was no B sample to back up the A sample results. Also, her alleged admissions in the interview were taken out of context and did not amount to proper admissions, and, in any event, they did not have any weight or probative value. According to the Anti-Doping Protocol, allegations of violations of the Anti-Doping rules must be proven to a higher level of satisfaction than the balance of probabilities. Pursuant to the Anti-Doping Protocol, the facts related to anti-doping rules violations may be established by any reliable means, including admissions. Since ASADA does not have the benefit of a positive analytical result in this case, the burden rests on ASADA to prove an Anti-Doping Rules violation with circumstantial evidence. Previous cases make it clear that retrospective computer data analysis is admissible evidence. Since Van Tienen did not present evidence that the doctor conducting the test lacked expertise, or that the method of evaluating the tests were flawed, the challenge by Van Tienen to the admissibility of the evidence from the retrospective test fails. CAS found that the evidence from the retrospective test should be accepted, and it, accordingly, constituted a reliable means by which the ultimate conclusion could be established. The test provided substantial weight and probative value in CAS's consideration of whether ASADA, pursuant to its burden of proof, met the requisite standard of proof in the circumstances of

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5. CAS A3/2007, award of June 16, 2008.

the case. CAS further agreed with ASADA that Van Tienen's answers in interviews resulted in the conclusion that Van Tienen ingested Fortius Synephrine, which contained BZP. CAS was satisfied that the combination of this evidence established the violation by reliable means in all the circumstances of this case. Van Tienen's results from the 2005 Mermet Cup were disqualified, and Van Tienen was ruled ineligible to compete for two years.

*Australian Sports Anti-Doping Authority (ASADA) v. Wyper*<sup>6</sup>

ASADA alleged that Andrew Wyper, an Australian cyclist, violated the Anti-Doping Policy of Cycling Australia in two ways: constructive possession and attempted use of prohibited substances. Wyper ordered hGH and EPO online, but his order was seized by the Department of Customs in Sydney. Wyper pled guilty to the criminal charge of importing prohibited imports, but did not believe that admission established the two ASADA violations. Constructive possession requires that an athlete had exclusive control over the substance or knew about the presence of the prohibited substance and intended to exercise control over it. Here, Wyper never had exclusive control over the hGH and EPO because they were confiscated before he received his order. Wyper intended to exercise control over the substances, but CAS held that there was no constructive possession because he never knew about the presence of the prohibited substances. Although he knew he ordered the drugs from a man in Indonesia, no evidence established that Wyper had knowledge of the presence of the drugs. CAS did find attempted use because Wyper's research about and ordering of the drugs was enough to show that he was purposely engaging in conduct constituting "a substantial step in a course of conduct planned to culminate in the commission of an Anti-Doping Rule Violation."

*Azerbaijan National Olympic Committee (ANOC) & Azerbaijan Field Hockey Federation (AFHF) v. Federation Internationale de Hockey (FIH)*<sup>7</sup>

Following a Women's World Hockey Qualifier Competition, two members of the winning team, the team representing the Real Federacion Espanola de Hockey (RFEH), had A and B samples that showed abnormal levels. Article 11.1 of the FIH Anti-Doping Policy states that if more than one member of a team sport commits an anti-doping violation, the team may be subject to disqualification. One of the athletes committed an anti-doping

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6. CAS A4/2007, award of Aug. 21, 2008.

7. CAS ad hoc Division (O.G. Beijing 08) 08/01, award of Aug. 2, 2008.

violation, but was found to have no fault or negligence by the Judicial Commission, while the other athlete was not found to have committed an anti-doping violation. The AFHF, who finished second at the competition, requested documentation and a copy of the decision regarding the athletes' violations, but their request was denied by the FIH. The AFHF wanted CAS to review the case *de novo* and determine that the two players had committed anti-doping violations, the RFEH team should be disqualified, and the AFHF team should be declared the winner of the event and replace the RFEH at the 2008 Olympics. However, CAS found that AFHF had no right of appeal under the FIH Anti-Doping Policy and therefore lacked standing to bring the appeal.

*Azerbaijan National Olympic Committee (ANOC) & Azerbaijan Field Hockey Federation (AFHF) v. Federation Internationale de Hockey (FIH)*<sup>8</sup>

Because they were found to lack standing in the previous case, AFHF went back to CAS seeking an order requiring FIH to bring the appeal. AFHF claimed that FIH abused its discretion because its decision not to appeal the case was contrary to the position it originally argued to the Judicial Commission, discriminated against AFHF, and denied AFHF the opportunity to present its case. However, CAS said FIH did not abuse its discretion. CAS found that a federation must have the discretion to adopt the reasoning of its Judicial Commission and decide not to appeal. Further, CAS stated that although AFHF was affected by FIH's decision not to appeal, that did not amount to discrimination. Lastly, CAS reiterated that AFHF did not have standing to bring an appeal; therefore, the FIH was not abusing its discretion when creating a situation for AFHF to present its case.

*Azerbaijan Field Hockey Federation (AFHF) & Azerbaijan National Olympic Committee (ANOC) v. Federation Internationale de Hockey (FIH)*<sup>9</sup>

AFHF appealed to CAS a third time over the same facts described in *CAS ad hoc Division (O.G. Beijing 08) 08/004*. AFHF was presented a copy of the decision that determined that one of the RFEH athletes did not commit an anti-doping violation, while the other athlete had no significant fault or negligence for her violation. AFHF claimed the decision shows that they were blamed for committing sabotage of the RFEH team by the Judicial Commission. AFHF now alleged that the Judicial Commission's findings against them were made in a circumstance where they should have had a right

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8. CAS ad hoc Division (O.G. Beijing 08) 08/004, award of Aug. 5, 2008.

9. CAS ad hoc Division (O.G. Beijing 08) 08/05, award of Aug. 8, 2008.

to be heard and were not given one. CAS found that there were no adverse findings against AFHF in the decision, and, therefore, this case was no different than the first one. In essence, AFHF was appealing the first decision by CAS and that is precluded by Article 21 of the CAS ad hoc Rules. Further, CAS agreed that the first award was correct, and, therefore, declared again that AFHF had no standing to bring the appeal.

*Boxing Australia Incorporated v. Association Internationale de Boxe (AIBA)*<sup>10</sup>

The International Olympic Committee (IOC) set forth the boxing qualification rules for the 2008 Beijing Olympic Games. These rules state that each federation of the AIBA is allowed to enter no more than one boxer in each weight category. Boxing Australia, the Australian national governing body for boxing, followed the AIBA rules for qualification for the Oceania Continental Championships (OCC), which allowed two boxers to be entered in each category according to Art. 10(c) of its constitution. Boxing Australia was under the impression that the rules for the OCC would also serve as the qualifying rules for the Beijing Games. While arbitration of this dispute between Boxing Australia and the AIBA was pending, the AIBA announced that Australia would no longer be hosting the OCC and renamed them the “Oceania Continental Olympic Qualifier” in an attempt to end the dispute. CAS held, despite the AIBA’s discretion to devise a different Olympic pathway, that the AIBA had departed from the established OCC without the IOC’s approval, which is the Olympic Charter. Furthermore, altering the system at such a late stage would violate the principle of procedural fairness. Secondly, CAS held that the Olympic Qualification System does not specify the number of boxers each federation may enter, but that the reference to “*the*” continental championships in the System reasonably induced Boxing Australia to believe that it would hold the qualifying tournament as it had in the past. Finally, the AIBA had passed no new rule that overruled Art. 10(c).

*Adams v. Canadian Centre for Ethics in Sport (CCES)*<sup>11</sup>

The CCES, a non-profit organization promoting ethical conduct in Canadian sports, alleged that Jeffrey Adams, an elite-level, disabled, track-and-field athlete, committed an anti-doping violation because a prohibited substance was found in a urine sample taken during an athletic event. Adams, while at the Vatican bar with a friend, became tired and began to play a game with his friend by pretending he was asleep. During the time Adams was

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10. CAS 2008/O/1455, award of Mar. 18, 2008.

11. CAS 2007/A/1312, award of May 16, 2008.

pretending to sleep, an unidentified woman stuck her fingers in his mouth, causing Adams to lurch forward and feel a numbness in his mouth and throat. The woman, leaving the bar with a bag of white powder, confirmed that the substance was cocaine. Adams left the bar, and one hour after the incident, needed to urinate. Because of his condition, the condition that rendered Adams a paraplegic, Adams must self-catheterize to urinate. He used a clean, wrapped catheter, described in the hearing as the “Vatikan Catheter,” to urinate. At an athletic event several days later, Adams inadvertently used the Vatikan catheter kept in the emergency pocket of his wheelchair to provide a sample, although he testified that he brought several other catheters to the competition. Because Adams is a member of Athletics Canada, the National Sport Organization governing Canadian track and field, and because he receives funding from the Canadian government through Sport Canada, he has contractually agreed to submit to doping control procedures.

The sample obtained during the competition was tested and found to contain a cocaine metabolite, a prohibited substance under the Canadian Anti-Doping Program (CADP) rules. CAS, citing CADP Rules 7.16 and 7.18, held that the mere presence of a prohibited substance in an athlete’s sample, regardless of whether the substance entered the sample through contamination or recent drug use, was evidence of an anti-doping rule violation. Further, CAS noted that CADP Rule 7.17 imposed a strict liability standard, even though it may result in unfair results in certain situations. Despite the strict liability standard, CAS recognized the unique circumstances of the case, including their determination that the cause of the test results was the contamination of the Vatikan Catheter, rather than the presence of cocaine in Adams system at the time of testing. Although CAS ultimately ruled to eliminate the two-year ineligibility period initially imposed by the CCES, it ruled that Adams’ competition results, medals, points, and prizes, attributable to the athletic event at issue, were forfeited according to CADP Rules. CAS also ruled against the CCES decision to permanently ban Adams from receiving direct financial support from the Canadian government.

*Comitato Olimpico Nazionale Italiano (CONI) v. Petacchi & Federazione Ciclistica Italiana (FCI) and World Anti-Doping Agency (WADA) v. Petacchi & Federazione Ciclistica Italiana (FCI)*<sup>12</sup>

Alessandro Petacchi is an Italian international level professional cyclist. Because of exercise-induced asthma, Petacchi was given an Abbreviated Therapeutic Use Exemption (ATUE) authorizing him to use Salbutamol by

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12. CAS 2007/A/1362 & 1393, award of May 5, 2008.

inhalation to treat his condition. Salbutamol is a Prohibited Substance according to the WADA 2007 Prohibited List. In May 2007, Petacchi won the 11th stage of the Giro d'Italia and was asked to undergo a doping control test. After two WADA-accredited laboratories found concentrations of Salbutamol exceeding 1000 ng/ml, the level at which an Adverse Analytical Finding results even with Petacchi's ATUE, and, therefore, comprises a breach of the anti-doping rules, CONI requested a one-year suspension. The recommendation for the one-year suspension took into account that there had been no significant fault or negligence by Petacchi. The Italian National Cycling Federation rejected the disciplinary recommendation, finding that Petacchi did not violate anti-doping rules, thereby triggering the submission of the issue to CAS.

Petacchi stated that he only took Salbutamol by inhalation according to his ATUE and that the use of the inhaler after the race, and shortly before providing the sample, could explain the elevated test result. He also provided expert testimony supporting his contention. CONI and WADA disputed that the Salbutamol concentration of 1352 ng/ml could have resulted from the use of the inhaler in accordance with the terms of the ATUE and also provided expert testimony supporting their position. CAS concluded that Petacchi failed to show that the Salbutamol concentration was the consequence of therapeutic use of inhaled Salbutamol and concluded that Petacchi had breached the Anti-Doping Rules of the World Anti-Doping Code. Although CAS found that the analyses of the sample were incompatible with the targeted therapeutic intake of Salbutamol in accordance with his ATUE, it concluded that the overdose was not taken with the intention of performance-enhancement. Consequently, the Panel concluded that Petacchi bore "no significant fault or negligence," permitting CAS to restore his period of ineligibility to a period of one year. CAS rejected a complete elimination of his period of ineligibility because Petacchi's use of too much Salbutamol did not reflect Petacchi's use of "utmost caution," a requirement for a "no fault or negligence" finding. Because he did not satisfy the no fault or negligence requirement, he was also disqualified from all competitive results of the 2007 Giro d'Italia.

*FC Schalke 04 v. Federation Internationale de Football Association (FIFA)*,<sup>13</sup>  
*SV Werder Bremen v. Federation Internationale de Football Association (FIFA)*,<sup>14</sup> and *FC Barcelona v. Federation Internationale de Football Association (FIFA)*<sup>15</sup>

The Brazilian Football Federation (CBF) and the Argentinean Football Associated (AFA) wanted FC Schalke 04, SV Werder Bremen, and FC Barcelona to release players so they could play for the CBF and AFA teams in the 2008 Olympics. However, all three teams refused to release the players. FIFA required that any player under the age of 23 had to be released to play in the Olympics. Article 1 of Annexe 1 of the Transfer Regulations requires that players be released for matches on dates listed in the coordinated international match calendar, but the Olympics were not listed on this calendar, and CAS stated that the specific and unique nature of the Olympics did not constitute a legal basis to obligate teams to release their players. FIFA relied on customary law to require the release of the players. Under Swiss association law, customary law can create such an obligation, but only if there is a loophole which may be supplemented by customary law, if there is a constantly and consistently applied practice of FIFA, and if the members are convinced that such a practice is legally binding. CAS found that none of these three requirements were met here, and, therefore, the three teams were not under any legal obligation to release their players.

*Federation Internationale de Natation Amateur (FINA) v. Confederação Brasileira de Desportos Aquáticos (CBDA)*<sup>16</sup>

During the Brazilian Swimming Championships, three urine samples of the Athlete were collected and forwarded to a WADA-accredited laboratory. The first results indicated that the samples contained testosterone of exogenous origin. FINA then presented results to CBDA, which thought the findings were not sufficient to support a sanction. FINA then requested a B-sample analysis that returned the same results. In a letter, CBDA maintained that the anti-doping violation had not been established due to bacterial degradation. On appeal, CAS declined to exercise jurisdiction because the CBDA letter did not constitute a genuine “decision.” Therefore, the Athlete

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13. CAS 2008/A/1622, award of Oct. 2, 2008.

14. CAS 2008/A/1623, award of Oct. 2, 2008.

15. CAS 2008/A/1624, award of Oct. 2, 2008.

16. CAS 2007/A/1373, award of May 9, 2008.

was denied her right to have the alleged violation adjudicated on the CBDA level. CAS declined to hold that CBDA denied the parties formal justice just because it agreed to follow any decision taken by FINA or CAS.

*Federation Internationale de Football Association (FIFA) & World Anti-Doping Agency (WADA) v. Confederaçao Brasileira de Futebol (CBF), Superior Tribunal de Justica Desportiva do Futebol (STJD) & Mr. Ricardo Lucas Dodo*<sup>17</sup>

Respondent Dodo was found guilty by the STJD, the judicial arm of the CBF in Brazil for soccer violations, for testing positive for Fenproporex, a banned substance. Dodo claimed that he took the drug unknowingly and that it was from a faulty dose of caffeine pills that were handed out by the team. He was suspended for 120 days. WADA and FIFA both appealed, claiming that the suspension should actually be for two years under the applicable rules. The respondents, STJD, CBF, and Dodo, first contended that CAS had no authority to rule on Dodo's anti-doping violation case, because they were not governed by FIFA or WADA, but by the STJD and, therefore, the CBF. CAS dismissed this claim, holding that because the CBF is subject to FIFA regulations, the STJD, as the judicial arm of CBF, is also subject to FIFA regulations. Therefore, the STJD was dismissed as a respondent to the case. Further, because FIFA was the regulating body, according to CAS, over the CBF, WADA governed FIFA, and, therefore, the appeals could be made to CAS.

CAS addressed the issue of whether, after determining that there was indeed a doping violation, Dodo could avoid or lessen punishment by proving that there was "no fault or negligence" or "no significant fault or negligence." In the former situation, his sanction could be removed and, in the latter case, it could be still be sanctioned but for less than the maximum amount of time. CAS determined that the probability that the player had known he was taking an illegal substance outweighed the probability that he took the substance through no fault of his own, and, therefore, on the balance of the probabilities, the player loses. Dodo contended that he took the substance as a caffeine pill that he received from the staff of his team and that the pill was defective and contained the illegal substance. To this, CAS held that the player has the burden to establish that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered a prohibited substance. The panel determined that it could accept that the player could not have reasonably known or suspected

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17. CAS 2007/A/1370 & 1376, award of Sept. 11, 2008.

that there was an illegal substance. Because Dodo simply and without question ingested every product administered to him, he could not reach the high standard required to show “no fault or negligence” or “no significant fault or negligence,” and the maximum two-year suspension was upheld.

*Giuseppe Gibilisco v. Comitato Olimpico Nazionale Italiano (CONI)*<sup>18</sup>

CONI alleged that Giuseppe Gibilisco, a professional pole vaulter, violated article 2.2 of the WADA Code through an “attempt to use” prohibited substances. Gibilisco, a member of an Italian military corps, visited Dr. Carlo Santuccioni, who was previously suspected of providing prohibited substances to athletes like Gibilisco and who was suspended for five years by the Italian Cycling Federation. Gibilisco saw Dr. Santuccioni without the knowledge of his military superiors.

Procedurally, the Commissione Giudicante Nazionale imposed two years of ineligibility on Gibilisco under article 2.2 of the WADA Code for attempted use of prohibited substances. Upon Gibilisco’s appeal to the Commissione d’ Appello Federale of FIDAL, the Commissioner set aside the previous decision and acquitted Gibilisco of the sanction, noting that there was not clear evidence of Gibilisco’s conduct directed at consuming doping substances and citing a previous negative doping test result and the absence of prohibited substances in Gibilisco’s possession. CONI appealed that decision and prevailed, which resulted in a sanction of two years of ineligibility. Although a number of factors were cited in the decision, the ruling held that the factors considered demonstrated that Gibilisco called on Dr. Santuccioni with the goal of receiving prescriptions for doping substances, thereby constituting an attempt to use prohibited substances in violation of WADC article 2.2. Ultimately, CAS defined the relevant issue as whether Gibilisco’s conduct established an “attempt” within the meaning of WADC article 2.2. CAS concluded that although some of Gibilisco’s conduct was questionable, *e.g.*, calling on Dr. Santuccioni despite having knowledge of his previous involvement in doping practices, the absence of conclusive evidence, including a positive test result and a lack of prohibited substances in his possession, did not establish an attempt to use prohibited substances within the meaning of article 2.2. Consequently, Gibilisco was acquitted of the sanction imposed in the appealed decision.

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18. CAS 2007/A/1426, award of May 9, 2008.

*Australian Sports Anti-Doping Authority v. Nathan O'Neill*<sup>19</sup>

Nathan O'Neill (O'Neill), a professional cyclist, tested positive for Phentermine during the Tour of Elk Grove on August 12, 2007. As a result of his violation of the Cycling Australia (CA) policy, O'Neil's results were disqualified, and he was suspended from competitive cycling for two years. O'Neill did not deny taking the banned substance but argued that he honestly believed that he allowed enough time for the substance to clear his system. Phentermine is a prescription drug that is used as a weight loss medication that O'Neill takes when not competing. O'Neill last took the drug on August 4, 2007. It was his understanding through research on the Internet that the drug would clear his system after five days. This was corroborated by expert testimony at the hearing that the drug will usually exit the system in four to five days. However, Phentermine in alkaline urine could last up to ten days. O'Neill's training regimen before the race included taking a high volume of sodium pills. Therefore, the drug stayed in his system longer than five days and explained the positive test seven days after taking Phentermine. Because the CAS judge found no significant fault or negligence on O'Neill's part, it reduced the suspension to fifteen months.

*Iraqi Football Association (IFA) v. Federation International de Football Association (FIFA) & Qatar Football Association (QFA)*<sup>20</sup>

The national football teams of Iraq and Qatar played a match in March 2008 in order to qualify for the 2010 World Cup. Qatar's team won 2-0, but one of their players, Marcio Passos de Albuquerque "Emerson", was ineligible. IFA objected to FIFA, and, in June 2008, FIFA found that Emerson was ineligible to play for Qatar's team, but that the match between the two teams would stand. IFA tried to appeal the decision, but did not pay the application fee in time so in July 2008 FIFA denied the appeal. Article 130 of the FIFA Disciplinary Code explicitly states that if the appeal fee is not paid within the seven day limit, the appeal is not admitted. IFA was aware of this requirement, and FIFA did nothing that would lead IFA to think the time period had been extended or did not need to be complied with. Therefore, CAS confirmed FIFA's decision not to allow the appeal.

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19. CAS A1/2008, award of June 13, 2008.

20. CAS 2008/A/1621, award of Sept. 29, 2008.

*Italian Olympic Committee & Spanish Olympic Committee v. International Sailing Federation*<sup>21</sup>

When sailing to the start line of the Medal Race at the 2008 Olympics, the Danish team broke their mast. Because they did not have time to fix their boat, the Danish team borrowed the boat of the Croatian team, who did not qualify for the Medal Race. The Danish team finished in seventh place in the race and won the gold medal overall. The Italian and Spanish teams protested, but the Jury determined that no penalty should be imposed on the Danish team. The Danish team did violate rules by replacing more than just the damaged part of their boat and by using a boat that did not identify themselves on the hull and the sail, was not quarantined before the event, and did not have the proper on-board camera equipment; however, the Jury determined that the Danish team obtained no advantage from doing any of these things, and, under the circumstances, it was acceptable for them to use the Croatian team's boat. CAS determined that the Jury applied its own guidelines correctly and did not abuse its discretion when deciding not to disqualify the Danish team.

*Ganaha v. Japan Professional Football League*<sup>22</sup>

Kazuki Ganaha is a professional football player with Kawasaki Frontale, a team in the Japanese Professional Football League (J League). In April 2007, Ganaha received an intravenous infusion of vitamin B1 from the team doctor after complaining of cold-like symptoms. The J League determined that the treatment was not an "acute and legitimate medical treatment" of Ganaha's health condition. As a result, the J League found that the infusion infringed the J League's Anti-Doping Regulations, which incorporated the WADA Code, and suspended Ganaha for six official games. After evaluating whether Ganaha's infusion comprised a Therapeutic Use Exemption to the Code and noting that both parties had agreed that the medical treatment was not capable of enhancing Ganaha's performance, CAS concluded that there was no need to decide if an anti-doping violation occurred because Ganaha's conduct was undeserving of any sanction. In reaching its findings, CAS noted that applicable provisions of the WADA Code were unclear and that the medical evidence in this case was divided on whether an intravenous infusion was an appropriate medical treatment for Ganaha's condition. CAS ruled that

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21. CAS ad hoc Division (O.G. Beijing 08) 08/008 & 009, award of Aug. 23, 2008.

22. CAS 2008/A/1452, award of May 26, 2008.

although Ganaha was undeserving of sanction, he should not be sanctioned even if an anti-doping violation had occurred because under the “unique facts and circumstances” of the case, Ganaha acted “totally without fault.” The decision to suspend Ganaha was, therefore, set aside.

*Joan Christel Simms v. Federation Internationale de Natation Amateur (FINA)*<sup>23</sup>

Christel Simms is a Philippine national who was born in Hawaii and holds dual citizenship. Simms represented the United States in January 2007 and was accepted as a member of the Philippine Amateur Swimming Association (PASA) in February 2007. She began working towards qualifying for the 2008 Olympics, and PASA requested that FINA grant Simms a change of sport nationality. FINA denied the application; however, it was not clear to PASA that the application had been denied, and Simms went on to represent the Philippines at the World Championships in Manchester, a FINA competition, in April 2008. Rule 42 of the Olympic Charter requires a three year period since a dual citizen last represented his or her former country before he or she can represent the new country. However, this rule can be waived if both National Olympic Committees and the International Federation involved agree. Here, both the USOC and POC agreed to change Simms’ sport nationality, but FINA did not. However, FINA did not make that clear and allowed Simms to represent the Philippines at the World Championships in Manchester, thereby inducing PASA to prepare and train Simms for the 2008 Olympics. CAS, relying on an estoppel doctrine, found that Simms was eligible to represent the Philippines at the 2008 Olympics.

*Justin Gatlin v. United States Anti-Doping Agency (USADA)*<sup>24</sup> and  
*International Association of Athletics Federations (IAAF) v. USA Track and Field & Gatlin*<sup>25</sup>

Justin Gatlin was diagnosed with ADD as a child and was prescribed Adderall, which contains amphetamine, to treat the condition. In 2001, Gatlin was suspended for two years after testing positive for amphetamines. However, the IAAF Council allowed Gatlin to be reinstated early because they believed he had a genuine medical reason that explained the positive test. In 2006, Gatlin tested positive for exogenous testosterone, and a AAA panel suspended him for four years as this was his second offense. Gatlin argued

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23. CAS ad hoc Division (O.G. Beijing 08) 08/02, award of Aug. 1, 2008.

24. CAS 2008/A/1461, award of Sept. 10, 2008.

25. CAS 2008/A/1462, award of Sept. 10, 2008.

that this offense should be considered his first offense because the fact that he was reinstated nullified the 2001 offense. However, the IAAF had made it clear to Gatlin that his positive test was a violation and that any second offense would lead to a lifetime suspension. The IAAF wanted Gatlin's suspension to be increased to eight years, which is the equivalent of a lifetime suspension, and Gatlin wanted it reduced to two years. CAS determined that regardless of whether Gatlin was at fault for the first doping offense, he did commit it. Therefore, this was his second offense, and a four year suspension was appropriate.

*Landis v. United States Anti-Doping Agency (USADA)*<sup>26</sup>

Floyd Landis, an American cyclist, was the first place finisher in the 2006 Tour de France. However, Landis' urine sample after stage 17 of the race contained exogenous testosterone. After being notified that his A sample came back positive on July 27, 2006, Landis requested that his B sample be tested. Between August 3 and 5, 2006, the laboratory that tested the urine samples conducted the test on the B sample in the presence of Landis' attorney and expert. Landis' B sample also came back positive. Landis challenged the validity of these tests at a AAA arbitration hearing, and the panel found that the tests had been conducted under the proper standards. He was suspended from competitive cycling for two years beginning on January 30, 2007. During the AAA arbitration, seven B samples from the 2006 Tour de France were tested and four of those tests came back positive. Landis now appealed to CAS, and it reviewed the decision de novo. Landis first challenged the accreditation of the laboratory and the accreditation of the test used administered to his urine samples. CAS concluded that the testing procedure was properly accredited before it was used to test the urine samples for the 2006 Tour de France. Next, Landis challenged the results of the tests. Specifically, Landis challenged quality controls, linearity, peak identification, manual integration of the test results, chromatography, the May 2007 Electronic Data Reprocessing of his B samples for the testing before the AAA arbitration, the bottle chain of custody, the use of different columns in recording the testing, the validation of the laboratory's positive test criteria, the data recording requirements, the labeling procedures done for the test, the spirit of the same operator rule, and that the results ran contrary to the known science of testosterone metabolism. Landis claimed that the procedures used by this laboratory went against the International Standard for Laboratories (ISL). After reviewing the ISL and hearing testimony from both sides'

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26. CAS 2007/A/1394, award of June 30, 2008.

experts, CAS concluded that all procedures were in accordance with the ISL. Finally, Landis alleged that the laboratory used false statements, fraud, forgery, and cover-ups when providing evidence during the AAA arbitration and for the CAS hearing. CAS concluded that these accusations had no merit. CAS ruled that Landis was ineligible to compete in cycling for two years beginning on January 30, 2007. It further awarded USADA \$100,000 from Landis as a contribution towards USADA'S legal fees.

*M. & Club X. v. Club Y. & Federation Internationale de Football Association (FIFA)*<sup>27</sup>

Club Y., a Greek football club and member of FIFA, alleged that Player M, an Egyptian born player, negligently breached his labor contract with Club Y. without just cause when he returned to Egypt and signed a contract with Club X., an Egyptian football club and member of FIFA. M went to Egypt in 2005 on holiday, where he was called to serve for three years in the Egyptian army and was also detained and imprisoned thirty days for his desertion. Club Y. argued that M breached his contract without just cause by returning to Egypt, knowing that he needed to fulfill his military service and did so in order to escape his contract with Club Y. and play for an Egyptian club. Club Y. alleged that Club X. was jointly and severally responsible for encouraging M's breach. The FIFA Dispute Resolution Chamber ruled that M was responsible for the breach, reasoning that M was aware of possibly being called into service and was negligent in traveling to Egypt, accepting the risk of his travel. It also found Club X. jointly and severally responsible for M's breach and compensation owed. M and Club X. appealed FIFA's decision to CAS, claiming that Club Y.'s withholding of payments to M constituted a breach and provided M just cause for his breach. They further alleged that Club Y. had knowledge of M's potential military service when it signed him. They also asserted an impossibility of purpose defense by force majeure associated with M's imprisonment and military service. A labor contract breach with just cause requires a major violation by one party thereby releasing the other party from all further duties. The civil law principle of impossibility of purpose requires (1) the impossibility to be unforeseen and (2) the debtor not being held responsible for the impossibility. Finally, according to FIFA regulations, a club is presumed to have encouraged a professional's contract breach and, therefore, is jointly and severally responsible when it signs a player still contracted to another club. Here, CAS found sufficient evidence that M breached his contract to Club Y. It also denied M's claim that Club Y.'s

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27. CAS 2008/A/1448, award of June 25, 2008.

failure to perform its contract obligations gave M just cause to breach. Further, M failed to meet the criteria for frustration of purpose by force majeure. Finally, CAS found insufficient evidence that Club X. had an active role in M's breach and, therefore, held it jointly and severally responsible for compensation to Club Y.

*Mewing v. Swimming Australia Limited*<sup>28</sup>

Mewing, an Australian swimmer, challenged the decision by Swimming Australia, Australia's national governing body for swimming, to exclude him from the Men's 4 x 200 Meters Freestyle Relay Squad for the 2008 Summer Olympics. Mewing's time in the 200 meters freestyle event final at the Swimming Selection Trials was within the Olympic qualifying time for the event, although he finished last among the eight finalists, separated from the top finisher by 1.1 seconds. After the qualifying event, Swimming Australia nominated the first seven male finishers for inclusion on the 2008 Olympic Team but excluded Mewing, even though all eight of the finalists in the Women's 200 meters event were selected for inclusion. The primary issue before the sole arbitrator was whether the National Head Coach of the team failed to properly follow or implement the Nomination Criteria of the Olympic Team Selection By-Law by failing to recognize the "overall needs of the team" through his exclusion of Mewing. The Nomination Criteria, specifically clause 3(7)(B)(ii), notes that "(m)eeting the relay performance requirements does not guarantee nomination for selection." The coach argued that it was unlikely Mewing would have an opportunity to swim in the Olympics, that he would not be needed in any of the heats or events, and, therefore, that he was not needed on the team. The arbitrator held that Mewing did not establish the coach's failure, as the relevant decision-maker, to properly follow or implement the nomination criteria; that Mewing's attack was on the merits of the coach's decision, an impermissible argument; and that "in the absence of bad faith, dishonesty or perversity," Mewing's appeal could only succeed if it was shown that the coach, in nominating the relay team, did not give "proper, genuine and realistic" consideration to the "overall needs of the team." Because Mewing could not satisfy that standard his appeal was dismissed.

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28. CAS 2008/A/1540, award of May 9, 2008.

*Moldova National Olympic Committee (MNO) v. International Olympic Committee (IOC)*<sup>29</sup>

Octavian Gutu was born and educated in Moldova. He participated in the 2004 Olympics representing Moldova, but then went on to represent Romania in the Swimming World Championships of 2007. Gutu wanted to represent Moldova in the 2008 Olympics, but the IOC said he was not eligible. Gutu claimed to be a dual citizen of both Moldova and Romania. Rule 42 of the Olympic Charter allows a dual citizen to represent either country. However, because Gutu represented Romania at the Swimming World Championships, per Rule 42 he must wait for a period of three years before he is allowed to represent Moldova. Three years had not passed since he swam for Romania, and, therefore, Gutu was not eligible to represent Moldova in the 2008 Olympics.

*Nicholas D'Arcy v. Australian Olympic Committee (AOC)*<sup>30</sup>

When Nicholas D'Arcy was selected as a member of the 2008 Australian Olympic Team he signed an agreement that stated, among other things, he would not engage in conduct that would be likely to bring him disgrace. In March 2008, D'Arcy struck a man in the face while out at a bar, leading the Australian Olympic Committee to terminate his membership with the team. D'Arcy appealed that decision to CAS, and a hearing was conducted by The First Panel in May 2008. The First Panel held that D'Arcy did violate his agreement with the AOC, but that the AOC did not follow the proper procedure when terminating him. Therefore, CAS set aside his termination and ordered the matter to be remitted to the AOC. The AOC then gave D'Arcy the chance to present his case, but, ultimately, the AOC again decided to terminate his team membership, and this appeal to CAS followed. CAS dismissed D'Arcy's appeal, determining that the AOC was within its power to terminate D'Arcy's membership based on his serious misconduct.

*Oscar Pistorius v. International Association of Athletics Federations (IAAF)*<sup>31</sup>

The IAAF contended that the "cheetah" prosthetic legs Pistorius had used since he was eleven months old violated IAAF competition rules in that the legs contained "springs," which were against IAAF rules. The IAAF conducted tests on Pistorius, known as the Cologne tests, and concluded that he had a

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29. CAS ad hoc Division (O.G. Beijing 08) 08/006, award of Aug. 9, 2008.

30. CAS 2008/A/1574, award of July 7, 2008.

31. CAS 2008/A/1480, award of May 16, 2008.

slower starting time than able-bodied participants, but was faster on the straight runs. CAS concluded that the IAAF council's decision to ban Pistorius from IAAF sanctioned events was not unlawfully discriminatory, because the CAS panel was assembled to determine if Pistorius had an unfair advantage based on his prosthetics. CAS also concluded that the IAAF's decision in determining that Pistorius' use of the Cheetah-Flex Foot device contravenes Rule 144.2(e) of the IAAF rules needed to be overturned, because the term "spring" was not defined well enough. Further, CAS concluded that there was not enough scientific evidence to determine that the cheetah legs gave Pistorius an unfair advantage, because the tests that the IAAF took only measured whether he had a disadvantage at specific parts of the race, rather than by looking at his advantages or disadvantages of the race as a whole. Finally, CAS concluded that there was not enough evidence to show that Pistorius had any advantage over able-bodied athletes. It determined that he had to have an "overall net-advantage" over other runners. CAS also determined that there was not enough evidence to show any metabolic advantage in favor of a double amputee using the cheetah legs.

*Racing Club de Strasbourg Football v. Ismaily Sporting Club*<sup>32</sup>

Hosni Ebrahim Abdrabu was transferred from Ismaily football club to Racing Club de Strasbourg Football (RCSF) for 1,100,000 euros, and RCSF loaned Abdrabu back to Ismaily. If Ismaily chose to keep the player, RCSF would withhold the last installment of 300,000 euros due under the original player transfer, which would be used to offset the 800,000 euros Ismaily would owe for the repurchase of Abdrabu. Ismaily decided to repurchase Abdrabu, but failed to pay the 500,000 euros it still owed RCSF. RCSF then attempted to transfer Abdrabu to another team, but failed to tell Ismaily. When RCSF applied for an International Transfer Certificate, it was rejected because there was an existing transfer agreement with RCSF and Abdrabu. CAS found that RCSF did not agree to extend the time limit or receive the 500,000-euro payment in installments. Furthermore, CAS held that RCSF did not violate the terms of its agreement with Ismaily by attempting to sell the Abdrabu to a different team for more money. Finally, CAS decided that RCSF owed Ismaily 500,000 euros from the original transfer from Ismaily to RCSF and that French law governed the amount of interest to be paid because the FIFA rules do not contain provisions dealing with interest. CAS did not address the refusal of the International Transfer Certificate or the request to return the player to RCSF because neither FIFA nor the Player was party to

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32. CAS 2007/A/1388, award of May 21, 2008.

the action.

*Rainer Schuettler v. International Tennis Federation (ITF)*<sup>33</sup>

The German National Olympic Committee chose Rainer Schuettler to represent them at the 2008 Olympics, but the ITF declined to enter him in the men's singles tennis competition at the 2008 Olympics even though he met the basic eligibility requirements. Each country may have a maximum of four men compete in men's singles. The ITF has a ranking system, and when the list was published in June 2008, Schuettler was ranked eighty-ninth. Germany had two other players ranked above Schuettler, but nominated him instead. The ITF prefers that NOCs nominate their highest ranking players, but because that is a suggestion, and not a rule, CAS found that the ITF must allow Schuettler to represent Germany.

*Serge Despres v. Canadian Centre for Ethics and Sport (CCES)*<sup>34</sup> and *World Anti-Doping Agency (WADA) v. Despres, Canadian Centre for Ethics and Sport (CCES) & Bobsleigh Canada Skeleton (BCS)*<sup>35</sup>

Serge Despres was tested by CCES in August 2007. His sample contained a heightened level of nandrolone, which was a doping violation, causing BCS to suspend him for two years. Despres did not take the nandrolone intentionally. Despres began using Kaizen HMB supplements following hip surgery in 2007. The supplements were contaminated with nandrolone and caused him to test positive for prohibited levels of nandrolone. Because they found Despres had no significant fault or negligence that caused the violation, the Sport Dispute Resolution Centre of Canada reduced his suspension to twenty months. WADA and CCES both felt that the two year suspension should have been reinstated because the circumstances here were not truly exceptional. CAS noted that Despres did not contact the manufacturer directly to get a guarantee that the supplements were not contaminated, did not check with his doctor, did very limited research prior to taking the supplement, and did not exercise due care when taking other supplements. Therefore, CAS found that there was no reason to reduce Despres' two year suspension, which they ruled should begin on August 9, 2007, the date of his first sample collection.

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33. CAS ad hoc Division (O.G. Beijing 08) 08/003, award of Aug. 4, 2008.

34. CAS 2008/A/1489, award of Sept. 30, 2008.

35. CAS 2008/A/1510, award of Sept. 30, 2008.

*Sport Lisboa e Benfica Futebol SAD v. Union of European Football Associations (UEFA)*<sup>36</sup>

The Chairman of the Board of Directors for FC Porto Futebol SAD (Porto) was found guilty of two attempts of bribing referees. The Chairman filed an appeal with the Council of Justice of the Portuguese Football Federation (CJ PFF), and the matter was referred to the Union of European Football Associations (UEFA) judicial body to determine if the Porto team could play in the Championship League (CL) despite the charges against its chairman. According to CL regulations, Art. 1.07, the next-placed club that fulfills the admissions criteria shall replace a non-eligible club. UEFA determined that Porto was still eligible to compete in the CL. League Counsel then invited the two next-placed teams to participate in the appeal process and they both accepted. UEFA asked CAS to set aside the two teams' appeals and uphold its decision, while Porto asserted that applying the CL regulations violated the principle of non-retroactivity. CAS found appellants, the two next-placed clubs, had standing before CAS because they were directly affected by its decision. CAS also found that the criminal law prohibition of retroactivity does not apply to the CL Regulations. CAS overturned the decision of the CJ PFF because the facts were not convincing enough to show that Porto or its Chairman was involved in the illicit activity; therefore, the appeal by the two next-placed clubs was dismissed.

*Swedish National Olympic Committee (SNOC) & Ara Abrahamian v. Federation Internationale des Luttes Associees (FILA), Guillermo Orestes Molina Gonzales, Jean-Marc Petoud & Lee Ronald Mackay*<sup>37</sup>

In a wrestling match between Ara Abrahamian and Andrea Minguizzi, Minguizzi won the first period. Abrahamian received a point and would have won the second period, forcing a third period to determine who won the match, but, following the period, Abrahamian was assessed a warning, which took away his point and gave a point to Minguizzi; therefore, Minguizzi won the match. Abrahamian's coach asked for a "video check" to determine if the warning was justified, but FILA denied his request. The Swedish coach then attempted to file a formal protest, but FILA refused to consider the protest. By the time CAS ruled on this case, it was too late for Abrahamian to challenge the decision to give him a warning following the match or to disqualify the officials involved, as originally requested. However, CAS did rule that going forward FILA was required, by the Olympic Charter and its own internal rules,

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36. CAS 2008/A/1583, award of July 15, 2008.

37. CAS ad hoc Division (O.G. Beijing 08) OG 08/007, award of Aug. 23, 2008.

to provide a procedure for an appeals jury to promptly hear an athlete's claim that in a competition the relevant officials did not comply with FILA rules and procedures.

*Wigan Athletic AFC Limited (Wigan) v. Heart of Midlothian PLC (Hearts)*,<sup>38</sup>  
*Heart of Midlothian PLC (Hearts) v. Andrew Webster & Wigan Athletic AFC Limited (Wigan)*,<sup>39</sup> and *Andrew Webster v. Heart of Midlothian PLC (Hearts)*<sup>40</sup>

Andrew Webster chose to terminate his contract with Hearts with a little over a year remaining before it expired. He sought to unilaterally terminate his contract without cause on the basis of Article 17 of the FIFA status regulations. On August 9, 2006, Wigan signed Webster to a three-year contract, and Hearts filed claims with the FIFA Dispute Resolution Chamber (DRC) against Webster, alleging breach of contract, and against Wigan, alleging that Wigan induced the breach. Each party appealed the DRC decision to CAS. CAS found Andrew Webster and Wigan to be jointly and severally liable for breach of Webster's contract with Hearts under Article 17 of the FIFA status regulations. CAS rejected Hearts' contention that compensation for unilateral termination without cause should be punitive or based on the player's estimated market value (four million GBP). Instead, CAS awarded Hearts the remuneration remaining due to Webster under the employment contract upon its date of termination (150,000 GBP).

*World Anti-Doping Agency (WADA) & International Association of Athletics Federations (IAAF) v. United States Anti-Doping Agency (USADA) & Lindsey Scherf*<sup>41</sup>

Lindsey Scherf was diagnosed with exercise induced asthmas in 2003. She applied for, and was given, an Abbreviated Therapeutic Use Exemption (ATUE) from the IAAF for her asthma medication, Flovent, in 2005 and from USADA in 2006 and 2007. Scherf wanted to participate in the Gold Coast Marathon in July 2007 in Australia. Prior to the race, USADA informed Scherf that she would need an ATUE from the IAAF and that they would forward her application. Scherf did not hear whether her application was granted, and she was not in a position to stop using her medication. Therefore, she attempted to find out if there would be drug testing at the marathon. She

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38. CAS 2007/A/1298, award of Jan. 30, 2008.

39. CAS 2007/A/1299, award of Jan. 30, 2008.

40. CAS 2007/A/1300, award of Jan. 30, 2008.

41. CAS 2007/A/1416, award of Aug. 11, 2008.

was told that there likely would not be any drug testing, as there had not been the past three years, so Scherf participated in the marathon. After the race, she was selected for drug testing, but she refused to take the test knowing she would test positively. The next day Scherf requested to be tested, but it was too late. As it turned out, Scherf did not need this separate ATUE that USADA had informed her she needed. USADA offered Scherf a reduced one-year suspension, but WADA and the IAAF felt the full two-year suspension was more appropriate. Because of the mistakes made by USADA and the IAAF, CAS determined that exceptional circumstances did exist in this case, and, thus, Scherf bears no significant fault or negligence. Therefore, the one-year suspension was sufficient.

#### ANTITRUST

Antitrust laws are enforced to protect consumers from companies manipulating the market place through conspiracies to restrain trade or monopolistic business practices. In general, they dictate a business environment in which competition among firms benefits the consumer. In a sports context, antitrust law has been complicated by the fact that teams need to work together in leagues to produce athletic competitions, yet they remain individual legal entities. The courts have been working to find a balance between protecting the necessary joint endeavors of teams and maintaining competitive markets.

#### *Am. Needle Inc. v. Nat'l Football League*<sup>42</sup>

In 1963, the National Football League (NFL) teams formed NFL Properties, a separate entity created for the purpose of developing, licensing, and marketing NFL team intellectual property. NFL Properties was also charged with granting licenses to vendors to manufacture and sell various products bearing NFL logos and trademarks. American Needle held one such license for twenty years until 2001 when an exclusive license was granted to Reebok. As a result of the loss of its license, American Needle filed an antitrust suit against the NFL, NFL Properties, individual NFL teams, and Reebok. The district court held that the individual teams long acted as a single entity for the purposes of licensing intellectual property and dismissed American Needles antitrust claims. On appeal to the Seventh Circuit, the Court of Appeals agreed with the lower court, stating that NFL teams are best viewed as a single source of economic power when promoting the NFL through the licensing of intellectual property.

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42. 538 F.3d 736 (7th Cir. 2008).

*Bassett v. Nat'l Collegiate Athletic Ass'n*<sup>43</sup>

Claude Bassett, an assistant football coach at the University of Kentucky from 1997-2000, resigned in November of 2000 due to alleged National Collegiate Athletic Association (NCAA) rule violations. The University's athletic director, Larry Ivy, told Bassett that if he resigned, there would be no further inquiry into the alleged violations. The day after Bassett resigned, however, the University prompted an investigation of its football program for possible NCAA infractions. Bassett sued the NCAA, Southeastern Conference (SEC), and the University of Kentucky Athletic Association (UKAA), alleging antitrust violations, fraud, civil conspiracy, and tortious interference with prospective contractual relations. The United States District Court for the Eastern District of Kentucky dismissed all claims against the SEC and held that the fraud claim against the UKAA, as well as the tortious interference claim against the NCAA, were the only legitimate claims. The appellate court granted summary judgment in favor of UKAA and affirmed the district court's dismissal of Bassett's antitrust claim against the NCAA. The court held that Bassett's antitrust claim failed because he could not show any anticompetitive effect of the NCAA's enforcement of its rules on the coaching market, and that Bassett could not allege fraud because he could not have reasonably relied on Ivy's promise that the alleged violations would not be investigated further.

*Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*<sup>44</sup>

In an action continuing the long history of *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the plaintiff argued that the Association's Recruiting Rule violated the Academy's equal protection rights and that the Association violated antitrust laws. The defendant filed a motion for summary judgment on what it believed to be the only remaining claim, the antitrust claim. The plaintiff responded by filing a motion for judgment on the equal protection claim. However, the court denied the plaintiff's motion for judgment due to the U.S. Supreme Court's previous ruling that the Association did not unconstitutionally burden the plaintiff's First Amendment rights. With regards to the antitrust claim, the court ruled in favor of the defendants because neither the Recruiting Rule nor the punishment enacted under the rule involves trade or commerce as required for an antitrust violation.

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43. 528 F.3d 426 (6th Cir. 2008).

44. No. 3:97-1249, 2008 WL 2811307 (M.D. Tenn. July 18, 2008).

*Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*<sup>45</sup>

Kentucky Speedway filed an antitrust action against the National Association of Stock Car Auto Racing (NASCAR), which arose from NASCAR's refusal to grant Kentucky Speedway the opportunity to host a NEXTEL series race. Kentucky Speedway alleged that this action was a violation of sections 1 and 2 of the Sherman Antitrust Act. The court held that Kentucky Speedway did not present any evidence of an antitrust injury or any actionable anticompetitive behavior, nor did Kentucky Speedway present any evidence regarding the relevant market, and it dismissed all claims against NASCAR.

*Madison Square Garden, L.P. v. Nat'l Hockey League*<sup>46</sup>

The New York Rangers, a National Hockey League (NHL) club that plays at Madison Square Garden (MSG), wanted to opt out of the NHL's centralized internet and website operations. It preferred to use a private website owned and operated by MSG. MSG filed a lawsuit against the NHL, accusing the organization of operating as an illegal cartel and violating antitrust provisions. MSG also moved for a preliminary injunction against the league's effort to ban the club from operating an independent website. The U.S. District Court for the Southern District of New York denied the preliminary injunction. The club appealed, and the Second Circuit affirmed the district court's refusal to grant the preliminary injunction. In denying the motion, the Second Circuit Court found that MSG failed to demonstrate a likelihood of success on the merits because the prohibition against operating a separate team website (1) did not constitute a "naked restraint" and (2) survived preliminary scrutiny under a full rule-of-reason analysis. After the decision of the Second Circuit, the NHL moved for dismissal, or in the alternative for partial summary judgment. The district court granted the NHL's motion in part and denied it in part. The court agreed with the NHL that the bulk of MSG's suit was barred by the doctrine of laches. However, the court did not see the need to decide in this case whether the NHL was a single entity for purposes of liability under the Sherman Act.

*Major League Baseball Props., Inc. v. Salvino, Inc.*<sup>47</sup>

Major League Baseball (MLB) Properties, the exclusive licensing agent

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45. No. 05-138, 2008 U.S. Dist. LEXIS 1076 (E.D. Ky. Jan. 7, 2008).

46. No. 07-CV-8455, 2008 U.S. Dist. LEXIS 80475 (S.D.N.Y. Oct. 10, 2008).

47. 542 F.3d 290 (2d Cir. 2008).

for the Major League Baseball's intellectual property, filed an action against Salvino, Inc., a corporation that was making and selling plush bean-filled bears featuring the logos of certain baseball clubs. In its suit, MLB Properties alleged claims of trade dress infringement, breach of contract, and unfair competition. In response, Salvino sued MLB Properties and its corporate parent, alleging antitrust, unfair competition, and tortious interference claims. The two actions were consolidated. The district court granted summary judgment for MLB Properties on Salvino's antitrust claims, holding that Salvino failed to offer sufficient evidence to support a finding that the MLB Properties' collective licensing arrangement unreasonably restrained competition. Salvino appealed and argued that the district court erred by applying a rule of reason analysis rather than holding MLB's centralized trademark licensing arm either illegal per se or illegal under a "quick look" approach. The Second Circuit rejected Salvino's argument and held that the rule of reason applied. Given that what Salvino referred to as price-fixing was, in fact, profit-sharing by interdependent entities and that Salvino brought no evidence of any reduction of or agreement to reduce output, the district court properly applied the rule-of-reason standard and that under that standard Salvino failed to show any genuine issues to be tried. The district court's dismissal of Salvino's antitrust claim was affirmed.

*Nat'l Athletic Trainers' Ass'n v. American Physical Therapy Ass'n*<sup>48</sup>

The National Athletic Trainers' Association (NATA) filed this antitrust lawsuit against the American Physical Therapy Association (APTA) for acting as a monopoly and colluding to harm NATA's business practices. NATA alleged that APTA was improperly claiming that manual therapy techniques could only be provided by physical therapists and not athletic trainers. In its complaint, NATA accused APTA of refusing to educate athletic trainers on proper techniques and representing to the public that physical therapists could provide additional services that athletic trainers could not. The district court ruled that NATA did not have organizational standing to allege an antitrust claim and could only seek injunctive or declaratory relief. Additionally, the court held that it could not exercise personal jurisdiction over NATA's cross claim against Orthopaedic Section, Inc. because Orthopaedic did not transact business in the district. However, the court could exercise jurisdiction over APTA.

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48. No. 3:08-CV-0158-G, 2008 WL 4146022 (N.D. Tex. Sept. 9, 2008).

*Windage, LLC v. U.S. Golf Ass'n*<sup>49</sup>

The United States Golf Association (USGA) regulates the game of golf in the United States and Mexico. The USGA determines the Rules of Golf. Rule 14-3(b) does not allow the use of artificial devices to gauge conditions that might affect play. Windage created a golf ball-sized container that emits talc powder when squeezed. The device is intended to allow golfers to gauge the wind speed and direction without plucking grass. The USGA determined that Windage's device did not conform with the Rules of Golf. Golf pro shops and other retailers refuse to purchase Windage's device. Windage claimed that USGA's decision and the retailers' subsequent refusal to stock the device equates to an illegal agreement in the restraint of trade. The court granted USGA's motion to dismiss for failure to state a claim because Windage's assertions of an agreement were not supported by any factual allegations in the complaint. Without an agreement, there can be no antitrust violation.

## CONSTITUTIONAL LAW

The Federal Constitution and state constitutions offer protection from certain government actions. Because public schools are state actors and cities often own or control sports facilities, constitutional protections are often invoked in disputes arising in sports contexts. Public schools and cities are prohibited from engaging in certain types of conduct with regards to student-athletes and sporting event patrons. However, with regard to school sports, athletics participation is not a constitutionally protected right, neither is the right to a coaching position. With regard to patrons attending a sporting event, attendance may be seen as a waiver of certain protected rights. The following cases discuss First Amendment rights, various rights to privacy, and issues of due process.

*Borden v. Sch. Dist. of E. Brunswick*<sup>50</sup>

High school football coach Marcus Borden filed a claim against the School District of East Brunswick (School District) because Borden wanted to silently bow his head during his team's pre-meal grace and kneel with his team during a locker-room prayer. Borden argued that the School District's policy forbidding faculty participation in student-initiated prayer violated the Constitution. The district court agreed, finding that Borden's silent acts would not violate the Establishment Clause of the First Amendment. On appeal, the

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49. No. 07-4897, 2008 WL 2622965 (D. Minn. July 2, 2008).

50. 523 F.3d 153 (3d Cir. 2008).

court held that the School District's policy was not unconstitutional because it merely reflected the law with respect to how school officials must act in order to not violate the Establishment Clause. The appellate court also held that Borden's silent acts would run afoul of the Establishment Clause because, when considering Borden's twenty-three years of prior prayer activities with the high school football team during which he organized, participated in, and led prayers, a reasonable observer could conclude that Borden was endorsing religion.

*Brannum v. Overton County Sch. Bd.*<sup>51</sup>

Thirty-four middle school students brought suit against the school district, claiming that their right of privacy was infringed upon when the district installed video surveillance equipment in their school locker rooms. The students claimed that their Fourth Amendment right against unreasonable searches and seizures was violated because the video cameras recorded footage of areas where the students would change before practices or games. These images were accessible on the internet to anyone with an applicable username and password. The court held that even though the school did install the cameras for security purposes, the school did not have any legitimate reason to think the students' safety in the locker rooms warranted installation of the cameras. The court held that the students' right of privacy was violated. The school's principal and vice principal argued that they were not liable due to the doctrine of qualified immunity; however, the court disagreed because they made the decision to install the cameras. Qualified immunity was granted in favor of the Director of Schools, as well as the school board members, because these individuals did not authorize the installation of the cameras.

*Bryant v. Gardner*<sup>52</sup>

Lamont Bryant was the boys' basketball coach at John Marshall High School in 2003. Bryant was subsequently terminated, and he alleged that the athletic director injured his reputation by making disparaging public comments about him. The court found that Bryant adequately alleged an alteration in legal status sufficient to warrant a protected occupational liberty interest. The athletic director allegedly stated that Bryant had cursed at bus drivers, threatened and failed to protect some players, disrespected fellow coaches, and failed to follow protocol regarding money. Because these were statements of fact, they were sufficient to injure one's reputation in the coaching profession,

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51. 516 F.3d 489 (6th Cir. 2008).

52. 545 F. Supp. 2d 791 (N.D. Ill. 2008).

therefore implicating a coach's liberty interests under the Fourteenth Amendment. Additionally, Bryant argued that the athletic director publicly slandered him in the press, and the athletic director's comments harmed Bryant in the coaching profession and interfered with Bryant's ability to pursue and secure further coaching jobs. The athletic director's motion to dismiss was denied, and the parties were directed to undertake new efforts to settle the case.

*Cooper v. Killeen Indep. Sch. Dist.*<sup>53</sup>

Plaintiff was attempting to attend a basketball game at his high school with his younger sister. Upon entering the school, he had to call a friend to bring him his ticket, but his sister did not yet have a ticket, and the ticket sales area was closed. The ticket-taker refused entry to Cooper, even though he had a ticket. He tried to enter regardless, and the ticket-taker physically restrained him from going any further and took him into custody. Cooper brought a claim of a violation of his constitutional rights under the Fourth and Fourteenth Amendments for excessive force and false arrest. The court looked to *Spann v. Rainey*, 987 F.2d 1110, 1115 (5th Cir. 1993), which held that to sustain a claim of excessive force, a plaintiff must prove "(1) an injury which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." The court must "balance the amount of force used against the need for that force." *Id.* In this case, taking the facts most favorable to Cooper, the court had no reason to deny the defendant school district's motion for summary judgment. As for Cooper's wrongful arrest claim, the court believed that there were genuine issues of material facts that should survive defendant's summary judgment motion.

*Gates v. Bd. of Dirs. of the Fla. High Sch. Athletic Ass'n*<sup>54</sup>

Mary Gates brought suit on behalf of her daughter, a high school basketball player of considerable ability. Her daughter had applied to the Florida High School Athletic Association for a hardship exemption that would have allowed her to play during her senior year. Gates claimed that two coaches from opposing teams (rivals of the high school her daughter attended) voted to deny the application. Gates asserted claims under the Due Process Clause and under Title IX. Because there was no factual basis for any Title IX claim, the court considered only whether Gates had a valid claim under the

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53. No. A-07-CA-082 LY, 2008 U.S. Dist. LEXIS 4881 (W.D. Tex. Jan. 23, 2008).

54. No. 4:07cv231-RH/WCS, 2008 U.S. Dist. LEXIS 38086 (N.D. Fla. May 9, 2008).

Due Process Clause. The court looked to precedent and the settled law of the circuit, which held that a student's interest in playing interscholastic sports is not protected under the Due Process Clause. The case was dismissed with prejudice.

*Gorum v. Sessoms*<sup>55</sup>

Wendell Gorum, a former tenured professor at Delaware State University, filed for injunctive relief against Allen Sessoms, President of the University, and the Board of Trustees of the University, alleging that Sessoms violated 42 U.S.C. § 1983 when he retaliated against Gorum for engaging in speech and association protected under the First Amendment. Gorum changed some student-athletes grades from failing grades to passing grades. In response, Sessoms began proceedings to formally dismiss Gorum from his teaching position. Gorum subsequently exercised his right under the collective bargaining agreement in effect at the time, to a hearing before an ad hoc committee. The agreement stipulated that tenured professors cannot be terminated without proof by clear and convincing evidence that there is "adequate cause" for termination. After an eight-day hearing, the ad hoc committee recommended that despite Gorum's violations, he be put on probation for two years. Sessoms disagreed and presented the Committee's findings to the Board of Trustees of the University. Sessoms recommended that Gorum be terminated. The Board agreed and officially terminated Gorum. Because the court agreed that the grade changes by Gorum were adequate grounds for his termination, the court granted Sessoms' motion for summary judgment.

*Johnston v. Tampa Sports Auth.*<sup>56</sup>

In September 2005, the Tampa Sports Authority instituted a brief pat-down search policy for all persons attending Buccaneers games. This policy was mandated by the NFL in August 2005. Press releases announced this new policy to the media and Buccaneers' season ticket holders prior to the first game of the 2005 season. Gordon Johnston, a season ticket holder, sued the Authority after the second game of the season, seeking to enjoin the searches. On November 2, 2005, the Florida state court found the searches unconstitutional under the Florida Constitution. The Authority moved the district court to reconsider and vacate the injunction issued by the state court. After consideration, the district court concluded that Johnston had no right to

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55. No. 06-565 (GMS), 2008 U.S. Dist. LEXIS 10366 (D. Del. Feb. 12, 2008).

56. 530 F.3d 1320 (11th Cir. 2008).

enter the Stadium for a Buccaneers' game and the revocable license granted by his season tickets could be revoked at any time. Furthermore, the court held that Johnston voluntarily consented to the pat-down searches each time he used his season tickets to attend Buccaneers' games.

*Ladner v. Hancock County Sch. Dist.*<sup>57</sup>

Michael Ladner was employed as a teacher under a standard licensed/certified teaching contract at Hancock County High School during the 2006-07 school year. Ladner also had a separate contract for his coaching position. The school district notified Ladner, in accordance with the Education Employment Procedures Law of 2001 (EEPL), that he would not be re-employed for the 2007-08 school year because his teacher license had expired. He did not request a hearing because he knew the license would soon be renewed. Ladner's teaching contract was renewed; however, his basketball coaching contract was not. Ladner alleged that the school district violated his Fourteenth Amendment rights by failing to provide notice regarding the non-renewal of his coaching contract. The court granted the school district's motion for summary judgment, holding that the EEPL did not require notification of non-renewal for every contract and that Mississippi law permits separate coaching contracts, which are exempted from the EEPL.

*Mayo v. W. Va. Secondary Sch. Activities Comm'n*<sup>58</sup>

The plaintiff, O.J. Mayo, was ejected during a high school basketball game for committing his second technical foul of the game. After the ejection, Mayo had physical contact with the referee. Under West Virginia Secondary Schools Activities Commission (SSAC) rules, a student is automatically suspended for two games if ejected. Mayo also received additional sanctions for violating a SSAC rule that prohibits players from physical contact with a referee. Mayo sought injunctive relief to prevent the SSAC from enforcing the automatic two-game suspension. Mayo's punishment for the physical contact with the referee was a thirteen-day suspension, which equated to three basketball games. A settlement agreement was reached among Mayo, the SSAC, and Mayo's school as to the merits of the suspension, but the trial court, sua sponte, held that the SSAC forfeiture rule, not at issue in the merits of this case, and the SSAC rule proscribing protests of ejections were both unconstitutional, as the SSAC was a state actor. On appeal, the determination that the SSAC was a state actor was reversed because the SSAC acted in

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57. No. 1:07CV901 LG-JMR, 2008 U.S. Dist. LEXIS 30490 (S.D. Miss. Apr. 8, 2008).

58. 672 S.E.2d 224 (W. Va. 2008).

“autonomous fashion without legislative control.” Because the SSAC was found not to be a state actor, the ruling on the constitutionality of its rules was overturned.

*Pinard v. Clatskanie Sch. Dist.*<sup>59</sup>

A group of student-athletes at Clatskanie High School signed a petition asking their varsity basketball coach, Jeff Baughman, to resign. Two days after the petition was presented to Baughman, the principal of the school announced that all of the players who signed the petition would be permanently suspended from the team. The students brought a First Amendment retaliation action, alleging that their suspension was a direct consequence of their criticism of the team’s coach. The district court granted summary judgment in favor of the school district, and the students appealed. The Ninth Circuit Court held that the player’s petition was, in fact, protected speech under the First Amendment. The circuit court reversed the decision for summary judgment and remanded the case to the district court to determine whether the protected speech (the petition and complaints against the coach) was a substantial or motivating factor in the school district’s exercise of disciplinary action. On this issue, the school district filed a motion for summary judgment. The school district argued that allowing this issue to go to trial would leave school administrators with the inability to discipline students who are disruptive, but first sign a petition. The district court found that the students made a sufficient showing to survive summary judgment that their suspension was a direct result of their protected speech, and the court denied the school district’s motion.

*Samuelson v. LaPorte Cmty. Sch. Corp.*<sup>60</sup>

The school board for LaPort Community School Corp. voted not to renew Samuelson’s contract as head girls’ basketball coach. Samuelson claimed that this was a result of him expressing opinions on various matters, including disparate treatment of girls’ athletic programs when compared to the boys’ programs. He brought suit under § 1983, claiming a violation of his First Amendment rights because the vote not to renew his contract came on the heels of him expressing an intention to file a Title IX complaint. The district court granted summary judgment in favor of the school board because not renewing Samuelson’s contract was not an unconstitutional prior restraint of free speech, and he could not prove that the alleged retaliation was pretextual.

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59. No. 03-172-HA, 2008 WL 410097 (D. Or. Feb. 12, 2008).

60. 526 F.3d 1046 (7th Cir. 2008).

The court of appeals affirmed the decision, holding that the decision to not renew his contract as basketball coach was based on the troubled state of the girls' basketball program.

*Walters v. Seattle Sch. Dist. No. 1*<sup>61</sup>

Plaintiffs, Walters and Fuller, were assistant coaches of the girls' basketball teams at Chief Sealth High School (Chief Sealth). They claimed that in early 2006, the *Seattle Times* began investigating allegations of a recruiting scandal involving the girls' basketball program at Chief Sealth, focusing solely on the African-American coaches, Amos and Fuller. On February 15, 2006, the *Seattle Times* published an article that alleged that the head coach of the girls' basketball team, Ray Willis, along with his assistants, Walters and Fuller, were engaging in illegal recruiting of high school students for their basketball teams. Ellis, a private investigator, was hired to investigate the allegations. After the investigation, Walters' and Fuller's coaching contracts were not renewed by the School District. The plaintiffs argued that they had been deprived of their procedural and substantive due process rights under the Fourteenth Amendment and 42 U.S.C. § 1983. The School District and Ellis moved for dismissal of the claims against them. The court found that the property interest argument raised by the plaintiffs failed because the plaintiffs could only assert a property interest in their reputation, which is not a cognizable property interest. The plaintiffs further argued a claim under 42 U.S.C. § 1981 that eliminates race from being an issue in making and enforcing contracts. The court dismissed the claim, finding that the plaintiffs did not contract with Ellis and that no facts were shown to prove that Ellis conspired with the Seattle School District. The court declined to exercise jurisdiction over the state law claims. Following proceedings, the School District argued that the plaintiffs' claims for defamation and outrage were barred by the doctrine of *res judicata* because of the "two-dismissal rule." The court found that the claims in the previous lawsuits were identical and involved identical parties, thus barring future suits under the doctrine of *res judicata*. In subsequent litigation, the court declined the plaintiffs' request to amend, citing several opportunities to correct deficiencies in their complaint, and that the future amendment would be futile.

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61. See 578 F. Supp. 2d 1310 (W.D. Wash. 2008); No. C08-264JLR, 2008 U.S. Dist. LEXIS 105868 (W.D. Wash. Dec. 15, 2008); No. C08-264JLR, 2008 U.S. Dist. LEXIS 84958 (W.D. Wash. Sept. 15, 2008); No. C08-264JLR, 2008 U.S. Dist. LEXIS 84960 (W.D. Wash. Sept. 15, 2008).

*Yatsko v. Berezwick*<sup>62</sup>

On January 10, 2005, Tracey Yatsko was injured when she struck the top of her head against another player's head during a basketball game. She experienced immediate visual problems and an immediate headache of which she informed the assistant basketball coach, Andrea Edmonds. Edmonds did not take Yatsko to a trainer but instead took her to her mother. Yatsko was still in pain during the next scheduled game on January 12th. Yatsko played in the game and later collapsed in the locker room. The Pennsylvania Interscholastic Athletic Association rules excluded from participation any athlete who suffered a serious injury from competition until cleared by a doctor. It was later discovered, after Yatsko went to the hospital, that she suffered serious brain injuries. As a result of her injuries, Yatsko sued the head coach, assistant coach, and the school district, alleging a violation of her substantive and procedural due process rights along with a failure to institute and enforce safety standards. The District Court dismissed the due process claims, and the case in general, for failure to provide evidence of alleged behavior that shocked the conscience and for failure to state a federal claim.

*York v. Wahkiakum Sch. Dist.*<sup>63</sup>

Parents of student athletes filed suit against Wahkiakum School District in opposition to the district's random and suspicionless drug testing policy. This policy was modeled after the one used by the Vernonia School District in *Vernonia School District v. Acton*. The plaintiffs alleged that this policy violated article I, section 7 of the Washington Constitution. A Washington Superior Court ruled against the plaintiffs, finding the random drug testing policy was constitutional. On appeal, the Supreme Court of Washington concluded that passing federal constitutional muster does not ensure constitutionality under the Washington State Constitution. Because the Washington State constitutional analysis applicable in this case depended on the state's authority of law to search instead of the Fourth Amendment's reasonableness standard, the random drug testing policy was found to be unconstitutional.

## CONTRACT LAW

Many of the relationships within the sports industry are governed by contracts. Contracts often control television broadcasts, agreements with

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62. No. 3:06cv2480, 2008 U.S. Dist. LEXIS 47280 (M.D. Pa. June 13, 2008).

63. 178 P.3d 995 (Wash. 2008).

suppliers for building facilities or providing services, sponsorship and endorsement deals for teams and athletes, ownership agreements of teams, and stadium leases. The following cases demonstrate the variety of uses to which contracts have been put in the sports industry, and the issues that can arise out of disputes involving them.

*Allen v. Thom*<sup>64</sup>

In a dispute over the ownership interests in the Fargo-Moorhead Redhawks baseball team, Gene Allen sued N. Bruce Thom for breach of a settlement agreement. The settlement agreement at issue sold Allen's ownership interest to Varistar for \$600,000 and for the right to 25% of any portion of the Redhawks eventual sale price exceeding \$2.5 million. In 2004, Varistar sold the Redhawks to Thom and other co-investors for \$1.7 million. At the time of the 2004 sale, Allen alleged that the team had a fair market value of \$4.5 million. He also claimed that investors would have paid more than \$1.7 million; however, he did not allege that any known investor was willing to pay \$2.5 million. The trial court dismissed Allen's claims, and on appeal, the court of appeals affirmed the trial court's judgment because Allen failed to prove that Varistar breached the settlement agreement due to the lack of duty under the settlement agreement to sell the team or assign a fair market value price-tag to the team.

*Cavaliers Operating Co., LLC v. Ticketmaster*<sup>65</sup>

In 1993, Ticketmaster entered into a contract with the Cleveland Cavaliers whereby Ticketmaster was to act as the exclusive primary ticket provider for all events at the arena owned by the Cavaliers. Subsequently, the contract was amended several times and currently runs through July of 2010. Both parties agreed that the contract permitted the Cavaliers to sell season tickets directly to consumers. However, in 2006, the Cavaliers began using the products and services of its related company, Flash Seats, LLC, for secondary ticketing. Ticketmaster argued that by offering secondary tickets through Flash Seats, LLC, the Cavaliers had breached Ticketmaster's exclusive rights under the licensed user agreement. The court agreed with Ticketmaster by holding that the Cavaliers had breached the contract. The court also granted Ticketmaster's request for specific performance under the licensed user agreement.

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64. No. A07-2088, 2008 WL 2732218 (Minn. Ct. App. July 15, 2008).

65. No. 08CV240, 2008 U.S. Dist. LEXIS 93112 (N.D. Ohio Sept. 30, 2008).

*Cheers Sports Bar & Grill v. DirecTV, Inc.*<sup>66</sup>

The 2007 game between the New England Patriots and the New York Giants was originally only supposed to air on the NFL network. However, the fact that the Patriots were undefeated going into the game made it a “must watch” game, but the NFL network is a cable station with limited access. High demand from fans without private access to the NFL Network led the NFL to allow two of the nation’s largest networks, NBC and CBS, to simultaneously broadcast the game. The plaintiff, a sports bar, had subscribed to DirecTV which carried the NFL Network. The bar expected to have increased business because of the hype surrounding the game and the fact that many people did not get the NFL Network at home so they would have to go to a sports bar to watch. The plaintiff argued that its contract with DirecTV was breached when the game was not shown exclusively on the NFL Network. The court held that there was no breach of contract because the contract clearly allowed a change in programming and also that DirecTV had no control over the change.

*City of Anaheim v. Angels*<sup>67</sup>

Anaheim and Disney entered into a stadium lease agreement in connection with Disney’s purchase of the California Angels major league baseball team. The agreement included a clause that stated that Disney must change the name from “California Angels” to something including the name “Anaheim.” Soon after the agreement, Disney changed the name of the team to the “Anaheim Angels.” Subsequently, Disney sold the team to the defendant, Angels Baseball, L.P. (ABLP). ABLP later changed the name of the team to the “Los Angeles Angels of Anaheim.” Anaheim sued, alleging the name change breached the team name provision of the lease and the implied covenant of good faith and fair dealing. A subsequent jury trial found in favor of ABLP. Anaheim is now arguing that it was deprived of a fair trial because the trial court improperly (a) allowed Larry Murphy, the Disney official in charge of the negotiations with Anaheim, to testify; (b) failed to give a number of jury instructions supporting Anaheim’s theory of the case; (c) excluded the testimony of Anaheim’s outside counsel regarding the meaning and intent behind various lease provisions; and (d) admitted the testimony of an undesignated expert witness. After going through extensive analysis of all of Anaheim’s arguments, the court affirmed the lower court’s finding.

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66. 563 F. Supp. 2d 812 (N.D. Ohio 2008).

67. No. G037202, 2008 Cal. App. Unpub. LEXIS 10284 (Cal. Ct. App. Dec. 19, 2008).

*Congleton v. Jackson County Bd. of Educ.*<sup>68</sup>

On November 22, 2002, Kaitlyn Congleton, then five years old, attended a high school football game with her aunt and uncle, Michelle and Michael Willingham. During the game, Kaitlyn fell through an opening between the footboard and the seat of the bleachers. As a result of the fall, she cut her head and broke both of her wrists. The School Board had absolute immunity from tort claims under an Alabama statute. However, Kaitlyn's parents argued that the child's purchase of a ticket to the game created an implied contract and implied warranty that the premises were in a reasonably safe condition for use by spectators and that the Board breached the implied contract and warranty. However, the Board produced evidence that no such contract and warranty existed, specifically that the game was sponsored by the Alabama High School Athletic Association. The court agreed with the Board and held that parents' claim was barred.

*Deoria v. State Athletic Comm'n*<sup>69</sup>

On February 9, 2006, Yorgey, a professional boxer, and his manager, Deoria, entered into a three-year boxer-manager contract. One section of the contract stated that Yorgey would not take part in any contest or other exhibition without Deoria's approval. Approximately two years after entering into the contract, a dispute arose between Yorgey and Deoria over Yorgey's career path and future fights. In January 2008, Yorgey entered into a contract with a promoter. Subsequently, Yorgey was given the opportunity to fight on ESPN; however, Deoria did not consent to the fight. Executive Director of the Commission, Gregory P. Sirb, upheld the boxer-manager contract. Yorgey did not like this result and subsequently, on May 7, 2008, a hearing regarding the boxer-manager contract was held before the full Commission. The Commission ruled that Yorgey could commit to fights not approved by Deoria, provided that he pay him 15% of the fight purse. The court found that the Commission had no authority to resolve contract disputes between boxers and managers. Therefore, the Commission's ruling was vacated.

*Estate of Mantle v. Rothgeb*<sup>70</sup>

On April 11, 1988, Lewis Rothgeb agreed to produce and distribute a documentary film about Mickey Mantle. Mantle and co-defendant Baseball

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68. No. 1070878, 2008 Ala. LEXIS 179 (Ala. Aug. 22, 2008).

69. 962 A.2d 697 (Pa. Commw. Ct. 2008).

70. 537 F. Supp. 2d 533 (S.D.N.Y. 2008).

Legend Video (BLV) amended the Agreement on May 1, 1989, providing that BLV would compensate Mantle with royalties from the video and merchandise sales. The amended Agreement gave BLV the right to use Mantle's name, biography, likeness, and voice. Ambiguity existed as to whether the Agreement gave BLV the right to engage in certain electronic activities, such as manufacturing and selling merchandise through websites that used Mantle's name and likeness, without explicitly referencing the film. BLV also described a website as Mantle's official website and failed to reference the film on fifty percent of the website's pages. On June 8, 2004, Mantle's estate filed this action, alleging breach of contract, trademark infringement and dilution, infringement of the right to publicity, false designation of origin, unfair competition, misappropriation of goodwill, and unjust enrichment. Defendants filed counterclaims, alleging breach of contract and tortious interference with prospective business relations. The court granted Mantle's estate's motion to dismiss the defendants' counterclaims because New York's revival statute did not exempt the counterclaims from the applicable statute of limitations.

*Gettysburg Sch. Dist. v. Helms & Assocs.*<sup>71</sup>

Gettysburg School District, in South Dakota, filed an action for breach of contract and negligence against a construction contractor, Bituminous Paving, and engineer, Helms and Associates, for faulty construction of an outdoor track. Bituminous initially seemed to complete the construction by the deadline until several material defects began to appear on the track. Helms directed Bituminous to make repairs, but the repairs were ineffective. Bituminous agreed to make re-repairs, but after the School District met with two independent experts, the School District decided to cancel the re-repairs and file suit instead. The School District settled with Helms prior to trial, and a jury determined that Bituminous breached its agreement with the School District, negligently constructed the track, breached express warranties or implied warranties, and breached its duty of good faith to the School District. Bituminous appealed, but the judgment was affirmed because the School District merely had to establish by a preponderance of the evidence where the contract expressly provided that if contractor's work was found to be defective, the contractor was responsible for all costs and disbursements, including attorney fees, spent by the District in bringing a civil action.

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71. 751 N.W.2d 266 (S.D. 2008).

*Gotham Boxing Inc. v. Finkel*<sup>72</sup>

The plaintiffs alleged that the defendants breached an agreement to hold a Heavyweight Championship fight between then defending International Boxing Federation (IBF) Heavyweight Champion Wladimir Klitschko and boxer Shannon Briggs on November 11, 2006, at the Madison Square Garden. The defendants filed a motion to dismiss this charge on the basis that the alleged agreement was unenforceable under the rules of the New York State Athletic Commission. One plaintiff, Cedric Kushner, was a boxing promoter acting on behalf of Shannon Briggs. On June 16, 2006, Kushner met with defendant Shelly Finkel, who serves as Klitschko's advisor, and reached an oral agreement that Klitschko would defend his title against Briggs on November 11, 2006, at the Madison Square Garden. On June 17, Finkel telephoned Kushner for an e-mail confirmation on Briggs' acceptance. Later that day, Kushner e-mailed Finkel confirming the fight and the material terms the parties agreed upon on June 16. Finkel informed Kushner that a written agreement would be prepared by Klitschko's lawyer, John Hornewer.

Briggs had a previous bout with a different opponent scheduled for July 26. Finkel demanded that Briggs withdraw from this bout and any other bouts prior to the proposed November 11 fight with Klitschko, unless Briggs wanted to forfeit his right to the Championship bout. Briggs decided to withdraw from the July 26 bout and turned down several other offers, including a World Boxing Organization (WBO) Title fight, because of the anticipated fight with Klitschko. On August 4, 2006, boxer Oleg Maskaev publicly challenged Klitschko, but Finkel assured Kushner that the Klitschko-Briggs fight was still taking place. Finkel finally provided a written contract on August 11, but it contained several changes to material terms that were previously agreed upon. Eventually, the fight did not take place, and Klitschko fought a different opponent. Kushner alleged that defendants acted in bad faith and claimed a breach of contract. Kushner lost on this claim because the contract was not in writing and the fight was not approved by the New York State Athletic Commission. Kushner also lost on his claim of breach of the implied covenant of good faith and fair dealing because the claim was not based on an enforceable contract between the parties. Kushner also failed to recover under promissory estoppel because there was no consideration for the alleged promise and it failed the unconscionability test by failing to satisfy even the Boxing Commission's own regulations.

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72. 856 N.Y.S.2d 498 (N.Y. Sup. Ct. 2008).

*Hardy v. Trs. of Univ. of Pa.*<sup>73</sup>

The plaintiff, Hardy, argued that the defendants, the Trustees of the University of Pennsylvania, misappropriated, for their own gain, an educational program, solely created and designed by Hardy. The educational program was a business program called the Business Institute for Continuing Education in Professional Sports and was designed to provide professional athletes with the training and knowledge necessary to handle the various business affairs that an athlete may encounter upon acquiring substantial wealth and assets. Hardy entered into an agreement with the Wharton School of the University of Pennsylvania to promote and facilitate the program. The agreement stated that any ideas developed by the Wharton School would be its own property. The Wharton School ended its association with Hardy and presented a similar program to National Football League players. The court held that the program developed by Hardy was not an idea worthy of protection as a trade secret because it was not novel. His other claims were dismissed as this was determined to be a contract issue, but he was given the opportunity to amend his intentional interference with prospective contractual relations claim.

*Harrison v. Hydrate2O*<sup>74</sup>

Les “Pee Wee” Harrison was a player for the Harlem Globetrotters and also founded Showtime Athletics working with young athletes. Hydrate2O offered Harrison a five-year contract to play basketball and promote Hydrate2O’s bottled water, which he agreed to. Harrison fully performed, and was paid, during the first ten months of the contract. However, subsequently, he was not paid under the agreement, nor did he receive the 50,000 shares of BodyExtreme stock that he was promised in the agreement. The court found that Hydrate2O breached the contract by failing to pay Harrison and, thus, owed Harrison the remainder of the money owed to him, less what he mitigated.

*Intersport v. Nat’l Collegiate Athletic Ass’n*<sup>75</sup>

In 1990, Intersport entered an agreement with the Illinois High School Association (IHSA) to form the new entity, March Madness, LLC. Under this agreement, Intersport assigned its rights to the March Madness mark to the

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73. No. 2178, 2008 Phila. Ct. Com. Pl. LEXIS 42 (C.P.C. Pa. Feb. 21, 2008).

74. No. CV07-1398-MO, 2008 U.S. Dist. LEXIS 69963 (D. Or. Sept. 10, 2008).

75. 885 N.E.2d 532 (Ill. Ct. App. 2008).

IHSA in exchange for royalties and an exclusive license. In 2000, the IHSA assigned the Intersport license agreement to the March Madness Athletic Association, an organization created by IHSA and the NCAA. This dispute revolves around the NCAA opposition to Intersport's agreement with Sprint to provide original programming via Sprint's mobile wireless media network. After this agreement was announced, the NCAA sent Intersport and Sprint a letter declaring that this action would violate the license agreement. Intersport then sought a declaratory judgment proclaiming that the license agreement allowed for the distribution of material to mobile wireless communication devices. The court affirmed the circuit court's ruling, holding that the license agreement encompasses the right to disseminate video content to mobile wireless communication devices.

*J'Carpc, LLC v. Wilkins*<sup>76</sup>

J'Carpc, LLC invested \$100,000 in an arrangement to host events during the 2003 NBA All-Star Game weekend in Atlanta, Georgia. On the representations of Dexter Chappel, Orel Barclay, and their corporation, Top Choice, J'Carpc and its President, Carl Ignacuinos, believed that former NBA player, Dominique Wilkins was represented by Chappel and Barclay. He also believed that Wilkins and other celebrities invited by Wilkins would attend these parties. Ignacuinos was also told that he would receive 100% of the bar tab, 25% of the DVD proceeds, and 100% of the admission fees. J'Carpc did not receive any return on the investments made to Barclay and Chappel. This action was filed on October 2, 2006, against Barclay, Chappel, Top Choice, and Wilkins. Only Wilkins appeared in this action. The court determined that Wilkins could not be held liable as Barclay and Chappel's principal because Wilkins had no reason to believe that J'Carpc was involved in the event. Nor did he make any representations to J'Carpc that Barclay and Chappel's representations were authorized by Wilkins.

*Kaiser v. Bowlen*<sup>77</sup>

Kaiser sold his majority share of the Denver Broncos to Bowlen in 1984. The agreement included a right of first refusal for Kaiser should Bowlen ever seek to sell the majority share. The Bowlen family subsequently purchased the remaining shares of the team and put all of their ownership interest into a corporation. Later, Bowlen negotiated an agreement with the then Broncos quarterback John Elway, which gave Elway the option of acquiring a ten

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76. 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

77. 200 P.3d 1098 (Colo. App. 2008).

percent interest in the corporation. Elway never used the option. Subsequently, Bowlen's brother and sister sought to sell back to the corporation their respective twenty-five percent interests. Kaiser brought a breach of contract claim in federal court upon learning of the Elway option because he claimed that the option violated the right of first refusal. Shortly thereafter, he brought claims in state court on a similar basis for the corporation's purchase of the siblings' twenty-five percent interests. The federal court determined that selling shares in the corporation did not violate the right of first refusal because it did not include solely Kaiser's former interest in the Broncos. The court in this case reviewed the state trial court's summary judgment ruling on the basis of issue preclusion. The court upheld the lower court, saying that the federal ruling was not limited to the Elway option, but held more broadly that the transfer of ownership rights in the corporation did not violate the right of first refusal and the parties to both suits were the same or in privity with one another.

*Nat'l Football League Enter. LLC v. Comcast Cable Commc'n, LLC*<sup>78</sup>

In 2004, NFL Enterprises (NFLE) and Comcast entered into two simultaneous contracts for a cable agreement. The first contract was a Negotiation Agreement, and the second contract was an Affiliation Agreement. The Negotiation Agreement requires that the parties negotiate in good faith over having an additional cable package carried by Comcast on a Comcast-owned network, and the Affiliation Agreement included no limitations. After the contract was executed, Comcast informed NFLE that it would be launching the NFL Network on a sports tier, and NFLE responded that this was not acceptable. No resolution was reached, and NFLE commenced the 2006 action, seeking a judgment declaring that Comcast was obligated to distribute the NFL Network to subscribers in the nature that NFLE requested. Comcast moved for summary judgment. NFLE cross-moved for summary judgment. Comcast's motion was granted, and NFLE's motion was denied. NFLE appealed. The appellate court held that Comcast failed to demonstrate that the second paragraph of the Negotiation Agreement was limited in scope to NFL games on a Comcast-owned network, and that NFLE's interpretation was ambiguous. Therefore, the appellate court modified the lower court's order and judgment that granted Comcast's motion for summary judgment and entitled Comcast to distribute the NFL Network on a sports tier. It also denied NFLE's motion for judgment. Comcast's motion was denied, and the case was otherwise remanded.

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78. 851 N.Y.S.2d 551 (N.Y. App. Div. 2008).

*Natural Res. Media & Tech. Group, LLC v. Snoop Youth Football League Found.*<sup>79</sup>

Natural Resources Media (NRM) alleged that the defendant youth football league breached a contract giving plaintiff the right to record the football league's events. NRM also brought claims against a management firm for defamation and tortious interference with a contract. The management firm moved to dismiss the two claims against it. The court granted the motion to dismiss on one claim of tortious interference because NRM could not prove any causal link between the third parties breaching a contract with NRM and the defendants' actions. The court denied the defendants' other motions to dismiss.

*NPS, LLC v. Minihane*<sup>80</sup>

NPS sells licenses for luxury seats at sporting events. Under the agreement at issue in this case, the license purchaser, upon default, was required to pay the amount due for all remaining years on the license. Here, Minihane defaulted on his agreement after one season and alleged that the liquidated damages clause was void because it was a penalty. The court stated that a liquidated damages clause is enforceable if, at the time the parties entered into the agreement, "the actual damages flowing from a breach were difficult to ascertain . . . and the amount of liquidated damages represented a reasonable forecast of damages expected to occur in the event of a breach." Here, the court held that the second condition was not met, so the term seeking to be enforced was an unlawful penalty. Instead, NPS was entitled to actual damages and a portion of its attorney's fees.

*Phillips v. Daktronics, Inc.*<sup>81</sup>

The plaintiff claimed that in the early 1990s he invented a device that would light up on the back of a basketball backboard when the shot clock expired. In 1997, he entered into negotiations with the defendant where the plaintiff would provide documents related to the invention, and the defendant would pay the plaintiff a lump sum of money and employ the plaintiff as a consultant. However, after the plaintiff handed over the documents, the defendant did not respond to him. In 2004, he noticed that the arena where the Detroit Pistons played used something similar to what he had designed. The

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79. No. 07 Civ. 7701 (SAS), 2008 U.S. Dist. LEXIS 20642 (S.D.N.Y. Mar. 14, 2008).

80. 886 N.E.2d 670 (Mass. 2008).

81. No. 07-CV-14662, 2008 WL 324248 (E.D. Mich. Feb. 5, 2008).

plaintiff sued for breach of oral and implied contract, breach of fiduciary duty, unjust enrichment, fraud, and negligent misrepresentation. The defendant claimed that the suit should be dismissed on all claims because the events that led up to the claims happened in 1997, which was beyond the three-year and six-year statute of limitations that applied to the claims.

*Rennell v. Through the Green, Inc.*<sup>82</sup>

John Doerr, who served as both president and majority shareholder of Through the Green, Inc., orally entered into an employment agreement with Rob Rennell, in which Rennell was to become the lead golf instructor at the Through the Green course. The position was for five years, and after the fifth year, Rennell could elect either a twenty percent equity interest in the business or a lump sum cash buyout of \$100,000. The business ran into cash flow problems twice, and on both occasions, Rennell agreed to forgo his salary in exchange for stock in the value of \$2 of stock for every \$1 of salary. Subsequently, Through the Green, Inc. went out of business, and a possible deal to sell the real estate fell through. When Rennell tried to cash out his equity in the company, Doerr denied that Rennell had any equity and claimed that no such deal existed. The Chancery Court for Williamson County, Tennessee ruled in favor of Rennell and awarded him over \$2.5 million. The court of appeals reversed the chancery court's ruling and remanded, finding that there was insufficient proof to show that Doerr was not acting in furtherance of the corporation's interest, and, therefore, he could not be held liable for intentional breach of contract.

*Robert J. Young Co. v. Nashville Hockey Club, L.P.*<sup>83</sup>

The Nashville Hockey Club entered into a contract, the "Sponsorship Agreement," with the Robert J. Young Company. Subsequently, the parties agreed to change their agreement, and as a result, they entered into a subsequent "Letter of Agreement." When the National Hockey League lockout occurred during the 2004-2005 hockey season, Robert J. Young Company wished to cancel the contract. The Club claimed that the Sponsorship Agreement, and particularly the *force majeure* clause contained therein, were not superseded by the Letter of Agreement. The trial court held that the Letter of Agreement did not supersede the Sponsorship Agreement, and, therefore,

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82. No. M2006-01429-COA-R3-CV, 2008 Tenn. App. LEXIS 151 (Tenn. Ct. App. Mar. 14, 2008).

83. No. M2006-2511-COA-R3-CV, 2008 Tenn. App. LEXIS 182 (Tenn. Ct. App. Mar. 26, 2008).

the *force majeure* clause was still in effect. The appellate court disagreed and determined that the language of the Letter of Agreement indicated that it was to stand alone and supersede the Sponsorship Agreement. Accordingly, the appellate court reversed the trial court's judgment and remanded for further proceedings including, but not limited to, the sponsor having the opportunity to prove its claims, as well as any damages arising there from.

*Robert Trent Jones II, Inc. v. GFSI, Inc.*<sup>84</sup>

Robert Trent Jones II, Inc. (Jones II) managed the rights to a world-renowned golf course architect's name, trademarks, and rights of publicity. It entered into an agreement with GFSI, a company that designed, manufactured, and distributed sportswear and other apparel, under which GFSI would manufacture and distribute apparel bearing Jones II's trademarks. Jones II alleged that GFSI sold apparel bearing the marks to several stores that Jones II contended were "discount stores." Under the terms of the agreement, selling apparel to "discount stores," as defined, was a violation of the agreement because the presence of Jones II's marks in "discount stores" would cause immediate and irreparable harm to the Jones II brand. Jones II sued for a preliminary injunction against GFSI. The court denied the injunction because Jones II failed to make the required showing that it was likely to succeed on the merits. Based on the record available, the court could not conclude that GFSI was in fact selling apparel to any "discount stores." Jones II's claim of irreparable harm failed because it was based on the fact that GFSI had violated the agreement by selling to "discount stores."

*Travelers Indem. Co. v. Am. Home Assurance Co.*<sup>85</sup>

This case stems from a settlement from the matter of *Thomas Kuehn, et al. v. Richard Anderson, II, et al.*, where the plaintiffs in that case were assaulted by Richard Anderson, II. and Richard Anderson, III., while attending a St. Louis Rams professional football game in November 2001. Sportservice was responsible for the sale and service of alcohol during the game, and Sportservice's insurer was American Home. The insurer for the St. Louis Rams was Gulf Insurance Company, and the insurer for the Edward Jones Dome was TIG. Gulf Insurance and TIG entered a settlement to resolve one of the other counts (Count IX) in the case, but American Home did not contribute towards Count IX.

The plaintiffs, Travelers Indemnity Company and TIG Insurance

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84. 537 F. Supp. 2d 1061 (N.D. Cal. 2008).

85. No. 4:06-CV-824 (CEJ), 2008 U.S. Dist. LEXIS 60174 (E.D. Mo. Aug. 6, 2008).

Company, brought suit against the defendant, American Home Assurance Company, to seek reimbursement from American Home because Sportservice had agreed to indemnify the Rams and the Dome. The plaintiffs mainly relied on an indemnification clause in the Concession License Agreement with Sportservice. However, the indemnification clause did not pertain to the negligence described in Count IX because the coverage is limited to liability arising out of Sportservice's concession operations. Sportservice was not even named as a defendant in Count IX and had no obligation to fund this part of the settlement. The defendant was granted summary judgment because no genuine issue of material fact existed.

#### CRIMINAL LAW

Criminal law applies to people within the sports industry just as it does to those outside of it, but sometimes the exact charges levied on a person or the opportunity to commit a crime arise because a person is connected with sports. The following cases include two of the more talked about criminal issues in sports recently, referee involvement in sports gambling and perjury while testifying about performance enhancing drugs, as well as sexual assault by coaches.

#### *Kaster v. Smith*<sup>86</sup>

Kaster, a former high school swim coach, was convicted of multiple counts of sexual assault and disorderly conduct, including two counts of sexual assault by a school staff member, against a group of female students he had coached. He appealed one of the sexual assault by a school staff member convictions, arguing that the assault had occurred after the season had ended at his home. Therefore, he had not been a school staff member at the time of the assaults because his one-season contract with the school had expired. He filed a petition for a writ of habeas corpus after he had exhausted all his state court remedies. The federal district court denied the petition, and Kaster appealed. He argued that he was no longer "providing services" for the school under the state statute making sexual assault by a school staff member illegal because his contractual obligations ended when the season ended, which the state contested, and because the offense occurred at his home where he was not conducting any work for the school. The state judge refused a jury instruction offered by the former coach, consistent with his theory, instead using the exact statutory definition, which did not explicitly require a contractual element or the offense to occur while actually doing work for the school, and the jury

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86. 290 F. App'x 949 (7th Cir. 2008).

found the former coach guilty. The circuit court affirmed the district court's ruling, holding that the state statute reasonably put the coach on notice that there was a temporal element to the law. In fact, as the circuit court pointed out, the former coach based his whole defense on the fact that he was not actually performing services for the school at the time of the assault. Thus, it was clear that the former coach understood that there was a temporal element to the statute and merely misinterpreted the temporal proximity required by the law. The U.S. Court of Appeals affirmed.

*People v. Grocesley*<sup>87</sup>

Grocesley, age twenty-one, engaged in sexual acts with a member, age fifteen, of Joliet Central High School. Grocesley's affiliation with the school was that he assisted with track practice, attended team meetings, and "acted" as an assistant coach. Grocesley was indicted for sexual assault and criminal sexual abuse for engaging in sexual acts with a minor. Grocesley contended that the State failed to prove that he held a position of trust, authority, or supervision in relation to the victim. The Court of Appeals affirmed the convictions because his actions were sufficient to make him a coach of the track team, and simply because she did not know he was a track coach does not mean that he did not hold a position of trust, authority, or supervision in relation to the female student.

*United States v. Donaghy*<sup>88</sup>

Defendant Tim Donaghy, who was a National Basketball Association (NBA) referee, used information he obtained within his official capacity as referee to make bets on NBA games, including games he officiated. He received cash payments from defendants James Battista and Thomas Martino for providing betting recommendations, including for games Donaghy officiated. The defendants pled guilty to conspiracy to commit wire fraud and conspiracy to transmit wagering information in connection with a betting conspiracy. The NBA sought restitution under the Mandatory Victims Restitution Act (MVRA) and the Victim and Witness Protection Act (VWPA). The NBA was considered a victim of the crime because the NBA was directly and proximately harmed as a result of this criminal activity. The crime was covered by the MVRA because the offense was committed through fraud and deceit. Therefore, the court awarded restitution to the NBA in the total amount of \$217,266.94, which was apportioned to the three defendants and

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87. 892 N.E.2d 1225 (Ill. App. Ct. 2008).

88. 570 F. Supp. 2d 411 (E.D.N.Y. 2008).

included attorney fees and compensation for the cost of the time NBA employees spent reviewing tapes of games that Donaghy officiated (which was done at the request of the government).

*United States v. Thomas*<sup>89</sup>

The United States charged Thomas, a professional cyclist until she was suspended for life after testing positive for steroids, with perjuring herself before a federal grand jury. Thomas was called to testify in a grand jury proceeding regarding distribution of anabolic steroids and other performance-enhancing drugs. Thomas was granted immunity. After the grand jury proceedings, the government brought the current action against her. She had submitted urine samples to the United States Anti-Doping Agency (USADA), which saved her samples following her suspension, and the federal prosecutor wanted them searched. The court found that because the USADA, not Thomas, owned the urine samples, she had no standing to contest the government's search of the samples. Thomas's motion to suppress the evidence and motion to dismiss were denied.

DISCRIMINATION LAW

Various laws and constitutional provisions protect people from specified discrimination by state and qualified private actors. Protections are offered against discrimination in employment based on gender and race, against discrimination in access to services and public buildings, and in the discriminatory use of education funds. No laws specifically apply to discrimination in the sporting context, but athletes, coaches, and others can invoke general anti-discrimination laws and their anti-retaliation provisions. Athletes, whether students or not, may be protected from unequal treatment, and coaches are protected in their employment from unequal treatment and in speaking out against the unequal use of education funds. The following cases deal with various protections against discrimination in sports contexts, including constitutional equal protection clauses and federal statutes, such as Title XI of the Education Amendments of 1972, the Civil Rights Act, the Americans with Disabilities Act, and others.

*Bailey v. Clovis Unified Sch. Dist.*<sup>90</sup>

In August 2007, Kevin Bailey was a freshman varsity basketball player at

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89. 545 F. Supp. 2d 1018 (N.D. Cal. 2008).

90. No. 08-CV-0146-AWI-GSA, 2008 U.S. Dist. LEXIS 10347 (E.D. Cal. Feb. 11, 2008).

Clovis East High School (CEHS) in California. In November 2007, the Clovis Unified School District informed Kevin that he was ineligible to play on the varsity team because his father, Vincent, had dinner with the principal of CEHS when the principal visited New York, where the Baileys lived prior to moving to California. The School District argued that Vincent having dinner with the principal violated a California Interscholastic Federation rule. The School District did, however, allow Kevin to play on the freshman team. The Baileys claimed the School District violated the Equal Protection Clause by treating Kevin differently than other similarly situated students. The Baileys requested a preliminary injunction to allow Kevin to play on the varsity team. The court denied their request because Kevin failed to show an irreparable injury existed, since he was still allowed to compete on the varsity team over his next three years at CEHS.

*Bastian v. N.Y. City Dep't of Educ.*<sup>91</sup>

Barry Bastian, a former boys' track and field head coach at Port Richmond High School, sued the New York City Department of Education, claiming discrimination under Title IX of the Education Amendments of 1972, the Equal Pay Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964. This discrimination arose from allegedly inferior equipment for the boys' track team versus the girls' team, Bastian's inferior compensation compared to female coaches, and retaliation for speaking out regarding these inequities. Due to Bastian's previous conduct, including inappropriate sexual advances towards students and multiple written reprimands, and a lack of evidence regarding the inequities asserted, the court granted summary judgment in favor of the Department of Education.

*Bowers v. Nat'l Collegiate Athletic Ass'n*<sup>92</sup>

Michael Bowers was ruled a non-qualifier after he submitted an application to the NCAA Clearinghouse, a step toward participating in athletics at a National Collegiate Athletic Association (NCAA) member school, when he was enrolled in high school during the 1995-1996 school year. Bowers argued that he was ruled a non-qualifier because he was enrolled in several special education classes, which negatively impacted his ability to receive any athletic scholarships. In 1997, Bowers filed suit against the NCAA, claiming that the NCAA, in discriminating against him because of his learning disability, violated the Americans with Disabilities Act and the

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91. No. 04 Civ. 7450 (PAC), 2008 U.S. Dist. LEXIS 57467 (S.D.N.Y. July 29, 2008).

92. See 563 F. Supp. 2d 508 (D.N.J. 2008); 564 F. Supp. 2d 322 (D.N.J. 2008).

Rehabilitation Act. While the suit was pending, Michael Bowers died of a drug overdose, and his mother was substituted as plaintiff on behalf of his estate. It was not until after Michael's death that the plaintiff disclosed Michael's substance abuse problem to the defendants. The defendants sought sanctions and to exclude evidence related to the substance abuse because they were prejudiced by the concealment. In two separate actions, the District Court of New Jersey addressed motions concerning substantive matters. Litigation has since continued on this matter, and most recently, Bowers asked the court to compel the NCAA to provide information relating to the changes the NCAA made to its eligibility bylaws after the 1995-96 school year. Bowers requested this information in order to try and prove that the eligibility requirements were arbitrary in trying to achieve a legitimate objective because they have since been amended. The court denied Bowers's motion to compel because Bowers had sufficient time to discover the information during the ongoing litigation. Also, as a result of the failure to disclose Michael's drug abuse, Bowers was precluded from using the testimony of two experts regarding her son's depression and the resources available to learning disabled students. Furthermore, the defendants were precluded in using after-acquired evidence about Michael's class history as well as evidence relating to the 1997 waiver proceeding to review Michael's application.

*Christman v. Tymaco, Inc.*<sup>93</sup>

Christman suffered from facioscapulohumeral muscular dystrophy, which required the use of a wheelchair. He sued Tymaco, Inc. and Ice Castle, Inc. under the Americans with Disability Act (ADA), alleging that the Ice Castle Arena ice rink, where Christman attended his son's hockey practices, violated the Title III of the ADA by failing to comply with wheelchair accessibility and seating regulations as is required of places of public accommodation. The court determined that both Christman and Ice Castle Arena fell under the provisions of the ADA and that the circuitous wheelchair route provided by the Arena and the limited wheelchair seating options in the stands were in violation of the ADA. The court ordered that the Ice Castle Arena make itself compliant with the ADA.

*Cohn v. Corinthian Colleges, Inc.*<sup>94</sup>

On Mother's Day, May 8, 2005, the Angels baseball team gave away a tote bag as part of its Mother's Day celebration. Corinthian, operator of

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93. No. 07-397, 2008 U.S. Dist. LEXIS 37208 (W.D. Pa. May 6, 2008).

94. 86 Cal. Rptr. 3d 401 (Cal Ct. App. 2008).

Bryman College, sponsored the tote bag. Cohn, who was in attendance at the game, asked for but did not receive a tote bag at the game. Cohn filed suit against Corinthian and the Angels on May 4, 2006, alleging gender discrimination in violation of the Unruh Civil Rights Act. The court found that the discrimination intended by the giveaway was not female versus male, but mothers versus everyone else, and that the nowhere in the Act does it mention that there must be equal treatment of mothers and non-mothers. Therefore, the court ruled that the tote bag giveaway did not violate the Act.

*Davis v. Houston County Bd. of Educ.*<sup>95</sup>

On September 16, 2005, Joshua Davis, a senior football player at Wicksburg High School, suffered a head injury early in a football game. Despite the injury, he continued to play. However, early in the third quarter the coaches felt that Davis was not playing well and took him out of the game. Subsequently, Josh walked past one of the coaches, hitting the coach with his shoulder pads. The coach grabbed Davis and explained that such actions would not be tolerated. At this point, Davis became irate and started yelling and flailing his arms. Another coach came in to stop the confrontation, but Davis punched him in the eye. However, Davis presented evidence that the events were not as the coaches claimed, but that they were much less severe. The next day, Davis went to a doctor who diagnosed him with a possible concussion. Subsequently, a disciplinary hearing was held, at which the doctor stated that the head injury could have caused Davis's erratic behavior. Despite the doctor's statements at the disciplinary hearing, Davis was expelled from school. Davis claimed that his equal protection rights were violated when the school board expelled him. The court disagreed with Davis, and it dismissed the testimony of the doctor because there was no evidence that the doctor could be an expert witness. The court also granted the school's motion for summary judgment because Davis had presented no evidence of how he was treated differently from others situated similarly.

*Dent v. U.S. Tennis Ass'n*<sup>96</sup>

Marvin Dent worked as Director of the Tournament Training Program for the United States Tennis Association (USTA). He, an African-American, was not promoted to the position of Director of Tennis at the National Tennis Center and sued, alleging that the USTA instead hired a less qualified white person. The court granted the USTA's motion to strike one sentence and two

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95. See 291 F. App'x 251 (11th Cir. 2008).

96. No. CV-08-1533, 2008 U.S. Dist. LEXIS 46971 (E.D.N.Y. June 17, 2008).

paragraphs of the complaint, which asserted that the USTA had a “legacy” of racial discrimination. The support for the claim was based on irrelevant, immaterial, and prejudicial evidence. In particular, Dent relied on prior allegations that had been dismissed on summary judgment and a prior settlement agreement. The court held that allegations do not prove anything about actual wrongdoing, and that settlement agreements cannot be used to prove the truth of the basis of the settlement – here, prior discrimination.

*Dorman v. Webster Cent. Sch. Dist.*<sup>97</sup>

Mary Dorman brought suit against the defendants, Webster Central School District and Superintendent Thomas Stringing, alleging that she was disparately treated and not brought back as the varsity girls’ swim coach on the basis of her gender. The Title VII claim against Stringing was dismissed because the court found no reason to make an exception to the rule that individuals are not usually subject to liability under Title VII. In determining whether Dorman was subject to any adverse employment action, the court found that the District’s practice of renewing Dorman as the coach three previous times, as well as the District’s policy and practice to renew coaches who received positive performance evaluations, gave Dorman the reasonable expectation to be reappointed. Thus, even though the general rule is that where an employee is employed for a fixed term, the natural expiration of the term and the employer’s decision not to rehire the employee will not be deemed an adverse employment action, this rule only applies if the plaintiff had no reasonable expectation of rehire. However, Dorman was unable to demonstrate that she was performing at a satisfactory level, thus she cannot rebut the District’s legitimate, nondiscriminatory reason for her termination. Thus, her claim was dismissed.

*Duck v. Port Jefferson Sch. Dist.*<sup>98</sup>

Joyce Duck brought suit against Port Jefferson School District, alleging age and gender discrimination and moved to compel discovery of the personnel files of certain coaches in the District. Duck, a retired physical education teacher, was not hired as the middle school girls’ field hockey head coach after she was recommended for the position by the varsity head coach. She claimed that she had informally accepted the position, but that the superintendent had refused to recommend her for the position because of her age and gender. The District claims that she did not formally apply for the

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97. 576 F. Supp. 2d 426 (W.D.N.Y. 2008).

98. No. 07CV2224 (ADS) (WDW), 2008 U.S. Dist. LEXIS 39695 (E.D.N.Y. May 14, 2008).

position and that preference is given to teachers currently working for the District. The court held that the District must provide to the court for an in-camera review the personnel files of all coaches who obtained their positions after they had retired or while they were “outside” of the District, and the personnel files of the two coaches hired instead to coach the girls’ field hockey team because they were similarly situated to the plaintiff. The school district was not required to provide the files of the school superintendent or any coach who retired from teaching but continued in a prior coaching role for the school. Duck had requested the files of the District’s coaches in order to show that the District’s excuses for not hiring her were mere pretext. The magistrate judge was to determine if disclosure to Duck was appropriate.

*Equity in Athletics, Inc. v. U.S. Dep’t of Educ.*<sup>99</sup>

Equity in Athletics (EIA) sought an injunction to prevent James Madison University (JMU) from eliminating seven men’s sports and three women’s sports. EIA claimed that JMU violated Title IX by intentionally discriminating against male athletes. The court denied the request for an injunction because EIA was unable to meet the factors set forth in *Blackwelder*. JMU’s enrollment was split between sixty-one percent female to thirty-nine percent male, while its student athlete split is fifty-one percent female to forty-nine percent male. EIA challenged the Title IX three-part test, claiming that the test violates the U.S. Constitution, Title IX, and the Administrative Procedures Act by permitting universities to take part in gender-conscious decision making that Title IX was created to prohibit. EIA sought injunctive relief to vacate the guidelines and require the Department of Education to issue new rules consistent with Title IX and the U.S. Constitution. In balancing the harms of not allowing the injunction, the court recognized the harm to student-athletes to be unable to compete in the sport that was being removed from JMU; however, the students would still keep their scholarships or could transfer to another school to play. On the other side of the balancing, the court did not want to take the control over the athletic department out of the hands of JMU. EIA next attempted to argue that Title IX requires schools to provide equal opportunity based on athletic interest, not equal participation based on enrollment. However, courts have rejected this claim multiple times in the past that equal opportunity should be tied to expressed interest rather than actual participation. The court found that there were no cases supporting EIA’s challenges to the 1979 Policy Interpretations, and that nearly every circuit in the country has rejected similar challenges,

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99. 291 F. App’x. 517 (4th Cir. 2008).

thus the injunction was properly withheld.

*Feldman v. Pro Football, Inc.*<sup>100</sup>

Plaintiffs were deaf and hard of hearing people who filed a claim under the Americans with Disabilities Act (ADA), arguing that the Washington Redskins failed to provide them with equal access to the information and announcements broadcast over the team stadium's public address system. The Redskins and FedEx Field offered hard of hearing fans assisted listening devices; however, these devices do not benefit the plaintiffs. In 2003, a request was made to make all announcements on the Sony JumboTron available with closed captioning. As of the filing of this case in 2006, the only captioning that occurred was that of an emergency evacuation video. However, some aural content began to be captioned, but not all that the plaintiffs requested. The captioning was placed on LED ribbon boards that were not within the line of sight of the JumboTron, thus making it difficult to both watch the JumboTron and the captioning. Also, the music played in the stadium was not captioned. The court found that the ADA required the Redskins to provide deaf and hard of hearing fans equal access to the aural information broadcast over the stadium bowl public address system, but the plaintiffs failed to point to any specific hardship or undue burden of not being provided equal access to music with lyrics played at FedEx Field. The court further found a material issue of fact in the location of the LED ribbon boards, thus remanding the case to trial. Lastly, the court found that the ADA only requires the Redskins to provide auxiliary services to ensure that information is equally available. It does not require that it specifically should be captioned.

*Harrison v. Bd. of Governors of W. Va. Univ.*<sup>101</sup>

Two members of the women's softball team at West Virginia University Institute of Technology, Terri Harrison and Alexis Cox, claimed that the University had provided the women's softball team with inadequate fields, facilities, and equipment in comparison to men's programs at the University. The inadequacy of resources available to the women's softball team at the University also included receiving fewer funds than the men's programs, allowing no assistant coach, and being awarded scholarship money that did not exist. Furthermore, the plaintiffs alleged that the University agreed in writing to take corrective action to alleviate these inadequacies but later refused to

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100. 579 F. Supp. 2d 697 (D. Md. 2008).

101. No. 2:08-00078, 2008 U.S. Dist. LEXIS 36146 (S.D. W. Va. May 2, 2008).

comply with the agreement. The plaintiffs sued the University alleging violations of Title IX, the West Virginia Human Rights Act, and common contract law.

The University countered with a motion to dismiss, alleging that the plaintiffs failed to comply with the pre-suit notification requirements under West Virginia law. The court held that the arguments of the plaintiffs and defendants were inapplicable to actions based on federal question jurisdiction.

*Holcomb v. Iona Coll.*<sup>102</sup>

Craig Holcomb, a white man, sued his former employer, Iona College, contending that his termination was motivated by his marriage to a black woman. Holcomb presented evidence of the improper racial motives of Shawn Brennan and Richard Petriccione, two men influential in the decision to terminate Holcomb. In response to these accusations, Iona College stated that as an assistant basketball coach, his job depended on the success of the team, and Iona contended that Holcomb was removed as a part of a necessary overhaul for the basketball program. The Seventh Circuit held that an employer may not violate Title VII if action is taken against an employee because of the employee's association with a person of another race. However, because Iona produced evidence that it acted in a non-discriminatory manner, the court vacated the judgment of the district court and remanded the case for further proceedings.

*Hollonbeck v. U.S. Olympic Comm.*<sup>103</sup>

Several elite paralympic athletes, including Scot Hollonbeck, challenged the USOC's policy of providing support programs only to Olympic team members. The plaintiffs alleged that this action was in violation of § 504 of the Rehabilitation Act, and that all amateur athletes should be treated alike, no matter the competition in which they compete. The Tenth Circuit ruled in favor of the USOC, concluding that the designation of "Olympic Athlete" status for participation in the Athlete Support Programs is not a proxy for non-disabled athletes because there is no direct link between being an Olympic athlete and not being disabled, and that any disparate impact does not amount to a prima facie case under § 504.

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102. 521 F.3d 130 (2d Cir. 2008).

103. 513 F.3d 1191 (10th Cir. 2008).

*Jones v. Washington Interscholastic Activities Ass'n*<sup>104</sup>

Patrick Jones, an assistant high school coach with Bellevue High School varsity football team, wanted to coach his son's "middle level" community football team without restrictions. However, the Washington Interscholastic Activities Association (WIAA) has a rule stating that high school coaches may work with middle school athletes for no more than twelve weeks during the high school football season. In 2006, Jones sought a waiver for this "out-of-season" rule, fearing that he would breach his contract with the Bellevue High School if he coached his son's team for its full thirteen-week-four-day season. The WIAA refused to grant a waiver, and while settlement was reached, this suit commenced because WIAA was unwilling to amend the rule to allow Jones to coach his son's team for its entire 2007 season. Jones alleged that the rule violated the equal protection clause of the Fourteenth Amendment. The court granted WIAA's motion for summary judgment because the WIAA had a legitimate interest in creating the out-of-season rule.

*Kiser v. Clark Coll.*<sup>105</sup>

Trev Kiser was the head coach for women's basketball at Clark College under yearly renewable contracts from October 1997 through March 2002. Kiser claimed he was fired because he complained about the disparity of resources between men's and women's basketball. The College countered that it terminated Kiser because he misappropriated player per diem funds and misused school gas card privileges. Kiser filed suit against the College, alleging retaliatory discharge under Title IX and wrongful termination. The trial court granted summary judgment in favor of the College, and Kiser appealed that decision. The court of appeals of Washington reversed and remanded the proceeding to the trial court, concluding that Kiser produced evidence that the College had a retaliatory motive in firing Kiser and that the College had not proven it was justified in terminating Kiser.

*Laudadio v. Se. Pa. Youth Lacrosse Ass'n*<sup>106</sup>

Joseph Laudadio's twelve-year old son, Matthew, played youth lacrosse with Wissahickon Club. Due to a strained relationship with the head coach of the Club, Matthew sought transfer to another Southeastern Pennsylvania Youth Lacrosse Association (SEPYLA) team. Before Matthew could play for

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104. No. C07-711SRL, 2008 WL 351013 (W.D. Wash. Feb. 6, 2008).

105. No. 35597-3-II, 2008 Wash. App. LEXIS 703 (Wash. Ct. App. Mar. 25, 2008).

106. No. 08-1525, 2008 U.S. Dist. LEXIS 33224 (E.D. Pa. Apr. 23, 2008).

another SEPYLA team, he had to obtain a waiver from the Wissahickon Club. His request for this waiver was denied. The Laudadios allege that Matthew's rights under the Equal Protection Clause of the Pennsylvania Constitution and the U.S. Constitution were violated in the denial of this waiver. The court held that the Wissahickon Club's use of public fields was insufficient evidence to establish state action. In addition, the court acknowledged that the Laudadios failed to demonstrate a violation of equal protection because they did not produce evidence alleging that Matthew was treated differently from others.

*Mansourian v. Bd. of Regents*<sup>107</sup>

In 2000, the University of California at Davis ended female participation in varsity wrestling, which had been going on throughout the 1990s. Responding to the University's action, three former female wrestlers, Arezou Mansourian, Lauren Mancuso, and Christine Wing-Si Ng, filed complaints against the University with the Department of Education's Office of Civil Rights (OCR). Their complaint alleged gender-based discrimination and retaliation based on the firing of the wrestling coach, who spoke on behalf of the plaintiffs. Following an investigation by the OCR, the University posed a voluntary resolution plan, which allowed female wrestlers to try out for the team. This plan was ultimately accepted by the OCR. Plaintiffs Ng and Mancuso participated in these tryouts and were denied a spot on the wrestling team. As a result, the plaintiffs filed the present suit on December 18, 2003, asserting violations of Title IX, §1983, and California's Unruh Civil Rights Act. The University responded with a motion for summary judgment. Upon review by the District Court for the Eastern District of California, the Defendant's motion for summary judgment was granted due to the plaintiffs' failure to raise a triable issue of fact regarding the notice and opportunity to cure Title IX actions necessary to sustain a private damages action.

*McKinney v. City of Hartford*<sup>108</sup>

*McKinney* alleged employment discrimination against his employer, the City of Hartford. In 2004, McKinney was terminated from a part-time position supervising youths in an after-school basketball league. One year later, and following a formal grievance process, a state arbitration panel reinstated McKinney to his position. However, McKinney alleged that the termination was the result of racial discrimination. The court held that because McKinney failed to present any evidence of racial discrimination, the City's motion for

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107. No. Civ. S 03-2591 FCD EFB, 2008 U.S. Dist. LEXIS 33395 (E.D. Cal. Apr. 23, 2008).

108. No. 3:06-CV-832 (JCH), 2008 U.S. Dist. LEXIS 14074 (D. Conn. Feb. 25, 2008).

summary judgment must be granted.

*Miller v. Cal. Speedway Corp.*<sup>109</sup>

The plaintiff-appellant, Robert Miller, is a quadriplegic who uses an electric wheelchair. Miller brought suit against the California Speedway Corporation, claiming that Speedway violated Title III of the Americans with Disabilities Act (ADA). Miller attended a NASCAR event but had his view obstructed when other spectators would stand during exciting parts of the car races. Title III of the ADA prohibits discrimination against any individual on the basis of disability and requires that wheelchair areas provide people with physical disabilities the same views comparable to the general public. However, the district court ruled against Miller, finding that the ADA regulation does not include providing the same lines of sight over standing spectators. However, the appellate court reversed and ruled in favor of Miller, finding that the ADA regulation does require the same lines of sight for people with physical disabilities as for the general public, including lines of sight over standing spectators.

*Miller v. Univ. of Cincinnati*<sup>110</sup>

Plaintiffs, a group of female rowers at the University of Cincinnati, filed a class action suit against the University claiming a Title IX violation. Plaintiffs essentially alleged that the University failed to provide the women's rowing team with a boathouse, minimal equipment, training facilities, coaching staff, and other items necessary for an intercollegiate rowing team. Plaintiffs also alleged that they were denied the equal opportunity to compete for and receive athletic scholarships. The court found that the University had been in compliance with the equal accommodation prong of Title IX and the termination of the rowing team did not place it out of compliance. As shown by the statistics proved for the suit, the opportunities for participation by women athletes (*i.e.*, roster spots on women's teams) were more than proportional to the percentage of women in the undergraduate study body and have been in each year after 2000. The court granted the University's motion for summary judgment.

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109. 536 F.3d 1020 (9th Cir. 2008).

110. No. 1:05-cv-764, 2008 U.S. Dist. LEXIS 4339 (S.D. Ohio Jan. 22, 2008).

*Moore v. Tangipahoa Parish Sch. Bd.*<sup>111</sup>

The school board decided not to hire Alden Foster as the head football coach at one of the district's high schools. According to an agreement, the school board was required to hire qualified African-American educators to achieve a system-wide faculty and staff ratio of forty percent African-American and sixty percent Caucasian, which required the school board to make special efforts to increase the number of African-American teachers and others employed at the high school level until the 40-60 ratio was achieved. Foster, an African-American, was a qualified football coach who applied for the head football coach position, but a Caucasian candidate was hired instead. Therefore, the plaintiffs contended that the failure to hire Foster constituted racial discrimination in violation of the 40-60 policy. Notwithstanding this policy, the school board used a set of objective criteria in the hiring process of which Foster was not aware. The school board asserted that the lack of African-American coaches resulted from the decline in the number of qualified black applicants for teaching positions. However, the court found this argument unpersuasive because it failed to address the precise issue before the court regarding disparate impact. Simply pointing to the decline in the number of applicants did not address the relevant question of the disparate impact caused by the use of the objective criteria used in the hiring process. Therefore, the court ordered the school board to hire Foster as head football coach.

*Nakashima v. Or. State Bd. of Educ.*<sup>112</sup>

OSAA is a voluntary organization of public and private schools in Oregon that administers interscholastic activities. The petitioners, Portland Adventist Academy (PAA), were a group of Seventh-Day Adventists and, in 1996, could not participate in competitive sports on Friday through Saturday night. A basketball tournament took place on Friday evenings and Saturday mornings. PAA asked OSAA to adjust the schedule, and OSAA agreed to switch the Friday games, but it was not willing to adjust the Saturday games for scheduling conflicts. PAA ended up not having to play, but it would have been allowed to forfeit the game. The same problem happened again in 2000, and PAA asked OSAA to reschedule games so they would not have to play on their Sabbath. The OSAA Executive Board issued an order stating that they had no obligation to do so and to do so would violate the Establishment Clause. PAA brought this action alleging discriminatory treatment. PAA

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111. No. 65-15556 Sec. B(1), 2008 U.S. Dist. LEXIS 35238 (E.D. La. Apr. 30, 2008).

112. 185 P.3d 429 (Or. 2008).

brought review to the court of appeals, which ruled that the state statute required the Board to reasonably accommodate the petitioner's religious beliefs. The court told the Board to apply federal case law, and the Board concluded that this obligation was only to the extent that it does not create an undue hardship on the employer. The Board then reviewed the situation and ruled that any accommodating proposal would be an undue burden. The petitioners again sought judicial review, asking if the legal standard was correct. The court of appeals held it was the wrong standard, reversed, and remanded a second time. OSAA petitioned for review. On review, the court affirmed, holding that (1) the statute allowed neutral policies and practices, which adversely affect a protected group, if the policies were reasonably necessary, (2) scheduling policies for basketball tournaments are to be evaluated under this standard to determine if it imposes more than a de minimus burden, (3) accommodating religious beliefs of students would not violate the Oregon Constitution, and (4) altering the tournament schedules would not violate the Establishment Clause. The issue was remanded back to the Board.

*Phillips v. Anderson County Bd. of Educ.*<sup>113</sup>

In her senior year of high school, the plaintiff, Ambrea Phillips, was one of two females to enroll in a "weightlifting and conditioning" course. Initially, the principal of the school removed Phillips and the other female student from the course because of safety concerns. However, after the principal discussed the matter with the County Director of Schools, Phillips was allowed to return to class. Even though Phillips completed the course and received an "A" grade, she and her father filed a one million dollar lawsuit against the Board of Education for allegedly violating her equal protection and Title IX rights. She claimed that the stress of being removed from the course led to her contracting mononucleosis. Because the principal was not acting on behalf of the Board of Education, Phillips did not have a claim against the school board, and the case was dismissed. Phillips appealed, claiming that she needed more time to discover information about any past allegations of sexual misconduct at the school, but the Court of Appeals held that such information was not relevant to Phillips' case, and it upheld the district court's grant of summary judgment in favor of the Board.

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113. 259 Fed. App'x 842 (6th Cir. 2008).

*Sabol v. Montclair State Univ.*<sup>114</sup>

Sabol brought suit under Title VII of the Civil Rights Act and Title IX of the Education Amendments after he was not hired as the Montclair State University head wrestling coach. He alleged that the University was retaliating against him for having complained about health and safety issues, security protocols, and the disparate treatment between male and female coaches at the University while he served as an assistant wrestling coach. Sabol had previously served as acting head wrestling coach while the previous head coach was suspended by the National Collegiate Athletic Association. During that time, he had proven himself to be apt in the role. The University moved for summary judgment on Sabol's claim, arguing that it had not taken an adverse employment action. The court denied summary judgment and held that there was still a question of whether Sabol was not hired as head wrestling coach as retaliation for making his complaints, given that he had been a successful head coach in the past.

*Sanchez v. Dubois*<sup>115</sup>

James Sanchez was the former cross-country coach and assistant track and field coach at the University of Wyoming. On November 4, 2003, he was fired by Wyoming's Director of Athletics for his poor job performance. University evaluations revealed that Sanchez was habitually tardy to work, unavailable, did not monitor his student athletes, was a poor recruiter, and on one occasion failed to report a missing student. Additionally, Sanchez broke NCAA rules when he held an unauthorized Saturday-practice, thus going over the NCAA-mandated limit on practice hours. Sanchez sued, arguing he was deprived of his liberty and right to due process. The Tenth Circuit Court of Appeals dismissed Sanchez's lawsuit because Sanchez failed to show that he was discriminated against or that the University of Wyoming had harmed his employment prospects.

*Scott v. NASCAR, Inc.*<sup>116</sup>

David Scott, a former employee of Penske-Kranefuss Racing, Inc., believed he was the target of racial discrimination when he was addressed by derogatory names and other employees dressed up as Ku Klux Klansmen to frighten him. After one specific event in Watkins Glen, New York, a reporter

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114. No. 06-3214(DMC), 2008 U.S. Dist. LEXIS 43682 (D.N.J. June 3, 2008).

115. 291 F. App'x 187 (10th Cir. 2008).

116. 06 Civ. 6029, 2008 U.S. Dist. LEXIS 5039 (S.D.N.Y. Jan. 17, 2008).

from ESPN sought an interview with Scott to discuss his treatment by the National Association of Stock Car Auto Racing (NASCAR). Scott declined to be interviewed and returned to his home without returning to work for six months after the incident in New York. Upon his return to work in January 2000, Scott did not receive his track credentials and was informed that Penske no longer had any work for him. Because Scott wished to continue working in racing, he forwarded an application for employment to NASCAR on August 8, 2000. NASCAR responded to his applications by recommending work with corporate sponsors, which Scott ignored because he still sought a job with NASCAR. Six years after the first application was filed with NASCAR, Scott filed suit, alleging racial discrimination and breach of contract. NASCAR and the other defendants responded with motions to dismiss. Concluding that the majority of the Scott's claims were time-barred and the remaining §1981 and §1985(3) claims failed to make a prima facie case of racial discrimination, the District Court for the Southern District of New York granted the defendants' motions to dismiss.

*Springer v. Durflinger*<sup>117</sup>

Two sets of parents complained to their daughters' school that their daughters' softball coach was showcasing her younger sister at the expense of their daughters. After hearing the parents' concerns, the superintendent, Durflinger, had the situation investigated, but determined that there had been no impropriety. After this, the parents began to see a series of events as retaliatory, including the fact that they were not asked to participate in hosting games the following season even though they did not volunteer and that the school board did not respond to their written requests for discussions about the softball team even though they never actually appeared before the board. The parents eventually filed a civil rights retaliation claim against the school, the coach, the superintendent, and others. Summary judgment was granted for the defendants because no retaliatory motive for any of the events at issue could be shown, and the parents appealed. The appellate court confirmed that summary judgment was proper because there was not enough evidence to suggest retaliation. Moreover, the court ordered the parents to show cause why they should not be sanctioned for filing a frivolous appeal.

*Tavares v. Nike, Inc.*<sup>118</sup>

The plaintiffs, Foot Soldiers Sports Apparel, Inc. (Foot Soldiers) and its

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117. 518 F.3d 479 (7th Cir. 2008).

118. No. 05-CV-4107, 2008 WL 4865972 (E.D.N.Y. Nov. 11, 2008).

president manager Nelson Tavares (Tavares), alleged that Nike, Inc. (Nike) engaged in racial discrimination in violation of 42 U.S.C. §1981 when Nike refused to enter into a contractual relationship that would have allowed the plaintiffs to sell Nike products. The plaintiffs' argument was based on three legal theories: discrimination, interference with prospective advantage, and negligence. Nike moved for summary judgment and the court granted the motion.

Tavares, a Hispanic, sent a letter to Nike to request a business account that would permit him to sell Nike products at Foot Soldiers. Nike rejected Tavares's request for several reasons, such as: Tavares had little athletic shoe retail experience, Foot Soldiers was not an athletic shoe store, Nike shoe sales at Foot Soldiers did not seem advantageous for Nike, and other established Nike shoe accounts were near Foot Soldiers. Nike also responded that at the time of the rejection, Nike was not aware of Tavares's race. Tavares then amended his complaint that after Foot Soldiers closed, the new shoe store owned by whites took the location and was granted a Nike account. Even assuming Tavares satisfied his initial burden of showing that Nike had discriminated against him, Nike was able to supply legitimate reasons for their rejection. However, Tavares failed to raise sufficient evidence upon which a reasonable jury could conclude by a preponderance of the evidence that the denial of his application was based on his race.

*Wholey v. Tyrell*<sup>119</sup>

Since 2003, John Wholey raised a number of claims against the school district, including: allegations of retaliation and age discrimination before the Massachusetts Commission Against Discrimination after the freshman boys' basketball team that he coached was cut for financial reasons, a complaint of gender disparities between the girls and boys athletic teams to the Office of Civil Rights, United States Department of Education, claims for lack of seating accommodations for mobility impaired persons at football games, and issues about school expenditures and administration as a member of the Hull School Committee. The claim at issue in this case stemmed from Wholey's two attempts to discuss certain matters with Joseph Sullivan, the Athletic Director. After each instance Wholey was contacted by local police and told to stay away from Sullivan. After the second instance, the school superintendent issued a "Temporary Restriction" to Wholey. The Temporary Restriction prohibited Wholey from entering the high school, the L Street Playground fields, and any school department property where the plaintiff

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119. 567 F. Supp. 2d 279 (D. Mass. 2008).

would expect to find Sullivan. Later, a permanent restriction was issued. Wholey brought constitutional and discrimination claims against the past and current superintendents. He claimed that they violated his First, Ninth, and Fourteenth Amendment rights. The court dismissed the First Amendment claims on the grounds that the restrictions were narrowly tailored “place” restrictions that were content-neutral. The court held that Wholey failed to present a plausible legal theory to support his Ninth Amendment claim. In regards to the Fourteenth Amendment procedural due process claim, the court held that the superintendent gave Wholey ample notice and opportunity to be heard in the Temporary Restriction by allowing him the opportunity to meet with school officials at a pre-arranged date, of which Wholey took advantage. The court dismissed with substantive due process claim because he had not alleged any treatment that “shock[ed] the conscience.” Finally, the court dismissed his Title IX retaliation claim because Wholey did not present a factual basis that the Superintendent knew of his prior claims against the school, and the restrictions were motivated by a concern for the safety of the school officials and students, not by retaliation against Wholey. Wholey’s Motion for a Preliminary Injunction was denied because he did not show a likelihood of success on the merits.

*Zachery v. Crawford County Bd. of Educ.*<sup>120</sup>

Clyde Zachery was a fifty-eight-year-old African-American who taught and coached for the Crawford County School District for thirty-six years. In 2003, Zachery applied for the Athletic Director position in the School District. However, the school district hired Tony Byrum, a White male in his forties. Zachery has mainly coached varsity boys basketball, and Bynum coached varsity football in the District from 1990-1998, and then coached for other schools not in the District until 2003. Both coaches enjoyed athletic success at the regional and state levels of competition. The School District pays the head football coach for forty days of summer coaching, while it pays the head basketball coach for only ten days in the summer. Zachery brought race discrimination claims against the School District for disparate treatment in hiring and pay. The United States District Court for the Middle District of Georgia ruled on the school district’s motion for summary judgment. The court held that Zachery had established a prima facie case of disparate treatment in hiring and pay under Title VII. The court also ruled that the School District presented adequate non-discriminatory reasons for the disparities. In regards to the disparate treatment in hiring claims, the court

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120. No. 5:06-cv-314 (HL), 2008 U.S. Dist. LEXIS 76781 (M.D. Ga. Sept. 24, 2008).

granted summary judgment and ruled that Zachery failed to present evidence sufficient to create a material issue of fact. On the other hand, the court held that Zachery's evidence of actual days worked during the summer was sufficient evidence to cast suspicion on the School District's claimed non-discriminatory reasons for the disparities in pay and raised a question of fact for the jury to consider, so the court denied the motion on this issue. Zachery also claimed age discrimination under the Age Discrimination in Employment Act for disparate treatment in hiring. The court held that the analysis mirrored that of the racial discrimination claim under Title VII, and likewise, the court granted the motion in this context.

#### EDUCATION LAW

The laws and regulations that govern the status of school teachers and administrators and any immunity enjoyed by schools, districts, and faculty affect, not surprisingly, the athletic programs run by schools. These laws may allow a public school, district, or public school coach to claim government immunity from suits arising out of sporting events. Also, regulations may classify coaches and athletic program administrators differently than other school faculty members, thereby affecting their rights and privileges. The following cases provide examples of how laws and regulations affecting educational institutions can affect disputes arising out of sports contexts.

#### *Edwards v. Riverdale Sch. Dist.*<sup>121</sup>

Steven Edwards, the athletic director, was dismissed by the Riverdale School District. Edwards appealed the dismissal to the Fair Dismissal Appeals Board (FDAB). Edwards claimed that the district failed to follow procedures that apply to the dismissal of teachers, as he taught one class per semester while serving as the athletic director. The district moved for dismissal, claiming that Edwards was not a teacher but, instead, was an administrator and, therefore, was not subject to the procedures that apply to the dismissal of teachers. A hearing was held and the FDAB ruled that Edwards was a teacher. However, the court found that the FDAB had erred in interpreting the term "director of a department or the equivalent." The FDAB applied the term only to an individual who possessed the highest rank or degree of authority to make decisions about the department, which the court ruled was too narrow. The court ruled that the term "director" should be understood more broadly as one who administers, regulates, or supervises the activities of a department, and remanded the case to the FDAB for consideration using the new

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121. 188 P.3d 317 (Or. Ct. App. 2008).

definition.

*Matter of Matyas v. Bd. of Educ.*<sup>122</sup>

Coach Matyas was a guidance counselor and boys' baseball coach. During one of the baseball games, a student's parent approached Matyas and began to speak to him in an allegedly threatening manner. Criminal charges were brought against the parent, who was acquitted and brought a suit for malicious prosecution against Matyas. Matyas requested a defense and indemnification as a Board employee. However, the Board of Education denied Matyas's request because the Board concluded that Matyas's filing of charges in court did not arise from his duties as an employee of the Board. Matyas registered his complaint from his own home, outside of school hours. The court disagreed with the Board because the underlying altercation that caused Matyas to file his complaint took place on school property, during a school baseball game, and involved the very subject of Matyas's coaching duties. Matyas contended that he decided to press charges in order to discourage the parent from disrupting any more practices and games. Such misconduct by a parent was directly applicable to Matyas's duties as the boys' baseball coach.

#### EMPLOYMENT LAW

Employment law governs the careers of sports industry employees, whether coaches, instructors, or athletes, outside of collective bargaining agreements and discrimination protection. Applicable statutory laws at the state and federal level include workers' compensation laws and the Family Medical Leave Act. Important common law provisions include treatment of non-compete agreements, resignations, and nondiscriminatory terminations. The following cases provide insight into sports industry employment disputes outside of discrimination and labor law contexts, including non-compete agreements, calculation of worker's compensation and pension benefits, and non-discriminatory terminations.

*Aim High Acad., Inc. v. Jessen*<sup>123</sup>

Aim High Academy filed suit against its former employees along with a temporary restraining order based on the non-compete agreements signed by the employees. Whether these agreements were signed was disputed during

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122. 855 N.Y.S.2d 339 (N.Y. Sup. Ct. 2008).

123. No. KC – 2008 – 1384, 2008 R.I. Super. LEXIS 152 (R.I. Super. Ct. Dec. 10, 2008).

the trial. The Superior Court of Rhode Island found clear and convincing evidence that the defendants signed the non-compete agreements and accepted the contents of the agreements as a result of their employment with Aim High. Modifying the agreement in parts, the court enjoined the defendants from soliciting business from Aim High's customers and limited the non-compete agreement to a fifteen mile radius of the current Aim High facility.

*Benedict v. New Canaan Bd. of Educ.*<sup>124</sup>

Howard Benedict, a high school lacrosse coach, sought an injunction to compel the New Canaan Board of Education to afford him a hearing with regard to whether he had resigned from his position. Benedict had sent an email to the school's athletic director indicating his intent not to continue as the lacrosse coach. He later sent another email, which Benedict argued was effective rescission of his prior email, but the athletic director did not accept the rescission. The court held that this second email was a clear effort to undo Benedict's initial statement against continuing his coaching position, but the attempted rescission was not legally binding on the employer. Because the rescission was not legally binding, Benedict had not been constructively discharged, and therefore, Benedict was not entitled to a hearing.

*Bd. of Dirs. of Ames Cmty. Sch. Dist. v. Cullinan*<sup>125</sup>

Dennis Cullinan served as a social studies teacher and the head boys' basketball coach for the Ames Community School District in 1997. Following the 1997 season, members of the boys' basketball team complained that Cullinan was treating them in a threatening manner. Cullinan was put on probation after the complaints continued. Cullinan's probation required him to have an assistant coach, counselor, or parent nearby whenever Cullinan spoke with any individual player. In late 2003, he violated his probation when he met with a player one-on-one, with no third party present. In April 2004, Cullinan was fired for failing to change his behavior. Cullinan appealed, and the decision was reversed. The Iowa Court of Appeals affirmed the reversal, and the school board appealed to the Iowa Supreme Court. The Supreme Court reversed in favor of the school board, holding that the board decided to terminate Cullinan based on his conduct and behavior throughout his entire coaching and teaching career, and because Cullinan violated his probation, the school had just cause for his termination.

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124. No. FSTCV084013437S, 2008 Conn. Super. LEXIS 2662 (Conn. Super. Ct. Oct. 22, 2008).

125. 745 N.W.2d 487 (Iowa 2008).

*Bogosian v. All Am. Concessions*<sup>126</sup>

Plaintiffs, who were employed as concession stand workers during the 2005 U.S. Open tennis tournament, brought an action based on the defendant's failure to pay wages. For the 2005 tournament, the United States Tennis Association (USTA), which owns and operates the U.S. Open, contracted with RA Tennis Corp. for catering and concession services. RA Tennis in turn subcontracted with All American Concessions, Inc. While RA Tennis and USTA claim no liability for the plaintiffs' wage claims, the plaintiffs countered with evidence that both parties had the rights to oversee various aspects of the work performed by All American Concessions. After dismissing an irrelevant cause of action under New York General Business law, the court denied all of the defendants' motions to dismiss for the remaining claims.

*Brocail v. Detroit Tigers, Inc.*<sup>127</sup>

Douglas Brocail, a relief pitcher for the Detroit Tigers and member of the Major League Baseball Players Association, developed bone spurs in his pitching arm in 2000. Brocail filed a claim against the Tigers, alleging that the Tigers (1) failed to provide reasonable medical care, (2) failed to provide a second opinion, and (3) induced him fraudulently. The Tigers claimed the Labor-Management Relations Act (LMRA) barred Brocail's claims. However, the obligation to provide reasonable medical care arose from the collective bargaining agreement (CBA), and therefore, Brocail's claims were not preempted by the LMRA. Brocail's claims of failure to provide a second opinion and fraudulent inducement were preempted by the LMRA because it was necessary to interpret the CBA. Because Brocail claimed his injuries were attributable to a fellow baseball player (co-employee), the Michigan Workers' Compensation Disability Act (WDCA) provided Brocail an exclusive remedy for any injury not caused by an intentional tort.

*Cavers v. Houston McLane Co.*<sup>128</sup>

Eric Cavers, a Maine native, was a minor league baseball player in the Houston Astros system. On June 27, 2004, while playing a game in Greenville, Tennessee, Cavers injured his shoulder when he threw a ball to second base. After numerous doctor opinions, treatment, and even surgery,

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126. No. 06-CV-1633 (RRM)(RML), 2008 U.S. Dist. LEXIS 78625 (E.D.N.Y. Sept. 30, 2008).

127. 268 S.W.3d 90 (Tex. App. 2008).

128. 958 A.2d 905 (Me. 2008).

Cavers recovered and was assigned by the Astros to a team in Troy, New York. However, after the 2006 season ended, the Astros released Cavers from his contract. Cavers played for another team in Illinois for a short period, and then he returned to Maine. He has not played professional baseball since, and was working as a carpenter in Maine. Cavers subsequently filed a petition for an award of workers' compensation benefits and for payment of medical and related services in Maine. The Astros moved to dismiss the claim, asserting that Maine lacks personal and subject matter jurisdiction. The hearing officer found that Cavers was a resident of Maine at the time of the injury, and thus, the Board had subject matter jurisdiction over the claim. The hearing officer also ruled that the Board had personal jurisdiction over the Astros. The Supreme Judicial Court of Maine, finding that Cavers has always been a resident of Maine and that Maine has a legitimate interest in the subject matter of the litigation, affirmed the decision of the hearing officer.

*Crutchfield v. Carolina Football Enters.*<sup>129</sup>

Wellington Crutchfield was playing football for the Carolina Cobras, which is part of the Arena Football League, in 2003 when he was tore his lateral meniscus. The injury required surgery to repair the tear. He began playing again after the surgery, but within two months he was hit again on the same knee. Surgery was performed to repair an ACL tear and a lateral tibia plateau flap tear. Crutchfield did not play football again after the second injury, but he was able to find jobs as an assistant football coach and a recruiter for Tech Systems. In addition, he was awarded workers' compensation benefits, but he appealed because he claimed that the North Carolina Industrial Commission had incorrectly calculated his average weekly wages. He argued that his average weekly wage should have been calculated by dividing his yearly salary by the number of weeks in the contract rather than fifty-two. The court affirmed the decision because the evidence demonstrated that his salary encompassed a full year's worth of performance.

*Gary Cmty. Sch. Corp. v. Powell*<sup>130</sup>

Tom Powell worked for Gary Community School Corp. as a full-time teacher and a part-time football coach. After taking a medical leave of absence of approximately two months, he was restored to his teaching position but not to his coaching position. Powell sued the school corporation under the Family and Medical Leave Act (FMLA). The trial court denied the school

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129. No. COA07 – 748, 2008 N.C. App. LEXIS 592 (N.C. Ct. App. Apr. 1, 2008).

130. 881 N.E.2d 57 (Ind. Ct. App. 2008).

corporation's motion for summary judgment on the issue of whether the coaching position was covered under the FMLA, and entered judgment on a jury verdict for Powell. The school corporation appealed. The appellate court stated that because the FMLA applied only to full-time employees, the question was whether the teaching and coaching jobs should be viewed together or separately. If the focus was on the total hours worked, both jobs would be eligible for coverage, but if the jobs were examined separately, the part-time coaching job would not be covered by the FMLA. Here, the school corporation had separate application processes for teaching and coaching positions, and the jobs had different hiring criteria. There were separate termination processes, so that an employee could be fired from a coaching job but retain a teaching job. Furthermore, the employment criteria did not require that a coach had to be a teacher. The contracts governing the teaching and coaching jobs were separate, and Powell reported to different supervisors. Thus, Powell worked in two separate capacities for the school, and the total hours he worked for each respective job should have been calculated separately and independently to determine whether the FMLA applied. The appellate court reversed the judgment of the trial court and remanded the case with instructions to enter judgment in the school corporation's favor.

*Gulf Ins. Co. v. Hennings*<sup>131</sup>

Chad Hennings was a defensive lineman for the Dallas Cowboys who suffered a neck injury during a game in October of 2000. The team physicians concluded that Hennings had sustained an injury to his spinal cord. Subsequently, in November 2000, he underwent surgery for cervical fusion at the C3-4 level. Hennings had to wear a neck brace for six weeks and was unable to play for the remainder of the season. The team doctors estimated his return to game condition would take six months. After Hennings's injury, the Cowboys continued to pay his salary. On March 7, 2001, the Cowboys terminated Hennings's contract and issued a "Notice of Termination" form letter to the National Football League, checking off that the termination reason was that Hennings's "skill or performance [had] been unsatisfactory as compared to that of other players competing for positions on the Club's roster." After consultation with his doctor and family, Hennings decided to retire in June 2001. Pursuant to this retirement, he filed for workers' compensation medical benefits with the Cowboys' insurance carrier, Gulf Insurance. The administrative judge determined that he was entitled to these benefits. Gulf appealed, arguing that the medical and the income benefits he

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131. No. 10-06-00192-CV, 2008 WL 256828 (Tex. App. Jan. 30, 2008).

was receiving added up to more than Hennings could have received under the Texas Workers' Compensation Act. The court concluded that the medical benefits and the income benefits need not be considered together. The court found that a jury could reasonably have inferred that medical benefits available under the Act were greater than the medical benefits the claimant had received from his employment, while considering that he had no future medical benefits as a result of the team's termination of his contract; therefore, he was entitled to benefits under the team's Gulf Insurance policy. Hennings was not precluded from receiving medical benefits in addition to his employment benefits. Henning was limited in what he could get as he stated that he could play football again and had not seen a doctor in over two years. The court also determined that Hennings's disability period ran from March 7, 2001 (when the Cowboys released him) to June 21, 2001 (when he admitted he could have played football again).

*Hayes v. New Orleans Voodoo Football, Inc.*<sup>132</sup>

On March 16, 2004, Kerry Hayes signed a 2004 Arena Football League Standard Player Contract to play football with the New Orleans Voodoo. Under the terms of the contract, Hayes would play for one season (ten weeks) at an annual salary of \$15,220. He was injured on March 23, 2004, sustaining a groin injury during a routine practice, and was unable to continue playing. Hayes was paid his weekly salary of \$1,522 according to the contract through June 5, 2004. He was also paid workers' compensation benefits of \$429 per week until these benefits were discontinued on November 19, 2004. In November 2005, Hayes filed a claim for compensation against his employer alleging that he was entitled to a continuation of supplemental earnings benefits. The workers' compensation judge found that Hayes was entitled to temporary total disability benefits from March 23, 2004 to December 2004 and supplemental earnings benefits from January 2005 to July 28, 2005. Hayes appealed, alleging that he is entitled to supplemental earnings benefits until capable of earning 90% of his pre-injury weekly wage. The court held that Hayes' weekly salary was miscalculated and should have been divided over fifty-two weeks instead of what he was paid per week while working for the Voodoo. The court affirmed the workers' compensation judgment after reducing the weekly payments.

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132. 985 So.2d 259 (La. Ct. App. 2008).

*Liger v. New Orleans Hornets NBA Ltd. P'ship*<sup>133</sup>

A group of former New Orleans Hornets employees filed this action seeking compensation for allegedly unpaid overtime. The Hornets franchise argued that the employees' wages were exempt from the Fair Labor Standards Act's overtime requirements under either the seasonal amusement and recreation exemption or the retail or service establishment exemption. Both sides filled cross-motions for summary judgment. The court held that a franchise in the National Basketball Association (NBA) operated year-round, regardless of the actual length of the basketball season, which was less than eight months per year. Therefore, to qualify for the seasonal amusement and recreation exemption, the employer was required to meet the "average receipts" test. Under a plain reading of the statutory language, accrual-based financial information could not be used to satisfy the average receipts test; thus, the employer did not qualify for the exemption because its average receipts for its lowest six months were greater than 33 1/3 percent of its average receipts for the other six months. The employer also failed to show that it was an exempt retail or service establishment because the franchise "manufactured" the product it sold, sports entertainment, and was not at the end of the stream of distribution. The court granted the employees' motion for summary judgment and denied the employer's motion.

*Matter of Long v. Liberty Mut. Ins. Co.*<sup>134</sup>

The claimant, Juan Long, was a player of the Buffalo Destroyers, an arena football team. Source One Group, a professional employee organization that provided employment related services to the Destroyers, obtained workers' compensation insurance through Liberty Mutual Insurance Company. Long was injured while playing for the Destroyers and filed a claim with Liberty Mutual for workers' compensation benefits. Liberty Mutual denied coverage, stating that Long was not an employee of Source One and therefore, was not entitled to coverage. A Workers' Compensation Law Judge determined that claimant was a dual employee of Source One and the Destroyers and was entitled to coverage under the Liberty Mutual policy. The Workers' Compensation Board affirmed this determination, but found that the claimant was not a dual employee but a special employee of the Destroyers and a general employee of Source One. Liberty Mutual lost its appeal and was bound to provide coverage under the policy for the claimant.

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133. 565 F. Supp. 2d 680 (E.D. La. 2008).

134. 866 N.Y.S.2d 433 (N.Y. App. Div. 2008).

*Meiburger v. Bert Bell/Pete Rozelle Nat'l Football League Player Ret. Plan*<sup>135</sup>

Wilber B. Marshall, Jr., a retired NFL football player, and his bankruptcy trustee were looking to obtain disability benefits from May 1, 2001, through December 2001. Marshall was originally awarded benefits in November 1997, but the benefits were terminated on April 27, 2001. Marshall reapplied for benefits and the benefits were renewed effective January 1, 2002, but the plaintiffs wanted the benefits for the intervening months as well. The Court of Appeals for the Fourth Circuit agreed with the bankruptcy court in finding that the withholding of benefits from May 1, 2001 through December 2001 was an abuse of discretion on the part of the retirement plan under ERISA because the examining doctor's report indicated that Marshall's disability extended back to at least May 1, 2001 and that his symptoms had been consistent since 1997. Because the retirement plan used the date of the doctor's examination of Marshall as a start date for benefits and not the date of the actual disability, there was an abuse of discretion.

*Moore v. Bert Bell/Pete Rozelle Nat'l Football League Ret. Plan*<sup>136</sup>

Moore, a former NFL player, appealed from a decision granting summary judgment in favor of defendant, a player retirement plan, which concluded that the plan's retirement board did not abuse its discretion in terminating the player's claim for disability benefits. The Plan gives the Plan's Retirement Board full discretion in construing the terms of the Plan and to determine eligibility for benefits. The impairment that Moore suffered from as a result of playing in the NFL was described as "serious" or "significant" by the physicians who examined him, one of whom specifically noted that a vocational expert was needed to determine the type of employment Moore could attempt in light of his limitations. Based on the record before it, the court found that it was unclear whether there was "any occupation or employment for remuneration or profit" that Moore could perform. Therefore, absent vocational testimony that there was a job that Moore could perform given his impairments, the Board's decision to terminate benefits was not based upon a reasonable interpretation of the Plan's terms. Consequently, the court reversed the district court's judgment and remanded the case to the district court with instructions to remand to the Plan for consideration of appropriate vocational evidence, including but not limited to the opinion of a vocational rehabilitation expert.

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135. 261 Fed. App'x 522 (4th Cir. 2008).

136. 282 Fed. App'x 599 (9th Cir. 2008).

*NASC Servs., Inc. v. Jervis*<sup>137</sup>

NASC, plaintiff, operates soccer camps throughout the United States. Defendants, a group of soccer instructors, are citizens of the United States Kingdom. NASC hired the defendants to work at its soccer camps in the New York/New Jersey area. Each defendant had to sign an employment contract with covenants not to compete with NASC's camps, not to solicit NASC's customers, and not to disclose NASC's confidential information. In 2007, the defendants assumed positions with another soccer organization. NASC brought suit alleging the defendants were in violation of their noncompetition covenants, and had further breached their contracts by drawing away customers and disclosing confidential information, and requested a preliminary injunction. The court denied the motion for preliminary injunction because NASC could not demonstrate imminent substantial or irreparable harm, and any such action would unreasonably oppress the defendants, because the noncompete were so broad and lack of employment would have jeopardized their visas. The court granted the defendants' motion to dismiss.

## INSURANCE LAW

As sports carry such a high degree of injury risk for participants, many athletes and schools that sponsor athletics turn to insurance companies to help protect their financial futures. The following cases deal with the interpretation of insurance policies in order to determine whether specific injuries are covered.

*Ashby v. Underwriters at Lloyd's, London*<sup>138</sup>

Plaintiff Andrew Ashby was a professional baseball player when he was injured. He was insured by Underwriters at Lloyd's, London (Underwriters). Ashby sought disability benefits under his insurance policy; Underwriters moved for summary judgment, arguing that Ashby did not suffer a permanent, total disablement, within the meaning of Ashby's insurance policy, and that Ashby's lawsuit was barred by the policy's time limitations provision. The court denied Underwriters' motion for summary judgment because its allegation of only an absence of evidence supporting Ashby's claim does not meet the summary judgment standard.

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137. No. 07-CV-5793 (DMC), 2008 U.S. Dist. LEXIS 40502 (D.N.J. May 19, 2008).

138. No. 07CV119JLS (CAB), 2008 U.S. Dist. LEXIS 17236 (S.D. Cal. Mar. 6, 2008).

*Lampe v. Allstate Ins. Co.*<sup>139</sup>

Lampe, a member of the Oak Creek High School wrestling team was invited to attend a practice session at Cudahy High School with a Cudahy wrestler. The practice was being held by Cudahy's volunteer coach, Campbell. During the practice, Campbell and Lampe engaged in a take-down maneuver, during which Lampe was seriously injured. As a result of those injuries, Lampe sued Campbell and his insurance company as well as the two insurers who carried insurance coverage for the Cudahy School District. The trial court granted summary judgment for one of the insurers finding that Campbell did not satisfy the definition of "volunteer worker" as that term was used in the insurance policies, because at the time Lampe was injured, Campbell was not acting at the direction of, or within the scope of duties determined by, the District. The appeals court reversed and remanded for further proceedings finding that it could be reasonably determined that Campbell was acting as a volunteer coach at the time of the incident and that the trial court erred in granting summary judgment.

*Mitchell v. Ace American Ins. Co.*<sup>140</sup>

In August 2003, Mitchell, then playing for the Dallas Cowboys, sustained an ankle injury during a pre-season game and did not play for the remainder of the 2003 season. In 2004, he was released from the Cowboys' rehabilitation program. Medical reports indicated that the injury had healed. Mitchell then participated in the Cowboys' 2004 training camp and played in the first three pre-season games. Following the third pre-season game, he was cut from the Cowboys' roster, at which time he signed a medical waiver stating that he was not suffering from any disability. After this, Mitchell sought disability benefits under his \$1 million disability income policy with Ace American Insurance, but Ace denied the application. On appeal, the court held that the district court did not err in finding that Mitchell failed to meet a condition of coverage, which had been totally disabled during a twelve-month elimination period. The court noted that the policy's rehabilitation clause did not allow Mitchell a rehabilitation period to practice and play in pre-season games before he was deemed ineligible for coverage. Instead, the rehabilitation clause provided more ways in which claims could be denied even if Mitchell was disabled for the duration of the elimination period. The district court's finding that Ace's denial of the claim was valid was upheld.

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139. 756 N.W.2d 810 (Wis. Ct. App. 2008).

140. 265 F. App'x 420 (5th Cir. 2008).

## INTELLECTUAL PROPERTY LAW

A substantial portion of money made in the sports industry comes from the sale of licensed logo merchandise and endorsement deals by sports personalities. To this end, teams and leagues work to control and protect the use of their trademarks under the federal Lanham Act, and people protect the use of their identities and publicity. Sports equipment manufacturers are also concerned about protecting their patented technology so that they may continue to reap all of the benefits of their inventions. As the Internet has become increasingly important to the sports industry, the protection of domain names has become critical. To this end, many sports-related organizations have filed claims with the World Intellectual Property's (WIPO) Mediation and Arbitration Center in order to settle disputes arising from the use of trademarks in domain names. All of this has made intellectual property law an increasingly important aspect of sports law.

*Adakim – Eurl v. Linea Networks*<sup>141</sup>

Adakim – Eurl (Adakim) is a French company that owns the registered mark FOOT MERCATO and the registered domain name “footmercato.net” as of July 9, 2004. The company's main activity is the operation of the Internet web site providing football and player transfer news. The disputed domain name was “footmercato.com,” which was registered on August 21, 2003 by Linea Networks (“Linea”) and placed on sale in 2008 for 10,000 euros. Adakim claimed that the disputed domain name was identical or confusingly similar to its French trademark, that Linea had no rights or legitimate interests in the domain name, and that the domain name was registered in bad faith, because it was being used in a similar activity and trying to get commercial gain from the web site traffic. Linea contends that Adakim's domain name was registered after the disputed domain name and that the FOOT MERCATO mark was registered more than three years after the disputed domain name's registration. Linea also filed a trademark application in Bosnia Herzegovina for the mark FOOTBALL MERCATO and contends that “foot,” “football,” and “mercato” are all well-known common words worldwide. Linea also contends that it had rights and legitimate interests in the disputed domain name and denied that the disputed domain name creates unfair competition, claiming rather that it was a form of market competition. Linea requested that the WIPO Panel find a case of reverse domain name hijacking and claimed that Adakim is harassing it in an effort to unfairly deprive the company of a domain name that it had owned for years. The Panel determined that the

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141. WIPO case no. D2008-0945 (Sept. 5, 2008).

disputed domain name was identical or confusingly similar to Adakim's trademark. However, the Panel determined that Linea had been using the disputed domain name for five years in connection with a bona fide offering of goods or services. This demonstrated that Linea had rights and a legitimate interest in the domain name and furthermore did not register the domain name in bad faith. Reverse domain name hijacking was defined as "using the Policy in bad faith to attempt to deprive a registered domain-name holder of a domain name." Here, the Panel determined that Adakim did not demonstrate that Linea registered the domain name in bad faith, but found it surprising that Linea placed the domain name on sale eight days prior to the filing of the complaint without any explanation for the act. The Panel therefore found against the claim of reverse domain name hijacking and dismissed the Complaint.

*Adidas AG v. Paolo Luppi*<sup>142</sup>

Adidas was the owner of several international trademarks for the word mark ADIDAS, the earliest registration dates back to 1969. Adidas was also the registrant of domain names using the mark, including "adidas.com" and "adidas-group.com." Adidas claimed that Paolo Luppi's domain name "adidasfootballshop.com" was confusingly similar to the ADIDAS mark, because it used the mark and the generic words "football" and "shop." According to Adidas, these words do not make the domain name any less confusingly similar. Adidas further states that Luppi did not have any rights or legitimate interests in the domain name and that it was not an authorized reseller or distributor, which the web site falsely suggested. Adidas also stated that its mark is known worldwide and that Luppi was using the mark in bad faith and was not making a legitimate, non-commercial or fair use of the domain name. Rather, according to Adidas, Luppi was using the domain name for commercial gain by selling Adidas and its competitors' products through a link with other web sites. Luppi contended that because the site sells original Adidas products it is entitled to use the Adidas mark to describe its business. Luppi also stated that neither a consent nor license are required if the domain name was used on a site with a bona fide offering of goods. According to Luppi, the website did not state that it was official and, instead, stated that it was owned by Paolo Luppi, a.k.a. Mr. Football. Furthermore, Luppi stated that this was nominative fair use because he was unable to sell ADIDAS products without using the ADIDAS mark. Also, he said that to prevent future confusion he did remove all ADIDAS device trademarks. The WIPO Panel

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142. WIPO case no. D2008-1334 (Oct. 17, 2008).

determined that evidence showed that Adidas owns the ADIDAS mark and that the words “football” and “shop” do not exclude the likelihood of confusion between the domain name and the ADIDAS mark. Therefore, the domain name was found to be confusingly similar. The Panel also determined that Luppi was offering ADIDAS products on a website which had links to other websites, and that such conduct was not consistent with a bona fide offering of goods or services. Lastly, the Panel found that Luppi had no rights or legitimate interests in the disputed domain name and registered the domain name in bad faith. As evidence of bad faith, the Panel said that it was likely that Luppi was aware of the ADIDAS mark and its fame, and that Luppi registered other domain names formed with sport and clothing brands connected to the word “shop.” Therefore, the Panel ordered that the domain name be transferred to Adidas.

*Adidas-Am., Inc. v. Payless Shoesource, Inc.*<sup>143</sup>

Adidas-America, Inc. (Adidas) filed claims for trademark and trade dress infringement, dilution, and related federal and state law claims against Payless Shoesource, Inc. (Payless), arguing that Payless marketed and sold footwear bearing a three-stripped design similar to that of Adidas’s footwear and merchandise. The court analyzed the *Sleekcraft* factors, namely (1) similarity of the marks, (2) relatedness or proximity of the parties’ goods, (3) similarity of trade or marketing channels, (4) strength of the mark, (5) defendant’s intent, (6) actual confusion, (7) degree of care exercised by the average purchase, and (8) likelihood of expansion into other markets. The court concluded that Adidas produced substantial evidence of the likelihood of confusion between their protected design and Payless’s use of a similar design (either two or four similar stripes instead of three), significant issues of material fact existed as to many of the *Sleekcraft* factors. Therefore, the court denied Payless’s motion for summary judgment.

*Advanced Sports Inc. v. Acme Internet Group, WhoisGuard*<sup>144</sup>

Advanced Sports, Inc. (Advanced Sports) manufactures various bicycles and is the owner of the mark “SE RACING” issued by the United States Patent and Trademark Office. Advanced Sports acquired the rights, title, and interest of the SE RACING mark when it acquired the business of SE Racing in August 2002, and sells BMX bikes. Advanced Sports promotes its bikes on its website at “www.sebmx.com,” as well as in print media and at sponsored

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143. 546 F.Supp.2d 1029 (D. Or. 2008).

144. WIPO case no. D2007-1631 (Feb. 1, 2008).

events. Acme Internet Group (WHOIS) registered “seracing.com” on October 22, 2001, and from that time through June 29, 2007, the website prominently displayed the SE RACING mark and logo. Advanced Sports filed a complaint with WIPO claiming that Advanced Sports has exclusive rights to the trademark SE RACING, that “seracing.com” was identical and confusingly similar to its mark, and that WHOIS lacked rights or legitimate interests in the disputed domain name. Advanced Sports also contended that WHOIS registered and used the domain name in bad faith, and that WHOIS committed “cyberflight” as evidenced by the transfer of “seracing.com” from Acme Interest Group to WHOIS following the filing of the complaint. The Panel found that “seracing.com” was identical and confusingly similar to Advanced Sports registered SE RACING mark. The Panel also found that “seracing.com” was not a legitimate fan site, but rather was a website lacking legitimate interests and rights. Finally, the Panel found that WHOIS registered and used the domain name in bad faith. Therefore, the Panel ordered that the domain name be transferred to Advanced Sports.

*Ain-Jeem, Inc. v. Barto Enterprises, Inc., Phillip Barto*<sup>145</sup>

Ain-Jeem, Inc. is a business entity of Kareem Abdul-Jabbar, a famous retired basketball player, former coach, actor, and product endorser. Abdul-Jabbar owns two trademarks for Kareem-Abdul Jabbar registered with the United States Patent and Trademark Office. Barto Enterprises registered the domain name “kareemabduljabbar.com” in 1999 and posted a one-page summary of Abdul-Jabbar’s basketball career on the website from 2002 until 2007 when the website was disabled. Ain-Jeem, Inc. filed a complaint with WIPO claiming that Barto Enterprises’s use of the trademark “Kareem Abdul-Jabbar” was confusingly similar and that Barto Enterprises had no rights or legitimate interest in the domain name. The Panel determined that Barto Enterprises’ use of the website was not legitimate and that Barto Enterprises registered and used the domain name in bad faith. Therefore, the Panel ordered that the domain name “kareemabduljabbar.com” be transferred to Ain-Jeem, Inc.

*Allen Stanford v. Krishna Mohunlal*<sup>146</sup>

Allen Stanford, a well-known former cricket player, is still known as a cricket sponsor and innovator and enjoys success in the business world. Krishna Mohunlal registered the disputed domain name,

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145. WIPO case no. D2007-1841 (Jan. 31, 2008).

146. WIPO case no. D2008-1188 (Sept. 25, 2008).

“allenstanfordcricket.com,” and maintains a website using that domain name to collect information about cricket worldwide. The website also has a number of click-through links that led to other websites related to the game. Although Stanford never registered his name as a trademark, he argued to WIPO that he had common law rights in his name and that he had never authorized Mohunlal to use his name. Mohunlal countered that he registered the domain name legally, because the domain name was available on register.com, and that Stanford is only making a claim because he failed to register the domain name. The Panel determined that Mohunlal was not authorized to use the name “Allen Stanford” and that the use of the name in the domain name was undeniably for commercial gain. According to the Panel, the facts further established that the name was used in bad faith because it was used to attract cricket lovers and fans of Allen Stanford for commercial gain; therefore, the domain name was ordered to be transferred to Allen Stanford.

*Almaden Valley Athletic Club v. Texas International Property Associates*<sup>147</sup>

Complainant Almaden is a California limited partnership that owned and operated a health and fitness membership club under the name “Almaden Valley Athletic Club” in San Jose, California. It was marketed under the name since 1974. The disputed domain name is “almadenvalleyathleticclub.com,” which Texas International obtained in 2005. Almaden filed to register its name in 2008. However, Texas International has apparently been involved in over 100 cybersquatting complaints before WIPO and each time has consented to the relief granted, so a WIPO Panel had not analyzed the complaints on the merits. Because there have been so many violations by Texas International, the WIPO Panel analyzed this case on the merits. The Panel determined that the marks were identical or confusingly similar, because Almaden had used the mark for a long period of time, it had advertised extensively, and was recognized in the community by consumers. Further, Texas International offered no basis on which it could be said to have a right or legitimate interest in the disputed domain name. Finally, due to the previous transgressions by Texas International, the Panel found an extensive and well-documented pattern of cybersquatting and bad faith use of domain names on the part of Texas International and found no reason to interpret Taxes International’s behavior differently this time. Therefore, the domain name at issue had to be transferred to Almaden.

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147. WIPO case no. D2008-0600 (June 11, 2008).

*Arizona Board of Regents on behalf of the University of Arizona v. DNS,  
Admin, Nevis Domains / Gee Whiz Domains Privacy Service*<sup>148</sup>

The University of Arizona is a public research university that has used the ARIZONA WILDCATS mark since 1950 and has two federal trademark registrations for the mark. The disputed domain name, “arizonawildcats.com,” was registered in 1999 by Gee Whiz Domains and was a “click-through” site that displayed advertising from which Internet users can “click-through” to various sports sites (for example the NFL and NBA sites). The University of Arizona argued before the WIPO Panel that the ARIZONA WILDCATS mark has led to substantial goodwill and that it has registered the mark. Furthermore, it argued that Gee Whiz Domains had no legitimate interest in the disputed domain name and was intentionally using the mark to attract Internet users to its website and thereby creating a likelihood of confusion with the ARIZONA WILDCATS mark. The Panel determined that the disputed domain name was identical to the registered ARIZONA WILDCATS mark and that the website was using the mark to attract traffic in order to generate revenue. Furthermore, it found that the website had not been known as, or conducted business under, the name ARIZONA WILDCATS and that it was not authorized to do so; therefore, the Panel ordered that the disputed domain name be transferred to the University of Arizona.

*Arsenal Football Club Public Ltd. Co. v. Official Tickets Ltd.*<sup>149</sup>

Arsenal Football Club (“Arsenal Football”) owns a London-based football club, Arsenal, and holds multiple international registrations for the mark ARSENAL. Arsenal Football also holds a registration for an ARSENAL device mark, which has the word “Arsenal” on a shield device, and owns a number of domain names, including the principal website <www.arsenal.com>, which allows consumers to purchase tickets to Arsenal football matches online. Official Tickets Ltd. (“Official Tickets”) held the domain name “official-arsenal-tickets.com,” which features the ARSENAL word and shield device marks and contains the language “Welcome to Official Arsenal Tickets. Book your official tickets online through our secure system. All tickets booked are confirmed and guaranteed.” This website allows consumers to purchase tickets to various sporting events, concerts, and make hotel reservations. Arsenal Football maintained that Official Tickets was not authorized to use the ARSENAL device and shield marks and that there was no disclaimer on the website stating that the site was not affiliated with or

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148. WIPO case no. D2008-1543 (Dec. 9, 2008).

149. WIPO case no. D2008-0842 (July 22, 2008).

endorsed by the club. Arsenal Football filed a complaint with WIPO claiming that Official Tickets had no rights or legitimate interest in the domain name “official-arsenal-tickets.com.” The WIPO Panel determined that Arsenal Football did establish its rights to the ARSENAL mark and that because “official-arsenal-tickets.com” incorporates the ARSENAL mark, it was confusingly similar to the mark. The Panel further determined that the domain name was being used in bad faith and for commercial gain based on the fame of the Arsenal Football and its marks. Therefore, the Panel ordered that the domain name be transferred to the Arsenal Football.

*Auburn Univ. v. Moody*<sup>150</sup>

Auburn University sued Mike Moody for trademark and service mark infringement based on Moody’s creation of an orange, six-fingered, foam hand novelty souvenir containing the words “Auburn” and “War Eagle,” two registered marks owned by the University. While Moody claimed that he did not profit from the creation of this hand and that he started this venture to improve his web design skills, he sold the hand to an Auburn University employee. He also continued to sell the hand after receiving a cease and desist letter from the University. Because the University demonstrated a substantial likelihood of success, irreparable injury, and harm, the court enjoined Moody and his website from producing, manufacturing and selling the unlicensed foam hands.

*Baden Sports, Inc. v. Kabushiki*<sup>151</sup>

Baden Sports, Inc. (Baden) and Kabushiki designed and sold sports balls. Baden designed and obtained a patent for a new cushioned sports ball. Baden filed a claim, alleging that Kabushiki marketed and sold a basketball that infringed on Baden’s patent and that Kabushiki also engaged in false advertising. After Baden won at the district court level, Kabushiki appealed, requesting a new trial because of erroneous jury instructions. This court dismissed Kabushiki’s claim, holding that the jury instructions were correct, and enough evidence supported the jury’s decision in favor of Baden.

*Bd. of Reg. v. KST Elec., Ltd.*<sup>152</sup>

The University of Texas (UT) owns the trademark to a longhorn silhouette

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150. No. 3:08cv796 – CSC (wo), 2008 U.S. Dist. LEXIS 89578 (M.D. Ala. Nov. 4, 2008).

151. 541 F. Supp. 2d 1151 (W.D. Wash. 2008).

152. 550 F. Supp. 2d 657 (W.D. Tex. 2008).

the school uses. KST Electric (KST) designed a similar logo, which included a lightning bolt along with a longhorn silhouette. UT sent KST a cease and desist letter in March 2002. Four years later, UT sued KST because KST failed to stop using the logo. UT alleged that KST violated state and federal trademark laws. KST countered, filing a motion for summary judgment based on the doctrine of laches and statute of limitations. The court denied KST's motion for summary judgment on the doctrine of laches claim because UT did not delay in enforcing its trademark rights. The court also denied KST's motion for summary judgment as to their statute of limitations defense because evidence existed that KST was still using the allegedly infringing logo. The court similarly denied KST's motions for summary judgment on the trademark infringement and unfair competition claims because a question of fact existed as to the likelihood of confusion and KST's intent in using the mark. The court did grant KST's motion for summary judgment as to the dilution claim because dilution claims are reserved for truly famous marks. UT failed to prove that the longhorn silhouette was a truly famous mark, or a household name.

*Bd. of Supervisors for La. State Univ. Agric. & Mech. College v. Smack Apparel Co. litigation*<sup>153</sup>

In December 2003, Smack Apparel Company sold six t-shirt designs in connection with the three national football championship games. As a result, six colleges and universities sued Smack Apparel for violation of the plaintiff schools' trademark rights. The district court permanently enjoined Smack from manufacturing, advertising, selling, or offering for sale any of the six designs infringing on the plaintiffs' trademarks. On January 2, 2008, the plaintiffs moved for a temporary restraining order, alleging that Smack's new t-shirt designs violated the terms of the permanent injunction. The district court agreed, finding Smack in violation of the permanent injunction. After appealing this decision to the Fifth Circuit, Smack was again denied relief when the Court of Appeals concluded that the designs were likely to cause confusion as to their source.

*Bouchat v. Balt. Ravens L.P.*<sup>154</sup>

Frederick Bouchat drew a series of logos inspired by the naming efforts for the new Baltimore football team in 1995. He posted his favorite drawing with the name "Ravens" at the guard station in the entrance of the building

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153. See 550 F.3d 465 (5th Cir. 2008); 574 F.Supp. 2d 601 (E.D. La. 2008).

154. 587 F.Supp. 2d 686 (D. Md. 2008).

where he worked. He also gave copies of the drawing as Christmas gifts in 1995. When it was announced that the new team would be named “the Ravens,” Bouchat faxed his drawing to the Stadium Authority office addressed to the Chairman asking him to send the sketch to the President of the Ravens. This drawing was mistakenly provided to commercial artists working on the Ravens logo project and was used as a basis for the “Flying B Logo.” The Flying B Logo was first used publicly in June 1996; thereafter, Bouchat consulted counsel and registered his copyright in his drawing in August of 1996. After filing suit, a jury found that the National Football League and the Ravens infringed upon Bouchat’s copyright. He then sought an injunction prohibiting the public display of memorabilia containing the infringing logo. In response, the Ravens contended that their use constituted fair use, barring any copyright infringement. The district court agreed with the Ravens and concluded that their use of the protected work constituted fair use.

### *The Boxing Match Broadcast Cases*

(e.g. *Garden City Boxing Club* litigation,<sup>155</sup> *J & J Sports Prods.* litigation,<sup>156</sup> *Joe Hand Promotions* litigation,<sup>157</sup> and the *Kingvision Pay-Per-View* litigation<sup>158</sup>)

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155. See *Garden City Boxing Club, Inc. v. 1900 Jerome Ave. Sports Bar Inc.*, No. 07 Civ. 8081 (LLS)(KNF), (S.D.N.Y. Dec. 17, 2008); *Garden City Boxing Club, Inc. v. Extasis Corp.*, No. 07-CV-3853, 2008 WL 3049905 (E.D.N.Y. Aug. 1, 2008); *Garden City Boxing Club, Inc. v. Sacks*, No. B-07-97, 2008 U.S. Dist. LEXIS 30332 (S.D. Tex. Apr. 10, 2008).

156. See *J & J Sports Prods., Inc. v. Tsoulouhaus*, No. C08-695Z, 2008 WL 5390936 (W.D. Wash. Dec. 23, 2008); *J & J Sports Prods., Inc. v. Forbes*, No. 07-cv-4394-ENV-JMA, 2008 WL 5263732 (E.D.N.Y. Dec. 17, 2008); *J & J Sports Prods., Inc. v. Gonzalez*, No. 08 CV 885(CBA)(JMA); 2008 WL 5050052 (E.D.N.Y. Nov. 26, 2008); *J & J Sports Prods., Inc. v. Rodriguez*, No. 1:08-CV-1350, 2008 WL 5083149 (N.D. Ohio Nov. 25, 2008); *J & J Sports Prods., Inc. v. Munoz*, No. CV-F-08-0090, 2008 WL 5046051 (E.D. Cal. Nov. 21, 2008); *J & J Sports Prods., Inc. v. Kamal*, No. 06 Civ. 13022, 2008 WL 4921353 (S.D.N.Y. Nov. 18, 2008); *J & J Sports Prods., Inc. v. Esquivel*, No. 1:08-cv-00392, 2008 WL 4911846 (E.D. Cal. Nov. 14, 2008); *J & J Sports Prods., Inc. v. Doan*, No. C-08-00324, 2008 WL 4911223 (N.D. Cal. Nov. 13, 2008); *J & J Sports Prods., Inc. v. Guzman*, No. CV-F-08-0091 AWI DLB, 2008 WL 4826131 (E.D. Cal. Nov. 6, 2008); *J & J Sports Prods., Inc. v. Ferreya*, No. CIV S-08-128, 2008 WL 4104315 (E.D. Cal. Aug. 28, 2008); *J & J Sports Prods., Inc. v. Guzman*, No. 1:08-CV-00091-AWI-DLB, 2008 WL 3905972 (E.D. Cal. Aug. 20, 2008); *J & J Sports Prods., Inc. v. Lopez*, No. 1:08-cv-00388-OWW-TAG, 2008 WL 3889749 (E.D. Cal. Aug. 20, 2008); *J & J Sports Prods., Inc. v. Gallegos*, No. 08-201, 2008 WL 3193157 (D.N.J. Aug. 5, 2008); *J & J Sports Prods., Inc. v. Lynn*, No. 3:07CV439, 2008 WL 3200626 (W.D.N.C. Aug. 5, 2008); *J & J Sports Prods., Inc. v. Lang*, No. 07-CV-468-JTC, 2008 WL 2917165 (W.D.N.Y. July 24, 2008); *J & J Sports Prods., Inc. v. Cubides*, No. H-08-608, 2008 WL 2756401 (S.D. Tex. July 15, 2008).

157. See *Joe Hand Promotions, Inc. v. Mills*, 567 F. Supp. 2d 719 (D.N.J. 2008); *Joe Hand Promotions, Inc. v. 143-08 94th Corp.*, No. 07-CV-02339, 2008 WL 3243886 (E.D.N.Y. Aug. 7, 2008).

158. See *Kingvision Pay-Per-View, Ltd. v. Villalobos*, 554 F.Supp. 2d 375 (E.D.N.Y. 2008);

During 2008, multiple plaintiffs brought claims against multiple defendants for illegal interception of pay-per-view boxing telecasts. In these cases, the plaintiffs were allowed to select either statutory or actual damages for unauthorized use of communications in violation of 47 U.S.C. §§ 553 and 605, enhanced damages for willful violations of 47 U.S.C. § 605, or attorney's fees. In a number of these cases, the defendants failed to respond. The courts reviewing these cases used different formulas available under the statutes to compute damages under the default judgments.

*Butkus v. Downtown Athletic Club of Orlando, Inc.*<sup>159</sup>

Former football player Dick Butkus sued the Downtown Athletic Club of Orlando (DACO) to prevent DACO's use of Butkus's name and likeness for the "Butkus Award," an award given annually to the nation's best collegiate linebacker. DACO filed counterclaims for tortious interference, injunctive relief, declaratory judgment, and attorneys' fees. The court granted Butkus's motion for summary judgment on the declaratory judgment claim and concluded that DACO was liable to Butkus for misappropriation of Butkus's name and likeness.

*Callaway Golf Co. v. Acushnet Co.*<sup>160</sup>

Callaway filed a lawsuit against Acushnet on February 9, 2006, alleging infringement of several Callaway patents. Callaway claimed that Titleist Pro V1 brand golf balls embody the technology described in one or more claims of the asserted patents. The jury returned a verdict mostly in favor of Callaway, finding that each asserted claim of patent infringement was valid except for one. Subsequently, Acushnet asked for a judgment as a matter of law (JMOL) or, in the alternative, for a new trial. The district court denied the JMOL, as well as a new trial, finding that the jury's verdict was supported by substantial evidence.

*Campagnolo S.r.l. v. Marzena Zytka*<sup>161</sup>

Campagnolo, a company, owns worldwide trademark registrations for the CAMPAGNOLO mark; the earliest registration for the mark dates back to

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Kingvision Pay-Per-View, Ltd. v. Gutierrez, 544 F. Supp. 2d 1179 (D. Colo. 2008); Kingvision Pay-Per-View, Ltd. v. Soluna Bar Lounge, Inc., 2008 WL 2673340 (E.D.N.Y. May 27, 2008).

159. No. CV 07-2507 PA (JWJx), 2008 U.S. Dist. LEXIS 49828 (C.D. Cal. Apr. 2, 2008).

160. No. 06-091-SLR, 2008 U.S. Dist. LEXIS 91243 (D. Del. Nov. 10, 2008).

161. WIPO case no. D2008-1037 (Aug. 20, 2008).

1986. This mark is well-known in bicycle circles and is associated with the company. Marzena registered the disputed domain name “campagnoloshop.com” in 2005 and listed Danuta Badziag from Raddiscount as a contact. Badziag had already registered and sold the domain name “campagnolo.pl” to Campagnolo. The domain name went to a website that offered Campagnolo’s products for sale. Campagnolo argued that the disputed domain name “campagnoloshop.com” was confusingly similar to the CAMPAGNOLO mark and that Marzena registered the domain name in bad faith, with no rights or legitimate interests in the domain name. Marzena argued that “campagnolo” was a common Italian word for “rural” or “farm worker” and that when combined with “shop,” it meant “a shop with rural products.” Marzena claimed to have bought this domain name from Badziag in order to sell rural products. The WIPO Panel determined that the Italian word for rural was “campagnuolo” with a “u,” and that the CAMPAGNOLO mark does not have the “u” in the domain name. The Panel also said that it is not inclined to second guess a trademark authority that had found that the CAMPAGNOLO mark was entitled to be registered. According to the Panel, the addition of the word “shop” did not make the domain name any more distinctive, and therefore, the domain name was confusingly similar to the CAMPAGNOLO mark. Marzena’s claim to intend to sell rural products under this domain name was found not sufficient to satisfy the required rights and legitimate interests. Based on the sale of the previous domain name to Campagnolo and the fact that Marzena had no rights or legitimate interests in the domain name at issue, the Panel determined that there was bad faith in the use of the domain name and ordered that the disputed domain name be transferred to Campagnolo.

*Chelsea Football Club Ltd. v. Official Tickets Ltd.*<sup>162</sup>

The Chelsea Football Club Ltd. (Chelsea) owns trademark rights to the CHELSEA mark and owns domain names using the mark, such as “chelseafc.com.” Official Tickets operated a website under the disputed domain name “official-chelsea-tickets.com,” which offered Chelsea fixtures and provided click-on links to websites that offered tickets for other football leagues. Chelsea claimed that the disputed domain name was confusingly similar to the CHELSEA mark, that Official Tickets had no rights or legitimate interests in the disputed domain name because the company was not known as Chelsea and had no trademarks rights to the term, and that Official Tickets was using the domain name in bad faith by intentionally trying to

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162. WIPO case no. D2008-1574 (Dec. 23, 2008).

attract users by creating a likelihood of confusion between the domain name and CHELSEA. It also pointed out a pattern of conduct, since Official Tickets had registered other domain names incorporating other registered trademarks. Official Tickets did not reply to the complaint. The Panel determined that Chelsea did have a valid trademark in the CHELSEA mark and that the disputed domain name was confusingly similar to that mark. The words “official” and “tickets” were found to be merely the addition of generic terms that were not sufficient to distinguish the domain name. The Panel also found that Official Tickets had no rights or legitimate interests in the disputed domain name and that it was operating the website to offer and sell tickets that competed with Chelsea’s business. Furthermore, the Panel noted the similarities between this case and the case of *The Arsenal Football Club Public Limited Company v. Official Tickets, Ltd.*, WIPO Case No. D2008-0842. The two cases involved almost identical domain names. The Panel determined that Official Tickets had engaged in bad faith conduct by preventing multiple trademark owners from using their trademarks in a corresponding domain name. Therefore, the Panel ruled that Official Tickets intentionally attempted to attract Internet users to the web site by creating a likelihood of confusion and ordered that the domain name be transferred to Chelsea.

*Chuck Liddell v. Comdot Internet Services Private Ltd.*<sup>163</sup>

Chuck Liddell, a well-known athlete with the Ultimate Fighting Championship, has appeared in movies and on television programs. When the disputed domain name, “chuckliddell.com,” was registered by Comdot Internet Services in 2004, Liddell was already well-known. The domain name was for a website that had links to other sites that were associated with Liddell. Since CHUCK LIDDELL was an unregistered mark, Liddell had to prove that prior to filing the Complaint, the public associated it with goods or services and that, therefore, he has a right to bring the Complaint. Based on Liddell’s assertions, the WIPO Panel determined that the name CHUCK LIDDELL had acquired a secondary meaning such that Liddell had the common law rights in the trademark CHUCK LIDDELL. The Panel further determined that the domain name was identical to the CHUCK LIDDELL mark and that the domain name was used to attract Internet users to the website for commercial gain. Therefore, the domain name was being used in bad faith and was ordered to be transferred to Liddell.

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163. WIPO case no. D2008-1284 (Nov. 3, 2008).

*Connor Sport Court Int'l, Inc. v. Bizzy Signals Entm't/Presto Productions*<sup>164</sup>

Connor Sport Court International, Inc. (“Connor Sport”) manufactures and markets athletic flooring products. It owns several trademark registrations, in the United States and in foreign countries, for SPORT COURT. Connor Sport contended that the disputed domain name, “sportscourt.com,” registered by Bizzy Signals, was confusingly similar to the SPORT COURT mark. It argued that Bizzy Signals had no right or legitimate interest in the domain name and registered it in bad faith. Bizzy Signals did not respond to the complaint. The WIPO Panel found that Connor Sport’s SPORT COURT registrations were valid and that the domain name was confusingly similar to the registrations. According to the Panel, the addition of the “s” and extension of “.com” did not distinguish the domain name. Furthermore, it found that Bizzy Signals failed to demonstrate that it had any rights or legitimate interests in the domain name and that the web site was merely used to provide links to advertised goods and services, which does not constitute a bona fide offering of goods and services. The Panel also determined that Bizzy Signals was using the domain name in bad faith, in an attempt to attract internet users to the website by creating confusion as to the source. Therefore, the Panel ordered that the domain name be transferred to Connor Sport.

*DECATHLON v. Decat*<sup>165</sup>

Decathlon specializes in the sale of sports and leisure goods and has a network of over four hundred stores worldwide. It owns multiple trademarks for the DECATHLON mark and the DECAT mark. The disputed domain name, “decat.com,” was registered on January 26, 2007, and the web site contained commercial links related to sports, including the DECAT and DECATHLON trademarks. Decathlon objected to the disputed domain name claiming that it was confusingly similar to its registered trademark, that the website had no rights or legitimate interests in the domain name, and that the domain name was registered in bad faith. Decat did not respond to the complaint. The WIPO Panel determined that the disputed domain name used the DECAT trademark and was therefore, confusingly similar to the registered trademark. The Panel also found no evidence showing that Decat had any rights or legitimate interests in the domain name and that, instead it used the web site for commercial gain because the site was paid each time an Internet user clicked on the commercial link on the web site. According to the Panel, it was likely that Decat had prior knowledge of Decathlon’s trademarks because

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164. WIPO case no. D2008-1157 (Sept. 16, 2008).

165. WIPO case no. D2008-1523 (Dec. 1, 2008).

it was a widely known brand. Also, because Decat was making money for each click on the commercial web site “www.decat.com,” there was evidence that the domain name was used in bad faith. Therefore, the Panel ordered that the disputed domain name be transferred to Decathlon.

*Elvstrom Sails A/S v. Moniker Privacy Services*<sup>166</sup>

Complainant Elvstrom brought this action to recover the domain name “elvstromsails.com.” The domain name was registered with Moniker Online Services, LLC and was registered to a company out of France. Because that company was not named as a respondent, The WIPO Panel concluded that the respondent is identified as Moniker. Elvstrom argued that it had a trademark for ELVSTROM and the domain name violated that trademark. The Panel concluded that Elvstrom had not provided any evidence in the form of either registration documents for the trademark or proof of sufficient common law usage. In other words, Elvstrom had not proven it had any rights in either trademark, ELVSTROM or ELVSTROM SAILS. Secondly, Elvstrom made no attempt to set out a prima facie case stating why any respondent had no such rights or legitimate interests in the domain name. Finally, there was no evidence in the record implicating Moniker Privacy Services in bad faith registration and use; the complaint was denied.

*ESPN, Inc. v. Quiksilver, Inc.*<sup>167</sup>

ESPN brought suit against Quiksilver alleging trademark infringement and trademark dilution over a stylized letter “X.” ESPN owns the trademark for the X that it uses for the “X Games,” which was created in the mid-1990s. Quiksilver claims it had begun using its version of the “X” on its products in 1986 on its “Gen X Brand.” Quiksilver counterclaimed alleging ESPN used the Gen Brand X as inspiration for the X Games “X.” The court found that a single letter can never be generic or descriptive of a product, thus is not precluded from being a strong mark able to be trademarked. The court looked at both X logos side by side and determined that the two Xs were similar enough to possibly confuse the public, thus the court would not allow ESPN’s motion to dismiss. The court also found that the dilution claim should not be dismissed either, as the mark need not be famous, only an extremely strong mark because of distinctiveness or acquiring secondary meaning. Quiksilver has used the mark since 1986; thus, it was enough to infer that Gen X Brand logos had become distinctive source identifiers. All motions to dismiss were

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166. WIPO case no. D2008-0393 (June 2, 2008).

167. See 586 F. Supp. 2d 219 (S.D.N.Y. 2008); 581 F. Supp. 2d 542 (S.D.N.Y. 2008).

denied.

*EZ Gard Indus. v. XO Ath. Co.*<sup>168</sup>

EZ Gard Industries (EZ Gard) manufactures athletic protective gear. EZ Gard sells its Gel Max mouth guard under the name “Shock Doctor.” Defendant XO Athletic Company (XO) is a competitor of EZ Gard’s, also manufacturing athletic protective gear. At a trade show, XO presented its plans for a protective mouth guard. EZ Gard was subsequently contacted by a customer, who informed EZ Gard that XO produced a similar mouth guard, and sold the mouth guard at a discounted price, cheaper than EZ Gard’s mouth guard. EZ Gard filed an action alleging patent infringement of its “Shock Doctor” design. After comparing the two products, the court found that XO’s mouth guard infringed on EZ Gard’s previous patent for the “Shock Doctor” mouth guard, and granted EZ Gard’s request for a preliminary injunction against XO.

*Facenda v. Nat’l Football League Films, Inc.*<sup>169</sup>

John Facenda was a legendary broadcaster who did work for NFL Films on a session-by-session oral agreement. Shortly before he died of cancer in 1984, Facenda signed a standard release contract giving NFL Films the rights to use his work. The estate of John Facenda sued NFL Films for using past voice-over work Facenda had done for a television show called “The Making of Madden NFL 06” without permission from Facenda’s estate. The estate alleged that the use of Facenda’s voice falsely suggested that Facenda endorsed Madden ‘06, violating the Lanham Act. Further, the estate alleged that using Facenda’s voice violated Pennsylvania’s right of publicity statute. NFL Films argued that its copyrights in the original NFL Films productions that Facenda narrated gave it the exclusive right to use portions of his work as it saw fit. The court found that the release did not bar the estate’s false-endorsement claim. Facenda waived his rights with regard to any uses that were not endorsements. If the estate could prove the elements of its false-endorsement claim, it would demonstrate that “Making of Madden 06” was an endorsement and falls outside the release clause. The release did not waive Facenda’s right to bring a claim under the Lanham Act for false endorsement. Additionally, the court found a likelihood of confusion to exist and remanded to trial to determine whether the television program was likely to cause confusion among consumers regarding the estate’s sponsorship or approval of

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168. No. 07-CV-4769, 2008 U.S. Dist. LEXIS 33483 (D. Minn. Apr. 23, 2008).

169. 542 F.3d 1007 (3d Cir. 2008).

Madden '06.

*Formula One Licensing B.V. v. Holding Theunisse*<sup>170</sup> and *Formula One Licensing B.V. v. Louis Theunisse*<sup>171</sup>

Formula One Licensing B.V. (“Formula One”) is the worldwide owner of trademarks that include the “F1” mark, with the registration dating back to 1999. Formula One is internationally known for motor racing and the trademarks are used to extensively promote its racing events. The disputed domain names, owned by Theunisse, were “f1energydrinks.com” and “f1drinks.com.” Formula One contended that these domain names were confusingly similar and that the addition of “energydrinks” and “drinks” to “f1” did not prevent the confusing similarity. Formula One also contended that Theunisse knew of its trademarks because it made “very aggressive reference to the F1 motor sport themes on the website.” The Panel decided to consolidate the two domain name disputes in accordance with its rules and policies. Theunisse did not respond to the complaint. The Panel determined that because the entire F1 mark was incorporated in the domain names, the disputed domain names were confusingly similar to the trademarks. The Panel also determined that Theunisse did not have any rights or legitimate interests in the domain names and that the domain names were used to promote Theunisse’s own products by referring to Formula One, which was not considered to be a bona fide offering of goods and services. Lastly, the Panel found that Theunisse had registered and was using the domain names in bad faith, because it was likely that Theunisse was aware of Formula One and its trademarks, since its website made references to F1 motor racing. Therefore, the Panel ordered that the disputed domain names be transferred to Formula One.

*Frolow v. Wilson Sporting Goods Co.*<sup>172</sup>

On March 1, 1989, Frolow and Wilson Sporting Goods Co. (Wilson) entered into a licensing agreement, which granted Wilson an exclusive license to use, manufacture, or sell tennis racquets covered by the licensed patents in the licensing agreement. The agreement also gave Wilson the right to use Frolow’s name. Wilson was to pay Frolow royalties based on five percent of the net sales from the “licensed articles” sold domestically, and two percent of net sales of licensed articles from international sales. A question arose as to

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170. WIPO case no. D2008-1631 (Dec. 17, 2008).

171. WIPO case no. D2008-1633 (Dec. 17, 2008).

172. No. 3:05-cv-04813-FLW, 2008 U.S. Dist. LEXIS 27176 (D.N.J., Mar. 31, 2008).

what specific items of Frolow's constituted licensed articles under the prior licensing agreement. Frolow brought suit against Wilson, alleging breach of contract and patent infringement. Wilson's motion for summary judgment was granted in part and denied in part.

*Hoffman v. Impact Confections, Inc.*<sup>173</sup>

In 2003, Carl Hoffman, while President of Ollie Pop Bubble Gum company, created a concept marketing gum and candy in NASCAR-related packaging to be sold under the mark "Pit Crew Chew." He, as the President of Ollie Pop, also entered into negotiations with Impact to market and sell "Pit Crew Chew," and signed a non-disclosure agreement with Impact on May 12, 2003. During this partnership, Hoffman allegedly revealed confidential information and materials to Impact. The relationship between Impact and Ollie Pop ended in September 2003. In 2005, Hoffman learned that Impact launched its own product for NASCAR, "Champion Chew." Hoffman sued Impact alleging misappropriation of trade secrets, copyright infringement, and contract law claims. The court granted Impact's motion for summary judgment declaring that the non-disclosure agreement did not apply because the agreement was not between Hoffman and Impact. Furthermore, the court found that the artwork for "Champion Crew" was not substantially similar to "Pit Crew Chew," denying the copyright infringement claim.

*Innovative Sports Mktg. v. Medeles*<sup>174</sup>

Innovative Sports Marketing (ISM) had the right to exhibit the championship soccer match between Club America and Chivas. This license was for closed circuit locations, including theaters, arenas, clubs, and other commercial establishments in Texas. Commercial customers could broadcast the program only after paying sublicensing fees to ISM. ISM brought this lawsuit after Emiliano's Sports Bar allegedly intercepted ISM's signal without paying the required fees. Because Emiliano's failed to file a responsive pleading in this suit, the court granted a default judgment in favor of ISM, but thought that the damages claimed were excessive; the court did allow for the recovery of attorney's fees.

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173. 544 F. Supp. 2d 1121 (S.D. Cal. 2008).

174. No. H-07-3281, 2008 U.S. Dist. LEXIS 31409 (S.D. Tex. Apr. 16, 2008).

*Izzo Golf, Inc. v. Taylor Made Golf Co.*<sup>175</sup>

Izzo brought suit against Taylor Made, claiming that Taylor Made infringed on its patents for a strap system on golf bags. Taylor Made responded by moving for summary judgment to invalidate the patents based on prior art, making the patents obvious. The court denied the summary judgment motion because Izzo's patents were not obvious. The court made this decision because the patents on which Taylor Made relied upon were not anticipated to be used for golf bags.

*Kabushiki Kaisha ASICS v. SC Gaticonstruct*<sup>176</sup>

Kabushiki Kaisha ASICS (ASICS) is a Japanese corporation that is a worldwide manufacturer of sportswear apparel and equipment. ASICS owns the ASICS trademark, which is registered worldwide, including in Romania, where the registration dates back to 1981. SC Gaticonstruct, a Romanian company which, among other things, manufactures and sells leather apparel and footwear, registered the domain name "asics.ro" on January 23, 2007. In filing a complaint with WIPO, ASICS contended that the domain name was identical to the registered ASICS trademark and that Gaticonstruct has no right or legitimate interest in the domain name, and, furthermore, that the domain name was registered in bad faith. Gaticonstruct failed to respond to the claims. The Panel determined that the domain name was confusingly similar to the registered ASICS trademark and that the addition of ".ro" had no legal significance. Furthermore, it found that Gaticonstruct had no interest in the domain name because it was not using it for a bona fide offering of any products or services. According to the Panel, Gaticonstruct should have used reasonable due diligence to research the domain name and possible infringements. Instead, it offered the sale of the domain name for 10,000 euros, which was found to be in excess of any out-of-pocket costs related to the domain name. Therefore, the Panel found that the domain name was registered in bad faith and ordered it transferred to ASICS.

*Lance Armstrong Foundation v. Media Services World*<sup>177</sup>

The Lance Armstrong Foundation was created by Lance Armstrong to provide services to cancer patients and others. The name of the Foundation was a registered trademark. Media Services had a website

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175. No. 04-CV-6253T, 2008 U.S. Dist. LEXIS 54322 (W.D.N.Y. July 16, 2008).

176. WIPO case no. DRO2008-0010 (Sept. 10, 2008).

177. WIPO case no. D2007-1945 (Mar. 21, 2008).

<www.lancearmstrongfoundation.com>. The Foundation filed a complaint claiming that the registered trademark made the domain name its to use. The WIPO Panel determined that, because the domain name was identical or confusingly similar, the Foundation proved that Media Services had no rights or legitimate interest with respect to the domain name, and that because the domain name was registered and used in bad faith, it must be transferred to the Foundation.

*Miken Composites, LLC v. Wilson Sporting Goods Co.*<sup>178</sup>

*Wilson Sporting Goods Company (Wilson)* appealed the United States District Court for the District of Minnesota's grant of *summary judgment* to Miken Composites, LLC (Miken) in an infringement suit. Wilson was the current assignee to a particular patent that covers "inserts" in baseball and softball bats. Wilson alleged that several bats made by Miken infringed upon the patent. The court compared the competing bats and came to the conclusion that Miken's bats did not infringe upon Wilson's patent.

*Nat'l Ass'n of Stock Car Auto Racing v. Does*<sup>179</sup>

This action, before the court *sua sponte*, reviewed the National Association of Stock Car Auto Racing's (NASCAR) practice of suing various defendants over the manufacturing of counterfeit goods under the Lanham Act and obtaining a court order to seize counterfeit goods under the Trademark Counterfeiting Act of 1984. NASCAR would then drop the cases without ever proving the seized goods were indeed counterfeit. NASCAR would then donate the goods to charities despite the fact that the lack of judgment regarding the nature of the goods meant that NASCAR had no authority to dispose of the goods. Because NASCAR had no intention of pursuing these claims to trial, and because the defendants in these cases still maintained a property right to the seized goods, the court ordered NASCAR to return the seized goods. If NASCAR were to pursue such cases and obtain judgments in its favor, it would be able to dispose of the goods as it pleased.

*Nat'l Ass'n for Stock Car Auto Racing, Inc. (NASCAR) v. Racing Connection/The Racin' Connection, Inc.*<sup>180</sup>

NASCAR is a corporation that has operated as the principal governing

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178. 515 F.3d 1331 (Fed. Cir. 2008).

179. 584 F. Supp. 2d 824 (W.D. N.C. 2008).

180. WIPO case no. D2007-1524 (Jan. 28, 2008).

body for stock car and stock truck racing events in North America since 1948. NASCAR holds more than sixty registered United States trademarks featuring the acronym NASCAR. The Racin' Connection has operated a website, "www.racetickets.com" which sells tour tickets, hospitality services, and racing tickets to NASCAR tracks and events. NASCAR filed a complaint with WIPO asserting multiple claims. NASCAR claimed that Racin' Connection's domain name was confusingly similar to its NASCAR marks, which Racin' Connection was using without its permission. Racin' Connection asserted that the domain name was not confusingly similar and that the domain name represented a fair use of the marks. Furthermore, Racin' Connection contended that the complaint should be dismissed on the ground of laches, since Racin' Connection had openly used the domain name for more than eleven years and expended substantial sums to promote the website associated with the domain name. The Panel determined that the doctrine of laches did not properly apply in this proceeding. Furthermore, the Panel found that although NASCAR satisfied the first element of an "identical or confusingly similar" complaint—that the domain name incorporated the registered NASCAR trademark—NASCAR failed at establishing the second and third elements. The Panel concluded that Racin' Connection had a legitimate interest in using the domain name in connection with a bona fide offering of goods and services in which Racin' Connection was engaged for many years before notice of this dispute, and that Racin' Connection had a legitimate interest in the domain name and did not engage in conduct that revealed a bad faith intention to create a likelihood of confusion with NASCAR's marks. Therefore, the Panel denied NASCAR's complaint.

*Nat'l Football League v. St. Kitts Registry*<sup>181</sup>

The National Football League (NFL) is an unincorporated association of thirty-two member clubs which own and operate professional football teams in the United States. The NFL is extremely popular around the world and owns numerous trademarks in respect of NATIONAL FOOTBALL LEAGUE in the United States. St Kitts Registry (St Kitts) first registered the domain name "nationalfootballleague.com" on April 10, 2003 and used it in connection with a website providing links to third parties' products, including products directly competing with those of the NFL. The NFL filed a complaint with WIPO claiming that St Kitts's use of "nationalfootballleague.com" was identical or confusingly similar to the NATIONAL FOOTBALL LEAGUE marks, that St Kitts had no rights or legitimate interests in respect to the domain name, and

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181. WIPO case no. D2007-1839 (Feb. 21, 2008).

that the domain name was registered and used in bad faith. Finally, the NFL contended that St Kitts was a cybersquatter that was taking advantage of the NFL's famous mark. The Panel found that the domain name was identical or confusingly similar, that St Kitts did not have any rights or legitimate interests to use the domain name, and, finally, that St Kitts registered and used the domain name in bad faith. Therefore, the Panel ordered that the domain name be transferred to the NFL.

*Nat'l Football League v. Vernard Bonner*<sup>182</sup>

Respondent Bonner registered the domain name <www.officialsuperbowlparties.com> with Godaddy.com. The National Football League (NFL) brought this complaint saying that it owned the mark "Super Bowl." The WIPO Panel concluded that because the domain name was identical or confusingly similar to the mark SUPER BOWL, the NFL had made out a prima facie case that Bonner had no rights or legitimate interests in the domain name. Bonner did not respond. Because Bonner registered and used the domain name in bad faith, the domain name had to be transferred to the NFL.

*NSM Resources Corp. v. Target Corp.*<sup>183</sup>

The plaintiff, NSM, sells clothing and shoes with the trademark "HUCK" appearing on its apparel. Huck is a verb used to mean "catching air" in the extreme sports context. After Target Corporation began putting the word "huck" on a shoe line, NSM sued under the Lanham Act for copyright infringement. However, because the term "huck" appeared in different sizes and fonts on the two products, there was not enough similarity to sustain a claim under the Lanham Act. Additionally, Target used arbitrary names for their product lines. Thus, there was no intent to infringe on NSM's trademark.

*Panathinaikos Athlitikos Omilos- Football Societe Anonyme, Green Team S.A. v. Internet Pennsylvania Inc.*<sup>184</sup>

Panathinaikos Athlitikos Omilos-Football Societe Anonyme (Panathinaikos) is a Greek Football Club that has a reputation in Greece and internationally in connection with football activities. The club was established on July 30, 1979. "PAO" is the abbreviation for Panathinaikos Athlitikos Omilos. Panathinaikos operates a website <www.pao.gr>. Green Team S.A.

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182. WIPO case no. D2008-0605 (May 29, 2008).

183. No. Civ. 07-2501DWFSRN, 2008 WL 5120974 (D. Minn. Dec. 3, 2008).

184. WIPO case no. D2008-0044 (Mar. 19, 2008).

is a Societe Anonyme responsible for the licensing, commercial exploitation and distribution of Panathinaikos official products. Green Team S.A. is also the operator of the official online store, “greenteam.gr,” where the official merchandise of Panathinaikos distributed. The respondent, Internet Pennsylvania, operates a website <www.pao.com>. The primary use of this website is to provide email services to customers of Internet Pennsylvania and PA Online with email accounts at <webmail.pao.com>. Panathinaikos and Green Team S.A. filed a complaint with WIPO claiming that the domain name “www.pao.com” is identical or confusingly similar to their registered trademark and to their website “www.pao.gr” Panathinaikos and Green Team S.A. also maintained that when individuals were looking for the Panathinaikos website they were likely to type in “www.pao.com,” the website run by Internet Pennsylvania. Panathinaikos and Green Team S.A. also maintained that the Respondent registered the website, “www.pao.com,” in bad faith and had no rights or legitimate interest in the domain name. The Panel determined that the domain name was confusingly similar to Panathinaikos and Green Team S.A.’s PAO mark. The Panel further found, however, that Internet Pennsylvania provided substantial evidence that it had a legitimate commercial purpose when it registered for the disputed domain name. The Panel also found that the domain name was not registered in bad faith because Internet Pennsylvania did not intentionally know of the complainant, was not “willfully blind” towards Panathinaikos and Green Team S.A, nor did it seek to trade on the reputation of Panathinaikos and Green Team S.A.’s mark. Therefore, the Panel denied the complaint.

*Panathinaikos Athlitikos Omilos- Football Societe Anonyme, Green Team S.A. v. Panathinaikos.com*<sup>185</sup>

Panathinaikos Athlitikos Omilos-Football Societe Anonyme (Panathinaikos) is a Greek Football Societe Anonyme that has a reputation in Greece and internationally in connection with football activities. Panathinaikos Athlitikos Omilos is also the owner of domain name registration “panathinaikosfc.gr”. Green Team S.A. is a Societe Anonyme responsible for the licensing, commercial exploitation and distribution of Panathinaikos official products. Green Team S.A. is also the operator of the official online store, “greenteam.gr”, where the official merchandise of Panathinaiko is distributed. “Panathinaikos.com” was a registered domain name with Melbourne IT, trading as Internet Names Worldwide. “Panathinaikos.com maintained [it] registered the domain name with the primary goal of

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185. WIPO case no. D2007-1871 (Feb. 26, 2008).

developing a genuine supporter website in order to provide information on the history, latest news and scores of the Panathinaikos football, basketball and volleyball teams without wishing to gain any money or other benefits related to this activity.” Panathinaikos and Green Team S.A. filed a complaint with WIPO contending that “panathinaikos.com” was identical or confusingly similar to the marks of Panathinaikos and Green Team S.A., that Panathinaikos.com had no rights or legitimate interests with respect to the domain name, and that the domain name was used in bad faith. The Panel also determined that Panathinaikos.com failed to counter that the use of the domain name created a likelihood of confusion in terms of the website’s origin or affiliation, which was prejudicial to the Panathinaikos and Green Team S.A.’s goodwill and reputation. Therefore, the panel ruled that the domain name should be transferred to Panathinaikos and Green Team S.A. or cancelled.

*Pino v. Viacom, Inc.*<sup>186</sup>

After Pino received a copyright on his fourteen-page screenplay entitled *Under Pressure*, which was meant to be a sports reality show featuring competitions between amateur and professional athletes, he began shopping the show to various networks, including MTV and Spike TV. Pino claimed that the show *Pros v. Joes*, which aired on Spike TV, violated the copyright on *Under Pressure*. In *Pros v. Joes*, professional athletes competed against average people in different sporting events. The court granted the defendants’ motion to dismiss because the elements that were similar were stock elements and were not legally protectable, and the elements that were legally protectable were not substantially similar to those in *Pros v. Joes*.

*PRL USA Holdings, Inc. v. United States Polo Ass’n, Inc.*<sup>187</sup>

The United State Polo Association (USPA) was sued by Ralph Lauren for trademark infringement of their mounted horseman logo. The USPA claims that it had the right to use one of the logos that was not “offensive” to PRL, evidence that the court correctly allowed to be admitted as estoppel evidence. A jury found that only one of the logos was infringing, and the appellate court upheld this decision. The appellate court also upheld the trial court’s denial of a “safe distance” jury instruction as it would have been too confusing for the jury.

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186. No. 07-3313 (AET), 2008 U.S. Dist. LEXIS 24453 (D.N.J. Mar. 4, 2008).

187. 520 F.3d 109 (2d Cir. 2008).

*Reebok Int'l Ltd. v. Domain Privacy Services, Hong Kong Names, LLC*<sup>188</sup>

The domain name reebokhockey.com was registered by Domain Privacy Services in December 2007. Reebok International first registered the trademark Reebok in 1980 and most recently reregistered it in 1995. Included in those trademark registrations are trademarks for hockey products. Reebok claims that the domain name is confusingly similar or identical to its trademark. The WIPO found that the domain name was confusingly similar because it combined the well known name Reebok with hockey, and it was used in bad faith because holding the registration of a well-known trademark is a clear indication of bad faith. The WIPO ordered the domain name to be transferred to Reebok.

*Roy Jones Jr. v. United Intelligence Ltd*<sup>189</sup>

Respondent United Intelligence registered the domain name “royjonesjr.com.” Complainant, Roy Jones, Jr., believed that this violated his rights, even though he never registered his name as a trademark. Roy Jones, Jr., is a world-famous boxer who has also released video and music recordings. The WIPO Panel concluded that because his name had acquired secondary meaning in the sense that consumers associate the mark with a particular source or sponsor, and that due to long association of the name with the business, the name and the business have become synonymous. Therefore, the domain name was identical or confusingly similar to the trademark, which had been acquired through secondary meaning. As to the second issue, the respondent was not called “Roy Jones” or anything similar and does not appear to trade under that or any related name. Therefore, the Panel concluded that United Intelligence had no rights or legitimate interests with respect to the disputed domain name. Finally, the Panel concluded that United Intelligence must have had one of the following objectives: to persuade Jones, Jr. to purchase the domain name from it at a price greater than United Intelligence’s expenses; to divert Internet users searching for sites relating to Jones, Jr. to the respondent’s websites; or to prevent Jones, Jr. from exploiting the domain name himself. The Panel concluded that it made no difference which of those three goals United Intelligence may have been trying to accomplish; they are all showings of bad faith use. Therefore, the domain name “royjonesjr.com” was transferred to Jones, Jr.

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188. WIPO case no. D2008-0359 (May 14, 2008).

189. WIPO case no. D2008-0527 (June 26, 2008).

*Sports Warehouse, Inc. v. Laksh Internet Solutions Private Ltd.*<sup>190</sup>

Sports Warehouse sells tennis related clothing and equipment online and registered the TENNIS WAREHOUSE mark in the United States in 2006. Sports Warehouse also owns the domain names “tenniswarehouse.com” and “tennis-warehouse.com.” Laksh Internet Solutions (Laksh), an Indian company, registered the disputed domain name “teniswarehouse.com” in 2004. The web site appears to have been generated by a domain name parking service. It offers a series of links related to various tennis items that, when clicked, go to a page of sponsored results. Sports Warehouse contends that it has a valid mark, to which the domain name was confusingly similar; that Laksh has no rights or legitimate interests in the domain name; and that the domain name was registered in bad faith. Laksh did not respond to the complaint. The Panel determined that Sports Warehouse does possess a valid trademark, and that even with the misspelling, the domain name was confusingly similar to that mark. The Panel also determined that Laksh was not authorized to use the TENNIS WAREHOUSE mark and that it had no rights or legitimate interests in the domain name other than to generate “click-through” revenue. It found that Laksh registered the domain name with the TENNIS WAREHOUSE mark in mind and was using it to take advantage of the mark’s reputation. Furthermore, the Panel determined that the domain name was registered in bad faith, with the TENNIS WAREHOUSE mark in mind, because the combination of the words “tennis” and “warehouse” suggest a business with a large stock of tennis related products and because of the misspelling of the word “tennis.” Therefore, the Panel found that Laksh registered the domain name with the TENNIS WAREHOUSE mark in mind, and that Laksh had used a Whois privacy service, which has been previously held to be an indicator of bad faith. The Panel ordered that the disputed domain name be transferred to Sports Warehouse.

*Sportsman’s Warehouse, Inc. v. Sportswear for Men LLC/Domain Privacy Services*<sup>191</sup>

Complainant Sportsman’s Warehouse (Warehouse) brought this complaint against Respondent Sportswear for Men (Sportswear) when it learned that Sportswear had registered the domain name “sportsmanwarehouse.com.” Warehouse consistently used the name “Sportsman’s Warehouse” in conjunction with its more than sixty retail stores across the nation. It also had a website <www.sportsmanswarehouse.com>. It had also registered marks for

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190. WIPO case no. D2008-1112 (Sept. 18, 2008).

191. WIPO case no. D2008-0592 (June 9, 2008).

its name. Warehouse made out a prima facie case by showing that the domain name in dispute was (1) identical or confusingly similar to a trademark or service mark in which Warehouse had rights; (2) Sportswear had no rights or legitimate interests with respect to the domain name; and (3) the domain name at issue was registered and used in bad faith. With respect to number (1), the WIPO Panel decided that the disputed domain name is so close to Warehouse's mark that it was identical or confusingly similar. With respect to (2), there was no evidence put forth that respondent was generally known by the domain name. With respect to (3), Sportswear had intentionally attempted to attract for commercial gain Internet users to its website by creating a likelihood of confusion with Warehouse's mark. Therefore, there was bad faith on the part of Sportswear. The Panel determined that the domain name must be transferred from Sportswear to Warehouse.

*Swissbike Vertriebs GmbH v. Executive Standard Limited*<sup>192</sup>

Complainant Swissbike brought this action against Respondent Executive over the domain name "raleighbikes.com." RALEIGH was a trademark registered by Swissbike in 1913. Executive claimed it used the site as a link. Swissbike claimed that the mark was identical and confusing, that Executive had no legitimate interest in the mark, and that Executive was using the mark in bad faith. Executive argued that the site was being used to connect to a forum site for fans of Swissbike's bikes and was not being used in bad faith even though there was a logo of Swissbike's on the site. The WIPO Panel found that the domain name was identical or confusingly similar to Swissbike's trademark. The Panel did not decide on the issue of the rights or legitimate interests, because it said that there was no evidence that the mark was being used for anything other than what Executive said it was being used for. The Panel said it could not find anything in the record to conclude that the domain name was registered in bad faith. The complaint was denied.

*Thoroughbred Legends, L.L.C. v. Walt Disney Co.*<sup>193</sup>

Upon learning that two television stations owned by Walt Disney Co. planned on making a movie about famed filly racehorse Ruffian, the Thoroughbred Legends registered the horse's name with the U.S. Patent and Trademark Office in an attempt to license the mark to the film makers. The defendants proceeded to make their film without licensing the mark "RUFFIAN." Legends warned against any infringement of its mark. Legends

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192. WIPO case no. D2008-0498 (June 19, 2008).

193. No. 1:07-CV-1275-BBM, 2008 U.S. Dist. LEXIS 19960 (N.D. Ga. Feb. 12, 2008).

sued, but the court granted the defendants' summary judgment with regards to all trademark infringement claims because Legends had never used their mark in commerce to indicate the origins of goods, the mark was merely descriptive, it was a name in the public domain, and the defendants' use constituted fair use. The court also denied a false endorsement claim, but it allowed discovery on all remaining claims.

*Tradition Club Assocs., LLC v. Tradition Golf Club Sales*<sup>194</sup>

The plaintiff, Tradition Club Associates, LLC (Associates), filed a motion for preliminary injunction, which was granted by the court. From 1996 to February 2008, Associates operated the Tradition Golf Club in La Quinta, California. In February 2008, Associates transferred operation of the Golf Club to the Club's members, but Associates retained the rights to use the trade names "Tradition" and "Tradition Golf Club." The defendant, Tradition Golf Clubs Sales (Sales), sold real estate around the Golf Club. Associates claimed that Sales was infringing their rights as to the use of their trademarks. Both Associates and Sales agreed that "Tradition" and "Tradition Golf Sales" was valid, protectable trademarks. However, Sales claimed that Associates did not own these trademarks. Associates was able to demonstrate the high likelihood of confusion between "Tradition Golf Club" with "Tradition Golf Club Sales" both in sound and meaning. Despite the dispute of whether Associates truly had ownership of the trademarks, the court deemed Associates as the senior user of the trademarks since it was established that Associates used the trademarks first and were thus entitled to protection.

*United States Olympic Comm. v. Xclusive Leisure & Hospitality Ltd.*<sup>195</sup>

The United States Olympic Committee (USOC) and the International Olympic Committee (IOC) own the trademarks "Olympic" and "Beijing 2008" and seek a preliminary injunction against the defendant Xclusive Leisure & Hospitality Ltd. from using seven websites that claim to sell tickets to the 2008 Beijing Olympic Games. The defendant's websites misled the public into thinking that the defendant's websites were an official Olympic ticket site, by using websites located at [www.beijingticketing.com](http://www.beijingticketing.com), [www.beijingolympic2008tickets.com](http://www.beijingolympic2008tickets.com), and [www.2008-Olympics.com](http://www.2008-Olympics.com), to name a few. The defendants attempted to conceal their identities from the public and never even provided the tickets purchased from their website. Congress granted the USOC the exclusive right to use and control the commercial use of certain

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194. No. EDCV 08-1581-VAP (RCx), 2008 U.S. Dist. LEXIS 104543 (C.D. Cal. Dec. 17, 2008).

195. No. C 08-03514 JSW, 2008 U.S. Dist. LEXIS 78640 (N.D. Cal. Aug. 25, 2008).

Olympic symbols and anyone who uses these Olympic symbols without consent would be held liable under the Lanham Act. The plaintiffs provided adequate evidence that they would likely succeed on the merits in showing that the defendant infringed under the Lanham Act, and that defendants' conduct showed false endorsement and false advertising. The plaintiffs were granted the preliminary injunction.

*Univ. of Kan. v. Sinks litigation*<sup>196</sup>

The University of Kansas (KU) brought an action against several defendants for trademark infringement for the production of t-shirts bearing the University's logo. Both sides filed motions for summary judgment, but while the court determined that many of the t-shirt designs were likely to be infringing, there was not enough evidence on the record to determine exactly how many shirts would be, so the court refused to grant the KU's motion for summary judgment as to the trademark infringement claims. The court also determined that no affirmative defenses to infringement applied, so the defendants' motions for summary judgment were also denied. There were also issues regarding the inclusion of evidence addressed. During the subsequent case on the merits, the court held that the defendants willfully infringed KU's trademarks and ordered them to pay the school about \$127,000 — or a quarter of the damages KU had sought. However, of the 206 shirts at issue, the court only found about 50 to be infringing. The court held that the defendants' use of the crimson-and-blue color scheme alone was not enough to constitute infringement.

*Warrior Sports, Inc. v. STX, L.L.C.*<sup>197</sup>

Warrior and STX both manufacture and sell lacrosse equipment. Warrior is the owner of a patent for protective lacrosse gear and it sued STX for patent infringement. STX argued that its protective equipment was modified in such a way as to not infringe. STX argued in the alternative that Warrior's patent was invalid and unenforceable. The court determined under a preliminary injunction standard that STX's products could be found to infringe and that Warrior's patent was valid and enforceable. Warrior was able to establish that it was likely to succeed on the merits of its infringement claim, so the court issued the preliminary injunction but held it in abeyance until the proper amount of bond could be determined.

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196. See 565 F. Supp. 2d 1216 (D. Kan. 2008); No. 06-2341-JAR, 2008 U.S. Dist. LEXIS 97787 (D. Kan. Dec. 1, 2008).

197. No. 07-14597, 2008 U.S. Dist. LEXIS 21387 (E.D. Mich. Mar. 19, 2008).

*Welsh v. Big Ten Conference*<sup>198</sup>

Starting in 1997, Robert W. Welsh began working on a business plan for the Big Ten collegiate athletic conference that included ideas for television programming and the “Big Ten Network,” a satellite/cable television station providing in-depth coverage of sports and the culture of Big Ten. His goal was for his company, Big Ten Development, to implement the business plan for the Big Ten. On May 18, 1998, Welsh presented his plan to the Big Ten in a written business plan dated May 1998 and annotated “confidential.” The Big Ten decided against the plan, but retained the submitted plan and several years later launched the Big Ten Network. Welsh filed suit for violations of § 38 of the Lanham Act, 15 U.S.C. § 1120, the Illinois Trade Secrets Act, 765 Ill. Comp. Stat. 1065/1 et seq., and for breach of contract. The Big Ten moved to dismiss the claim arguing that Welsh’s claim did not give rise to a cause of action under the Lanham Act. The court found that Welsh’s submission of a business plan and failure to use the mark did not establish a protectable trademark. Furthermore, the court found that an idea for a television show cannot be protected under trademark law. The court dismissed Welsh’s argument under the Lanham act, but denied the Big Ten’s argument for fees. The remaining two state law claims were dismissed for want of subject matter jurisdiction.

*World Natural Bodybuilding Federation v. Daniel Jones TheDotCafe*<sup>199</sup>

Complainant World Natural Bodybuilding Federation (WNBF) filed a complaint over the domain name “pronaturalmuscle.com.” WNBF is the registered proprietor of the word mark PRO NATURAL in the United States in connection with conducting bodybuilding championships among drug-free athletes. It has owned exclusive control of the mark since 1993. The respondents were two athletes who competed in the bodybuilding competitions at one time and created the site <pronaturalmuscle.com> to sell the product that the respondents used in their exercise regimen. WNBF contended that the domain name was confusingly similar to its PRO NATURAL mark, the respondents cannot demonstrate any right or legitimate interest in the domain name, and the respondents have registered and have been using the domain name in bad faith. The WIPO Panel concluded that the domain name was confusingly similar to the WNBF’s mark in that the mark was incorporated entirely within the domain name, and numerous panels deciding cases under WIPO policy have found that circumstance sufficient to establish confusing

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198. No. 08 C 1342, 2008 WL 5070321 (N.D. Ill. Nov. 21, 2008).

199. WIPO case no. D2008-0642 (June 6, 2008).

similarity. The addition of the word “muscle” only served to increase the likelihood of confusion between that mark and the domain name. As for rights and legitimate interests in the mark, the use by the respondents of the domain name falls well short being an organization or business that was commonly known by the domain name. Use of the expression “Pronaturalmuscle” in a trademark sense, on the respondents’ website, did not of itself prove that the respondents, or any business or organization represented by them, were commonly known by that expression. Any copyright claims and the statement that “Pronaturalmuscle” had taken on a particular meaning were not sufficient on their own to establish that there existed a business or organization that had been commonly known by that name. Finally, there was ample evidence to conclude that the domain name was registered and used in bad faith, because the respondents were well aware of the mark and were using the mark for commercial gain. Therefore, the Panel ordered that the domain name “pronaturalmuscle.com” be transferred to WNBF.

*World Triathlon Corp. v. Dunbar*<sup>200</sup>

In 1978, the defendants named in this action, collectively known as the Hawaiian Ironman Triathlon Organizing Committee (HITOC), participated in the original Ironman Triathlon. This competition was taken over by Valerie Silk and Henry Grundman in 1980. A dispute about the ownership of the Ironman competition later occurred due to the Silk and Grundman sale of the competition to the current plaintiffs, World Triathlon Corp (WTC). HITOC was ultimately barred from disputing the ownership of the Ironman Triathlon due to the six-year statute of limitations. Despite this decision, HITOC ran their own Ironman Triathlon from 1994 to 1998 and laid claim to the trademarks associated with the competition. As a result of this action, WTC sued HITOC and were granted declaratory relief that WTC had superior and exclusive rights to the Ironman mark. WTC was also granted sanctions and reasonable attorneys’ fees by a Special Master, to which HITOC objected in the present action. The District Court of Hawaii agreed with the Special Master and concluded that the extenuating circumstances of this case warranted the application of attorneys’ fees.

*World Wrestling Entm’t, Inc. v. AWA Wrestling Entm’t, Inc.*<sup>201</sup>

Dale Gagner was a former employee of the American Wrestling Association (AWA) until he was fired for promoting a wrestling exhibition

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200. 539 F. Supp. 2d 1270 (D. Haw. 2008).

201. No. 07-2058 ADM/JSM, 2008 U.S. Dist. LEXIS 85823 (D. Minn. Oct. 21, 2008).

under the AWA label without approval from the AWA. The AWA was successful in obtaining a permanent injunction on Gagner from using the AWA marks. World Wrestling Entertainment, Inc. (WWE) subsequently purchased the AWA and all of its intellectual property rights in 2003. Gagner incorporated AWA Wrestling Entertainment, Inc. in Minnesota, and he set up the website [www.awastars.com](http://www.awastars.com) and a MySpace page. He promoted wrestling under the AWA name and used pictures of former AWA wrestlers on his websites. The WWE claimed trademark infringement, unfair competition, cybersquatting, and deceptive trade practices. The WWE moved for summary judgment. The court granted summary judgment, finding that the AWA marks were valid and distinctive and that five of the six factors for likelihood of confusion favored the WWE with little or no dispute from Gagner. In regards to the cybersquatting claim, the court found that the domain names were confusingly similar and that Gagner had a bad faith intent to profit from the AWA marks. Gagner was ordered to take down the websites and transfer them to the WWE, and he was prohibited from using any of the AWA marks in the future.

#### LABOR LAW

Because many groups of employees who work for the various major American professional sports leagues are unionized, labor law plays an important role in sports law. Disputes arising because of player compensation and grievances are all decided under the provisions of any applicable collective bargaining agreements into which a union and league may have entered. Grievances of a player against his union also fall under the umbrella of labor law.

#### *Nat'l Football League Players' Ass'n v. Nat'l Football League*<sup>202</sup>

Five National Football League (NFL) players were suspended for four games after they tested positive for a diuretic, a banned substance under the NFL's Policy on Anabolic Steroids and Related Substances. The diuretic came from an over-the-counter weight loss drug, StarCaps. After an NFL Hearing Officer upheld the players' suspension, the players filed suit seeking a preliminary injunction to prevent the suspensions from immediately taking place. The NFL Players' Association (NFLPA), acting as representative of the players, alleged that because the NFL was aware StarCaps was a banned substance, it had a duty to warn NFL players about the drug. The court granted a preliminary injunction against the suspension after finding that the

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202. No. Civ. 08-6254 PAM JIG, 2008 WL 5191442 (D. Minn. Dec. 11, 2008).

NFL Hearing Officer was not an impartial arbitrator. Because suspending the players would irreparably harm their teams, the court held that the players could finish out the season and thus postponed the issue of the validity of the suspensions until after the season.

*Parrish v. Nat'l Football League Players Ass'n*<sup>203</sup>

The plaintiffs, Parrish and Adderly, were two retired National Football League players who moved for certification of two classes of plaintiffs: 1) all retired NFL players who signed licensing agreements with the National Football League Players Association (NFLPA); and 2) all retired NFL players who joined the NFLPA. The action arose after the NFLPA began soliciting retired NFL players to join a retired group licensing program in which the NFLPA would then license images to third parties. The retired players could then sign a Group Licensing Agreement (GLA) with the NFLPA. The plaintiffs moved for breach of fiduciary duty and breach of contract after most of the players failed to receive anything from their GLAs. Because the GLAs have proven fruitless for the players who entered into them, the court granted certification for the first class of plaintiffs. However, the court denied certification for the second class of players after it was determined that Parrish was an inadequate representative, given his history of inflammatory comments towards former NFLPA chief Eugene Upshaw.

*Phillips v. Selig*<sup>204</sup>

Phillips began as counsel to the umpire union, the Major League Umpires Association (MLUA), for the Major League Baseball (MLB) in 1979. In 1998 and continuing to 1999, tension between the MLUA and the MLB arose, and tensions arose between members of the union also. Phillips and the union discussed the possibility of taking a strike vote, but because the collective bargaining agreement (CBA) contained a no strike agreement, they thought that it would not achieve the goal of getting the Commissioner of Baseball to address their concerns. They then thought of a non-strike strategy that called all members of the union to resign, demand termination pay, and to sign a new personal services contract with a newly formed entity. Fifty-seven umpires resigned, and between July 18 and July 22 of 1999 thirteen rescinded their resignation letters, and the MBL started replacing them. The union then filed suit demanding a temporary restraining order to prevent the MLB from accepting the umpires' resignations. The union representative then attempted

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203. No. C 07-00943 WHA, 2008 WL 1925208 (N.D. Cal. Apr. 29, 2008).

204. 959 A.2d 420 (Pa. Super. Ct. 2008).

rescinding all of the remaining letters, but many of the positions had been filled. In total, twenty-two umpires lost their jobs. The union demanded arbitration pursuant to the CBA challenging MLB's acceptance of the resignation of the twenty-two umpires. The arbitrator found in favor of MLB. In October 1999, the Umpires Independent Organizing Committee then challenged the union, and voted to decertify. In December 1999, the union filed a petition with the NLRB to overturn the decision to decertify and the NLRB rejected the union's claims. In February 2000, the umpires formally voted to decertify and to verify the World Umpires Association as the new union, and retained a new lawyer and law firm as their collective bargaining representative. In the aftermath of the creation of the new union, Phillips and his law firm filed a lawsuit claiming fraudulent conveyance, quantum meruit/unjust enrichment, and breach of contract, defamation, invasion of privacy/false light, commercial disparagement, injurious falsehood, tortious interference with contractual relations, and conspiracy. The court found that the relationship of an attorney with a former union did not give probability of a prospective contractual relationship (2) the law firm representing the new union did not tortiously interfere with existing contractual relationships (3) the umpire's criticisms were not tortious interference with existing contractual relationship and (4) the umpires efforts to decertify were not tortious interference with existing contracts.

*White v. Nat'l Football League*<sup>205</sup>

The National Football League Players' Association brought a claim against the National Football League (NFL) for violation of the nonforfeiture provision of their collective bargaining agreement. The NFL had worked to help the Atlanta Falcons recover roster bonus amounts paid to former quarterback Michael Vick, who had plead guilty to federal criminal charges. A special master had determined that the bonuses were not protected by the nonforfeiture clause and that there were no other legal avenues open to the Falcons by which they could recover more money. The court did not agree that roster bonuses could be recovered because they were considered earned for each year a player made the team roster; the court did agree that the CBA barred subsequent state law claims. The Falcons were only able to recover Vick's 2006 roster bonus because it was not earned.

PROPERTY LAW

The laws governing real property and its use have an impact on the sports

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205. 533 F. Supp. 2d 929 (D. Minn. 2008).

industry with regards to land use for sporting facilities. The laws that regulate the acquisition of land, such as the Fifth Amendment, zoning laws, and environmental regulation can affect how and where sports facilities are built and maintained. The following cases give some insight into how land use property law claims can arise in a sports context.

*Carson Harbor Vill., Ltd. v. Bd. of Trs. of Cal. State Univ.*<sup>206</sup>

Before constructing the Home Depot Center, California State University – Dominguez Hills (CSUDH) completed an environmental impact report (EIR). After CSUDH completed the EIR, changes were made to the building project, such as reducing the amount of permanent seats and including permanent lights. Carson Harbor Village (Carson) complained about the spillover effect of using the permanent lights during evening soccer games, so CSUDH's President decided to turn off the lights. However, attendance began to decline when the games were moved to the afternoon, so CSUDH decided to further evaluate the environmental impact of permanent lights compared to temporary lights. Carson was never able to comment on the draft of the second EIR report, so Carson filed a petition challenging approval of the report, arguing that Carson did not have to exhaust its administrative remedies since CSUDH failed to provide proper notice. The court held that Carson did not exhaust its administrative remedies because it did not comment on the second EIR, nor did it attend a public meeting to comment about the impact of the second EIR. CSUDH gave proper notice to Carson regarding the meeting, as well as all other people possibly affected by the EIR.

*Deerfield Twp. v. Deerfield Raceway, LLC*<sup>207</sup>

Deerfield Raceway is located on two parcels of property at 9673 State Route 224 in Deerfield Township, Portage County. The land has been used for racing since the 1970s. However, in 1979, Deerfield Township passed a zoning resolution that classified the property as residential. Deerfield later brought a suit against the raceway; however, the trial court dismissed the suit with prejudice holding that Deerfield Raceway was a non-conforming use. On this appeal Deerfield Township only raised one question, whether the trial court erred in finding the non-conforming use. The court affirmed the judgment of the trial court, finding that the non-conforming use was valid.

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206. No. B193879, 2008 Cal. App. Unpub. LEXIS 3098 (Cal. Ct. App. Apr. 14, 2008).

207. No. 2007-P-0060, 2008 WL 3270951 (Ohio Ct. App. Aug. 8, 2008).

*Goldstein v. Pataki*<sup>208</sup>

Plaintiffs, consisting of Daniel Goldstein and fourteen other property owners, sued New York Governor George Pataki and Bruce Ratner, the developer carrying out the Atlantic Yards Arena and Redevelopment Project, under the Fifth Amendment. Plaintiffs' homes and businesses were subject to condemnation to make room for the Project. The Project was primarily designed to provide room for construction to begin on a new arena for the soon-to-be Brooklyn Nets National Basketball Association team. The court held for the defendants because the plaintiffs could not mount a viable Fifth Amendment claim, and the Project bore at least a rational relationship to several well-established categories of public uses, such as redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements.

## TORT LAW

Torts continue to be one of the most litigated aspects of sports law. Tort law governs the duties of care owed to co-participants in sporting events, spectators, and people using sports facilities. Because of the intense physical nature of sports, courts have distinguished between the risks inherent in different sports activities, and the risks that are intensified by negligence or recklessness. Many courts have also been careful to distinguish between injuries caused by negligence and those caused by recklessness during the course of play in contact sports. The following cases include examples of injured spectators, injured skiers, and athletes injured by their co-participants.

*Ackerman v. Paulauskas*<sup>209</sup>

Coach Thomas Ackerman filed a complaint alleging defamation, breach of contract, and interference with a contractual relationship. Ackerman served as men's basketball coach at Assumption College (Assumption) since June 1999. He was employed under several one-year contracts. After his 2004 contract expired, Assumption's Athletic Director, Theodore Paulauskas, informed Ackerman that his contract would not be renewed for 2005. After Ackerman left Assumption, Paulauskas made several statements disparaging the men's basketball program during an interview with a local newspaper. Ackerman contended that those statements were directed at him, and that Paulauskas intended to defame and discredit him. The court found that one of the

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208. 516 F.3d 50 (2d Cir. 2008).

209. 23 Mass. L. Rep. 666 (Mass. Super. Ct. 2008).

statements might have been directed at Ackerman's work habits. The court ultimately granted Paulauskas's motion for summary judgment as to the breach of contract and interference with a contractual relationship claims, and denied Paulauskas's motion for summary judgment as to Ackerman's defamation claim, specifically as to the one statement.

*Allred v. Capital Area Soccer League, Inc.*<sup>210</sup>

On April 26, 2003, Teresa Allred attended a professional women's soccer match at State Capital Soccer Park where she was injured after being struck in the head by a soccer ball. She sought monetary damages for her injuries and her husband's loss of consortium based on the negligence of the defendant soccer league. The defendants responded with allegations of contributory negligence and assumption of risk, and the trial court dismissed Allred's claims with prejudice. On appeal, the court of appeals remanded the case due to the lack of reported decisions concerning an owner's duty at a soccer match.

*Barry v. Rollarama Skating Ctr., Inc.*<sup>211</sup>

Florence Barry injured herself when she fell down a set of bleachers at Roll on America, a skating rink in Massachusetts, while watching her granddaughter, Chantal, participate in a roller skating competition. The competition was hosted by the defendant, Rollarama Skating Center, Inc. (Rollarama). Rollarama is based in New York, but often hosts roller skating competitions in other states. The court found that personal jurisdiction existed over Rollarama because Barry's claims were related to Rollarama's conduct in Massachusetts. Rollarama voluntarily and purposely reached into Massachusetts by bidding to host these skating competitions, and Rollarama encouraged Massachusetts residents to participate in the competitions from its New York facility. Rollarama posted information about the Massachusetts competition on its website. The court found that but for Rollarama bidding on, and securing, the opportunity to host the competition, and accepting Chantal's application fee, Barry would not have been injured.

*Berman v. Rolling River Assocs.*<sup>212</sup>

The infant Plaintiff, Dana Berman, was seven years old, and was enrolled in a summer day camp when she fell and injured herself while participating in

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210. 669 S.E.2d 777 (N.C. Ct. App. 2008).

211. No. 07-40266-FDS, 2008 U.S. Dist. LEXIS 39996 (D. Mass. May 7, 2008).

212. No. 4559/06, 2008 N.Y. Misc. LEXIS 2097 (N.Y. Sup. Ct. Mar. 17, 2008).

a gymnastics activity. The camp argued that it provided proper supervision because at least four counselors were present to instruct and oversee the campers; it provided proper warning; and the activity was appropriate for seven-year olds since it only involved jumping, tumbling, and climbing. The court found insufficient evidence that the camp provided adequate, if any, instruction. The camp tried to rely on the fact that one counselor informed the campers that they would be going through an obstacle course, and jumping over, and through, various things, in arguing it provided proper instruction. However, Berman's motion for summary judgment was denied because a question of fact existed as to whether the camp provided adequate supervision.

*Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist.*<sup>213</sup>

Jennifer Besler filed suit against the School Board and her former basketball coach, Daniel Hussong, among others claiming emotional distress from an eating disorder and amenorrhea as a result of the actions of her basketball coach during her senior year of high school. Her father also filed suit against the School Board based on an infringement of his First Amendment rights relating to his complaints against Hussong. During her senior year, Jennifer alleged that Hussong became abusive and told her to lose weight. She also believed that all comments regarding health and weight during team meetings were directly related to her. A jury trial found in favor of Jennifer, holding that she suffered emotional distress as related to the amenorrhea, but not the eating disorder. The jury also found in favor of Mr. Besler's First Amendment claim. The verdict in favor of Jennifer was reversed by the trial judge, and all of Jennifer's claims were dismissed. He also modified the award for Mr. Besler by increasing the amount the defendants were entitled to pay. After appeals by both parties, the Superior Court of New Jersey affirmed the dismissal of Jennifer's claims as not being severe enough to constitute emotional distress under the Tort Claims Act.

*Bjorgung v. Whitetail Resort*<sup>214</sup>

On February 10, 2001, Anders Ellis Bjorgung was injured while competing in a giant slalom race at Whitetail Ski Area in Franklin County, Pennsylvania. He failed to negotiate a turn and skied into the woods, where he struck a tree. Two years later, on November 21, Bjorgung brought a suit, alleging that the resort had a negligently designed and maintained ski trail and race course. Due to Bjorgung's assumption of risk by participating in the ski

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213. No. A-0317-05T3, 2008 WL 3890499 (N.J. Super. Ct. App. Div. Aug. 25, 2008).

214. 550 F.3d 263 (3d Cir. 2008).

race, the district court granted summary judgment in favor of the defendants, which was affirmed by the Third Circuit.

*Bridges v. City of Carenco*<sup>215</sup>

Plaintiff Charles Bridges was injured while participating in a softball tournament. The tournament was sponsored by the USSSA. Bridges brought an action against the USSSA, alleging that the game should have been postponed because of the defective condition of the field around second base that caused Bridges's injuries. The USSSA filed a motion for summary judgment, claiming immunity under Louisiana law. The trial court granted the motion and the decision was upheld on appeal because the appellate court found that Bridges offered no evidence to counter the USSSA's claims of remedial action, nor did he raise an issue of material fact regarding any alleged gross negligence on USSSA's part. The record before the court established that remedial steps had been taken to improve the playing surface around second base after a rainfall. In affirming the trial court, this court found that the tournament director was covered under the Louisiana immunity statute.

*Britt v. Maury County Bd. of Educ.*<sup>216</sup>

Christina Britt brought suit against the Maury County Board of Education to recover damages for personal injuries sustained while participating on her high school cheerleading squad. She broke her arm during an unsupervised warm-up exercise. Britt alleged that the Board was liable because the cheerleading supervisor, Sherry Boshers, was negligently hired due to lack of experience or qualifications for sponsoring cheerleaders and that the supervisor negligently supervised the squad. The trial court granted summary judgment on both counts. Upon review, the court of appeals affirmed the trial court's judgment in part and reversed in part, dismissing the allegation of negligent hiring and concluding that there remained disputes issues of material fact regarding Boshers's negligence.

*Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*<sup>217</sup>

Andrew McSorley, a high school basketball player, struck Jeremy Brokaw, another high school basketball player, in the head with his elbow, causing Jeremy to fall to the floor. The referee called a technical foul on

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215. 982 So. 2d 306 (La. Ct. App. 2008).

216. No. M2006-01921-COA-R3-CV, 2008 WL 4427190 (Tenn. Ct. App. Sept. 28, 2008).

217. No. 8-435/07-1328, 2008 Iowa App. LEXIS 1138 (Iowa Ct. App. Oct. 29, 2008).

McSorley and ejected him from the game. Mcsorley was also suspended for six games combined by his school and the Iowa High School Basketball Association. Subsequently, Jeremy and his parents filed a petition against the school and McSorley alleging that McSorley had struck him with his fist and sought damages for assault and battery, including punitive damages. The trial court found the plaintiffs had proved McSorley committed a battery and awarded Brokaw damages of \$23,000. However, the court denied Brokaw's claim for punitive damages against McSorley because it found that McSorley's act did not rise to the level of willful or reckless disregard of Brokaw's rights. The court also ruled that Brokaw failed to prove that the school was negligent in supervising McSorley and dismissed his claim for negligent supervision. The appellate court affirmed the trial court, finding that McSorley's action during the basketball game did not rise to a level justifying a punitive damage award. Also, because the school could not reasonably foresee that the McSorley would commit a battery during the game, it did not breach any duty to the Brokaw.

*Chung v. Van Nuys Ice Skating*<sup>218</sup>

Chung, a member of the Association of Chinese Americans (ACA), hosted a social broomball event at Van Nuys Iceland Skating Center. For the event, the participants in the event played by rules other than the standard broomball rules. The Center allowed the event to proceed without requiring the use of helmets with faceguards, allowing the use of two balls rather than one, and permitting up to thirty players to play at one time, as opposed to the normal ten. During the event, Chung was struck in the eye with a broomstick and lost vision in that eye. The court found that because Chung has assumed a risk of injury by playing the game, the Center was only liable for her injury if it had increased the risk of injury by contact with a broomstick. This court relied on *Balthazor v. Little League Baseball, Inc.*, 62 Cal. App. 4<sup>th</sup> 47 (Cal. App. 4<sup>th</sup> Dist.1998) which held that "the defendant has a duty not to increase the risks inherent in the sport, not a duty to decrease the risks." Thus, the Center had no duty to provide helmets with facemasks to the participants in the broomball social. Lastly, because the incident revolved two participants, not the entire thirty, and chasing one ball, not two different balls, it was irrelevant that there were two balls being used in the game instead of the standard single ball.

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218. No. B198637, 2008 Cal. App. Unpub. LEXIS 1972 (Cal. Ct. App., Mar. 10, 2008).

*Cohen v. Five Brooks Stable*<sup>219</sup>

Cohen rented a horse from the stable and signed a release acknowledging certain inherent risks, including the risk that a horse could move unexpectedly in response to the movement of people or other horses. While riding on a recreational trail, Cohen fell from her horse and was injured. Her complaint alleged that the trail guide, who was an employee of the stable, suddenly caused his horse to gallop without warning the other riders that their horses would do the same. The court stated that in order for a release to exculpate a tortfeasor from future negligence or misconduct, the release had to be clear, unambiguous, and explicit. Any ambiguity had to be construed against the drafter. The court concluded that the release did not unambiguously apply to injuries caused by the negligence of the stable or its employees that increased a risk inherent in horseback riding. Moreover, the application of the doctrine of primary assumption of risk could not be resolved on summary judgment because there was a factual issue as to whether the trail guide's conduct was so reckless as to be totally outside the range of the ordinary activity involved in the sport.

*Crace v. Kent State Univ.*<sup>220</sup>

Angela Crace was a cheerleader at Kent State University. During the 1999-2000 school year the cheerleading squad practiced a human pyramid stunt. The squad successfully performed the stunt in competition in early 2000 but did not attempt the stunt again until February 12, 2001. On that date the squad tried the stunt and failed three times. During the third failed attempt, Angela suffered severe injuries from a fall, resulting in paralysis in her lower body. Angela alleged that the University and its employees were negligent in allowing the squad to attempt the stunt. She also asserted that she should recover because of negligent supervision from the coach. From the facts, the court found that Angela had assumed the risks associated with the stunt, and therefore, the judgment was made in the favor of the University.

*Craig v. Amateur Softball Ass'n*<sup>221</sup>

Matthew Krushinski Craig was hit in the head by a softball while playing in a slow-pitch softball league that was organized under the Amateur Softball Association (ASA) rules. He was not wearing a helmet at the time and sued

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219. 72 Cal. Rptr. 3d 471 (Cal. App. 1st Dist. 2008).

220. No. 2005-07275, 2008 Ohio Misc. LEXIS 267 (C.C. Ohio Nov. 12, 2008).

221. 951 A.2d 372 (Pa. Super. Ct. 2008).

the ASA, claiming that it had a duty to recommend or mandate that players in the league wear a helmet. The ASA argued that it did not owe a duty of care to Craig, and he had assumed the risk of being struck in the head by failing to wear a helmet. The court dismissed the case because Craig did not provide any facts that suggested the ASA owed him a duty, nor did he provide any direct evidence that the ASA had deviated from custom by not recommending or mandating players should wear helmets.

*DeLafosse v. Vill. of Pine Prairie*<sup>222</sup>

On February 26, 2004, while DeLafosse was at work, Carrie Aucoin was babysitting DeLafosse's two daughters, Kasie and Kayla Crawford. Aucoin took the two children to a high school baseball game at Pine Prairie's baseball field. While on the way to the stands a ball came over the fence and hit Kasie in the head. Kasie sustained severe physical injuries and was immediately taken to the hospital. DeLafosse brought suit against Pine Prairie, the Evangeline Parish School Board, and the Livingston Parish School Board. The defendants filed for summary judgment, which the trial court granted, dismissing DeLafosse's suit. On appeal DeLafosse asserted three errors: (1) the trial court erred in its interpretation of the recreational use immunity statute because it did not strictly construe the statute; (2) there were genuine issues of material fact relative to the existence of a dangerous condition or structure at the ballpark that prevent Pine Prairie from being granted summary judgment on the issue of immunity; and (3) Pine Prairie failed to refute the evidence contained in the record that would exclude it from receiving immunity. The court held that the burden of proving a malicious or willful failure to warn was on the mother, and she did not provide any such proof with which to satisfy the burden. The court also found that no evidence was introduced that showed intentional or grossly negligent acts by an employee of a public entity. Therefore, the court affirmed the grant of summary judgment against DeLafosse.

*Demelio v. Playmakers, Inc.*<sup>223</sup>

John Demelio, a minor, was injured at John Franco's Indoor Sports when a baseball hit in the venue's batting cages ricocheted off of a part of the cage and hit him in the eye. The defendant-owner of John Franco's moved for summary judgment based on Demelio's assumption of risk. The court denied the motion holding that there were issues of fact as to whether the defendant

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222. 998 So.2d 1248 (La. Ct. App. 2008).

223. 855 N.Y.S.2d 878 (N.Y. Sup. Ct. 2008).

unreasonably increased the risk of injury in the design or operation of the batting cages. Specifically, Demelio alleged sufficient facts that the defendant failed to adequately pad the pole off which the ball ricocheted, failed to hang netting, failed to provide adequate distance between the pole and the back of the batter, failed to inform the batter of increased risk, failed to provide protective eye wear or head gear for use while batting, and did not provide sufficient evidence to show that ricocheting balls were an inherent risk.

*Deutsch v. Traditional Equitation Sch.*<sup>224</sup>

On September 2, 2004, Deutsch was thrown from a horse and suffered severe and disabling injuries. She was a beginning equestrian student at Traditional Equitation School (TES). Deutsch alleged that TES assigned her a skittish horse that would be particularly difficult to ride by a beginner. She also alleged that she was never advised of the horse's temperament or taught how to control it. TES moved for summary judgment asserting that (1) Deutsch's sole cause of action for negligence was barred by the doctrine of primary assumption of risk; and (2) she had signed a release of "all claims, demands, actions or causes of action of any kind or character whatsoever" against TES. The appellate court, finding no issues of fact precluding summary judgment, held that the trial court properly granted summary judgment for TES.

*DiGiose v. Bellmore-Merrick Cent. High Sch. Dist.*<sup>225</sup>

DiGiose, a cheerleader, was injured while practicing cheerleading stunts on a gym floor without any protective mats. She sued the School District, alleging that it had unreasonably increased the risks inherent in cheerleading by failing to provide protective mats or to supervise and instruct her properly. The trial court denied the School District's motion for summary judgment. The School District appealed. The appellate court reversed the denial and granted summary judgment to School District, holding that a participant in a sport or recreational activity consents to the inherent risks of participating in that sport. In its reversal, the appellate court determined that the plaintiff offered only the affidavit of an expert that relied on speculative and conclusory opinions that the School District had unreasonably increased the risks to the DiGiose. Thus, the appellate court held that DiGiose failed to meet her burden in opposing the summary judgment motion.

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224. No. B203319, 2008 Cal. App. Unpub. LEXIS 10384 (Cal. Ct. App. Oct. 24, 2008).

225. 855 N.Y.S.2d 199 (N.Y. App. Div. 2008).

*Evans v. Nantucket Cmty. Sailing, Inc.*<sup>226</sup>

The defendants, Kiely and O'Siochru, are instructors at Nantucket Community Sailing. During a sailboat race, Kiely jibed the boat on which Evans was a passenger, which was driven by O'Siochru. The boom of Kiely's boat struck Evans, causing her to lose taste and smell. The court decided that the loss of taste and smell was proximately caused by being struck with the boom. The court found that Kiely was negligent by starting a jibe and misjudging the distance between the boom and Evans. O'Siochru was negligent by failing to take early or substantial action to avoid a collision. Evans was also negligent for not paying attention. Had she acted with reasonable care, she would have seen the boom coming at her and had time to move to avoid it. The court found Keily to be twenty-five percent responsible, O'Siochru thirty-five percent responsible, and Evans forty percent responsible.

*Farone v. Hunter Mountain Ski Bowl, Inc.*<sup>227</sup>

Farone could not recover against a fellow skier, Morris, who struck Farone at an area operated by Hunter Mountain Ski Bowl, Inc. Farone argued that posted signage at Hunter Mountain failed to comply with Hunter Mountain's statutory and common-law duty. However, since the accident occurred when Morris hit an ice patch during a difficult ski maneuver, the court found that this was an inherent risk involved in skiing, and that neither Morris nor Hunter Mountain enhanced these inherent risks. Neither defendant was liable for Farone's injuries.

*Feld v. Borkowski*<sup>228</sup>

A group of high school students formed an intramural slow-pitch softball league. During a practice, Borkowski was in the batter's box, and after swinging at a pitch, lost his grip on the aluminum bat, which hit Feld in the head. Borkowski raised the defense of the contact sports exception and assumption of the risk. The court looked at case law from other jurisdictions to confirm that softball, as a matter of law, is a contact sport necessitating the recklessness standard of review. Feld claimed that, even if softball is a contact sport, the exception does not apply because he did not assume the risk of being struck by the bat because a first basemen being struck by a bat from a right handed hitter is not inherent or virtually inevitable in the game of softball.

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226. 582 F. Supp. 2d 121 (D. Mass. 2008).

227. 859 N.Y.S.2d 64 (N.Y. App. Div. 2008).

228. No. 8-247/07-1333, 2008 Iowa App. LEXIS 1130 (Iowa Ct. App. Oct. 1, 2008).

The court rejected this argument because the incident does not need to be virtually inevitable to qualify under the contact sports exception. The court also rejected the argument that the contact sports exception is limited to situations where the specific type of physical contact prompting the cause of action is inherent to the contact sport. According to Feld's own rationale, he subjected himself to being struck by a bat if the batter was left-handed. The court found that Feld assumed the risk when he decided to play softball.

*Fithian v. Sag Harbor Union Free School Dist.*<sup>229</sup>

Fithian, a high school student, was struck in the head by a baseball during a high school game. Fithian alleged that the school district was negligent in providing and allowing the use of a cracked batter's helmet. The court found that being struck in the head by a ball was a known risk inherent in the sport of baseball. However, the allowance of a cracked batter's helmet raised a triable issue of fact as to whether the district unreasonably increased the risk of injury.

*Garcia v. Score Int'l*<sup>230</sup>

The plaintiffs, Aleman, Garcia, and Vega, brought suit against Score International claiming premises liability and general negligence for injuries sustained as spectators of an ATV race organized by Score. Driver Benitez, whose driver's license was suspended as a result of a reckless DUI, had lost control of his ATV and collided with the plaintiffs. The plaintiffs alleged that Score did not guard against or warn spectators of the dangerous condition of the course or anticipate that racers could leave the course at any time, striking spectators standing fifteen feet off the designated course. The court decided that it is common knowledge that off-road vehicles can travel too fast and lose control, running off the course. Additionally, aggressive driving, as well as the possibility of mechanical problems, are inevitable or unavoidable features of the sport. However, the court found that, because Score is a race producer, it has the minimal duty of care not to increase the inherent risks of the sport to spectators. Score could have arranged for limited spectator access to the race course and marked spectator areas with signage discussing the risks. Furthermore, even though the plaintiffs were not in an approved spectator zone, Score foresaw the potential presence of spectators in non-approved spectator zones.

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229. 864 N.Y.S.2d 456 (N.Y. App. Div. 2008).

230. No. D052243, 2008 Cal. App. Unpub. LEXIS 7962 (Cal. Ct. App. Sept. 24, 2008).

*Gardner v. Town of Tonawanda*<sup>231</sup>

Gardner, playing in an indoor recreational flag football game in a facility owned by the Town of Tonawanda, slipped and fell on a baseball glove being used as a sideline marker. The town presented evidence that Gardner had experience playing in these games on the artificial turf field in question, and knew orange plastic cones marked the sidelines, although the referee had discretion to use other items as sideline markers. Gardner argued that the risk of slipping on a baseball glove was greater than the risk of slipping or tripping on the plastic cones or plastic flags sometimes used as markers; however, Gardner presented no evidence substantiating his argument. The use of the baseball glove did not create a condition any more dangerous than the usual dangers inherent in a recreational flag football game. The court reversed the lower court's decision in favor of Gardner, and held that Gardner assumed the risk of injury in playing in the flag football game, and dismissed Gardner's complaint.

*Gateway Hotel Holdings, Inc. v. Lexington Ins. Co.*<sup>232</sup>

Boxer Fernando Ibarra Maldonado brought suit after being injured during a boxing match held at the Regal Riverfront Hotel. After being knocked out in the match, he went to his dressing room and lost consciousness. The hotel had failed to have an ambulance on the premises, and after one was called to the scene, Maldonado suffered severe brain damage. The promotion contract required the hotel to have an ambulance or medical personnel standing by on-site. Maldonado asserted that the negligent failure to provide the ambulance caused his injury. While the court found that the injuries were worsened by the hotel's failure to have medical staff on-site, the injury occurred in a sporting event, which was excluded under the general liability insurance policy, and thus, attached during the time Maldonado was in his dressing room after the match. The court could not separate the time in the ring from the time in the dressing room.

*Gerry v. Commack Union Free Sch. Dist.*<sup>233</sup>

Russell Gerry, a minor plaintiff who had participated in a high school track meet, sued the defendants, the school district, and another participant in the track meet, seeking damages for injuries suffered when he was hit with a

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231. 850 N.Y.S.2d 730 (N.Y. App. Div. 2008).

232. 275 S.W.3d 268 (Mo. Ct. App. 2008).

233. 860 N.Y.S.2d 133 (N.Y. App. Div. 2008).

shot that had been thrown by the other participant during competition. The Supreme Court of Suffolk County, New York, denied motions for summary judgment filed by the school district and the participant. The school district and the participant appealed. The school district and the other participant established their prima facie entitlement to judgment as a matter of law by presenting undisputed evidence that Gerry assumed the risks associated with his voluntary participation in the shot put event. Gerry's deposition testimony established that he was an experienced shot putter who previously had participated in ten to fifteen similar track meets and previously had thrown a shot between a hundred and two hundred times, that he understood the procedures and rules of the shot put event, including those related to safety, and that he also understood the inherent risks associated with the sport. In opposition, Gerry failed to raise any fact issues as to whether the school district and the other participant unreasonably increased the risk of injury to Gerry or others. There was no evidence in the record that any conduct on the part of the school district or the other participant created a unique condition over and above the usual dangers associated with the sport of shot put. The lower court's order was reversed, and the motions for summary judgment filed by the school districts and the participant were granted.

*Gibson v. Digiglia*<sup>234</sup>

Wade Gibson was a twenty-four-year-old professional ice hockey player for the Lake Charles Ice Pirates. During an away game in San Angelo, Texas, Gibson was injured when a hockey puck struck him on the left side of his face. After being taken to the emergency room, two doctors diagnosed Gibson as sustaining a left malar fracture and a retinal hemorrhage. That night, Gibson's coach called Dr. John Digiglia, the team's physician, and informed Digiglia of Gibson's injuries. The day after the accident, on Digiglia's advice, Gibson was transferred via air back to Lake Charles. Gibson suffered significant loss of depth perception and central vision in his left eye, which he attributed to a delay in medical treatment combined with a change in air pressure on the flight home. Gibson sued Digiglia for damages due to medical malpractice. The trial court granted Digiglia's motion for a directed verdict. However, the appellate court recognized that Gibson presented no evidence regarding the proper standard of care required by Digiglia, nor did Gibson present any evidence to support his claim that Digiglia's actions fell below the standard of care for a team physician. The appellate court affirmed the trial court's directed verdict in favor of Digiglia.

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234. 980 So. 2d 739 (La. Ct. App. 2008).

*Gill v. Tamalpais Union High School District*<sup>235</sup>

During “open gyms” for Redwood High girls’ junior varsity basketball team, the plaintiff, Jennifer Gill, suffered a cut on her face when she collided with the metal pole supporting an outdoor basketball backboard. The basketball hoop was on the premises of defendant, Tamalpais Union High School District, and Gill was directed to go to the training room. As Gill sat on a counter and awaited treatment from respondent Presidio Sport & Medicine, Gill fainted and fell off the counter sustaining additional injuries to her face and teeth. She was then taken to a nearby hospital where she spent the night. Gill had stitches on her face, serious dental damage, experienced migraines for a couple weeks, was dropped from the basketball team, had her school grades suffer, and developed a fear of dentists that required counseling.

Initially, the jury found in favor of Gill and apportioned sixty percent of the responsibility to Tamalpais and forty percent to Presidio. The jury awarded Gill \$477,000, but the court amended this award and entered judgment for Gill in amount of \$336,932 against Tamalpais. Tamalpais filed a cross-complaint against Presidio for indemnification, and the judge awarded Tamalpais \$50,572.80. Tamalpais appealed, arguing Gill was barred by the doctrine of primary assumption of risk and that the trial court erred. However, the court rejected these arguments and found that the trial court did not err. Gill appealed when the court did not find Tamalpais liable for all damages awarded by the jury. The court rejected this appeal and held that the court did not err because the judgment was prematurely and erroneously entered. Presidio’s appeal was also denied because the court did find competent evidence from which a jury could conclude that Presidio committed professional negligence.

*Gillen v. Nassau Semi-Fast Softball League*<sup>236</sup>

Peter Gillen was injured while playing catcher in a softball league game when a base runner from the opposing team collided with him near home plate. The defendant, Nassau Semi-Fast Softball League, was found not liable for the injuries because it was able to establish that such collisions were an inherent risk in softball. Because Gillen assumed that risk by participating in the game, the league was not held liable.

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235. Nos. A112705, A112830, A113358, 2008 Cal. App. Unpub. LEXIS 3928 (Cal. Ct. App. May 14, 2008).

236. 853 N.Y.S.2d 590 (N.Y. App. Div. 2008).

*Goodfield v. Sugar Bowl Corp.*<sup>237</sup>

Lori Goodfield sued Sugar Bowl Corp., a ski resort, after she was injured on Sugar Bowl's premises during a collision with another skier. Goodfield contended that the ski resort was negligently designed and constructed. The appellate court affirmed the trial court's grant of summary judgment on behalf of Sugar Bowl. Goodfield was held to have assumed the risk of her injuries when skiing at Sugar Bowl, and Sugar Bowl owed no duty to protect Goodfield from the risk and injuries Goodfield sustained.

*Heintzelman v. RCPI Landmark Props.*<sup>238</sup>

Heintzelman, a nine-year-old girl, was injured after ice skating at the defendant's ice-skating rink. On the rink, there was a small divot hole in the ice that Heintzelman was able to avoid for an hour before getting caught in the divot. She twisted her leg, injuring it. Because issues of material fact remained as to whether the hole was apparent and whether the operators had constructive notice of the condition, and because the standard of review for a child's assumption of the risk is lower in the sporting context, the case was remanded for trial.

*Hoffman v. Town of Burlington*<sup>239</sup>

Hoffman brought a negligence claim against the Town of Burlington after she fell and injured herself in a parking lot while attending her son's youth football league game. The Town moved for summary judgment based on a recreational use statute barring negligence claims, absent willful, wanton, or reckless conduct, against those who allow their land to be used for recreational purposes. The court held that the football league's use of the property fell within this statute because the league was not charged to use the property and no fee was charged to attend the game. Hoffman also claimed that failure to repair the hole in which she fell constituted willful, wanton, or reckless conduct. The court stated that such conduct could not, as a matter of law, be said to entail the risk of substantial harm resulting in death or grave bodily injury and that the injury Hoffman sustained was the type of injury the statute was meant to protect against. Therefore, the court granted summary judgment in favor of the Town on all of Hoffman's claims.

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237. No. C053992, 2008 WL 376366 (Cal. Ct. App. Feb. 13, 2008).

238. No. 118785/06, 2008 N.Y. Misc. LEXIS 5921 (N.Y. Sup. Ct. July 29, 2008).

239. 24 Mass. L. Rep. 241 (Mass. Super. Ct. 2008).

*Karas v. Strevell*<sup>240</sup>

On January 25, 2004, Benjamin Karas, a high school hockey player, was injured when two members of the opposing team, Russell Zimmerman and Joseph Strevell, struck him from behind. The Amateur Hockey Association, of which both teams were members, had a rule prohibiting body-checking players from behind. The word “STOP” was also sewn on the back of players’ jerseys to reinforce this rule. Karas filed this action, alleging that his injuries were caused by the players’ willful and wanton conduct. Karas also alleged negligence on the part of the Naperville Central Redhawk Hockey Association, the Amateur Hockey Association, and the Officials Association. The circuit court concluded that Karas failed to plead willful and wanton conduct, as is necessary to establish co-participant tort liability under Illinois’ contact sports exception, and that no duty of care existed for the various organizations. The appellate court reversed the trial court’s dismissal of claims against the player defendants and the organizations. This ruling was appealed to the Supreme Court of Illinois, which remanded the claims to the circuit court to allow Karas to amend his complaint in conformance with the duty to refrain from willful and wanton or intentional misconduct.

*Kirton v. Fields*<sup>241</sup>

Bobby Jones signed a release and waiver of liability, assumption of risk, and indemnity agreement for his son, Christopher, so that Christopher could ride an all-terrain vehicle (ATV). While attempting a particular jump, Christopher lost control of his ATV, causing himself to be ejected, and hit the ground with the ATV landing on top of him causing his death. The court held that the father did not have the authority to execute the pre-injury release on behalf of the child, binding the child’s estate and releasing the park from liability, where the release involved participation in a commercial activity.

*Lincoln v. Canastota Cent. Sch. Dist.*<sup>242</sup>

In April 2006, Lincoln was shooting baskets outside of the defendant’s Southside Elementary School when he injured his left knee and collapsed onto the court. He then brought suit, alleging that the school district’s failure to properly maintain and repair the basketball court created an unsafe condition, which caused the plaintiff’s injury. He also asserted that it was not until he

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240. 884 N.E.2d 122 (Ill. 2008).

241. 997 So. 2d 349 (Fla. 2008).

242. 861 N.Y.S.2d 488 (N.Y. App. Div. 2008).

fell to the ground that he noticed that the pavement was uneven and “very wavy.” The trial court denied the school district’s motions for summary judgment and dismissal. On appeal, the appellate court reversed the trial court’s decisions. The court reasoned that Lincoln had voluntarily participated in shooting baskets on an outdoor basketball court that was in a state of disrepair with open and obvious uneven areas and cracks. Thus, he assumed the risk of injury, precluding any imposition of liability on the school district.

*Luna v. Vela*<sup>243</sup>

Fabian Luna, a minor bringing this action through a guardian ad litem, sued Edilberto Vela for personal injuries suffered when Luna tripped over a net line and fractured his elbow while participating in a recreational volleyball game in Vela’s front yard. Vela had described the string used to hold up the volleyball net as “invisible string.” The tie line was elsewhere described as a “thin pinkish colored string or wire.” The trial court granted summary judgment in favor of Vela, concluding that Luna’s action was barred by assumption of risk. The court of appeals reversed the judgment of the trial court and remanded the case for further proceedings. Because Vela moved for summary judgment on the issue of duty, it was his burden to establish not only that tripping over a tie line was an inherent risk of playing a front yard game of volleyball, but also that neither his placement of the tie lines nor his failure to distinctively mark the lines increased the risk of harm to participants. In order to preclude Luna’s claim as a matter of law, Vela should have shown that requiring volleyball net tie lines to be placed in order to reduce the risk of tripping over them or flagging or coloring the lines would either fundamentally alter the nature of the sport or deter participants from vigorously engaging in the sport. Vela did not show this, and thus, the court of appeals held that it was for the trier of fact to determine whether Vela breached his limited duty to not increase the risks inherent in the sport.

*Magazzu v. State*<sup>244</sup>

Olympic Regional Development Authority, under the auspices of the State of New York, operates the Summer Storm Bobsled Ride. Two separate passengers suffered back injuries during the ride. While both passengers signed releases of liability, the releases were found to be unenforceable. The court found that primary assumption of the risk was not applicable in this case as the risk had been unreasonably increased by the defendant. The defendant

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243. 86 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).

244. No. 103133, 2008 N.Y. Misc. LEXIS 2100 (C.C.N.Y. Mar. 11, 2008).

failed to properly design or maintain the ride. While the court found that one of the passengers was completely without fault, the other passenger was found fifty percent at fault because she disregarded the risks by going on the ride, even though she had a prior whiplash injury and a recent diagnosis of osteopenia.

*Mason v. Brigham Young Univ.*<sup>245</sup>

In 2003, Rachael Mason injured her back while participating in weight training for the Brigham Young University (BYU) swim team. Mason filed suit against BYU in September 2006, claiming that her coaches, and the University, were negligent in their instructions. At trial, BYU contended that Mason's injuries and subsequent impairments were caused by third parties and that it owed her no duty of care, no applicable standard of care was breached, Mason had agreed to limit BYU's liability, and she was covered by a BYU insurance policy. The court concluded Mason had alleged enough facts, including facts regarding whether her injuries were risks inherent in swimming and weightlifting, to make inappropriate summary judgment on the grounds that BYU had no duty and that it had not breached any applicable standard of care. The court further found that the document by which BYU claimed Mason had limited its liability was ambiguous and possibly against public policy. As for BYU's insurance policy, any issues with that policy were issues of fact, not law. The court denied summary judgment to BYU on all grounds.

*Mason v. Monroe City Sch. Bd.*<sup>246</sup>

The plaintiffs, Kenneth and Brenda Mason, brought suit on behalf of their minor child, Brelynn Mason, against the defendant, the Monroe City School Board (MCSB). While attending a football game at Carroll High School, Brelynn Mason fell down the steps of the bleachers, through the rail at the foot of the steps, and onto a concrete surface. The Masons claimed that the bleachers were unreasonably dangerous in design, construction, and maintenance. The Masons asserted that MCSB had adequate notice of the defects and an opportunity to remedy them prior to Brelynn's accident. MCSB denied any defects and unreasonable risk of harm. MCSB also denied having any actual or constructive notice of any defect, and, as a result, no opportunity to remedy any alleged defect. The court granted summary judgment in favor of MCSB because the Masons failed to provide enough evidence to establish a triable issue as to whether there was a defect in the

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245. No. 2:06-CV-826 TS, 2008 U.S. Dist. LEXIS 7771 (D. Utah Feb. 1, 2008).

246. No. 43,595-CA, 2008 La. App. LEXIS 1222 (La. Ct. App. Sept. 17, 2008).

bleachers. The simple fact that an accident had occurred was deemed insufficient. The appellate court upheld the trial court's findings.

*McGarry v. Sax*<sup>247</sup>

McGarry attended a professional skateboarding event in a parking lot in front of a skateboard store. After the performance, one of the skateboarders flung a skateboard deck into the crowd of spectators who were trying to retrieve it. The plaintiff was injured and sued the skateboard store. The trial court granted summary judgment for the skateboard store, and the appellate court affirmed. The court said that the activity had elements of a competitive sporting event, and the plaintiff was a willing participant in the event. The fact that the plaintiff might fall while trying to secure the skateboard was an inherent risk of the competition.

*McLeod v. Blase*<sup>248</sup>

Roshown McLeod, a player for the Atlanta Hawks, sued the team's athletic trainer, Walter Blase, alleging that Blase was negligent in treating an injury McLeod had. The injury was suffered during the course of his employment, and was subsequently treated by Blase. McLeod alleged that due to the negligent treatment, his otherwise treatable injury became permanent and is now disabled from playing professional basketball. Under standard applicable workers' compensation law, Blase would be immune from McLeod's medical malpractice claim because they were co-employees of the Hawks. Georgia, however, has an exception to its workers' compensation law that allows one employee to sue another for professional malpractice. The district court held that this exception was not generally applicable to all medical personnel, and should only apply to physicians. It, therefore, granted Blase's motion for summary judgment. The appellate court affirmed, agreeing that the exception does not apply to all co-employees who are professionals subject to the authority of some professional licensing board and that athletic trainers should not be classified with physicians.

*Mendoza v. Vill. of Greenport*<sup>249</sup>

German Mendoza was injured while playing basketball on an outdoor public park owned by the Village of Greenport when he tripped over a hole on

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247. 70 Cal. Rptr. 3d 519 (Cal. Ct. App. 2008).

248. 659 S.E.2d 727 (Ga. Ct. App. 2008).

249. 861 N.Y.S.2d 738 (N.Y. App. Div. 2008).

the court. The court found that primary assumption of the risk applied in this case, and that the Village established that Mendoza was aware of the hole on the court but continued to play basketball regardless. The court granted the Village's motion to dismiss.

*Milligan v. Sharman*<sup>250</sup>

Milligan sued a golf course for injuries he suffered when he was struck by a ball hit from the ninth hole while he was waiting at the eighth hole. The owner and operator of the golf course submitted evidence establishing that the proximity of the ninth tee to the eighth green and hole was open and obvious. The appellate court found that the possibility that a ball would fly off in a random direction was a risk inherent in the game of golf. Accordingly, Milligan willingly assumed the risks consistent with participating in the sport. The record did not establish precisely where he was located at the time of the accident, and thus, his expert's affidavit stating that the layout of the eighth green and the ninth tee was unacceptably dangerous and that Milligan was located within an alleged area of conflict was based on mere speculation. Milligan's expert also failed to identify any specific industry standard upon which he relied in concluding that the golf course was negligently designed. The court found for the golf course and dismissed the case.

*Miulli v. Fla. High Sch. Athletic Ass'n, Inc.*<sup>251</sup>

Kathleen Miulli's son, Matthew Miulli, was participating in high school baseball practice when he fell to the ground, lost consciousness, and died. Miulli sued the Florida High School Athletic Association (FHSAA) for her son's wrongful death, alleging claims of strict liability, negligence *per se*, and simple negligence. Miulli alleged that the FHSAA adopted bylaws requiring medical evaluations to be received and approved by the school, but it had breached these bylaws by permitting Matthew to participate without securing a medical evaluation and clearance. The trial court dismissed her complaint with prejudice and Miulli appealed. The dismissal of her complaint was affirmed because no private cause of action exists under Florida law for an alleged failure to enact or enforce this particular bylaw.

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250. 859 N.Y.S.2d 827 (N.Y. App. Div. 2008).

251. 998 So. 2d 1155 (Fla. Dist. Ct. App. Nov. 14, 2008).

*Mondelli v. County of Nassau*<sup>252</sup>

Mondelli was injured during a baseball game when he tripped on the outfield dirt on a Nassau County baseball field. He sued the county, alleging that it had negligently maintained the field. The county sought summary judgment. The appellate court found that the assumption of risk doctrine applied. The County established that Mondelli was aware of the “lip” of dirt that had accumulated at the infield/outfield border, over which he had tripped, and that he assumed the risk of injury when he chose to play on the field. While Mondelli testified at a deposition that he believed the County had replaced the infield/outfield border with loose, sod-like pieces, such speculative testimony was insufficient to raise a triable issue of fact. This holding by the appellate court, which granted the County’s motion for summary judgment, was a reversal of the trial court’s decision.

*Moss v. Pete Suazo Utah Ath. Comm’n*<sup>253</sup>

Moss, the heir to Bradley Rone, a boxer who died during a boxing match, brought suit for negligence against the Pete Suazo Utah Athletic Commission for allowing Rone to fight. Rone died as a result of heart failure, and Moss claimed that the Commission did not follow several of its rules before granting Rone a license to fight. The Supreme Court of Utah affirmed the decision of the district court to dismiss Moss’ claim because the Commission had governmental immunity. The court applied a three-step analysis in analyzing whether immunity applied. First, the activity of licensing boxers constituted a governmental function and was therefore immunized. Second, the allegedly negligent conduct of the Commission was subject to the general waiver of immunity for injury caused by the negligent act or omission of government employees. Third, the Commission was immune because a state statute granted immunity for “the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization.”

*Muller v. Spencerport Cent. Sch. Dist.*<sup>254</sup>

Audrey Muller and her parents sued the School District after Audrey was hit in the head by an errant discus at track practice. The New York Appellate Court held that the District had established that getting hit with a discus was

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252. 854 N.Y.S.2d 224 (N.Y. App. Div. 2008).

253. 175 P.3d 1042 (Utah 2008).

254. 865 N.Y.S.2d 455 (N.Y. App. Div. 2008).

an obvious risk at this track practice, but it was appropriate to have a trial on the issue of whether the school coaching staff was negligent in its instruction of the activity. Additionally, the school district could not seek indemnification from the student who accidentally hit Muller with the discus.

*Noffke v. Bakke*<sup>255</sup>

Brittany Noffke was a cheerleader at Holmen High School. She fell and was injured during a pre-game warm-up session. Noffke sued the student responsible for spotting her during the stunt, the school district, and the school district's insurance company. The student moved for summary judgment, claiming he was immune from liability based on a Wisconsin statute that governs liability for co-participants of contact team sports. The school district also moved for summary judgment, claiming that it had governmental immunity. The court granted summary judgment for the school and school district. The student was denied summary judgment because the court determined that cheerleading was not considered a contact sport.

*Nungester v. Risk Mgmt*<sup>256</sup>

Nungester was injured after being hit in the head by a hockey puck while attending a game at Bowling Green State University and brought suit to recover unpaid medical expenses. The court denied Nungester's claim because the University owed her no duty to protect her from the known danger presented by flying pucks. The danger of pucks entering the stands was so open and obvious that she assumed the risk by attending the game and could not recover damages. The court determined that the primary assumption of risk doctrine that applied to spectators of baseball games applied to spectators of hockey games.

*O'Connor v. Syracuse Univ.*<sup>257</sup>

O'Connor brought action to recover for personal injuries sustained on Feb. 11, 2005, at Syracuse University while attending a club hockey game. O'Connor was standing near where the players exit the ice, and fractured his ankle when he attempted to break up a fight between a player and a spectator. Syracuse and McNeil (the spectator) moved for summary judgment, and O'Connor cross-moved for an order striking an answer on account of an

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255. 760 N.W.2d 156 (Wis. 2009).

256. No. 2007-03196-AD, 2008 Ohio Misc. LEXIS 11 (C.C. Ohio Jan. 25, 2008).

257. 873 N.Y.S.2d 235 (N.Y. Sup. Ct. 2008).

alleged failure to produce a witness statement. The court denied the motion to strike and granted summary judgment because the plaintiff failed to raise a triable issue of fact with regard to Syracuse's duty.

*Palestine Herald-Press Co. v. Zimmer*<sup>258</sup>

Zimmer was the defensive coordinator and assistant coach for the Jacksonville High School football team in Jacksonville, Texas. After winning a game against a cross-county rival, Zimmer made an exuberant celebration lasting seven seconds, about which a local newspaper columnist wrote a column regarding the show of lack of sportsmanship, stating it was inappropriate for the coach to behave such a way. Zimmer filed a defamation suit against the columnist, and the trial court denied summary judgment. Because the article was written as a subjective and indefinite opinion about the gesture, it was not defamatory and the appellate court reversed the trial court, awarding the newspaper summary judgment.

*Patrick v. Great Valley Sch. Dist.*<sup>259</sup>

Patrick and her son, Rosenberg, brought a claim against her son's wrestling coach, alleging that the wrestling coach directed Rosenberg to "live wrestle" a teammate much heavier than he. Rosenberg suffered injuries to his right leg during the match. Patrick and Rosenberg appealed the district court's grant of summary judgment in favor of the school district and the coach (among others), claiming that Rosenberg was deprived of a constitutionally protected liberty interest without due process of law. The court affirmed the district court's decision on summary judgment for the claims against the school district, but held that a rational jury could find that the coach's conduct "shocked the conscience," and, accordingly, reversed and remanded for trial to determine the coach's personal liability.

*Pearce v. Utah Ath. Found.*<sup>260</sup>

Pearce suffered an injury while bobsledding at the Utah Winter Sports Park and brought suit for ordinary and gross negligence. Pearce appealed the district court's grant of summary judgment on both negligence claims. The appellate court affirmed the summary judgment decision on the ordinary negligence claim because Pearce had signed an enforceable pre-injury release

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258. 257 S.W.3d 504 (Tex. App. 2008).

259. 296 F. App'x. 258 (3d Cir. 2008).

260. 179 P.3d 760 (Utah 2008).

of liability. However, the court reversed the summary judgment decision on the gross negligence claim because the district court did not identify an applicable standard of care, thus making summary judgment inappropriate.

*Pecoraro v. Balkonis*<sup>261</sup>

The plaintiff, Joseph Pecoraro, was a former high school hockey coach. He brought a suit against the individual members of the Board of Governors of the Fremd High School Hockey Club, alleging that they were negligent in failing to control Thomas Olsak, a seventeen year-old hockey player who assaulted Pecoraro after being told that he could not play. Pecoraro argued that, because the Board knew that Olsak was disciplined in school for breaking a ceiling tile, that he had assaulted another player in a previous game, that he led the team in penalty minutes, and that the Board was aware of threatening comments Olsak made against Pecoraro, the Board was liable for Olsak's assault. However, Pecoraro could only demonstrate that some members of the Board had this previous knowledge. Thus, he could not hold each member individually liable. Finally, the court held that the pre-trial settlement agreement between Pecoraro and Olsak, whereby Olsak paid Pecoraro \$5,000 and assigned to him all of his insurance rights, was in good faith.

*Reyes v. City of New York*<sup>262</sup>

James Reyes, a former minor league baseball player, who was coaching a team that was playing in one of the City of New York's ball fields, was injured by a foul ball while in the third base dugout during the third inning of a game. Reyes sued the City because the dugout did not have a fence in front of the side of the bench facing home plate. The court ruled that, because the coach was aware that foul balls had previously been hit into the dugout along the third base line, the City was not liable under the doctrine of primary assumption of the risk.

*Roberts v. Boys and Girls Republic, Inc.*<sup>263</sup>

Linda Roberts was attending her son's baseball practice when she was hit in the face with a bat by a player taking practice swings. The court determined that she had assumed the risk of her injury. The danger of people swinging bats while warming up is inherent in baseball. Furthermore, it was an obvious

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261. 891 N.E.2d 484 (Ill. Ct. App. 2008).

262. 858 N.Y.S.2d 760 (N.Y. App. Div. 2008).

263. See 891 N.E.2d 719 (N.Y. App. Div. 2008); 850 N.Y.S.2d 38 (N.Y. App. Div. 2008).

risk, even to someone without a thorough knowledge of the sport.

*Sallinen v. Upper Lake Union High Sch. Dist.*<sup>264</sup>

Justin Sallinen was hit simultaneously from the left side and from the front during football practice at Upper Lake High School, resulting in a fractured femur, a torn ACL, and torn meniscus in the knee. Following practice, the coaches left Justin alone in the locker room without making sure he had a ride home. While attempting to walk to a pay phone to call for a ride home, Justin fell again. Justin had three surgeries to try to repair everything, but still needed one more to repair the torn ACL. At trial, there was a question of whether Justin tore his ACL during the original injury or whether he tore it when he fell as he was walking to the pay phone. The jury determined the injury occurred when Justin was walking to the pay phone and awarded him \$250,000. The defendants asked for a new trial because it did not realize that one of its witnesses had given disputing evidence to the plaintiff. The court did not award a new trial because the defendants could have asked the witness if he had given any statements to the plaintiffs at any time during discovery.

*Salvini v. Ski Lifts, Inc.*<sup>265</sup>

On February 11, 2004, Kenneth Salvini was snowboarding at night on rough, icy snow. He took a lift to the terrain park, where a hand written message in light blue pen stated “Terrain park Tip of the Week: Most injuries in the terrain park are as a result of the rider outjumping [sic] the landing.” Salvini went over a jump in the terrain park area at speed “within the range expected at a ski jump.” He lost control, and as a result of his “overshooting” the landing ramp, Salvini landed on his back on a flat area, and was left a quadriplegic. Salvini and his parents filed a negligence action against Ski Lifts, alleging that it designed and built unreasonably dangerous ski jumps and failed to close the jump or warn of dangers, thereby exposing Salvini to an extreme risk of injury beyond those inherent in the sport. Ski Lifts claimed the trial court erred in jury instruction and filed a motion in limine to exclude evidence admitted. However, the court disagreed. The jury instruction on “inherent risk” was proper because the trial court instructed the jury on assumption of the risks that are inherent to terrain-park jumping, and the instruction was not misleading as to the law. The jury instruction on “duty to discover dangerous conditions” was proper because it accurately summarized the duty of care owed by ski area operators to skiers, and was not misleading

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264. No. A116155, 2008 Cal. App. Unpub. LEXIS 1553 (Cal. Ct. App. Feb. 26, 2008).

265. No. 6021-0-1, 2008 Wash. App. LEXIS 2506 (Wash Ct. App. Oct. 20, 2008).

as to the law. The jury instruction on “failure to warn” was proper because this question was a matter of determination by the jury, and the jury instruction allowed Ski Lifts to argue that the defect was known or obvious. Further, the evidence of prior accidents was properly admitted because Ski Lifts did not timely object to the testimony. Therefore, Ski Lifts waived any challenge to it on appeal. Also, the evidence was not overly prejudicial as to leave the jury to improperly punish Ski Lifts for prior acts.

*Sam Houston State Univ. v. Anderson*<sup>266</sup>

The plaintiff, Thomas Anderson, broke his arm after he fell off the bleachers while watching his son play baseball at Sam Houston State University (SHSU). Anderson then sued SHSU for premises liability under the Texas Tort Claims Act. SHSU responded by alleging that Anderson’s claim fell under the Recreational Usage Statute. Under the Recreational Usage Statute, Anderson would have to demonstrate that SHSU’s negligence led to his injuries. The Texas Court of Appeals agreed with SHSU’s argument that the Recreational Usage Statute governed, and that Anderson was engaged in, a “recreational activity” when he was watching a baseball game from the bleachers. The court reasoned that the phrase “any other activity associated with enjoying . . . the outdoors” was broad enough to encompass watching a sporting event. Because Anderson failed to allege any negligence by SHSU, the court of appeals dismissed his case for lack of jurisdiction.

*Sciarrotta v. Global Spectrum*<sup>267</sup>

Denise Sciarrotta brought suit for negligence after she was hit in the head by a hockey puck while attending a hockey game. The puck struck Sciarrotta during warm-ups, when there were many pucks in motion at the same time. Therefore, she claimed that a larger area of the arena had to be considered dangerous during warm-ups than during actual game play. New Jersey has a limited duty rule that requires certain areas of the arena to be screened, including during warm-ups. The trial court held that the arena satisfied the limited duty rule and provided protective seating for spectators who might reasonably have requested it, by placing netting behind the goals and in the corners. The court of appeals reversed, finding that the risk of injury was not the same during warm-ups as it was during the game itself. Therefore, Sciarrotta should be allowed to develop evidence that there were steps that could have been taken to minimize the harm during warm-ups. However, the

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266. No. 10-07-00403-CV, 2008 WL 4901233 (Tex. App. Nov. 12, 2008).

267. 944 A.2d 630 (N.J. 2008).

New Jersey Supreme Court reversed the court of appeals. It held that the limited duty rule applied during warm-ups and during the game itself. So, if a venue operator complied with the limited duty rule, it is absolved of negligence cases arising out of objects leaving the field of play.

*Shatzkin v. Village of Croton-on-Hudson*<sup>268</sup>

Shatzkin, a softball player, was injured during a game when she ran into a chain-link fence while chasing a fly ball across the foul line on the field. She sued Croton-on-Hudson (the Village) claiming that the fence was placed too close to the foul line, which unreasonably increased the risks inherent in the game of softball. The appellate court overturned the trial court's denial of summary judgment for the Village, because the denial was based upon a prior order that did not reach the merits of the Village's motion, but rather determined that the motion was premature. The Village established its prima facie entitlement to summary judgment by showing that Shatzkin was an experienced softball player, that the condition of the fence was open and obvious, and that Shatzkin appreciated the risks of playing near the fence. The motion for summary judgment dismissing Shatzkin's claims was granted.

*Stephenson v. Food Bank for N. Y. City*<sup>269</sup>

Devone Stephenson was recruited by the law firm Milberg Weiss Bershad Specthrie & Lerach to play for the law firm's basketball team that competed in the New York Corporate Athletic League. During a game against a team of employees at Food Bank for New York City, Stephenson was punched by a Food Bank player, fracturing Stephenson's jaw. Stephenson sued the Athletic League for negligence after it was revealed that the player who punched Stephenson was not an employee of Food Bank. While Stephenson signed a "hold harmless" agreement before participating in the league, he argued that being punched by another player was not a foreseeable risk. However, the court dismissed Stephenson's suit after finding that the waiver Stephenson signed was valid.

*Steverson v. United States*<sup>270</sup>

The plaintiffs were riding an innertube on a snow run at Coyote Sno Park when they struck a metal pole in the snow and were injured. Defendant

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268. 858 N.Y.S.2d 362 (N.Y. App. Div. May 20, 2008).

269. No. 404743/07, 2008 WL 4934625 (N.Y. Sup. Ct. Nov. 12, 2008).

270. No. 1:06CV0545DLB, 2008 U.S. Dist. LEXIS 5904 (E.D. Cal. Jan. 25, 2008).

moved for summary judgment on the grounds that the plaintiffs had assumed the risks of going down the run on a tube with no brakes or steering mechanism, and because the risk of the pole was open and obvious. The court determined that the plaintiffs assumed all of the risks inherent in the sport of innertubing, but that the defendant had a duty not to increase those risks. The court found that there were genuine issues of material fact as to whether the post struck was visible to the plaintiffs, and therefore, an inherent risk, or whether the defendant had a duty to warn of the pole. Summary judgment was denied.

*Sword v. Altenberger*<sup>271</sup>

Zachary Sword was injured by another child playing football at recess, and Sword sued for damages after suffering a concussion. The trial court determined that, because Sword had been playing in the football game before stepping outside of the game's boundaries to watch and then build a snowman, he counted as a spectator of the game and not a nonparticipant, so he still fell under the assumption of risk doctrine. Summary judgment for the defendants, the child who ran into Sword and his parents, was correctly granted.

*Turner v. Mandalay Sports Entm't, LLC*<sup>272</sup>

Kathleen Turner was struck in the face by a foul ball while eating at a stadium's beer garden while attending a minor league baseball game. The beer garden had no protective netting around it, unlike other concession areas. The Nevada Supreme Court determined that Turner's negligence claim against the stadium did not survive a motion for summary judgment because stadium owners and operators have a limited duty to protect against such injuries and Turner was aware of the risks inherent in the game of baseball. The court determined that the stadium had issued warnings about these risks and that Turner could have sat in a protected area. The primary implied assumption of risk doctrine has not been abolished by Nevada's comparative negligence statute, and district courts need to determine whether this doctrine bars a plaintiff's claim as part of their initial duty analysis.

*Uzun v. Oakwood Sports Ctr. of Hamden, Inc.*<sup>273</sup>

Ercan Uzun, the plaintiff, alleged that during a soccer game at Oakwood

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271. No. 07-COA-029, 2008 Ohio App. LEXIS 2122 (Ohio Ct. App. May 23, 2008).

272. 180 P.3d 1172 (Nev. 2008).

273. No. CV065001420S, 2008 Conn. Super. LEXIS 2650 (Conn. Super. Ct. Oct. 21, 2008).

Sports Center of Hamden, he was negligently pushed, intentionally forced to the ground by another player, and suffered injuries. Uzun brought this suit, alleging that the defendant was liable because it “failed to provide a safe and secure environment for individuals lawfully on the premises; failed to warn the plaintiff of the risks in using the facilities; [and] failed to properly monitor, inspect, and/or patrol the premises.” The defendant moved for summary judgment on the basis that its alleged negligence was not the cause-in-fact of the plaintiff’s injuries. Because the defendant’s conduct was not the direct cause of the plaintiff’s injuries (Uzun was forced to the ground by the other soccer player, not by the recreation center itself), the court considered whether the specific harm was foreseeable. The court ultimately held that the plaintiff’s injuries could not have been foreseen by the defendant or the referee that it charged with monitoring the game, and the plaintiff could not demonstrate that the defendant’s alleged negligence was the proximate cause of his injuries. The defendant’s motion for summary judgment was granted.

*Valente v. State*<sup>274</sup>

Valente was an eight-year-old who took ski lessons at a ski resort. She claimed the resort’s instructor forced her to board a ski lift before she was ready. The court found that there were genuine issues as to the material fact of whether Valente, as a child, assumed the risks involved with skiing on the mountain. Therefore, the court determined that summary judgment was inappropriate.

*Vortex Sports and Entertainment, Inc. v. Ware*<sup>275</sup>

Vortex, an athlete representation agency, sued one of its former owners and attorney, Ware; the company that hired him away from Vortex, CSMG; and Ware’s former law firms for breach of fiduciary duty (or aiding and abetting thereof) and tortious interference with a contract. Originally, Ware had negotiated the sale of Vortex to CSMG, but the deal fell through and CSMG offered Ware employment, which he accepted. A number of the athletes represented by Vortex subsequently transferred their representation. During litigation, Vortex settled with Ware and his two previous law firms, but its claims against CSMG went to trial. A jury awarded Vortex some damages, and both parties appealed. On appeal, the court found that the trial court did not err in denying CSMG’s motions for a directed verdict; admitting a law professor’s expert testimony as to fiduciary duty; allowing damages

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274. 859 N.Y.S.2d 900 (C.C.N.Y. 2008).

275. 662 S.E.2d 444 (S.C. Ct. App. 2008).

based on the contracts of Vortex's former clients; or by off-setting the jury's damage award by the amount Vortex recovered from Ware.

*Williams v. Conn. Sportsplex, LLC*<sup>276</sup>

Mark Williams was injured during a football event at Sportsplex on May 19, 2007, after a football player came into contact with the protective barrier that Williams was standing behind. Williams filed suit against Sportsplex, alleging negligence. The complex filed special defenses related to Williams's own negligence and that he was estopped from bringing suit due to the execution of a release. Williams responded by filing a motion to strike the special defense related to the release because he signed the release as the parent/guardian of his minor son, claiming that this release did not apply to any of his injuries. The court concluded that it was necessary to look beyond the pleadings to determine liability, denying the motion to strike.

*Wilson v. O'Gorman High Sch.*<sup>277</sup>

Andrea Wilson sued O'Gorman High School after she was badly injured while participating as a member of the school's gymnastics team. O'Gorman High School sought to reduce any potential judgment against them based on the amount received by Wilson under the school's catastrophic injury insurance policy. Wilson countered that she purchased the policy through her tuition payment and the one dollar fee to participate in gymnastics. According to the court, this one dollar fee did not constitute payment towards the policy. Thus, the court held that the school would be entitled to off-set a potential judgment to the extent Wilson received proceeds from the policy.

MISCELLANEOUS CASES

The following cases do not fall under any of the categories provided above. They deal with bankruptcy, private association law, civil procedure, and facility naming rights.

*Brillon v. Walden*<sup>278</sup>

Robert and Karen Brillon loaned money to Reginald Walden to open a martial arts studio. Walden then used most of the money to cover rent and renovate a space he leased. Walden also used approximately nine thousand

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276. No. CV075013413, 2008 Conn. Super. LEXIS 1403 (Conn. Super. Ct. June 4, 2008).

277. No. 05-4158-KES, 2008 U.S. Dist. LEXIS 49454 (D.S.D. June 26, 2008).

278. 380 B.R. 883 (Bankr. M.D. Fla. 2008).

dollars to purchase fitness equipment. Walden defaulted on his rent payments for his studio and, subsequently, moved his equipment to a new studio. The owner of the new studio, Ripped Fitness, loaned Walden eight thousand dollars to relocate the martial arts studio to Ripped Fitness. The Brillons obtained a judgment against Walden for over five thousand dollars. Shortly thereafter, Walden filed for Chapter 7 bankruptcy. The Brillons alleged that the equipment was fraudulently transferred to the owner of Ripped Fitness. However, the court disagreed, ruling in favor of Walden because the equipment was technically still in Walden's possession.

*Davis v. N. N.Y. Sports Officials' Council*<sup>279</sup>

Jude Davis was suspended by the Northern New York Soccer Officials Association (NNYSOA) for over a year. Davis informed the NNYSOA in writing that she wanted to appeal the decision. She was told that the executive board would hold an e-mail conference to consider her appeal, but in the same letter was told that the executive board already concurred with the recommendation to suspend her. However, the NNYSOA Constitution stated that an appeal would be addressed at the next scheduled executive board meeting. Davis sought a declaration from the court that the actions of the NNYSOA were arbitrary and capricious, and an abuse of discretion. The defendants sought to dismiss it because the petition failed to state a cause and because she failed to exhaust her internal remedies. The court did not dismiss the case because she had attempted to exhaust her internal remedies, and the NNYSOA failed to follow its constitution in regards to the internal remedies process. In addition, judicial review was appropriate because there was evidence that the board acted in an arbitrary and capricious manner.

*Gordon v. Vitalis Partners, Inc.*<sup>280</sup>

Ben Gordon of the NBA's Chicago Bulls agreed to have defendant Harmon and LHA provide financial services for him throughout his NBA career. After a couple years, Harmon changed the fee structure of their arrangement without the consent of Gordon. Harmon borrowed one million dollars from Gordon on a promissory note to make investments for his own benefit. Gordon attempted to enforce the promissory note but was unsuccessful. Gordon then filed a complaint for breach of contract and breach of fiduciary duty. Harmon brought this motion to dismiss the complaint. Harmon first claimed a lack of personal jurisdiction, but the court rejected this

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279. 856 N.Y.S.2d 497 (N.Y. Sup. Ct. 2008).

280. No. 07 C 6807, 2008 WL 489359 (N.D. Ill. Feb. 20, 2008).

argument because defendants knew that Gordon and his funds were in the state of Illinois. The court found that these contacts were enough to exercise Illinois' long-arm jurisdiction over Harmon. Harmon should have also recognized the likelihood of being called to court to answer these legal allegations. Therefore, the court dismissed Harmon's motion to dismiss Gordon's complaint.

*Nedvidek v. Kuipers*<sup>281</sup>

In 1945, the City of La Crosse named its football facility Veterans Memorial Stadium. The city quitclaimed the facility to the University of Wisconsin (UW) Board of Regents in 1987 for the University of Wisconsin-La Crosse, and, in 2000, the school chancellor renamed the facility the Roger Haring Veterans Memorial Stadium. In 2001, the successor chancellor renamed it Veterans Memorial Stadium, and named the field within the stadium Roger Haring Field. In 2005, the UW Board of Regents renamed the stadium Roger Haring Stadium and renamed the surrounding athletic areas and the field Memorial Field. Nedvidek, commander of the local VFW post, and Hundt, President of Vietnam Era Veterans, brought action declaring the name changes void because they (1) violated Wisconsin's open meeting policies and public record laws; (2) violated UW policies and regulations regarding the naming of UW facilities; and (3) were the product of malfeasance by the Board of Regents. The court found that Nedvidek and Hundt had no standing to challenge the Board of Regents decision because they suffered no injury and that there is no legally protectable interest. All claims were moot.

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281. 747 N.W.2d 527 (Wis. 2008).

## CONCLUSION

Throughout 2008, the field of sports law continued to grow and change, just as it has in previous years. The cases presented in this survey offer a detailed look into how that field has changed with important decisions handed down in areas of law, such as antitrust law, that will have effects both in the sports industry and beyond. With the continuing importance of new technologies and the effects of increased globalization, sports law will continue to grow in the future. Sports law cases will continue to be an exciting context in which to view the application and interaction of the many different areas of law under a variety of circumstances.

Kaitlyn Anne Wild, Managing Editor (2008-2009)

with contributions from

Senior Members David N. Fowler, Sean M. Light, Lauren G. McCoy, Will Pridemore, Dan Raben, and Andy J. Shiffman

and Members Jessica Baranko, Lindsay K. Caldwell, Matthew Fernholz, Michael Jin, Kristen E. Knauf, Christopher J. Kobes, John G. Long, Jared M. Nusbaum, Alex Porteshasver, Kevin T. Prochaska, Nathan Ristow, Jessica R. Schaak, Brian Z. Schott, and Mark P. Suhr