



# For The Record

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Matthew Mitten

## **Legal Protection of Sports Participation Opportunities in the United States of America\***

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At all levels of sports competition in the United States, monolithic sports leagues and governing bodies<sup>1</sup> establish eligibility requirements and conditions that must be satisfied for an individual to participate in athletics. Most U. S. amateur or professional sports governing bodies have broad, exclusive authority to regulate a single sport or group of sports on either a national or state-wide basis, which provides the corresponding power to condition, limit, and/or exclude athletic participation opportunities. In some instances, unilaterally established eligibility rules may either completely preclude an individual from athletic participation, or condition his or her right to participate upon compliance with several requirements. I will describe and compare the existing legal frameworks governing athletic eligibility rules and dispute resolution processes for Olympic, professional, college, and high school sports in the United States from both private law and public law perspectives. Rather than a single national governing body, there is a different governing body for same sport at different levels of athletic competition. For example, baseball is governed at the youth level by Little League Baseball, high school level by the state high athletic association for each state, college level by the National Collegiate Athletic Association, at the Olympic level by USA Baseball, and at the professional level by Major League Baseball.

\* This article is based on two prior works: Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 Va. Sports & Ent. L. J. \_\_\_ (2009) (forthcoming); Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Issues*, in RESEARCH HANDBOOK ON INTERNATIONAL SPORTS LAW (James A. R. Nafziger & Stephen F. Ross, eds., forthcoming).

1. For example, the National Collegiate Athletic Association has plenary nationwide governing authority over its 1,281 member universities and colleges and approximately 380,000 student-athletes. Each of the fifty state school athletic governing bodies has exclusive, broad authority to regulate interscholastic sports competition within its state.

## A. Olympic Sports

The United States Olympic Committee (“USOC”) is the national Olympic committee authorized by the IOC to represent the United States in all matters relating to its participation in the Olympic Games. In the United States there currently is no federal government funding of Olympic sports. Rather, these sports are privately funded, primarily through sponsorships by various United States companies and businesses.

A U.S. athlete has no federal constitutional right to participate in the Olympic Games. In *DeFrantz v. USOC*,<sup>2</sup> a group of athletes selected to be members of the U.S. Olympic team sought injunctive relief enabling them to compete in the 1980 Moscow Olympic Games. The Carter Administration urged a boycott of the Moscow Games to protest the Soviet Union’s 1979 invasion of Afghanistan. Faced with political pressure from the federal government, threatened legal action by President Carter, and the possible loss of its federal funding and federal tax exemption, the USOC decided not to enter an American team in the Moscow Games. The court found that, under IOC rules, the USOC has the exclusive and discretionary authority to decide whether to enter a U.S. team in Olympic competition. The court held that, despite being federally chartered, the USOC is a private organization rather than a state actor; therefore, its conduct is not subject to the constraints of the U.S. Constitution.<sup>3</sup> Moreover, even if the USOC’s decision constituted state action, athletes have no federal constitutional right to participate in the Olympic Games.

The USOC, a federally chartered corporation created by Congress, and the national governing body (“NGB”) for each Olympic sport must comply with the Ted Stevens Olympic and Amateur Sports Act (“Amateur Sports Act”),<sup>4</sup> which establishes a legal framework for protecting the participation opportunities of Olympic sport athletes. The Amateur Sports Act requires that an Athletes’ Advisory Council be established to represent their interests and to ensure open communication with the USOC.<sup>5</sup> It also requires the USOC to ensure that athletes have at least 20% of the membership and voting power held by its Board of Directors<sup>6</sup> and committees<sup>7</sup> as well as each NGB.<sup>8</sup> The Athletes’ Advisory Council, whose members are elected by Olympic athletes, maintains an open line of communication with the USOC and provides input on their behalf.

To be eligible to be recognized by the USOC as the NGB for an Olympic sport, an amateur sports organization must provide all amateur athletes with an equal opportunity to participate “without discrimination on the basis of race, color, religion, sex, age, or national origin.”<sup>9</sup> Each NGB has an

2. 492 F. Supp. 1181 (D.D.C. 1980).

3. The Supreme Court subsequently confirmed that the USOC is not a state actor. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987). Consistent with this ruling, courts have held that an NGB also is not a state actor. *Behagen v. Amateur Basketball Ass’n of U.S.*, 884 F.2d 524 (10th Cir. 1989).

4. 36 U.S.C. §220501 (2008). The USOC has a statutory obligation to ensure, directly or by delegation to the NGBs for the various sports (which normally occurs), “the most competent representation possible” for the U.S. in each event of the Olympic, Paralympic, and Pan-American Games. 36 U.S.C. §220503(4) (2008). Its Mission is “[t]o support United States Olympic and Paralympic athletes in achieving sustained competitive excellence and preserve the Olympic ideals, and thereby inspire all Americans.” UNITED STATES OLYMPIC COMMITTEE, BYLAWS OF THE USOC, art. II, § 2.1 (2006), available at [http://www.usolympicteam.com/USOC\\_Bylaws\\_as\\_of\\_6232006.pdf](http://www.usolympicteam.com/USOC_Bylaws_as_of_6232006.pdf) (last visited Dec. 20, 2007). The Stevens Act also requires the USOC to encourage participation opportunities for women, racial and ethnic minorities, and disabled athletes and to provide assistance necessary to achieve this objective. 36 U.S.C. §220503(12)-(14).

5. 36 U.S.C. §220504(b)(2). Members of the USOC Athlete Advisory Committee “must have represented the United States in the Olympic, Pan American, or Paralympic Games, World Championships, or an event designated as an Operation Gold event within the ten (10) years preceding election.” BYLAWS OF THE USOC, *supra* note 87, art. XII, § 12.3. The Council’s members are elected by U. S. athletes who currently participate in international amateur athletic competition or did so within the past ten years. *Id.*

6. 36 U.S.C. §220504(b)(2). Two members of the USOC’s Board of Directors are selected from a group of individuals nominated by the Athletes’ Advisory Council. BYLAWS OF THE USOC, art. III, § 3.2.

7. 36 U.S.C. §220504(b)(2).

8. *Id.* §220522(a)(10).

9. *Id.* §220522(a)(8). However, an NGB has no authority to regulate high school or college athletic competition. *Id.* §220526(a).

affirmative duty to encourage and support athletic participation opportunities for women and those with disabilities.<sup>10</sup> An NGB's eligibility and participation criteria for U.S. athletes to participate in the Olympic, Paralympic, and Pan American Games must be consistent with those of the international federation ("IF") for its sport.<sup>11</sup> Athletes must be allowed to compete in international amateur athletic competitions unless the organization conducting the competition does not meet the applicable sanctioning criteria.<sup>12</sup> The Amateur Sports Act requires the USOC to establish a procedure for investigating and resolving complaints by athletes alleging that an NGB has violated these requirements, which adversely affects her or her eligibility to compete.<sup>13</sup>

The Amateur Sports Act also mandates that the USOC establish a procedure for "swift and equitable resolution" of disputes "relating to the opportunity of an amateur athlete . . . to participate" in the Olympic, Paralympic, Pan-American Games, and world championship competitions (hereinafter "protected competitions").<sup>14</sup> The USOC is required to hire an athlete ombudsman to provide independent advice to athletes (free of charge) regarding resolution of disputes regarding his or her eligibility to participate in these competitions.<sup>15</sup>

Article IX of the USOC's Bylaws creates some important procedural and substantive rights for all athletes (including professional athletes) who meet the eligibility standards established by the NGB or Paralympic governing body for the sport in which he or she competes.<sup>16</sup> No member of the USOC, such as an NGB, "may deny or threaten to deny any amateur athlete the opportunity to participate" in a protected competition.<sup>17</sup> An NGB is required to provide fair notice and an internal hearing that provides an appropriate level of procedural due process before declaring an athlete ineligible to participate.<sup>18</sup> The USOC is required "by all reasonable means at its disposal" to "protect the right of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States" in any protected competition.<sup>19</sup> The USOC must conduct an investigation if an athlete alleges a denial of his or her participation rights by an NGB and promptly attempt to settle the matter.<sup>20</sup> The USOC's chief executive officer may also, in order to protect an athlete's rights, authorize legal action on the athlete's behalf or fund the athlete's legal action (including arbitration) against an NGB.<sup>21</sup>

The Act gives an athlete the right to submit an eligibility dispute, if it is not resolved by the USOC to his or her satisfaction, to final and binding arbitration in accordance with the Commercial Rules of the American Arbitration Association ("AAA").<sup>22</sup> The athlete must submit a list of persons that he believes may be adversely affected by the arbitration (e.g., other athletes).<sup>23</sup> The AAA's Commercial Arbitration Rules govern, with an expedited procedure available to ensure that a timely award that will "do justice to

10. *Id.* §220524(6)-(7).

11. *Id.* §220522(a)(14).

12. *Id.* §220524(5).

13. *Id.* §220509(a). If the USOC finds that an NGB is not in compliance, it is authorized to place the NGB on probation or revoke its recognition.

14. *Id.*

15. *Id.* 36 U.S.C. §220509(b). John Ruger, a member of the 1980 U.S. Olympic biathlon team, currently serves as the USOC athlete ombudsman.

16. BYLAWS OF THE USOC, art. I, § 1.3A.

17. *Id.* art. IX, § 9.1.

18. *Id.*

19. *Id.*

20. *Id.* art. IX, § 9.2.

21. BYLAWS OF THE USOC, art. IX, § 9.9. However, the CEO's decision whether or not to do so "shall not be construed as an opinion of the [USOC] with respect to the merits of the athlete's claim." *Id.*

22. *Id.* See also 36 U.S.C. §220522(a)(4)(B) (as a condition of being recognized as an NGB, it must agree to submit to binding arbitration in any dispute regarding an amateur athlete's opportunity to participate in a competition).

23. BYLAWS OF THE USOC, art. IX, § 9.3. This provision was added after the conclusion of multiple arbitration proceedings and subsequent litigation in *Lindland*, which illustrates the need for all affected athletes to have a fair opportunity to be heard in a single arbitration. *Lindland v. USA Wrestling Ass'n*, 227 F.3d 1000, 1007 (7th Cir. 2000).

the affected parties” can be made.<sup>24</sup> The dispute, which is an arbitration proceeding between the athlete and the NGB (the USOC receives notice but generally is not a party), is resolved by a single impartial arbitrator or panel of arbitrators selected by the AAA (usually an attorney, retired judge, or other individual familiar with the particular sport).<sup>25</sup> The AAA panel’s review is *de novo*, and the award must include the arbitrators’ findings of fact and conclusions of law.<sup>26</sup>

Because the AAA is bound by confidentiality obligations, historically it has not publicly released Article IX arbitration awards. Some recent Article IX arbitration awards obtained from sources other than the AAA<sup>27</sup> illustrate that arbitration panels have required that: 1) athletes have a fair opportunity to qualify for protected competitions;<sup>28</sup> and 2) an NGB’s selection procedures must be fair, reasonable, and consistently applied to all athletes.<sup>29</sup> But otherwise, no general conclusions can be drawn regarding whether the AAA arbitration process effectively protects athletes’ participation opportunities.

A court will provide only limited scrutiny of an AAA arbitration award affecting an athlete’s eligibility to participate in a sport, which is subject to review and enforcement under the Federal Arbitration Act.<sup>30</sup> In *Gault v. United States Bobsled and Skeleton Federation*, a New York appellate court explained: “[a]lthough we also may disagree with the arbitrator’s award and find most unfortunate the increasing frequency with which sporting events are resolved in the courtroom, we have no authority to upset it when the arbitrator did not exceed his authority.”<sup>31</sup> However, a court will vacate or refuse to confirm an arbitration award that is “the result of ‘corruption,’ ‘fraud,’ ‘evident partiality,’ or any similar bar to confirmation.”<sup>32</sup>

**In the United States there currently is no federal government funding of Olympic sports. Rather, these sports are privately funded, primarily through sponsorships by various United States companies and businesses.**

24. American Arbitration Association Online Library, *Sports Arbitration, Including Olympic Athlete Disputes* (“AAA Sports Arbitration”), available at <http://www.adr.org/si.asp?id=4135> (last visited Dec. 20, 2007).

25. *Id.*

26. *Id.* The arbitrator has no authority to review “the final decision of a referee during a competition regarding a field of play decision,” which may determine or materially influence whether an athlete is selected to participate in a protected competition, unless it was outside the referee’s authority to make or was “the product of fraud, corruption, partiality, or other misconduct.” BYLAWS OF THE USOC, art. 9.5.

27. Copies of these awards are on file with Professor Mitten.

28. In the Matter of Arbitration between Sean Wolf and U.S. Rowing Association, Case No. 30 190 00635 02 (AAA, August 9, 2002) (finding that the NGB had granted a waiver to another rower who was unable to participate in one of the National Selection Regattas because he was taking a law school exam, the arbitrator ruled that the NGB improperly refused to grant claimant a waiver for a similar reason).

29. In the Matter of Arbitration between Rebecca Conzelman, Case No. 30 190 404 04 (AAA, April 6, 2004) (arbitrator concluded that time standards used to select U.S. competitors for World Cup cycling event have a rational basis and are valid).

There is a special arbitration process for resolving doping disputes that affect a U.S. athlete’s eligibility to participate in protected competitions. See generally Travis T. Tygart, *Winners Never Dope and Finally, Dopers Never Win: USADA Takes Over Drug Testing of United States Olympic Athletes*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 124 (2003); Anne Benedetti & Jim Bunting, *There’s a New Sheriff in Town: A Review of the United States Anti-doping Agency*, I.S.L.R. 19 (2003). The United States Anti-Doping Agency (“USADA”), an independent anti-doping agency for Olympic sports in the United States, provides drug education, conducts drug testing of American athletes, investigates positive results, and recommends charges and sanctions for violations of the World Anti-doping Code or an IF’s doping rules. See UNITED STATES ANTI-DOPING AGENCY, <http://www.usantidoping.org/> (last visited Nov. 25, 2007). If a U.S. athlete is dissatisfied with the USADA Review Board’s proposed disposition of an alleged doping offense, he may request a hearing before a single arbitrator or a panel of three arbitrators who are qualified as both AAA and North American CAS arbitrators. In this arbitration proceeding, USADA and the athlete are adversarial parties. Special AAA Supplementary Procedures apply to a USADA doping arbitration before the AAA/North American CAS panel. See *Jacobs v. USA Track & Field*, 374 F.3d 85 (2d. Cir. 2004) (rejecting athlete’s petition to compel arbitration pursuant to AAA Commercial Rules). The arbitrators’ decision is published and available on the USADA website. An athlete may appeal an adverse AAA/North American CAS arbitration award to a different panel of three CAS arbitrators, whose decision is final and binding. Although generally not parties to USADA doping arbitrations, the USOC and U.S. NGBs effectively are bound by the resulting awards pursuant to the Amateur Sports Act. Gahan, 382 F. Supp.2d 1127.

30. 9 U.S.C. §1 et seq. (2008).

31. 578 N.Y.S.2d 683, 685 (N.Y. App. Div. 1992).

32. *Lindland*, 227 F.3d at 1003.

The Amateur Sports Act<sup>33</sup> does not create any substantive athletic participation rights that athletes can enforce in a private litigation against the USOC or an NGB.<sup>34</sup> As one Seventh Circuit judge remarked, “there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”<sup>35</sup> The merits of disputes regarding an athlete’s eligibility to participate in the Olympic Games and other protected competitions are to be resolved by AAA arbitration, not the courts.

Consistent with this view, federal courts have ruled that the Amateur Sports Act immunizes an NGB from antitrust liability for rules and decisions that adversely affect an athlete’s eligibility to participate in a protected competition. In *Behagen v. Amateur Basketball Ass’n of United States*,<sup>36</sup> the Tenth Circuit noted that the statute expressly authorizes only one NGB to represent the U.S. within each IF and to recommend to the USOC individual athletes and teams to represent the U.S. in the sports it governs. It ruled that implied antitrust immunity is necessary because: “[t]he Act makes clear that Congress intended an NGB to exercise monolithic control over its particular amateur sport, including coordinating with the appropriate international sports federation and controlling amateur eligibility for Americans that participate in sport.”<sup>37</sup>

The Amateur Sports Act, which requires that all amateur athletes be given an equal opportunity to participate in protected competitions without discrimination, does not expressly nullify or supersede any applicable federal civil rights statutes that protect Olympic sport athletes against prohibited disability,<sup>38</sup> gender,<sup>39</sup> race,<sup>40</sup> and religious discrimination.<sup>41</sup> Courts are reluctant to grant any injunctive relief that interferes with the USOC’s exclusive jurisdiction regarding athlete eligibility to participate in the Olympics or other protected competitions,<sup>42</sup> although an award of damages against the USOC or an NGB is an available remedy for violating an athlete’s civil rights.

Except for a breach of contract action to require the USOC or an NGB to follow its own internal dispute resolution rules and procedures,<sup>43</sup> courts have ruled that the Amateur Sports Act bars state law claims by athletes arising out of eligibility disputes regarding protected competitions.<sup>44</sup> American judges recognize the need for a uniform national procedure for resolving athlete eligibility issues, which is necessary to further Congress’ “grant of exclusive jurisdiction to the USOC over all matters pertaining

33. In 1998, the original Amateur Sports Act was renamed the Ted Stevens Olympic and Amateur Sports Act and, *inter alia*, amended to expressly provide that, although the USOC may sue and be sued in federal court, nothing in the Act “shall create a private right of action.” 36 U.S.C. §220505(b)(9).

34. *See, e.g.*, *Slaney*, 244 F.3d 580. Courts also generally hold that athletes have no private right of action under the Amateur Sports Act. *Martinez v. U.S. Olympic Comm.*, 802 F.2d 1275 (10th Cir. 1986); *Oldfield v. Athletic Congress*, 779 F.2d 505 (9th Cir. 1985); *Michels*, 741 F.2d 155; *Lee v. U.S. Taekwondo Union*, 331 F. Supp.2d 1252 (D. Haw. 2004). *But see Sternberg v. USA Nat’l Karate-Do Fed’n, Inc.*, 123 F. Supp.2d 659 (E.D.N.Y. 2000) (athlete allegedly excluded from participating in a protected competition because of her sex has an implied private right of action for damages against an NGB for violating the Stevens Act’s prohibition against gender discrimination).

35. *Michels*, 741 F.2d at 159. *See also Abdallah v. U.S. Ass’n of Taekwondo, Inc.*, 2007 WL 2710489 (S.D. Tex. 2007).

36. 884 F.2d 524 (10th Cir. 1989).

37. *Id.* at 529. *See also JES Properties, Inc. v. USA Equestrian, Inc.*, 458 F.3d 1224 (11th Cir. 2006); *Eleven Line, Inc. v. North Texas State Soccer Ass’n, Inc.*, 213 F.3d 198 (5<sup>th</sup> Cir. 2000).

38. *Shepherd v. USOC*, 464 F. Supp.2d 1072 (D. Colo. 2006), *aff’d*, *Hollonbeck v. USOC*, 513 F.3d 1191 (10<sup>th</sup> Cir. 2008).

39. *Sternberg*, 123 F. Supp.2d 659.

40. *Lee*, 331 F. Supp.2d 1252.

41. *Akiyama v. United States Judo Inc.*, 181 F. Supp.2d 1179 (W.D. Wash. 2002).

42. *See, e.g.*, *Gatlin v. USADA*, 2008 WL 2567657 (N.D. Fla. 2008); *Lee*, 331 F. Supp.2d at 1260, n.2. As one court observed, although the Stevens Act requires the USOC and its NGBs to submit unresolved eligibility disputes to binding arbitration, the statute does not require an athlete to do so. *Sternberg*, 123 F. Supp. at 666. Although a court must give effect to both the Amateur Sports Act and a federal civil rights statute if they can be reconciled, judicial application of a federal civil rights law to resolve the merits of an eligibility dispute would conflict with the Stevens Act’s grant of exclusive authority to the USOC in such matters. Arbitration, not judicial intervention, is the best means of finally resolving the merits of all athlete eligibility disputes in a timely and efficient manner.

43. *See Harding v. U.S. Figure Skating*, 851 F. Supp. 1476 (D. Ore. 1994), *vacated on other grounds*, 879 F. Supp. 1053 (D. Ore. 1995); *Slaney*, 244 F.3d 580.

44. *Slaney v. IAAF*, 244 F.3d 580 (7<sup>th</sup> Cir.), *cert. denied*, 534 U.S. 828 (2001).

to United States participation in the Olympic Games.”<sup>45</sup> Thus, the Amateur Sports Act limits the nature and scope of judicial authority in athlete eligibility disputes and “only a very specific claim will avoid the impediment to [a court’s] subject matter jurisdiction” established by this federal law.<sup>46</sup>

In summary, courts have a very limited role in resolving athlete eligibility disputes. Although a court will not resolve the merits of the dispute, it will ensure that the USOC and NGBs follow their own rules and provide an athlete with the procedural due process protections required by the Amateur Sports Act and the USOC Bylaws. A court also will provide limited scrutiny of an Article IX arbitration award to ensure that the arbitrator did not exceed his authority and that it is not the product of corruption or bias.

## B. Professional Sports

Professional team and individual performer sports are a very popular form of entertainment in the United States. The producers of professional sporting events such as sports leagues and other organizations have strong market incentives to create a brand of athletic competition that attracts elite, highly skilled athletes, is commercially appealing to the public, and is profitable. Major professional team sports such as the National Football League (“NFL”), Major League Baseball (“MLB”), National Basketball Association (“NBA”), and National Hockey League (“NHL”) as well as individual performer professional sports such as golf and tennis collectively attract millions of event attendees and viewers and generate billions of dollars in revenues annually. For most professional athletes, playing a sport is their primary occupation and source of income. In team sports, professional athletes generally are employees of their respective clubs who are paid an agreed salary, which typically is a substantial sum for NFL, MLB, NBA, and NHL players.<sup>47</sup> Professional athletes who participate in individual performer sports such as golf and tennis usually are independent contractors who must satisfy the event organizer’s qualifying criteria in order to participate in organized competitions. Their compensation is based on their respective individual performances in competitions.

In professional sports, the legal framework establishing the parameters of permissible athlete eligibility requirements and protecting an athlete’s opportunity to participate is a mix of contract, labor, antitrust, and civil rights laws. In general, the legal relationship between a producer of professional sports competition and an athlete is established by the terms of their contract, with state contract law and federal labor, antitrust, and civil rights law governing its parameters. United States professional sports

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45. *Id.* at 594.

46. *Id.* at 595. In *Harding*, a federal district court held that judicial intervention in athlete eligibility disputes: “is appropriate only in the most extraordinary circumstances, where the association has clearly breached its own rules, that breach will imminently result in *serious* and irreparable harm to the plaintiff, and the plaintiff has exhausted all internal remedies. Even then, injunctive relief is limited to correcting the breach of the rules. The court should not intervene in the merits of the underlying dispute.” *Harding*, 851 F. Supp. at 1478 (emphasis original). The Amateur Sports Act, in relevant part, provides: “In any lawsuit relating to the resolution of a dispute involving the opportunity of an amateur athlete to participate in the Olympic Games, the Paralympic Games, or the Pan-American Games, a court shall not grant injunctive relief against [the USOC] within 21 days before the beginning of such games if [the USOC], after consultation with the chair of the Athletes’ Advisory Council, has provided a sworn statement in writing . . . to such court that its constitution and bylaws cannot provide for the resolution of such dispute prior to the beginning of such games.” 36 U.S.C. §220509 (a). As one court observed, this statutory provision “is designed to prevent a court from usurping the USOC’s powers when time is too short for its own dispute-resolution machinery to do its work.” *Lindland*, 227 F.3d at 1007.

47. For MLB the 2006 average player salary was \$2.699 Million and the minimum salary was \$380,000. See Frequently Asked Questions, MLBPLAYERS.com, <http://mlbplayers.mlb.com/pa/info/faq.jsp#average> (last visited Nov. 27, 2007). For the NBA the 2006-2007 average player salary was \$5.215 Million, and the minimum salary was \$412,718. See NBA Salary Cap FAQ, <http://members.cox.net/lmcoon/salarycap.htm> (last visited Nov. 27, 2007); NBA Minimum Salary, InsideHoops.com, <http://www.insidehoops.com/minimum-nba-salary.shtml> (last visited Nov. 27, 2007). For the NFL the average player salary rose was \$1.4 million, and the minimum player salary was \$285,000. See Larry Weisman, *Expect NFL Salary Cap to Keep Going Through the Roof*, USA TODAY, Jul. 7, 2006, available at [http://www.usatoday.com/sports/football/nfl/2006-07-07-salary-report\\_x.htm](http://www.usatoday.com/sports/football/nfl/2006-07-07-salary-report_x.htm) (last visited Nov. 27, 2007); *Salary Cap FAQ*, ASKTHECOMMISH.COM, <http://askthecommish.com/salarycap/faq.asp> (last visited Nov. 27, 2007). For the NHL, the 2005-06 average player salary was \$1.28 million, and the minimum player salary was \$450,000. See Collective Bargaining FAQs, NHL.com, <http://www.nhl.com/nhlhq/cba/index.html> (last visited Nov. 27, 2007); see generally Salaries, The Hockey News, [http://www.thehockeynews.com/salaries/team\\_listing.html](http://www.thehockeynews.com/salaries/team_listing.html) (last visited Jan. 24, 2008).

leagues and governing bodies are private entities that are not subject to the constraints of the United States Constitution,<sup>48</sup> and, therefore, are not obliged to comply with, for example, the requirements of the Due Process and Equal Protection Clauses. To prevent potentially conflicting and burdensome requirements, the Constitution's dormant Commerce Clause<sup>49</sup> precludes direct state regulation of the legal relationship between a professional athlete and a national or multi-state professional sports league or governing body (other than enforcement of valid contracts).<sup>50</sup>

Professional athletes have no athletic participation "rights" absent those established by contract. There is no federal law comparable to the Amateur Sports Act (which governs Olympic sports) that directly regulates professional sports leagues and governing bodies and protects professional athletes. However, professional athletes are covered by the federal civil rights statutes, which prohibit discrimination based on "race, color, or national origin."<sup>51</sup>

Federal labor law enables a players' union to negotiate collectively bargained contractual provisions that define and protect unionized professional athletes' athletic participation opportunities as well as athlete eligibility dispute resolution procedures. In the major United States professional sports leagues (*e.g.*, Major League Baseball, National Basketball Association, National Hockey League, National Football League, and Major League Soccer), players unions represent athletes and possess exclusive authority to negotiate on behalf of athletes over terms and conditions of employment, including eligibility rules and grievance procedures. Through the collective bargaining process, unionized professional team sport athletes have the ability to negotiate initial eligibility requirements, limits on league and club disciplinary authority, and a dispute resolution process that adequately protects their athletic participation interests. Similar to the process for resolving eligibility disputes involving Olympic athletes, *de novo* arbitration before independent arbitrators with specialized sports law expertise often is used to resolve athlete eligibility disputes arising in unionized professional team sports.

By contrast, individual performer sport athletes are unable to engage in arms-length negotiation of eligibility requirements. However, the sport's independent promoter or governing body has a strong profit motive to produce a commercially viable form of athletic competition attractive to sports fans, which provides an economic incentive not to unduly restrict athletic participation opportunities.

### C. High School and College Sports

In the U.S. more than 7 million boys and girls participate in high school sports, and approximately 400,000 participate in intercollegiate sports sponsored by universities that are members of the National Collegiate Athletic Association. Athlete eligibility rules are adopted, interpreted, and enforced by a state governing body for interscholastic athletics or a national association for intercollegiate athletics (*e.g.*, the NCAA), which is comprised of their respective member educational institutions. Each high school and university also frequently has its own athlete eligibility rules and requirements.

48. *See, e.g.*, Long v. NFL, 870 F. Supp. 101 (W.D. Pa. 1994), *aff'd*, 66 F.3d 311 (3d. Cir. 1994).

49. *See generally* John E. Nowak & Ronald D. Rotunda, Principles of Constitutional Law sec. 8.1 (Concise Hornbooks, 2d ed. 2005); Erwin Chemerinsky, Constitutional Law Principles and Policies sec. 5.3 (2d. ed. 2002).

50. *See, e.g.*, Partee v. San Diego Chargers Football Co., 668 P.2d 674 (Cal. 1983). An early case, Neeld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977), held that state human or civil rights laws such as those prohibiting disability discrimination can be applied to multi-state professional sports leagues. Today, a disability discrimination claim by a professional athlete against an interstate professional sport league or association is likely to be brought under the federal Americans with Disabilities Act. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

51. 42 U.S.C. § 2000(d) et seq. (2008); 42 U.S.C. § 2000(e) et seq. (2008).

In contrast to athletes who participate in Olympic sports, high school and college athletes do not have direct representation on these governing bodies or a vote regarding athlete eligibility rules.<sup>52</sup> Unlike professional sport athletes, no union represents the interests of high school or college athletes<sup>53</sup> or collectively bargains for eligibility rules or an eligibility dispute resolution process (e.g., arbitration) on their behalf. Similar to the well-known “Golden Rule” in business and politics, high school and college sports governing bodies have the “gold,” which provides broad and exclusive authority to adopt, interpret, and enforce athlete eligibility “rules” subject only to applicable legal constraints.

No federal law provides a legal framework for directly regulating high school or college sports [i.e., no ASA], and there is no government entity charged with a legal duty to protect student-athletes’ sports participation opportunities. There is no federal (or state) constitutional law right to participate in either interscholastic or intercollegiate athletics,<sup>54</sup> and courts rarely find that athlete eligibility rules or their application in individual cases violate the U.S. Constitution or any state constitution.<sup>55</sup> Courts also have uniformly rejected antitrust challenges to NCAA student-athlete eligibility rules, thereby creating a body of federal antitrust law jurisprudence holding that these rules are essentially *per se* legal.<sup>56</sup>

**There is no federal (or state) constitutional law right to participate in either interscholastic or intercollegiate athletics...**

Although high school and college sports are offered because of their inherent educational benefits to student-athletes,<sup>57</sup> American courts almost uniformly refuse to recognize a legally protected interest in interscholastic or intercollegiate athletic participation (which is the means to the end of achieving these benefits) absent a valid contractual right to play a sport. Unless a governing body or educational institution violates federal or state civil rights laws by promulgating and/or applying eligibility rules that deny a high school or college student-athlete an opportunity to participate in sports based on race, color, national origin, gender, or learning or physical disability<sup>58</sup> courts generally refuse to apply anything

52. As one court observed: “as a student, Carlberg has not voluntarily subjected himself to the rules of the [state high school athletic association]; he has no voice in its rules or leadership. We note as well the relatively short span of time a student spends in high school compared to the amount of time often required for institutional policies to change. These factors all point to the propriety of judicial scrutiny of [state high school athletic association] decisions with respect to student challenges.” *Indiana High Sch. Athletic Ass’n v. Carlberg*, 694 N.E.2d 222, 230 (Ind. 1997). The same is essentially true for college athletes. *Gulf So. Conference v. Boyd*, 369 So.2d 553, 558 (Ala. 1979) (“The individual athlete has no voice or participation in the formulation or interpretation of these rules and regulations governing his scholarship, even though these materially control his conduct on and off the field. Thus in some circumstances the college athlete may be placed in an *unequal bargaining position*.”).

53. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006) (arguing that NCAA athletes are employees who should have right to unionize and collectively bargain).

54. *See, e.g.*, *In re United States ex rel. Missouri High Sch. Ath. Ass’n*, 682 F.2d 147 (8th Cir. 1982); *Walsh v. Louisiana High Sch. Athletic Ass’n*, 616 F.2d 152 (5th Cir. 1980); *Hysaw v. Washburn Univ.*, 690 F. Supp. 940 (D. Kan. 1987); *Yeo v. NCAA*, 171 S.W.2d 863 (Tex. 2005); *Hart v. NCAA*, 550 S.E.2d 79 (W. Va. 2001).

55. *See generally* Scott C. Idleman, *Religious Freedom and the Interscholastic Athlete*, 12 MARQ. SPORTS L. REV. 295 (2001). Courts will intervene, however, to protect student-athletes’ substantive rights premised on federal or state constitutional law and statutes. *See, e.g.*, *Pryor v. NCAA*, 288 F.2d 548 (3rd Cir. 2002) (holding that student-athletes’ complaint alleged intentional racial discrimination in violation of federal statutes); *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (although ultimately rejecting student-athletes’ claim against the NCAA, the court acknowledged the existence of a state constitutional right of privacy).

56. *See, e.g.*, *Smith v. NCAA*, 139 F.3d 180, 185-86 (3d Cir. 1998) (finding NCAA eligibility rules are not related to the NCAA’s commercial or business activities and therefore are not subject to Sherman Act scrutiny); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) (NCAA student-athlete amateur eligibility rules have no anticompetitive effects); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988) (eligibility rules have predominately procompetitive effects and do not violate antitrust laws).

57. Competing in athletics in interscholastic and/or intercollegiate athletics provides a unique educational experience with a significant potential to positively shape several aspects of a student-athlete’s academic, personal, and professional life. Some of the most important traits and skills developed from competing in athletics are motivation, self-esteem, a strong work ethic, discipline, and the ability to work in a team environment, all of which are important factors in determining one’s academic and career success.

58. *See e.g.*, *Garvey v. Unified Sch. Dist.* 262, 2005 WL 2548332 (D. Kan.) (Title VI provides college athlete with private cause of action for claims of intentional discrimination); *Mercer v. Duke Univ.*, 401 F.3d 199 (4th Cir. 2005) (finding the same for gender discrimination); *Cole v. NCAA*, 120 F. Supp.2d 1060 (N.D. Ga. 2000) (finding the same with respect to discrimination based on a participant’s disability).

more than very limited rational basis scrutiny.<sup>59</sup> In other words, the athlete almost always loses because the rational basis test is an easy standard for a sports governing body to satisfy in most eligibility disputes.

Student-athletes rendered ineligible to participate in intercollegiate athletics may assert federal denial of due process claims against public colleges and universities, which are “state actors” subject to the constraints of the U.S. Constitution.<sup>60</sup> The Due Process Clause protects only property and liberty interests.<sup>61</sup> Courts generally refuse to recognize a constitutionally protected property interest in intercollegiate athletic competition and reject arguments that such participation is necessary to develop the skills necessary for a future professional sports career.<sup>62</sup> Although many college athletes aspire to a professional career, few achieve their dreams and such aspirations are considered speculative and not subject to constitutional protection.<sup>63</sup> Courts do recognize a student-athlete’s property interest in the economic value of his or her athletic scholarship, which constitutes a renewable one-year contract with his or her university.<sup>64</sup> However, an athletic scholarship itself does not create a constitutionally protected property right to participate in intercollegiate sports.<sup>65</sup>

As is true at the intercollegiate level, the prevailing judicial view is that participation in interscholastic athletics is not a federally protected property right or liberty interest.<sup>66</sup> However, this majority view is ironic because the Supreme Court has recognized that high students have a legally protected interest in “attending and participating in extracurricular activities as part of a complete educational experience,” such as school-sponsored athletic events.<sup>67</sup> Nevertheless, absent violation of some independent fundamental constitutional right such as freedom of religion or speech, a high school athletic association or school rule or decision rendering a student-athlete ineligible to participate in interscholastic sports probably does not violate the federal constitution.<sup>68</sup>

Courts often fail to recognize the important—perhaps unique—educational benefits and skills development derived from participation in interscholastic athletics (e.g., teamwork, discipline, perseverance, dealing with success and failure, etc.), which generally have many positive effects on a student’s future personal life and career. The prevailing judicial approach, which is to accord substantial

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59. *Carlberg*, 694 N.E.2d at 230-31.

60. *NCAA v. Tarkanian*, 488 U.S. 179, 189 (1988). However, the NCAA is a private association that is not subject to the requirements of the U.S. Constitution. *Id.* at 195-96.

61. *Goss v. Lopez*, 419 U.S. 565, 572 (1975).

62. *See* *Hall v. NCAA*, 985 F. Supp. 782 (N.D. Ill. 1997); *Lesser v. Neosho County Cmty. Coll.*, 741 F. Supp. 854 (D. Kan. 1990); *Spath v. NCAA*, 728 F.2d 25 (1st Cir. 1984); *Rutledge v. Arizona Bd. Of Regents*, 660 F.2d 1345 (9th Cir. 1981); *Marcum v. Dahl*, 658 F.2d 731 (10th Cir. 1981).

63. *Colorado Seminary v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976), *aff’d*, 570 F.2d 320 (10th Cir. 1978).

64. *Conard v. Univ. of Washington*, 834 P.2d 17, 22-23 (Wash. 1992).

65. *Hysaw v. Washburn Univ.*, 690 F. Supp. 940 (D. Kan. 1987). If an institution has fulfilled its obligation during the one-year contract term by allowing athlete’s access to scholarship funds, courts conclude that a student-athlete has not been deprived of a property interest. *Jackson v. Drake Univ.*, 778 F.Supp. 1490, 1493 (S.D. Iowa 1991). Moreover, courts have refused to imply into the student-athlete/university contract terms that would create an entitlement to athletic participation that extends beyond contract’s one-year term. *See e.g. Gonyo v. Drake Univ.*, 837 F.Supp. 989, 994 (S.D. Iowa 1993); *Lesser v. Neosho County Cmty College*, 741 F.Supp. 854, 861-62 (D. Kan. 1990); *Conard*, 834 P.2d at 22-23. According to one commentator, student-athletes “argue that what is bargained for between the student-athlete and the institution is not merely express provisions of the scholarship agreement, but instead a much broader package of benefits.” John P. Sahl, *College Athletes and Due Process Protection: What’s Left After National Collegiate Athletic Association v. Tarkanian?*, 21 ARIZ. ST. L. J. 621, 657 (1989). *See also* Brian L. Porto, Note, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athletes’ Limited Property Interest Ineligibility*, 62 IND. L.J. 1151 (1987). In rejecting such arguments, courts reason in part that to imply terms into the agreement would lead to improper judicial intrusion into academic affairs. *See Ross v. Creighton Univ.*, 972 F.2d 410 (7th Cir. 1992).

66. *See e.g., A.C. v. Bd. of Educ.*, No. 05-4092, 2005 WL 3560658 (C.D. Ill. Dec. 28, 2005) (adopting the majority rule that the student-athletes possess no protectable property interest in interscholastic athletics and citing to cases that have similarly held); *Brown v. Oklahoma Secondary Sch. Activities Ass’n*, 125 P.3d 1219, 1227 (Okla. 2005) (rejecting plaintiff’s assertion he possessed right to participate in interscholastic athletics); *Ryan*, 114 Cal.Rptr.2d at 805 (articulating majority rule that there is no property interests in interscholastic athletics).

67. *Santa Fe Indep. School District v. Doe*, 530 U.S. 290, 312 (2000).

68. *Walsh v. Louisiana High Sch. Athletic Ass’n*, 616 F.2d 152, 159-60 (5th Cir. 1980) (holding a “student’s interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement”).

deference to state high school athletic associations and educational institutions regardless of the adverse effects on students who are deemed ineligible to participate in interscholastic athletics, reflects the judiciary's strong desire to avoid interfering with and micromanaging the high school educational process.<sup>69</sup> In a forthcoming article Professor Timothy Davis and I have proposed that a high school or college athlete should be denied an opportunity to participate in a sport only if doing so actually furthers a legitimate objective of the governing body or a school such as ensuring academic integrity, maintaining competitive balance and fair play, or promoting appropriate standards of conduct.<sup>70</sup>

In summary, United States law does not establish any constitutionally protected or fundamental right to participate in sports. Nevertheless, Olympic and professional athletes are provided a means to seek independent *de novo* review of eligibility decisions, usually through a system of private arbitration. In contrast, despite the significant benefits of participation in intercollegiate or interscholastic sports competition, U.S. courts almost uniformly refuse to recognize a legally protected interest in interscholastic or intercollegiate athletic participation or apply more than very limited rational basis scrutiny of student-athlete eligibility determinations unless there is exclusion or discrimination prohibited on constitutional or statutory grounds.

69. *Wooten v. Pleasant Hope R-VI Sch. Dist.*, 139 F.Supp.2d 835, 843 (W.D. Mo. 2000); *Jones*, 197 Cal.App.3d 751, 757 (1988) (Stating "schools themselves are far the better agencies to devise rules and restrictions governing extracurricular activities. Judicial intervention into school policy should always be reduced to a minimum").

70. Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 Va. Sports & Ent. L. J. \_\_\_ (2009).



**Martin Greenberg**

## **Rich Rodriguez – Jumping Has Legal Consequences**

By **Martin Greenberg**, Greenberg & Hoeschen, Member, Southeast Wisconsin Professional Baseball Park District, and Member, National Sports Law Institute Board of Advisors

### **INTRODUCTION**

Rich Rodriguez attended West Virginia University (WVU) where he walked on to the football team and later earned a scholarship as a defensive back from 1981 to 1984 under Coach Don Nehlen.<sup>1</sup> Subsequent to his playing days, Rodriguez was the head coach at Glenville State and an assistant coach at Tulane and Clemson.<sup>2</sup>

On November 26, 2000, WVU announced that Rodriguez would again return to his alma mater to replace retiring Don Nehlen as head football coach. His first year at WVU, 2001, was a disappointment as he compiled a 3–8 record. However, during 2002 he led WVU to the biggest turnaround in Big East history compiling a 9-4 record. The success continued in 2005 when Rodriguez and the Mountaineers won the Big East title, defeated the Georgia Bulldogs in the Nokia Sugar Bowl, and were ranked number 5 by the *Associated Press*, the highest ranking in school history. More success followed in 2006, when WVU went 11-2 and won the Gator Bowl versus Georgia Tech, and in 2007 when the team compiled a 10-2 record.<sup>3</sup> Rodriguez, who is one of only two current Hispanic head football coaches in the NCAA,<sup>4</sup> was one of the most successful coaches in WVU history with a 60-26 overall record.<sup>5</sup> He

1. *Rich Rodriguez Bio: About His Diverse Background; Plus Key Decisions Ahead*, DETROIT FREE PRESS, Dec. 17, 2007.

2. *Id.*

3. Rich Rodriguez, *Head Coach*, <http://www.mgoblue.com/football/coachbio.aspx?id=42166> (last visited Nov. 4, 2008).

4. *Rich Rodriguez Bio. . .*, *supra* note 1.

5. *Id.*

was credited with the school's first back-to-back Top 10 finishes, 4 consecutive New Year's Day bowl appearances, the school's first BCS bowl win, 3 Big East championships, 8 wins over top 25 teams, 26 straight weeks in the Top 25, a 30-6 record from 2005-2007, and a home-attendance average of 98% of capacity.<sup>6</sup>

On December 16, 2007, Rodriguez informed his players that he was leaving WVU to succeed Lloyd Carr as the head football coach at the University of Michigan. Assistant Coach Bill Stewart coached WVU in the Fiesta Bowl and was subsequently appointed head coach.<sup>7</sup>

Five years earlier Rodriguez entered into an Employment Agreement with WVU to serve as head coach of the football team from January 2002 to January 2010.<sup>8</sup> On June 24, 2006, Rodriguez agreed to a First Amendment to the Employment Agreement<sup>9</sup> that increased his compensation and provided he would be responsible for liquidated damages if he terminated the Agreement prior to January 15, 2013.<sup>10</sup>

On August 24, 2007, Rodriguez entered into a Second Amendment to his Employment Agreement, which was effective retroactively to December 8, 2006.<sup>11</sup> It increased his compensation,<sup>12</sup> extended the term of his employment to January 15, 2014, and increased the amount of liquidated damages for prematurely terminating his contract.<sup>13</sup> The Second Amendment provided as follows:

(D) Termination by Coach.

(1) In the event that Coach terminates his employment under this Agreement because of material and substantial breach of the Agreement by University, if Coach has given written notice to the University within ninety (90) days of such breach and the breach has gone uncured for thirty (30) days after the University's receipt of such written notice, University will pay Coach:

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(2) Except as provided in Article V(B), if Coach terminates his employment under this Agreement for any reason other than as set forth under Article V(D)(I):

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(b) Unless Coach terminates his employment under this Agreement due to a permanent retirement from the University and all other employment with any coaching responsibility with an institution of higher education, in addition to all other forfeitures and penalties provided herein, Coach will pay University the sum of ... (b) Four Million Dollars (\$4,000,000.00), payable, as further described below, within two years of termination if termination occurs after August 31, 2007 and on or before August 31, 2008[.] ... This sum shall be deemed to be liquidated damages and extinguish all rights

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5. *Id.*

6. *West Virginia's Rich Rodriguez Negotiating to be Michigan Football*, <http://sportswrap.berecruited.com/2007/12/14/west-virginias-rich-rodriguez-negotiating-to-be-michigan-football/> (last visited Oct. 27, 2008).

7. *Id.*

8. Employment Agreement by and between West Virginia Board of Governors for and on behalf of West Virginia University and Richard Rodriguez, Dec. 21, 2002.

9. First Amendment to the Employment Agreement for Richard Rodriguez, June 24, 2006.

10. *Id.* at 2-3.

11. Second Amendment to the Employment Agreement for Richard Rodriguez, Aug. 24, 2007.

12. *Id.* at 1-2.

13. *Id.* at 4-5.

of University to any further payment from Coach. All sums required to be *paid*. by Coach to the University under this Section within two years shall be payable according to the following schedule: one-third due (30) days after termination; one-third due on the one year anniversary of termination; and one-third due on the second anniversary of termination.<sup>14</sup>

Before breaking his agreement with WVU, and without the prior knowledge or consent of the university, Rodriguez allegedly engaged in discussions with the University of Michigan regarding their head football coach position employment.<sup>15</sup> As a result of this conduct, West Virginia sued Rodriguez after he accepted the Michigan job.<sup>16</sup> WVU asked the court to find that Rodriguez's contract with WVU was valid, that WVU had not breached that contract, that Rodriguez had breached it by taking the Michigan job, and that he failed to pay the first installment of the \$4 million in liquidated damages he owed to WVU by virtue of his early termination of the Employment Agreement.<sup>17</sup>

Initially the parties disputed whether the case should be decided in Michigan or West Virginia. Rodriguez argued that the proper venue for the dispute was in Michigan because he was a domiciled resident of the state prior to the original filing of the lawsuit. WVU ultimately prevailed on this issue as the West Virginia federal court remanded the matter to the West Virginia circuit court.<sup>18</sup>

In defense, Rodriguez argued that in August of 2007, just prior to the football season, pressure was put on him to execute the Second Amendment to the Employment Agreement. He claimed that the following promises were made in order to induce him to execute the Second Amendment:

- a. That the major donors to the Athletic Department at WVU insisted upon a \$4,000,000.00 penalty clause in the event that Rodriguez left the employ of WVU.
- b. That he would be given additional monies to pay assistant coaches more money for salary increases.
- c. That he would be given a website to promote the athletic program.
- d. That the students under the athletic program would not be required to return their books at the end of the semester season as was the current practice at that time.
- e. That monies would be made available for the Puskar Center renovation to increase the viability of the football program being coached by Rodriguez.
- f. That Michael Garrison, the incoming President of WVU, indicated that if Rodriguez wanted to leave "the lawyers would get together and reduce the cost of the buyout to \$2,000,000.00."<sup>19</sup>

Rodriguez alleged that he relied upon these representations and they were neither kept nor implemented. As a result, he alleged that he was fraudulently induced into signing the Second Amendment.<sup>20</sup> In addition, he claimed that on December 15, 2007, Athletic Director Pastilong and President Garrison, in separate meetings, both stated that they would not follow through on these promises.<sup>21</sup> Thus, Rodriguez believed that WVU breached his employment agreement and specified those breaches in a supplementary resignation letter dated January 10, 2008.

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14. *Id.* at 4-5.

15. Complaint, West Virginia University Board of Governors v. Richard Rodriguez, Civil Action No.: 1:08-CV-00041, at ¶20 (N.D. W. Va. 2008).

16. *Id.*

17. *Id.* ¶25.

18. West Virginia University Board of Governors v. Richard Rodriguez, 543 F. Supp. 2d 526, 536 (N.D. W. Va. 2008).

19. Defendant's Answer To Amended Complaint With Affirmative Defenses, Counterclaim and Third-Party Complaint With Jury Demand, West Virginia University Board of Governors v. Richard Rodriguez, Civil Action No.: 1:08-CV-00041, at ¶4 (N.D. W. Va. 2008).

20. *Id.* ¶5.

21. *Id.* ¶6.

Later in January, Rodriguez posted a \$1.5 million letter of credit with the court which he described as a “gesture of good faith.”<sup>22</sup> The letter of credit was designed to secure any payments up to \$1.5 million that the court might order him to pay. He argued that \$1.5 million was the maximum amount of damages that WVU might be entitled under the terms of his employment agreement.<sup>23</sup>

On July 9, 2008, Rodriguez and WVU agreed to settle the lawsuit. WVU will receive \$4 million. \$2.5 million will come from the University of Michigan’s Athletic Department using funds from its reserves (annual surpluses from sponsorships, licenses and media rights payments). The University also agreed to pay Rodriguez’s legal fees.<sup>24</sup> Rodriguez is responsible for the remaining \$1.5 million, which will be paid in three annual payments of \$500,000 beginning January 10, 2010. Under the terms of the settlement Rodriguez is not required to pay any interest that accrued on the buyout triggered by his departure.<sup>25</sup>

In an editorial in the *Ann Arbor News* on July 13, 2008, the University of Michigan was severely criticized for the payment of Rodriguez’s buyout.

If anyone is under the illusion that Michigan football is part of the universe of public education, get over it. That’s a quaint notion, but college sports at this level is big business: a farm system for the pros, a money-making enterprise with multimillion-dollar endorsement deals and TV rights, an engine to woo and garner major alumni donations.<sup>26</sup>

Oddly enough, Rodriguez’s new contract with the University of Michigan also contains a liquidated damage provision in the event of an early departure.<sup>27</sup> Rodriguez agreed to pay the University of Michigan \$4 million if he terminates his contract in year one. The buyout amount decreases by \$500,000 each contract year. The contract term is 6 years, from January 2, 2008 to December 31, 2013.<sup>28</sup>

WVU’s new head football coach Bill Stewart executed an Employment Agreement on September 10, 2008.<sup>29</sup> In the event that Stewart terminates his Employment Agreement to take a position in any capacity with a football program at another Division 1 school or a professional football team, he is required to pay WVU liquidated damages in the amount of \$1 million.<sup>30</sup> Under a Covenant Not to Compete clause, if Stewart leaves WVU for another Division 1 or professional job, he cannot in the next year “personally contact or otherwise seek to recruit any high school student or transfer a prospective student athlete previously contacted or recruited by the University.”<sup>31</sup>

Interestingly, at the time of Rodriguez’s resignation, it was also alleged that he was recruiting current Ohio State quarterback Terrelle Pryor and that he told Pryor of his move to Michigan before telling West Virginia. Allegedly he also attempted to recruit a handful of WVU prospects including WVU offensive

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22. Shawn Windsor, *COMPROMISE? U-M Coach Rich Rodriguez Makes \$1.5-million Offer*, DETROIT FREE PRESS, Jan. 30, 2008.

23. *Id.*

24. Jeff Arnold, *Rodriguez, Michigan move on after agreeing to pay \$4 million buyout*, THE ANN ARBOR NEWS, July 10, 2008.

25. *Rich Rodriguez, WVU Settle Lawsuit for \$4 Mil*, W. VA. UNIV. SPORTS & ENT. L. SOCIETY, July 10, 2008, [http://richrodriguezlaw.blogspot.com/2008/07/rich-rodriguez-west-virginia-university\\_10.html](http://richrodriguezlaw.blogspot.com/2008/07/rich-rodriguez-west-virginia-university_10.html).

26. *Rodriguez settlement is about more than money*, THE ANN ARBOR NEWS, July 13, 2008, [http://blog.mlive.com/annarbornews\\_opinion/2008/07/editorial\\_rodriguez\\_settlement.html](http://blog.mlive.com/annarbornews_opinion/2008/07/editorial_rodriguez_settlement.html).

27. Letter of Intent between the Univ. of Michigan and Coach, at §1(C)(6), Dec. 17, 2007.

28. *Id.* at §1(A).

29. Employment Agreement between West Virginia University and William Stewart, Sept. 10, 2008.

30. *Id.* at §V(D)(2).

31. *Id.* at §V(F).

guard Josh Jenkins, to join him at Michigan. Cell phone records showed that he used his WVU cell phone to contact recruits and then took records pertaining to these communication and other documents related to his employment at WVU when he moved out of his office.<sup>32</sup>

Stewart's contract language seeks to prevent this type of activity. Upon the termination of the contract by either Stewart or WVU, Stewart is obligated to give WVU "all materials or articles or information, including without limitation, keys, keycards, cell phones, computers, equipment, parking passes, automobiles, personal records, recruiting records, team information, video, statistics or other material documents, correspondence or other data furnished to the coach by the University or developed by the coach."<sup>33</sup>

### TYPES OF BUY OUTS

Buyouts or back-end agreed-to liquidated damages for early termination by coaches have become popular for universities in the last several years as a deterrent to prevent coaches from leaving. Because a university's judicial remedies are limited to a negative injunction; that is, preventing the coach from working for another employer during the term of an existing contract, back-end agreed-to liquidated damages helps a school prevent a coach from jumping, allows the school to preserve its reputation, and provides it with agreed upon monetary damages in the event of an early termination.

Buyouts take a number of forms. Some high profile college coaches have no buyout provisions in their existing and/or amended contracts. Examples include Bob Stoops, University of Oklahoma;<sup>34</sup> Nick Saban, University of Alabama;<sup>35</sup> Kirk Ferentz, University of Iowa;<sup>36</sup> Mack Brown, University of Texas;<sup>37</sup> and Bobby Bowden, Florida State University.<sup>38</sup>

Other coaches' contracts contain a specific buyout number regardless of when they leave. For instance:

- Louisiana State University (LSU) coach Les Miles could owe the university \$500,000 in the event of his early termination; however, if Miles accepts employment at the University of Michigan he is required to pay LSU \$1.2 million for early termination.<sup>39</sup>
- If Ohio State University's coach Jim Tressl prematurely terminates his contract he has to pay \$500,000 to reimburse Ohio State for expenses "including, but not limited to (i) searching for, recruiting, and hiring a new head football coach and coaching staff, (ii) relocating a new head football coach and coaching staff, and (iii) buying out the contract, if necessary, of the new head coach." In addition, Tressl agrees to reimburse Ohio State for all amounts Ohio State is contractually required to pay coaches, coaching staff if the new head coach does not recommend employment of coaching staff.<sup>40</sup>

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32. *Id.*

33. *Id.* at §V(G).

34. Contract of Employment between the University of Oklahoma and Robert Anthony Stoops, Jan. 1, 2002.

35. Head Coach Employment Contract by and between the Board of Trustees of the University of Alabama, for and on behalf of the University of Alabama and Nick L. Saban, June 15, 2007.

36. University of Iowa, Head Coach Contract, by and between The State University of Iowa and Kirk J. Ferentz, June 2, 2006.

37. Head Coach Agreement, between the University of Texas at Austin and William Mack Brown, March 7, 2002.

38. Employment Agreement by and among The Florida State University for and on behalf of the Board of Regents, Robert C. "Bobby" Bowden, and the Seminole Boosters, Inc., Oct. 1, 1999.

39. Contract of Employment by and among the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and Les Miles, at 10-11, Jan. 21, 2005.

40. Employment Agreement, at 14-15, Feb. 1, 2003.

- Recently hired Coach Bobby Petrino of the University of Arkansas, Fayetteville, has the following termination provision:

In the event that you choose to terminate this employment to accept a college or professional coaching position during the first four years of the initial term of your employment agreement or any extensions thereto, you will be responsible to pay liquidated damages to the University in the amount of \$2,850,000. The liquidated damages provision shall not apply during the fifth year of the initial term of your employment agreement.<sup>41</sup>

A third way in which buyout – liquidated damage provisions are negotiated is a de-escalating buyout; i.e., the longer the coach stays, the less the buyout. Examples of de-escalating buyout are:

- Tommy Tuberville, Auburn University:

<u>Contract Calendar Year</u>	<u>Coach's Buyout Amount</u>
2005	\$7,000,000
2006	\$7,000,000
2007	\$6,000,000
2008	\$6,000,000
2009	\$5,000,000
2010	\$4,000,000
2011	\$3,000,000 <sup>42</sup>

- Greg Schiano, Rutgers University.

The university is entitled to the following pay schedule based upon the date on which he terminates his employment agreement:

1. \$1,000,000 if terminated prior to the end of the 2007 regular football season.
2. \$750,000 if terminated between the end of the 2007 regular football season and the end of the 2008 regular football season.
3. \$650,000 if terminated between the end of the 2008 regular football season and the end of the 2009 regular football season.
4. \$500,000 if terminated between the end of the 2009 regular football season and the end of the 2013 regular football season.
5. \$450,000 if terminated between the end of the 2013 regular football season and the end of the 2014 regular football season.
6. \$350,000 if terminated between the end of the 2014 regular football season and the end of the 2015 regular football season.
7. \$250,000 if terminated between the end of the 2015 regular football season and December 31, 2016.<sup>43</sup>

- Tommy Bowden, Clemson University:

41. Letter of Understanding between University of Arkansas and Bobby Petrino, Dec. 11, 2007.

42. Amended and Restated Agreement by and between Auburn University and Thomas Hawley Tuberville, at 17-18, Dec. 31, 2004.

43. Employment Agreement Extension, Jan. 17, 2003.

1. Four Million Dollars (\$4,000,000) if Coach terminates this Employment Agreement prior to December 1, 2008.
2. Three Million Five Hundred Thousand Dollars (\$3,500,000) if Coach terminates this Employment Agreement on or after December 1, 2008 and before December 1, 2009.
3. Three Million Dollars (\$3,000,000) if Coach terminates this Employment Agreement on or after December 1, 2009 and before December 1, 2010.
4. Two Million Five Hundred Dollars (\$2,500,000) if Coach terminates this Employment Agreement on or after December 1, 2010 and before December 1, 2011.
5. Two Million Dollars (\$2,000,000) if Coach terminates this Employment Agreement on or after December 1, 2011 and before December 1, 2014.<sup>44</sup>

{*Bowden was terminated not for cause by the University during the 2008 football season.*<sup>45</sup>}

Depending upon the agreement, back-end buyout clauses may also contain other covenants and contractual language including:

1. A stipulation that the university will suffer material damages, including, but not limited to, lost revenue from disruption of ticket sales, product endorsement, and/or other promotional activities, additional costs in having to locate, recruit and contract with a replacement coach, disruption within the team, and recruiting activities and other damages.
2. An acknowledgment that the amount is a bargained-for and agreed-to liquidated damage which shall not constitute a penalty.
3. A requirement that the coach should notify the athletic director or chancellor prior to engaging in discussions with other institutions, their representative or agents, including discussions related to offers of administrative opportunities at other educational institutions.
4. An agreement that the payment of the liquidated damage amount be made in lump sum and/or in scheduled installments.
5. A requirement of written notice of the intended early departure.
6. A prohibition against termination during the football season, (i.e. the university's collegiate football season commencing on the first day of the fall training camp for the football team and terminating at the end of the last game played by the football team immediately prior to the first day of the next practice for the football team).
7. A statement that the university shall have no duty to mitigate nor shall the coach have any right of offset.
8. A covenant that if the coach retires, and if the coach resumes any coaching responsibilities with any other institution of higher education within a stated period of his asserted permanent retirement, the coach shall be obligated to pay the University a liquidated damage amount.
9. A right of the university, at its option, to require the coach to coach any post-season games scheduled to be played later than December 15<sup>th</sup> of the year of coach's termination.

In addition to these examples of contractual language, a final lesson can be learned from *Northeastern University v. Brown*. Soon after signing a contract extension, Donald Brown, former head football coach at Northeastern University, left to become the head football coach at the University of Massachusetts. When Brown left, Northeastern sued to enforce his employment contract. The contract contained two pertinent clauses. The first clause, found in Article VIII, stated that "Coach agrees to devote full time and effort to the university and agrees not to seek, discuss, negotiate for or accept other

44. Employment Agreement by and between Clemson University and Tommy Bowden, at 18, Dec. 1, 2007.

45. *Bowden's Golden Parachute*, CFAA-ELITE-CLIPS, Oct. 15, 2008.

employment during the term of this Agreement without first obtaining the written consent of the president of the University. Such consent shall not be unreasonably withheld.”<sup>46</sup> The second clause, found in Article IX, stated that if Brown left Northeastern prior to the end of the contract period, then he “shall pay to the University as liquidated damages \$ 25,000” and if the university accepted that amount, it would be deemed to be “adequate and reasonable compensation to the University.”<sup>47</sup>

According to the court, the liquidated damages clause in Article IX did not limit the university’s remedies to mere acceptance of liquidated damages.<sup>48</sup> Instead, the court construed the contract to mean that if the university accepted the liquidated damages, the coach was free to leave; however, the university could exercise and did not waive other remedies, including injunctive relief.<sup>49</sup>

As a result of this case, to protect the coach when drafting similar liquidated damage clauses, there must be a clear statement that if the coach decides to prematurely terminate his contract, pursuant to the liquidated damages provision, the university must accept the amount of liquidated damages as its sole and exclusive remedy and waives or has no further right to any alternative remedies, including injunctive or other equitable relief.

The *Brown* court also indicated that Article VIII had precedence over the liquidated damages clause and, in effect, the university could trump a buyout by not consenting to or approving other employment.<sup>50</sup> As a result, contract drafters should include further protective language indicating that if the coach desires to terminate early and pay liquidated damages pursuant to the Employment Agreement, provisions similar to those found in Article VIII of Brown’s contract, should not have the legal effect of negating or having precedence over the liquidated damages clause.<sup>51</sup>

**Buyouts or back-end agreed-to liquidated damages for early termination by coaches have become popular among universities in the last several years as a deterrent to prevent coaches from leaving**

#### TAX CONSIDERATIONS

Oftentimes these buyout fees are actually paid for by the new employer and/or the new employer reimburses the coach. An interesting article analyzing the tax consequences of such buyouts recently appeared in the *Florida Tax Review*.<sup>52</sup> According to the authors, “[i]t makes no difference whether the employer makes the buyout payment directly or reimburses the employee for making it since the substance of these two circumstances are identical, i.e. it will be treated as a payment by the employee.”<sup>53</sup>

Most likely the buyout will be considered to be a personal obligation of the coach and the Internal Revenue Service will contend that “the new employer’s payment of the buyout obligation is additional compensation to the employee and taxable to him.”<sup>54</sup> Still, the payment of a buyout fee may be

46. *Northeastern Univ. v. Brown*, 17 Mass. L. Rep. 443, \*2 (Mass. Super. Ct. 2004).

47. *Id.* at \*2-3.

48. *Id.* at \*7-8.

49. *Id.* at \*8-9.

50. Martin J. Greenberg, *The Donald Brown, Jr. Case – Another Look at Liquidated Damage Provisions*, FOR THE RECORD, Vol. 15, No. 4, at 5 (October/December 2004).

51. *Id.*

52. Douglas A. Kahn and Jeffrey H. Kahn, *Tax Consequences When a New Employer Bears the Cost of the Employee's Terminating a Prior Employment Relationship*, 8 FLA. TAX REV. 539 (2007).

53. *Id.* at 542.

54. *Id.* at 543.

deductible as a business expense for the coach.<sup>55</sup> However, if the payment were fully deductible by the coach then it would not matter whether the employer's payment or reimbursement constitutes income taxable to the coach as this income would be totally offset by the deduction allowed.<sup>56</sup>

The contract executed by Rodriguez with the University of Michigan dated October 24, 2008, discusses the tax consequences and settlement payment made by Michigan to resolve the WVU lawsuit.<sup>57</sup> Paragraph 3.02 Compensation, (g) Settlement Payment, indicates as follows:

Rodriguez acknowledges that as of the date of execution of this Agreement, the University has paid the sum of \$2,500,000 to West Virginia University ("WVU") pursuant to the terms of that certain settlement agreement by and among Rodriguez, WVU and the University dated July 31, 2008 (the "Settlement Payment"). The University considers this payment as taxable wages for tax withholding and reporting purposes. Consistent with that determination, the University has made timely deposits with appropriate taxing authorities of all amounts required to be withheld as taxes with respect to Rodriguez as a result of making the Settlement Payment (the "Withheld Taxes"). The University has agreed to neutralize the actual tax impact of the Settlement Payment to Rodriguez, in order that Rodriguez not be unduly burdened or distracted in connection with the performance of his duties hereunder. It is the express intention of the parties that neither party benefit financially to the extent that there is a difference between (i) the amount of the Withheld Taxes, and (ii) the amount of the tax liability incurred by Rodriguez (after claiming all deductions allowable under applicable tax laws) which is attributable to the University having made the Settlement Payment. Therefore, as soon as practicable in 2009, the parties will review Rodriguez's pertinent 2008 tax information, and Rodriguez will pay the University, or the University will pay Rodriguez, as the case may be, such amount as is necessary to effectuate this mutually desired result.<sup>58</sup>

## CONCLUSION

The situation involving Rich Rodriguez should serve as a warning for a university with a high profile coach or one who is perceived as a rising star. A liquidated damages clause may provide the jilted university with some monetary relief if a coach leaves before his contract expires, but, it will not prevent the loss of the coach's services. In the end, although the university may receive some sort of compensation, nothing can force a coach to stay.

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55. *Id.*

56. *Id.*

57. Letter of Intent between the Univ. of Michigan and Coach, *supra* note 27.

58. *Id.*

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## Profiles of New Members of the NSLI's Board of Advisors

**Mary K. Braza**, is a partner, member of the management committee and chair of the Sports Industry Team, Foley & Lardner LLP. Ms. Braza serves as outside counsel to Major League Baseball in a wide variety of issues including strategic planning, and on matters such as employment, taxation, technology and consulting agreements, licensing, trademark and antitrust litigation. Ms. Braza was involved in MLB's successful consolidation of League and Club interactive media rights and the formation of MLB Advanced Media, L.P. and continues to counsel MLBAM in relation to MLB's interactive media business. She also works with clients on the acquisition of professional sports franchises.



Ms. Braza received her bachelor's degree (1978) and her J.D. degree (*magna cum laude*, Order of the Coif, 1981) from Cornell University, where she was note editor for the *Cornell International Law Journal*. She is a member of the Wisconsin Bar, and is admitted to practice in many federal district and appellate courts. Ms. Braza is an instructor at the National Institute of Trial Advocacy and has lectured on a variety of trial-related topics. Since 2006, she has served as an adjunct professor at John Marshall Law School in Chicago, IL, where she teaches a course on Sports Law.

Ms. Braza is a member of the American Bar Association Forum on Sports and Entertainment, Sports Law Association and Women's Sports Foundation. She is a frequent speaker on sports-related legal topics. She was named one of America's Leading Lawyers in the area of sports law by *Chambers USA* in 2006, 2007 and 2008. Ms. Braza was also named to the 2006 list of Wisconsin Super Lawyers by *Law & Politics Media, Inc.* for her general litigation work.



**Jim McKeown** is a partner in the Milwaukee office of Foley & Lardner LLP, chair of the firm's Antitrust Practice, and a member of the Sports Industry Team. In the area of sports law, Mr. McKeown has counseled a number of sports-related entities on antitrust and litigation issues. For example, he regularly works with the legal team at Major League Baseball, Major League Baseball Properties, and MLB Advanced Media, L.P. and also was involved in Major League Baseball's successful consolidation of League and Club interactive media rights and the formation of MLB Advanced Media, L.P.

In addition to the sports industry aspect of his practice, Mr. McKeown's litigation practice includes antitrust, distribution, and general litigation. He counsels clients on antitrust issues in a wide variety of areas, including the antitrust aspects of mergers and acquisitions, joint ventures, intellectual property and licensing, health care, and product distribution.

Prior to joining Foley & Lardner in 1985, Mr. McKeown served as a law clerk to the Hon. Harlington Wood, Jr., United States Court of Appeals for the Seventh Circuit. He graduated, *magna cum laude*, from the University of Minnesota Law School in 1984, where he was elected Order of the Coif and served as an article editor of the *Minnesota Law Review*. His undergraduate degree in economics was conferred, *magna cum laude*, by St. John's University, and he holds a Master's degree from the Humphrey Institute at the University of Minnesota.

**Beginning in the spring 2009 semester, Mary Kay and Jim will co-teach a new workshop course, *Sports Law & Governance*, at Marquette University Law School. Professors Mitten and Anderson welcome them to Marquette's Sports Law Faculty.**

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