

**2009-10 Sports Law Developments**  
(from May 15, 2012 through April 1, 2013)

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## **CHAPTER ONE: MORAL INTEGRITY OF THE SPORT**

### **Section A: Rose v Giamatti**

#### **Chapter 1, Section A, Page 3, insert:**

► Former Asian Football Confederation president Mohamed Bin Hamman in January 2013 dropped his appeal from the decision of FIFA’s Executive Committee to ban Bin Hamman from the sport of football for life. The dispute between Bin Hamman and FIFA centered around allegations that Bin Hamman had bribed members of the Caribbean Football Union to vote for him over incumbent Sepp Blatter in their election contest for the presidency of FIFA. FIFA’s disciplinary board found Bin Hamman guilty and banned him for life. In July 2012, a panel of the CAS reversed that suspension on the ground that while Bin Hamman was likely to have engaged in unethical behavior, there was insufficient proof to conclude definitively that the money apparently paid to the CFU delegates originated with Bin Hamman. Subsequently, FIFA charged Bin Hamman with new claims of bribery and mismanagement, found him guilty, and again suspended him for life. In September 2012 Bin Hamman filed another appeal with the CAS and a panel of arbitrators was chosen. But in January 2013 Bin Hamman filed papers officially dropping his appeal, saying that he was tired of fighting the vindictiveness of Blatter and the FIFA leadership and that he would retire from football and concentrate on his many other business interests.

### **Section C: Challenges to Best Interest of the Sport**

#### **Subsection 1: Misconduct**

##### **Page 32, insert:**

► Saints “Pay for Performance” Bounty Scandal. After an enormous amount of publicity and numerous suspensions of team administrators, coaches and four players imposed by NFL Commissioner Roger Goodell for involvement in the infamous Saints “bounty” scandal, a three-person arbitration panel on September 7, 2012 reversed the suspensions against the four players (Jonathan Vilma for one year, and former Saints players Anthony Hargrove for eight games, Scott Fujita for three games, and Will Smith for four games) on the ground that Goodell had failed to specify if he was asserting authority to discipline for conduct not in the best interests of the game of football (which discipline is only appealable to the commissioner himself and is not eligible for neutral grievance arbitration) or for a violation of the league’s salary cap rules (which is appealable to a neutral arbitrator). Goodell then reimposed the discipline under his “best interests” authority, although he reduced the length of the suspensions of Scott Fujita and Anthony Hargrove. When the players appealed that decision again to Goodell himself, Goodell deferred taking the case himself and delegated the job of hearing and deciding the appeal to former commissioner Paul Tagliabue. Meanwhile, the NFLPA also filed a grievance with system arbitrator Stephen Burbank claiming that the bounty system was really a violation of the salary cap rules, discipline for which is within the system arbitrator’s exclusive jurisdiction and not subject to commissioner discipline. Burbank ruled on June 4, 2012 that while bounty payments might well give rise to salary cap issues under CBA article 14, it could also reasonably constitute conduct detrimental to the game that the commissioner has unreviewable authority to discipline under CBA article 46. Burbank thus dismissed the grievance as not being within his jurisdiction, a ruling that shortly

thereafter was unanimously affirmed by the three-person CBA arbitration appeals panel. Despite a motion to disqualify Tagliabue as the arbitrator in a lawsuit filed in late June 2012 by Jonathan Vilma in federal district court in New Orleans, and a companion suit filed in early July 2012 by the NFLPA on behalf of the other three suspended players, challenging the players' suspensions, which motion was still pending before federal district judge Genger Berrigan, Tagliabue on December 11, 2012 reversed all of the suspensions against the players, finding that Goodell's factual findings were accurate, but that even though the players were involved in the bounty system, they were merely functionaries and the real responsibility rested with (and thus the only properly disciplined parties were) the coaches and other Saints officials who had also been disciplined. Thus, no players lost any playing time as a result of the Bountygate scandal.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 1: Misconduct**

#### **Page 32, insert:**

- ▶ NFL Commissioner Roger Goodell voided a September 2012 multi-year contract extension between by the New Orleans Saints and their suspended head coach Sean Payton, temporarily making Payton a free agent when his suspension was to end at the end of the 2012 season. The ground for disallowing the contract was that it contained an unacceptable clause that allowed Payton to terminate the contract if the Saints general manager Mickey Loomis were suspended, fired, or left the Saints during the term of Payton's contract. Nonetheless, the Saints and Payton subsequently entered into another multi-year contract without the offending clause and it was approved by the NFL.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 1: Misconduct**

#### **Page 38-39, insert:**

- ▶ Some Las Vegas casinos offered refunds to gamblers who lost money on the Sept. 24 Monday Night Football game after an apparently blown call on a Hail Mary pass allowed the Seattle Seahawks to beat (and beat the spread against) the Green Bay Packers 14-12.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 1: Misconduct**

#### **Page 32, insert:**

- ▶ The NFL, MLB, NBA, NHL and NCAA filed a lawsuit on August 7, 2012 in federal district court in Trenton, New Jersey, claiming that the recently adopted New Jersey law and regulations permitting sports betting on professional and college games in New Jersey casinos and racetracks, which were adopted through a November 2011 referendum with 64% of a statewide vote and signed into law by Gov. Chris Christie on

January 17, 2012, violated the federal Professional and Amateur Sports Protection Act of 1992 that prohibits sports gambling except in four specific states (Nevada, Delaware, Montana, and Oregon) that had such betting before the federal law was passed. New Jersey defended on the ground that the federal law was an unconstitutional equal protection violation and an unconstitutional restraint on interstate commerce. Three years earlier New Jersey had filed a declaratory judgment action to have the federal law declared unconstitutional, but that suit was dismissed because New Jersey lacked standing. On January 21, 2013, the U.S. Department of Justice filed a motion with the court asking for permission to intervene in the case so that it could help the plaintiffs defend the constitutionality of the federal law. The motion was granted. On February 28, 2013, U.S. District Court judge Michael Shipp granted the plaintiffs' motion for summary judgment and entered a permanent injunction barring New Jersey from allowing sports betting. The judge's injunction prohibited New Jersey from "sponsoring, operating, advertising, promoting, licensing, or authorizing a lottery, sweepstakes or other betting, gambling, or wagering scheme" based on amateur and professional games. The court ruled that the federal law barring such betting had a rational basis for grandfathering locations that then had such betting and thus was constitutional. New Jersey indicated that it would appeal the decision to the Third Circuit.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 2: Gambling**

#### **Page 38-39, insert:**

- ▶ The NCAA announced in mid-October 2012 that it was relocating five post-season championship events out of New Jersey and would not award any future post-season events in New Jersey because of New Jersey's allowing single-game sports wagering at New Jersey casinos and racetracks. Such venues may begin applying for sports betting licenses in 2013. A federal law appears still to bar such betting in New Jersey and most other states, but New Jersey is challenging that law in a federal lawsuit. Unless and until it is clear that such single-game betting on sports events will not occur in New Jersey, the NCAA will not schedule events in the state. The five events that had been scheduled but were relocated were the D-I regional swimming & diving championships, first round women's D-I tournament basketball games, the D-III men's volleyball championships, and the D-II and D-III women's lacrosse championships. Not surprisingly, New Jersey's understated governor Chris Christie had harsh criticism of the NCAA decision, which it said was based on its by-law that expressly prohibiting having any championship events "in a state with legal wagering that's based on single-game betting involving a point spread or money-line."

On March 6, 2013, the NCAA lifted this ban on post-season events in New Jersey after federal district judge Michael Shipp in Trenton issued a permanent injunction barring New Jersey from allowing sports betting in the state's casinos. However, the memorandum sent to all New Jersey colleges indicating that the ban had been lifted also emphasized that the ban would be reimposed if the State were successful in appealing Judge Shipp's injunction.

## **Section C: Challenges to Best Interest of the Sport**

## **Subsection 2: Gambling**

### **Page 40, insert:**

- ▶ Europol revealed in February 2013 that criminals based in Singapore had orchestrated a global match-fixing corruption conspiracy that had recently rigged as many as 680 soccer matches across the world. While the Singapore government had no public response, there was a worldwide outcry that it needed to invest more resources into ferreting out and prosecuting such criminals who could well compromise the integrity of sport throughout the world. While Singapore has a squeaky-clean image as a country of law and order, it (like much of Southeast Asia) has a massive gambling culture that has turnover in the many billions of dollars every year making the potential for corruption substantial.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 2: Gambling**

#### **Page 40, insert:**

- ▶ Massive corruption in Chinese football (soccer) was exposed in the summer of 2012 when two former Chinese Football Administrative Center directors, Nan Yong and Xie Yalong, were both sentenced to 10 years of imprisonment for taking bribes. Four prominent players in China's only trip to the World Cup in 2002 were also punished to varying degrees for taking payments to shave points or throw matches. Since then, as many as two dozen former football officials, players, coaches and referees have been sentenced to prison and fined various amounts as the Chinese government demonstrated what it referred to as a bold attempt to clean up the corruption-plagued sport. Apparently the sport in China has been rife with match-fixing, gambling, bribery and embezzlement for decades. Whether the government's recent campaign to clean it up will be successful remains to be seen – many observers are doubtful.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 3: Drug Use**

#### **Page 50, insert:**

- ▶ After Tagliabue lifted the suspensions on the players, the NFLPA's suit challenging the discipline in federal court in New Orleans was dismissed by consent, and Saints LB Jonathan Vilma dismissed his federal district court claims seeking to have his suspension overturned (as well as his interlocutory motion to have Tagliabue disqualified as the "arbitrator" hearing the appeal of the suspensions), but he announced that he would continue to pursue the defamation suit he had filed separately on May 16, 2012 in Louisiana federal district court in New Orleans against Goodell claiming that Goodell's findings, punishments, and public comments had wrongfully damaged Vilma's reputation. Nonetheless, in late January 2013 federal district judge Ginger Berrigan granted the NFL's motion to dismiss Vilma's defamation claim, the last of the claims in Vilma's lawsuits..

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 3: Drug Use**

**Page 53-54, insert:**

► The Biogenesis Clinic Scandal. A new scandal reminiscent of the infamous Balco Laboratories scandal blew open when the Miami New Times in January 2013 broke the story about a Florida based “anti-aging” clinic named Biogenesis, run by director Anthony Bosch and located in an office building in Coral Gables, Florida, across the street from the University of Miami, that apparently had distributed a variety of PEDs, including HGH and synthetic testosterone, to more than 25 professional athletes, almost all baseball players, including the Yankee’s Alex Rodriguez, Milwaukee Brewers Ryan Braun, and Washington Nationals pitcher Gio Gonzalez, all of whom played college ball at (or were associated with) the University of Miami. Records taken from the clinic also indicated that in addition to a long list of athletes, Biogenesis had supplied Miami’s strength and conditioning coach Jimmy Goins with large amounts of banned substances. Statements by a former Mets clubhouse attendant also implicated prominent MLB player agents Seth and Sam Levinson and their ACES Agency with obtaining banned PEDs through an employee named Juan Nunez, although they have vigorously denied any knowledge of or connection to Bosch or Biogenesis and claim that Nunez had been fired. Other athletes listed on the clinic’s logs as having been clients included Detroit Tigers shortstop Johnny Peralta, Seattle Mariners Jesus Montero, and Yankees catcher Francisco Cervelli, all ACES clients. In 2012 ACES client Melky Cabrera tested positive for elevated testosterone levels and was suspended for 50 games MLB and the DEA are investigating what could potentially uncover evidence of massive doping violations by professional athletes. Subsequent documents made public in February 2013 during the ongoing investigation identified several more professional baseball players as clients of the clinic who may have received banned substances, including San Diego Padres shortstop Everth Cabrera (the 2012 National League stolen bases champion), Oakland A’s pitcher Jordan Norberto, Houston Astros outfielder Fernando Martinez, San Diego Padres pitcher Fautino de los Santos, and New York Mets outfield minor league prospect Cesar Puello.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 3: Drug Use**

**Page 53-54, insert:**

MLB v. Biogenesis of America -- On March 22, 2013, MLB filed a lawsuit in Florida district Court in Dade County (Miami) against the Biogenesis Lab, a related company named Biokem, Anthony Bosch and five other individuals associated with the Lab, claiming that the defendants had committed a tort by intentionally interfering with MLB’s collective bargaining agreement with the MLBPA and with the players’ individual contracts with their teams by providing them with substances that the defendants knew were prohibited by those contracts. Although the suit asks for damages and an injunction against further acts of providing illegal substances to MLB players, perhaps the primary value of the suit to MLB is that through discovery it will gain access to Biogenesis records that would otherwise be unavailable to it.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 4: Drug Testing**

#### **Page 56, insert:**

- ▶ The NFLPA continued to resist agreeing to a procedure for testing for HGH for the stated reason that the union believed the available tests are unreliable.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 3: Drug Use**

#### **Page 57, insert:**

- ▶ Major League baseball and the MLBPA announced on January 9, 2013 that they had agreed on rules that would expand their drug testing program to include random in-season blood testing for humane growth hormone (HGH). The enhanced testing will begin during the 2013 season.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 4: Drug Testing**

#### **Page 70, Note 3 insert:**

- ▶ Seattle Seahawks CB Richard Sherman tested positive early in the 2012 season and was given a four game suspension by the NFL. That suspension, however, was set aside on appeal by NFL appointed arbitrator Bob Wallace after a hearing on December 21, 2012, on the grounds that there were procedural irregularities in the collection of the urine sample, specifically that the first cup began to leak so the collector used a second cup without making a note of it in his report. The NFL argued that the irregularities were immaterial to the positive result, but Wallace disagreed. Sherman had threatened to sue the NFL if it followed through with the suspension. Had Wallace upheld the suspension and Sherman had sued, he likely would have alleged that the test on him violated state procedural testing requirements. He then would have relied on the 2010 *StarCaps* litigation where a Minnesota state law was held to apply to protect NFL players on the Vikings in spite of conflicting CBA provisions -- the Minnesota courts ruled that the state law applied even though the players ultimately lost the case because they could not prove the state law was violated or that any violation damaged them.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 5: Sports and Social Ethics**

#### **Page 75, insert:**

- ▶ The NFL says it will look into certain questions asked of University of Colorado tight end Nick Kasa during the NFL combine in Indianapolis this week. Kasa told ESPN radio in Denver that during interviews with team officials at the combine, he was asked

“do you have a girlfriend?”, “are you married?”, “do you like girls?” Kasa did not identify which team officials asked these questions, but the league expressed concern that questions like these violate NFL policy and possibly even the CBA. If players being asked these questions would want to seek legal protection, they would likely have to sue under labor and civil rights laws as they are not yet members of the players union protected by the CBA.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 5: Sports and Social Ethics**

#### **Page 75, insert:**

- ▶ A bill was introduced in Congress in early March 2013 by Sen. John McCain (R-AZ) and Rep. Peter King (R-NY) to pardon posthumously the former and the first black heavyweight boxing champion Jack Johnson who was convicted in 1913 of violating the federal Mann Act by transporting a woman across state lines for immoral purposes. It is almost universally believed that this was a prosecution that was solely to dethrone a black heavyweight champion who outraged many by marrying a white woman. Since interracial marriage was then not recognized in many states, when Johnson crossed a state line with his wife, federal prosecutors were able to argue that he was in violation of the Mann Act when he and his wife traveled to different states. Johnson, who was the son of a former slave, first won the heavyweight title in 1908 by defeating Australian Tommy Burns in Australia.

## **Section C: Challenges to Best Interest of the Sport**

### **Subsection 5: Sports and Social Ethics**

#### **Page 80, insert:**

- ▶ Texas state district court judge Steven Thomas on October 18, 2012 issued a temporary injunction against the Kountze Independent School District governing board ordering the board to lift its ban on Kountze High School’s cheerleaders displaying large scriptural banners with quotations from the Bible before and during the team’s football games. The board had issued its ban after receiving a complaint from The Freedom of Religion Foundation, a Wisconsin-based watchdog organization, about the banners and getting a legal review of the court decisions dealing with religious displays at public school athletic events. The plaintiff parents of the cheerleaders argues that the ban infringed their freedom to practice their religion, whereas the board believes that the banners offend the First Amendment ban on government establishment of religion. The preliminary injunction allowed the cheerleaders to continue to display their banners throughout the 2012 season. A trial on the merits of the case is set for June 2013. Texas governor Rick Perry and attorney general Greg Abbot have publicly expressed support for the parent plaintiffs.

**Section C: Challenges to Best Interest of the Sport**  
**Subsection 5: Sports and Social Ethics**  
**Page 87, insert:**

- ▶ The lockout and use of replacement officials resulted in the first female official working regular season NFL games – Shannon Eastin, who had previously officiated in the NCAA Mid-Eastern Athletic Conference.

## **CHAPTER THREE : FROM ANTITRUST TO LABOR LAW**

### **Section C: Labor Exemption from Antitrust**

Chapter 3, Section C, Page 237, insert:

- ▶ U.S. District Court Judge David Doty, who had retained jurisdiction to oversee the implementation of so-called “system issues” in the NFL collective bargaining agreements from 1993-2011 as a result of the 1993 settlement of the *White v. NFL* class action, on December 28, 2012 ruled that the NFLPA’s \$1B-plus collusion claim that the league and its teams had colluded to restrain player salaries in 2010 was barred by the terms of the 2011 dismissal of the *White* antitrust settlement, a dismissal that was part of the overall settlement that led to the new CBA in July 2011. The NFLPA then indicated that it would continue to pursue its claim against the NFL.

A motion filed by the union to reconsider filed with Judge Doty was denied by Judge Doty on February 21, 2013, and the case was then appealed to the Eighth Circuit. The NFLPA, however, indicated that it would continue to pursue another case that it had filed on Aug. 2, 2012 as a preventive measure in the event Doty turned down the collusion claim, which he did. That suit claimed that the *Brady* settlement that led to the new CBA in 2011 was the result of intentional deception and should therefore be set aside, which would then allow Judge Doty once again to reassert oversight jurisdiction under the old *White* settlement. The union alleged that the league misled the players into agreeing to the dismissal of the *White* settlement, leading to the conclusion that the court’s oversight arising from the *White* settlement should be reinstated. The NFLPA said it will “demonstrate that the Court should relieve the *White* class from any effect of the (dismissal) and/or August 11, 2011 (court) Order because they were obtained by ‘fraud, misrepresentation, or misconduct.’” The union sought discovery into the period leading up to the July 2011 settlement, which capped the end of the lockout that had paralyzed the NFL off- season. In the filing with Doty, the NFLPA included an exhibit that listed a series of discovery demands, including all documents tied to the dismissal of the lawsuit, as well as those that pertain to the allegation of collusion in 2010.

However, in his order on February 21, 2013 denying the motion to reconsider the initial ruling, Judge Doty rejected this claim as well, holding that declining to reopen the case “achieves the appropriate balance between bringing litigation to a close and satisfying the equitable principles of Rule [of Civil Procedure] 60(b).” The union then asked the Eighth Circuit to lift the stay on its appeal of the earlier ruling and proceed to decide that appeal.

## **CHAPTER FOUR : LABOR LAW AND COLLECTIVE BARGAINING IN PROFESSIONAL SPORTS**

### **Section C: Union Support and Employer Retaliation**

Chapter 4, Section C, Page 290, insert:

- ▶ The NFL Coaches' Association filed a lawsuit against the NFLPA and its then general counsel Richard Berthelsen, as well as Amalgamated Bank, claiming that the Bank was improperly refusing to release \$959,000 in an account belonging to the NFLCA, and that the union and Berthelsen were instigating the Bank's conduct by telling the Bank that the funds were part of a dispute between the two organizations.

### **Section G: Economic Conflict in Sports Labor Relations Page 330, insert:**

- ▶ The NFLRA filed an unfair labor practices charge against the NFL on June 20. The essence of the claim was that the league failed to bargain in good faith by "direct dealing" with locked-out officials when they sent them inaccurate, false, and misleading letters about the bargaining issues and proposals. The charge was withdrawn after the settlement was reached.

### **Section G: Economic Conflict in Sports Labor Relations Page 330, insert:**

- ▶ The NFL Officials Lockout. After a June 4, 2012 lockout that resulted in the first three weeks of the NFL regular season being played with replacement officials (amid substantial media and public criticism because of several controversial calls and misapplications of the rules), the NFL and the NFL Referees' Association reached a new eight-year collective bargaining agreement on September 26, 2012, which was ratified by the officials on September 29. The new CBA provides: (1) substantial pay increases resulting in the average official's salary to go from \$149,000 in 2011 to \$173,000 in 2013, and to \$205,000 in 2019; (2) current officials will continue to have a defined benefit pension plan through the 2016 season, retirement benefits for all new officials and for existing officials after 2016 will be on a defined contribution plan; and (3) the NFL has the option starting in 2013 to hire a number of full-time officials.

### **Section H: Administration of the Labor Agreement Page 339, insert:**

- ▶ Matthews v. NFL Management Council, 688 F.3d 1107 (9th Cir. 2012) – The 9<sup>th</sup> Circuit Court of Appeals on August 6, 2012 affirmed a district court ruling that in turn upheld an arbitration award denying former NFL player Bruce Matthews the right to file a workers compensation claim in California. Matthews was a star offensive lineman in the NFL for 19 years (1983-2001) with the Houston Oilers/Tennessee Titans. He played in 14 Pro Bowl games and never missed a game in his entire career

because of injury. Five years after retiring, however, he began to suffer disabling pain from lingering effects of playing football. So seeking to take advantage of California's generous workers compensation law, he frilled a claim in that state, in contravention of a clause in his former players contract that required him to file any such claim in Tennessee. So the NFL Management Council filed a grievance with the arbitrator named in the CBA. The arbitrator found for the MFLMC and ordered Matthews to "cease and desist" from pursuing his claim in California. Matthews then sued in federal district court in Los Angeles arguing that the arbitration award violated public policy as recognized in California that militates against clauses under which employees waive their right to seek compensation under California's workers comp law. When the district court upheld the arbitration decision, Matthews appealed to the 9<sup>th</sup> Circuit, which then affirmed the district court and the arbitrator. The court noted that in 19 years, Matthews had only played 13 games in California, never played for a team in California, suffered no discrete identifiable injury in California, and had never received any medical treatment in California. Thus, enforcing the contract clause requiring any claim to be filed in Tennessee did not contravene California's public policy. However, the court expressly noted that its holding was based on the specific facts in Matthews' case where the claimant had extremely limited contacts with California. It said: "We do not hold that wemployers may use binding arbitration of choice of law clauses as a means to evade California law where it would otherwise apply."

## **Section H: Administration of the Labor Agreement**

### **Page 349, insert:**

- ▶ Among those suspended were the New Orleans Saints general manager Mickey Loomis (for eight games), head coach Sean Payton (for one full season), whose suspension was lifted in January 2013, just before Super Bowl XLVII in New Orleans), assistant coach Joe Vitt (for six games), and former Saints and then St. Louis Rams defensive coordinator Gregg Williams (for an indefinite time). As club officials and coaches, they did not have appeal rights to an neutral arbitrator under a collective bargaining agreement and none filed a lawsuit challenging the discipline, although Peyton did appeal his suspension back to Goodell who denied the appeal.

## **Section I: Union and the Individual Player**

### **Page 351, insert:**

- ▶ The family of former NHL "enforcer" Derek Boogard who died in May 2011 of drug and alcohol-related problems filed suit in federal district court in Los Angeles on September 24, 2012 against the NHL Players Association claiming that the union had failed to meet its fiduciary duty (generally characterized as the duty of good faith and fair dealing to the union members) to pursue a claim against the New York Rangers for compensation within the required 60-day window. Boogard was not considered very talented player but was well know as an "enforcer" or fighter who started his career with the Minnesota Wild. After several injuries for which he was prescribed various narcotic pain-killers, sleeping pills, and other drugs by the Wild's team doctors, Boogard developed addictions to these medications. Still, the doctors continued to prescribe them, causing Boogard to go into the league's substance abuse

program in fall 2009. The Wild did not renew his contract when it expired in 2010, but the New York Rangers signed him to a four-year contract. There were three years remaining on that contract when he died in May 2011 in his Minneapolis apartment from the after-effects of a serious concussion sustained during a game. The family alleges that the union contacted Boogard's family about six weeks after his death to outline their possible claim against the Rangers for the balance of the money owed under the contract, and it apparently tried to obtain medical records from the Rangers needed to file such a claim, but it ultimately failed to file that claim or to advise the family about other possible wrongful death claims against the Wild and/or the Rangers. The complaint claims that this was a breach of the union's duty to Boogard that resulted in the family losing its ability to pursue such claims against the teams.

## **Section I: Union and the Individual Player**

### **Page 351, insert:**

- ▶ **Eller v. NFLPA** – Federal district judge Susan Nelson in Minneapolis on May 29, 2012 dismissed a lawsuit filed on behalf a class of retired NFL players, with the lead plaintiff being former Vikings defensive end Carl Eller, against the NFLPA claiming that the NFLPA was not a union when it negotiated the antitrust settlement in spring/summer 2011 in the famous *Brady* case that resulted in the recertification of the union and adopting the settlement as the critical aspects of the new CBA, and that during these negotiations the NFLPA interfered with the retired players' negotiations with the NFL and ended up persuading the NFL to give the active players more and the retired players less (roughly \$900 million) than the \$1.5 billion the NFL was offering them. Thus, because the plaintiffs argue that the union was engaging in illegal collective bargaining as a non-union, the entire settlement/CBA should be set aside and an entire new deal involving both retired and active players renegotiated. Judge Nelson granted the NFLPA's motion to dismiss on the grounds that the settlement/CBA resulted from a mandatory mediation process that she had ordered in *Brady* was proper and legitimate and that the NFLPA had no duty to the retired players. It was also noted that the retired players had filed a parallel antitrust lawsuit to *Brady*, styled *Eller v. NFL*, against the NFL back in 2011, that they were represented by separate counsel during the mediation and settlement negotiations, and that they had agreed to dismiss their lawsuit against the NFL after the settlement had been reached. The *Eller* plaintiffs appealed Judge Nelson's decision in June 2012 on the ground that her decision was based an incorrect standard of review and on disputed facts that could not have been established without discovery. The appeal is still pending as of April 1, 2013.

## **Section J: Salary Caps and Taxes**

### **Page 359, insert:**

- ▶ The NFL team salary cap for the 2013 season will be approximately \$123M.

## **Section J: Salary Caps and Taxes**

**Page 359-359, insert:**

- ▶ The NBA team salary cap for the 2012-13 season was \$58.044M, with the luxury tax trigger at \$70.307M. Both numbers are the same as in 2011-12. Teams exceeding the tax threshold paid \$1 for each dollar over. The minimum team salary is 85% of the salary cap, or \$49.337.

**Section J: Salary Caps and Taxes****Page 362, insert:**

- The NHL Lockout. The NHL locked out its players in the fall of 2012 after the CBA expired. The lockout lasted for 113 days, ending on January 5, 2013 with a new collective bargaining agreement after 480 games had been cancelled, leaving a 50 game season for each team. Among the terms agreed to in the new CBA are: (a) the team salary cap for the abbreviated 2013 season will be \$70.2 million, dropping to \$64.3 million in 2013-14, with a salary floor of \$44 million per team; (b) free agent contracts are limited to a maximum of seven years; (c) salaries within a contract cannot vary by more than 35% year-to-year, and the lowest year must be at least 50% of the highest year; (d) there were no changes to eligibility for salary arbitration or free agency; (e) the players will receive a defined benefit pension plan for the first time; (f) each team may use two buyouts to terminate contracts before each of the next two seasons provided the buyout amount is at least 2/3rds of the remaining guaranteed salary, and the buyout amount will not count toward the salary cap; (g) the minimum salary is set at the old rate of \$525,000 per season, rising to \$750,000 by 2021-22; (h) although the CBA has a ten-year term through the 2021-22 season, either party may exercise an option to terminate it after the 2019-20 season; (i) team revenue sharing will increase by at least \$200 million each year, with increase depending on revenues. There was no resolution of whether NHL players will be allowed to participate in the 2014 Sochi Winter Olympics and will be determined after further talks with the IOC and the IIHF.

## CHAPTER FIVE : AGENT REPRESENTATION OF THE ATHLETE

### Section C: Emergence of Agency Regulation

Chapter 5: Section C, page 407, insert:

- ▶ Sports Capital Group, a Weston, Florida-based football agency run by athlete agent Jonathan Kline, was became the center of controversy in late 2012 for its use of Twitter to recruit NFL players. Sports Capital Group sent out several “Tweets” asking NFL players to “please contact us regarding your future NFL representation.” The Tweets included the agency’s phone number and concluded with, “Look forward to hearing from you.” At the time, the account had sent over 50 Tweets. After the backlash, all of those “recruiting pitch Tweets” were deleted. Four of the Tweets were sent to Buffalo Bills linebacker Shawne Merriman, defensive lineman Spencer Johnson, quarterback Tavaris Jackson and running back Tashard Choice. The Group clarified that it did not believe using social media was a violation of agent regulations but other agents disagree. The NFLPA will probably clarify this issue in the near future.

### Section D: Agents, College Athletes and NCAA Rules

Page 425, insert:

- ▶ The University of North Carolina announced in early 2013 what it called its “Agent and Advisor Program, which purports to regulate tightly all access to UNC players by sports agents. While many universities have either policies or guidelines that purport to control or regulate communications between their athletes and agents, the UNC policy takes the degree of attempted control to the strictest level any university has ever attempted. First, the policy requires any agent wishing to communicate in any way with a UNC athletes to register with the UNC athletic department. Then the policy states:

*“Once registration with the UNC Department of Athletics is confirmed in writing, all subsequent contact with UNC student-athletes or affiliated individuals must be pre-approved by both the Compliance Office and the appropriate head coach. If approved, a member of the Compliance Office must be present for any in-person meeting or phone call with a UNC student-athlete or affiliated individual. Similarly, any non-verbal communication or correspondence of any kind intended for a UNC student-athlete or affiliated individual must first be submitted to the Compliance Office for approval by both a Compliance Office representative and the appropriate head coach. If approved, the Compliance Office will be responsible for provision of the non-verbal communication. **No form of contact or correspondence, verbal or otherwise, should ever take place with a UNC student- athlete or affiliated individual without the pre-approval and facilitation of the Compliance Office.”***

It is unclear how UNC will attempt to police or enforce these requirements. It is also questionable whether a state university subject to constitutional requirements could impose such stringent limitations consistently with the First Amendment. However, if successful, it is likely that other college athletic departments would try to impose similar restrictions on agents.

## Section D: Owner Trademark Rights

### Page 432, insert:

- ▶ As of April 1, 2013, the UAAA had been passed in 40 states and two territories: [Alabama](#), [Arizona](#), [Arkansas](#), Colorado, [Connecticut](#), [Delaware](#), District of Columbia, Florida, [Georgia](#), Hawaii, [Idaho](#), Illinois, [Indiana](#), Iowa, [Kansas](#), [Kentucky](#), Louisiana, [Maryland](#), [Minnesota](#), Mississippi, Missouri, Nebraska, [Nevada](#), New Hampshire, New Mexico, New York, [North Carolina](#), [North Dakota](#), Oklahoma, Oregon, [Pennsylvania](#), [Rhode Island](#), South Carolina, South Dakota, [Tennessee](#), Texas, [Utah](#), [U.S. Virgin Islands](#), [Washington](#), [West Virginia](#), [Wisconsin](#), and Wyoming.
  - Three states had existing, non-UAAA laws regulating athlete agents: [California](#), [Michigan](#), and [Ohio](#).
  - Seven states and one territory had no existing law regulating athlete agents: Alaska, Illinois, Maine, Massachusetts, Montana, New Jersey, New Mexico, Puerto Rico, Vermont, and Virginia.
  - This list can be updated at any time by checking the NCAA's web site at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/uniform+athlete+agents+act+homepage>

## Section D: Owner Trademark Rights

### Page 432, insert:

- ▶ Notably, the Uniform Law Commissioners have created another committee to consider revising the UAAA in some significant ways. It has held a couple of hearings. Proposed revisions are expected and will likely be presented to the full National Conference of Commissioners on Uniform State Laws, probably in summer 2014.

## **CHAPTER SIX : Sports Broadcasting, Merchandising, and Intellectual Property**

### **Law**

#### **Section B: Copyright in Game Broadcasts**

Chapter 6: Section B, page 458, insert:

- ▶ The NFL announced on July 1, 2012 that it was relaxing its historic requirement that a stadium sell out 72 hours before kickoff before it would permit the local television blackout to be lifted. Henceforth, the League will permit the local blackout to be lifted if 85% of the available tickets are sold 72 hours before kickoff. Individual clubs, however, may choose to maintain a higher percentage before allowing local telecasting of their home games

#### **Section C: Player Publicity Rights**

**Page 478-479, insert:**

- ▶ Steelers RB Rashard Mendenhall's \$1 million lawsuit against Hanesbrands for canceling his lucrative endorsement deal was settled out of court with the terms undisclosed. Mendenhall's contract to endorse Champion sporting gear was terminated after the outspoken player tweeted comments about the 9/11 terrorist attacks that Hanesbrands considered inflammatory and damaging to its company image. Mendenhall asserted in his case that the termination was an unlawful breach because he was merely exercising his First Amendment right to say controversial things, an argument that most experts regarded as certain to be rejected. Chapter 6, Section C, Page 478/9

#### **Section C: Player Publicity Rights**

**Page 479, insert:**

- ▶ **O'Connor v. Burningham**, 2007 Utah 58 (2007) – The Utah Supreme Court held in November 2007 (an old case but worth noting since it was not discussed before) that a high school basketball coach is not a “public official” for purposes of defamation law, so that a coach suing parents who publicly made false accusations against him that eventually caused him to be fired does not have to prove actual malice to maintain his claim. In this case, girls’ basketball coach Michael O’Connor at Lehi High School became the object of scorn by the parents of several girls on his team because they thought he was showing too much favoritism toward Michelle Harrison, a high school All-American, and not giving their daughters sufficient attention. The parents went so far as to go to the school board and made several scurrilous, and allegedly false, accusations about O’Connor’s relationships with some of the girls and other aspects of his personal life. The board terminated his employment, which led O’Connor to sue the parents for defamation. The trial court dismissed the case on the ground that as a public official, O’Connor could not sustain his case unless he could prove actual malice, which the court determined he could not do. On appeal the Utah Supreme Court reversed and remanded the case for a trial on the elements of the defamation claim. Apparently the case was then settled.

### **Section C: Player Publicity Rights**

#### **Page 488, insert:**

► **Univ. of Alabama Bd. Of Trustees v. Moore**, 683 F.3d 1266 (11<sup>th</sup> Cir. 2012) – The 11<sup>th</sup> Circuit ruled on June 11, 2012 that artist Daniel Moore did not have to obtain or pay for a copyright or athlete publicity rights license from the University of Alabama to paint and sell his artwork depicting famous moments in Crimson Tide football history. The court ruled that all of Moore’s paintings were fully protected by the First Amendment as “embodiments of artistic expression” and thus could be reproduced in prints and on calendars without paying the University anything. The court found that reasonable people would not believe that Moore’s work was in any way affiliated with or endorsed by the University, and if anyone had such an erroneous impression it would not have sufficiently negative consequences for the University to outweigh the First Amendment rights held by the artist. The issue of whether the scenes could be reproduced on smaller functional products like coffee mugs was not decided, but because such use might be entitled to less aggressive First Amendment protection, the question was remanded to the district court to create a record and balance the considerations outlined by the appeals court. Twenty-seven other major Division I universities had filed amicus briefs supporting the University of Alabama’s position in the case.

### **Section C: Player Publicity Rights**

#### **Page 489, insert:**

► The U.S. Patent and Trademark Office on October 18, 2012 granted the application of Tim Tebow, then a backup QB with the new York Jets, to issue the trademark in the word “Tebowing.” Tebow announced that any revenue from licensing that trademark will be donated to the Tim Tebow Foundation charity.

### **Section D: Owner Trademark Rights**

#### **Page 511, insert:**

► Roy Fox, an ardent football fan from Pendleton, Indiana, amazingly predicted that Jim and John Harbaugh would face each other in the 2013 Super Bowl when their teams (the San Francisco 49ers and Baltimore Ravens) qualified for the game. In February 2012 he filed an application in the U.S. Patent and Trademark Office to register the trademarks “Harbow!” and “Harbaugh Bowl.” However, even before the 2012 season started, the NFL notified Fox that it would oppose the registrations on the ground that they would be confused with the NFL’s marks in connection with the Super Bowl. After the 49ers and Ravens in fact did make it to the Super Bowl, the NFL renewed its cease and desist demand, which led Fox to withdraw his application, not because he believed that the NFL would ultimately prevail on the merits of a challenge, but because he did not have the resources to fight the League’s efforts. Fox did ask the League to compensate him for his costs in filing the application, season tickets to the Indianapolis Colts in 2013, and an autographed photo of Commissioner Roger Goodell. The League did not respond to his request.

## **Section D: Owner Trademark Rights**

### **Page 514, insert:**

- ▶ Under Armour filed a lawsuit against Nike on February 21, 2013 in federal district court in Baltimore, claiming that Nike is “illegally using a version of the Baltimore sports apparel company’s new primary slogan ‘I Will’.” The suit asks for an injunction to “force Nike to stop using any form of that phrase and seeks unspecified punitive damages for trademark infringement and unfair competition.” The complaint asserts that “several instances of ads Nike placed on social media platforms such as Facebook and Twitter beginning in late 2012 using slogans that all begin with ‘I will.’” The complaint also accuses Nike of “trying to cause consumer confusion by using language that approximates the iconic ‘Protect this house’ campaign that helped propel” UA into the mainstream. For example, a basketball ad reads, “I will protect my home court.” UA said that its rights to ‘I Will’ date back to 1998 and that it has used the slogan in connection with hundreds of products, in TV commercials and on billboards. The first “I Will” trademark “dates to 2000, and Under Armour filed for multiple trademarks on the phrase in May 2012.

## **Section E: Group Marketing of Intellectual Property Rights**

### **Page 530, insert:**

- ▶ The Michigan Department of Civil Rights filed a complaint on February 9, 2013 with the U.S. Department of Education’s Office of Civil Rights asking it to issue an order banning the use of Native American mascots and imagery in all K-12 schools in Michigan. The complaint alleges that at least 35 Michigan School Districts have schools with such imagery that it claims unlawfully discriminates against Native American students by reinforcing stereotypes that negatively affect the students’ self-esteem, learning, and achievement. If the OCR grants the requested order, it would certainly change the current law under which demands to cease the use of such imagery would only be granted if the complainant could show harassment, a difficult thing to prove since it requires showing either bad intentions or “universal offensiveness.” Such a change would probably be a huge step in banning the use of Native American mascots and imagery in K-12 schools throughout the nation. Currently, Oregon bans such use of Native American symbols through regulation issued by the state Board of Education in May 2012, and Wisconsin has a law enacted by its legislature in 2010 that allows a resident of a district that has a Native American nickname, logo or imagery to file a complaint with the state superintendant of schools who will order the abandonment of such imagery if it is reasonably offensive.

## **Section E: Group Marketing of Intellectual Property Rights**

### **Page 530, insert:**

- ▶ For the second time in the past few years, a group of Native Americans has had a petition heard on March 7, 2013 by the U.S. Patent and Trademark Office Appeal Board to deregister the mark “Redskins,” currently owned by Pro Football, Inc., the legal entity that does business as the Washington Redskins of the NFL. The basis for the petition is that the mark runs afoul of the statutory provision barring marks that

are “disparaging, scandalous, contemptuous or disreputable.” A previous petition filed in the late 1990s resulting in the Board deregistering the mark in 1999, but a 2003 decision by the federal courts in the District of Columbia in *Harjo v. Pro Football, Inc.* reversed that ruling on the ground that the petitioners were old enough to have filed their petition in a much more timely fashion and thus were barred by laches from bringing it when they did. The current petition, which was initially filed in 2006, was then brought by a new group of young Native Americans against whom the laches defense would not apply.

**Section E: Group Marketing of Intellectual Property Rights**  
**Page 530, insert:**

- ▶ The Michigan Department of Civil Rights filed a complaint on February 9, 2013 with the U.S. Department of Education’s Office of Civil Rights asking it to issue an order banning the use of Native American mascots and imagery in all K-12 schools in Michigan. The complaint alleges that at least 35 Michigan School Districts have schools with such imagery that it claims unlawfully discriminates against Native American students by reinforcing stereotypes that negatively affect the students’ self-esteem, learning, and achievement. If the OCR grants the requested order, it would certainly change the current law under which demands to cease the use of such imagery would only be granted if the complainant could show harassment, a difficult thing to prove since it requires showing either bad intentions or “universal offensiveness.” Such a change would probably be a huge step in banning the use of Native American mascots and imagery in K-12 schools throughout the nation. Currently, only Oregon bans such use of Native American symbols through regulations issued by the state Board of Education.

**Section E: Group Marketing of Intellectual Property Rights**  
**Page 531, insert:**

- ▶ The long-running dispute between the NCAA and the University of North Dakota and others in North Dakota over the University’s historic nickname, logo, and imagery has presumably come to an end. After the NCAA announced in 2005 that schools using offensive Native American names and symbols would not be allowed to host NCAA post-season events and would not be allowed to use such imagery in any NCAA event, the University leadership and the state Board of Higher Education eventually relented and agreed in 2007 as part of a lawsuit settlement to drop the Fighting Sioux nickname and symbols. However, in March 2011 the state legislature passed a law requiring the University to use the logo and Fighting Sioux nickname despite the threat of NCAA sanctions. The NCAA responded that it would enforce its earlier sanctions and require any team using such symbols in a post-season event to forfeit the game(s). Thus, the legislature repealed the previous law in November 2011, but Fighting Sioux nickname backers collected enough signatures on a petition to force a referendum of the state’s voters on whether to force the University to continue using the name and logo. Then in December 2011 the Board of Higher Education filed a lawsuit in state court against Secretary of State Al Jaeger to obtain an injunction to prevent the measure from going on the ballot. That injunction was denied and voters went to the polls on June 12, 2012. The measure, however, failed

almost 2-1. While the University then proceeded on June 14, 2012 officially to drop the offensive nickname and logo, it petitioned the NCAA not to force it to change all of the places where the Fighting Sioux names and the Indian head logo appeared in Englestad Arena where such names and logos were woven into carpets and engraved in seats, railings, stones and walls throughout the venue. The NCAA partially granted the petition, allowing much of the symbols to remain inside the building on condition all such symbols were removed outside the building and that as carpets and other places bearing the old symbols were removed as “it wears out.” Except for the inevitable complaints by fans, this appears to end all of the legal wrangling. State law now prohibits the University from adopting a new nickname until the 2015-16 academic year.

### **Section E: Group Marketing of Intellectual Property Rights**

#### **Page 537, insert:**

- ▶ Minnesota Vikings star running back and 2012 NFL MVP Adrian Peterson discovered to his surprise in early 2013 that his effort to have the number on his uniform changed from the 28 he has always worn as a Viking to either number 23 or 21 would cost him \$1 million. Historically, players who want to change numbers have had to pay Reebok a “refund” for the existing inventory of jerseys for sale to the public, as well as for lost value in the recognizability of the old jersey number, although such payments have never approached \$1 million. Peterson had hoped that because the NFL had switched jersey sponsorship to Nike starting in April 2013, he would not have to pay that fee, but he was informed by the League that the policy was still in place and that because of his fame and the number of unsold jerseys in the inventory his fee to change numbers would be roughly \$1 million.

## **CHAPTER SEVEN : FRANCHISE, LEAGUE AND COMMUNITY**

### **Section A: The Nature of a Sports League**

Chapter 7: Section A, page 582, insert:

- ▶ There was a plethora of litigation involving attempts by various local governments or citizens groups to stop or otherwise impede efforts by professional teams to build new or to sign leases with existing facilities, including:
  - The San Francisco 49ers filed a suit against Santa Clara County in state court in Sacramento to obtain an injunction keeping the County from spending \$30 million in redevelopment tax funds approved by Santa Clara County voters in 2010 to be earmarked for the new \$1.2 billion 49ers stadium that started construction in April 2012. [Status of the suit is unknown.] Construction has continued and the stadium is scheduled to open in July 2014.
  - The Goldwater Institute in Phoenix filed at least two different lawsuits designed to prevent the Glendale City Council from approving deals related to the Phoenix Coyotes' leasing of the Glendale Arena. One suit seeking to block a City Council vote on a \$325M lease deal with the Coyote's prospective new owner Greg Jamison was dismissed by superior court Judge Katherine Cooper on June 7, 2012 on the ground that she had no authority to bar the City Council from taking a vote. After the Council voted to approve the lease, the Goldwater Institute filed another suit to have the vote overturned on the ground that the Council should have put the aspect of the lease relating to operation of the Arena out for bids rather than incorporate it into the Coyotes' lease. On June 27, 2012, superior court judge Dean Fink rejected this argument and ruled that the Council's vote was valid and allowed the lease agreement to proceed.
  - Five residents of Seattle, Washington, filed a lawsuit in King County superior court on January 11, 2013 against the City of Seattle, King County, and investor Chris Hansen to enjoin part of the financing deal to build a new basketball arena for the Sacramento Kings NBA team that was expected to relocate to Seattle. The plaintiffs argued that the \$200 million that the City committed to investing in the new \$490 million arena contravenes the voter-approved ballot initiative 91 passed in 2010 that prohibits the City from supporting any sports team with city tax dollars unless the investment is proven to yield a profit at least equivalent to that of a 30-year U.S. Treasury bond. Thus, the suit seeks to obtain an injunction barring the City from spending anything on construction of the new arena unless it can establish the profit requirement in the ballot initiative, which given the likely rental arrangement with the new NBA team would be very difficult. [Status of the suit is unknown.]

### **Section A: The Nature of a Sports League**

**Page 582, insert:**

- ▶ Two lawsuits have been filed in Seattle attempting to block construction of an arena that could house the now-Sacramento Kings. Hedge-fund manager Chris Hansen is working with Seattle and King County to build the \$490 million facility, and Hansen is also in talks to purchase the Kings and move them to the Pacific Northwest. The

first suit, citing a 2006 voter-approved initiative that requires the city of Seattle to profit from public investments in sports facilities, seeks to block a \$200 million city and county subsidy of the planned arena. According to a report by the Seattle Times, the lawsuit charges that the arena plan fails to satisfy this requirement because the funds planned to repay the public investment “represent unsecured future cash revenue or interest repayment that is not allowed under the initiative.” The second lawsuit facing the arena plan is by the union representing longshoremen at the Port of Seattle. That suit charges that the city and county agreed to a deal with Hansen and his group on an arena financing plan before properly studying the project’s impact on freight mobility or looking at other locations.

### **Section B: Franchise Ownershi Rules**

#### **Page 591, insert:**

- ▶ The highly publicized dispute and subsequent litigation between the former directors of the English FA club Liverpool and former majority owners of the team, Tom Hicks (who also owns the Texas Rangers) and George Gillett was finally settled out-of-court. Hicks and Gillett had argued that the sale negotiated with The Fenway Sports Group, headed by Boston Red Sox owner John Henry and then calling itself New England Sports Ventures, for BPS300 million was an “epic swindle” because Liverpool directors Martin Broughton and Christian Purslow, along with managing director Ian Ayre, failed to follow proper procedures, negotiated in private without keeping the shareholders informed, and eventually sold the team for far less than the market value of the team that Hicks and Gillett said was BPS533 million. Hicks and Gillett had filed a lawsuit in Texas state court a couple of years earlier to try to stop the sale but it was dismissed for lack of jurisdiction. They then filed suit in the English courts seeking damages. That is the case that has now been settled on undisclosed terms.

### **Section B: Franchise Ownershi Rules**

#### **Page 591, insert:**

- ▶ Three days after the UEFA announcement noted in the previous item, the English Premier League announced that its clubs had agreed in principle by a vote of 13-6-1 (barely meeting the two-thirds requirement) to a controversial system of regulations even tougher than UEFA’s Fair Play Rules. These regulations contain a “sustainability” clause that does allow for some infusion of new owner equity initially to help pay off current debts, but contains a “short-term cost control protocol” requiring all clubs to have a plan working toward break-even (while allowing annual losses of up to BPS105million (\$165M) in the short term) and limiting the amount a club can raise its player costs above an agreed floor from centrally distributed revenue (a British twist on a salary cap). Clubs failing to comply with these new rules will be docked points in the standings (which could risk relegation to the second tier).

### **Section C: Admission and Relocation of Sports Franchises**

#### **Page 611, insert:**

- ▶ An amazing shuffling of membership in various Division I college athletic conferences led to numerous lawsuits between schools seeking to leave conferences and the conferences that claimed the schools owed them large multi-million dollar departure fees. Such suits included:
  - (a) Rutgers December 4, 2012 suit filed in New Jersey state court in Middlesex County against the Big East for a \$10 million fee to join the Big Ten, arguing that the conference has not applied the exit fee equally to other teams that have left for another conference.
  - (b) The Atlantic Coast Conference's suit filed in late November 2012 against the University of Maryland to recover a \$50 million exit fee established by resolution of the ACC's presidents (with Maryland and Florida State opposing) two months earlier when Pittsburgh and Syracuse were added to the conference and Notre Dame was admitted in all sports except football (previously the exit fee was between \$12 and \$14 million; the suit was filed in North Carolina state court in Greensboro after it was announced that the Terrapins would move to the Big Ten beginning in 2014. Maryland has filed a motion to dismiss this suit. Then Maryland filed its own suit against the ACC on January 15, 2013 in state circuit court in Prince George's County Maryland for a declaration that the ACC's exit fee requirement violates antitrust law, breached the contract between the parties, and tortiously interfered with the economic relationships of the university.
  - (c) Back in June 2012 the Big East had sued TCU for failing to pay the conference \$5 million after it reneged on an agreement to leave the Mountain West Conference and become a member and chose instead to join the Big 12 without ever playing a season in the Big East. The \$5M penalty was in a liquidated damages clause in the agreement

**Section D: League Wide Television Contracts**  
**Page 659, insert:**

- ▶ The NBA filed a petition with the federal district court in Manhattan on September 5, 2012 to clarify the settlement agreement entered in the *Robertson* antitrust litigation against the NBPA in the mid-1970s with respect to the television revenue that the former owners of the old ABA St. Louis Spirits were to receive. As part of the overall *Robertson* settlement four ABA teams were taken into the NBA (the Indiana Pacers, Denver Nuggets, San Antonio Spurs, and the now Brooklyn Nets) and the ABA's St. Louis Spirits were disbanded. As compensation for agreeing to disband the owners of the Spirits, Ozzie and Dan Silna, were to be paid a portion of the television revenue earned by the four ABA teams taken into the NBA every year in perpetuity. Over the almost 40 years since, the Silna brothers have reaped a windfall of almost \$240 million, costing each of the four old ABA teams up to as much as \$5 million a year. The NBA has recently reduced the payments transferred to the Silnas by arguing that the intent of the settlement was to pay them only a percentage of the television revenue earned from national television broadcasts under league contracts, not all television revenue including local TV and other new sources of TV revenue like the NBA League Pass. To resolve the dispute, the League filed the petition with the court, which has now been assigned to district judge Loretta Preska. [The status of the case is unknown.]

## Section D: League Wide Television Contracts

### Page 659, insert:

- ▶ In two consolidated cases, *Garber v. Office of the Commissioner of Major League Baseball* and *Laumann v. National Hockey League* filed in federal district court in Manhattan, plaintiffs have challenged the rules and policies of local sports television broadcasting on antitrust grounds. The lawsuits allege that major professional sports leagues, their member teams, cable and satellite broadcasters such as Comcast and DirecTV, and the regional sports networks (RSNs) that broadcast games have conspired to reduce competition and raise prices on sports broadcasts through policies that restrict what games consumers can watch. In December 2012, U.S. District Judge Shira Scheindlin denied defendants' motions to dismiss the cases, finding that the lawsuits plausibly allege that defendants' policies harm competition by dividing the country into local television markets and imposing mandatory blackouts on out-of-market games.

## Section D: League Wide Television Contracts

### Page 662, insert:

- ▶ A 10-member federal jury in Manhattan on February 28, 2013 found ESPN liable to Dish Network for \$4.86 million, a small fraction of the \$152 million DN had sought, for ESPN's breaching a 2005 licensing agreement by allowing DN rivals to pay lower rates for ESPN Deportes, a Spanish language sports channel, without giving DN the option to match those rates. However, the jury rejected most of Dish's damages claim that ESPN had breached the 2005 contract by giving better distribution deals to DN's rival distributors

## Section D: League Wide Television Contracts

### Page 679, insert:

- ▶ The Tennis Channel won a victory over Comcast in December 2012 when FCC administrative law judge Richard Sippel ruled that because the Tennis Channel, the Golf Channel, and the Versus channel (which is owned by Comcast's subsidiary NBCUniversal), Comcast cannot discriminate against the Tennis Channel or the Golf Channel in carriage arrangements on its various cable systems. Whatever tier Versus is on, Comcast must place the Tennis and Golf Channels on the same tier, even though the Tennis Channel failed to convince the judge that its survival was threatened by being placed on a lower tier. The decision has added between 20 and 23 million new households with access to the Tennis Channel, and that number should quickly grow to almost 50 million. Comcast subscribers will have to pay a slightly higher monthly fee to receive the Tennis Channel on the digital sports tier. The decision, which is the first time a network has prevailed in a program carriage complaint against a cable operator, is still subject to review by the full FCC, and an adverse decision against Comcast could then be appealed to the courts. If this decision stands as a precedent for finding unlawful discrimination when any sports channel is given lower tier status by a cable operator that also owns its own sports network that is on a higher tier, it could open the door for all sorts of new networks owned by leagues, governing bodies, college conferences, and others to get more

access to many households that currently can either not get them or can get them only on a lower, pricey tier

#### **Section D: League Wide Television Contracts**

##### **Page 684, insert:**

- ▶ Despite instituting its complicated so-called Fair Play Rules that essentially require European soccer teams to spend no more than their revenues in order to qualify for European competitions, UEFA president Michel Platini announced on February 4, 2013 that audits revealed that in FY2011 European teams playing their nations' highest division lost over \$2.3 billion, about half of which was incurred by ten clubs. UEFA's analysis is that over the past three years, at least 20 clubs failed to comply with the Fair Play Rules. Nonetheless, UEFA officials continue to claim that the Fair Play Rules are having an effect of narrowing the gap between revenues and expenses for many teams and is moving things in the right direction.

## **CHAPTER EIGHT : MONOPOLY IN PROFESSIONAL SPORTS**

### **Section B: Monopoly Resources and Monopolizing Conduct**

Chapter 8: Section B, page 718, insert:

► **Jim Evans Academy of Professional Umpiring v. The National Association of Professional Baseball Leagues** – The owner of a privately run umpire school in Florida on August 7, 2012 filed a sections 1 and 2 antitrust suit against Minor League baseball and the Professional Umpire Development Corp., MiLB’s subsidiary umpire training company, in federal district court in Orlando. The plaintiff claims that by establishing its own umpire training school and only hiring graduates of that school to umpire in the minor leagues (and ceasing to accredit plaintiff’s academy or hire its graduates) – essentially vertically integrating umpire training with the operation of MiLB, Minor League Baseball illegally conspired to and did monopolize professional umpire training. MiLB’s first line of defense is a motion to dismiss on the grounds that Baseball’s historic antitrust immunity protects it from this type of antitrust claim. On March 28, 2013, Florida district court judge Lisa Munyon denied the motion to dismiss, ruling that the Florida Supreme Court’s decision in *Butterworth v. National League of Professional Baseball Clubs* (644 So.2d 1021 (Fla. 1994), holding that the *Federal Baseball* exclusion was limited to the player reserve clause, not the broader business of baseball) was controlling precedent even though the Eleventh Circuit in *MLB v. Crist*, 331 F.3d 1177 (11<sup>th</sup> Cir. 2003), subsequently expressly rejected that view and reasserted that the Baseball “Exemption” covered the entire “business of baseball.” As of April 1, 2013 the case was still in discovery.

## **CHAPTER NINE : INTERCOLLEGIATE SPORTS: DUE PROCESS AND ACADEMIC INTEGRITY**

### **Section A: The Tarkanian Saga and Procedural Due Process**

Chapter 9: Section A, page 746 or 772, insert:

- **The Penn State-Sandusky Child Sexual Abuse Scandal.** The highly publicized scandal involving the Penn State football program following the arrest in November 2011 and subsequent conviction of former PSU defensive coordinator Jerry Sandusky for sexually molestating 10 boys (technically for unlawful contact with minors, corruption of minors, and endangering the welfare of children), and the subsequent sentencing of Sandusky to 30 to 60 years in prison, as well as the resignation and then death of legendary Joe Paterno in January 2012, led to several legal developments:
- After a lengthy investigation, a report written by former FBI director Richard Freeh that was commissioned by Penn State's board of trustees, was released on July 12, 2012. It found that there was a systematic conspiracy on the part of Penn State officials, including head coach Joe Paterno, athletic director Tim Curley, vice president Gary Schultz, and president Graham Spanier to cover-up information they knew that revealed that Sandusky was sexually abusing boys both on and off campus. Chapter 9, Section A, either Page 746 or Page 772
  - The family of Joe Paterno released on February 11, 2013 a lengthy report that they commissioned, prepared after an extensive investigation and written by former attorney general and Pennsylvania governor Richard Thornburgh, top FBI profiler Jim Clemente, DC attorney Wick Sollers, and Johns Hopkins sexual behaviors professor Dr. Fred Berlin, that concluded that the Freeh Report was in many respects factually wrong, speculative, and fundamentally flawed.
  - NCAA president Mark Emmert announced on July 23, 2012 that, without going through the normal enforcement process or investigation, and even though Penn State had not been found to violate any NCAA rules, and based exclusively on the Freeh Report commissioned by the University, the NCAA executive committee had voted to penalize Penn State by levying a \$60 million fine and banning the football team from post-season play through the 2016 season (five years).
  - Using the state's *in parens patriae* jurisdiction provided for in the Sherman Act, Pennsylvania governor Tom Corbett on January 2, 2013 filed an antitrust case against the NCAA in federal district court in Harrisburg, PA alleging that the heavy sanctions imposed against Penn State by the NCAA were acts of illegal monopolization and anticompetitive conduct that injured the citizens of Pennsylvania.
  - Pennsylvania state senator Jake Corman, who represents the district around State College and chairs the Senate Appropriations Committee, filed a lawsuit on January 4, 2013 against the NCAA in Pennsylvania state court claiming that the NCAA's refusal to submit control over the way the \$60 million in fine money paid by Penn State, which Corman claims are state funds, as well as its refusal to commit more than 25% of the fine money to be spent inside Pennsylvania, violates the laws of Pennsylvania granting him an oversight role for the expenditures of all public funds.

- The Pennsylvania legislature passed Senate Bill 187 that Sen. Jake Corman introduced, which was signed by Governor Tom Corbett on February 19, 2013, requiring that any fines assessed against by Penn State by the NCAA in connection with the Sandusky scandal be put into a special trust fund administered by the State Treasurer, distributed solely to the Pennsylvania Commission on Crime and Delinquency, and thereafter paid out to Pennsylvania organizations that fight or treat child abuse. The day after the bill was signed into law, the NCAA sued the State of Pennsylvania, Governor Corbett, and several other Pennsylvania state officials on February 20, 2013 in federal district court in Harrisburg claiming that the law violates the US Constitution because it interferes with a private contract that would disrupt interstate commerce.
- Criminal charges for conspiracy to cover up a crime, obstruction of justice, and lying to police investigators were filed first in early 2012 against then suspended Penn State athletic director Tim Curley and former university vice president Gary Schultz, and later in fall 2013 against former Penn State president Graham Spanier.
- Former Penn State assistant coach Mike McQueary, the man who reported that he saw Sandusky molest a boy in the shower in the Penn State locker room and testified against Sandusky at his criminal trial, sued Penn State in state district court in Center County for defamation and wrongful termination, alleging that when he reported what he had seen his character was publicly impugned and he was later terminated by university officials for his coming forward. Penn State has denied the factual allegations. \_
- One of the Sandusky victims, dubbed during the criminal trial against Sandusky as Victim Six, filed suit under the alias John Doe Six in federal district court in Philadelphia on January 21, 2013 against Penn State and The Second Mile, the charity that Sandusky had founded, alleging that both defendants acted with “reckless indifference” when they intentionally failed to investigate or report Sandusky to authorities after being given information that he was abusing children in Penn State facilities. Victim Six asserted that he was sexually abused by Sandusky in a campus shower in 1998 when he was 11-years old.
- Several of the other victims of Sandusky’s criminal conduct also filed suits against Penn State in various state courts in Pennsylvania.

## **Section A: The Tarkanian Saga and Procedural Due Process**

### **Page 772, insert:**

- ▶ The NCAA’s 13-member Division I board of directors on October 29, 2012 approved sweeping rules changes that revamped the organization’s DI enforcement rules to create four levels of infractions (instead of two – there four levels are severe breach, significant breach, breach, and incidental breach), provide for a faster enforcement process, create more severe sanctions for the most egregious violations (up to two to four-year post-season bans and heavy fines from revenues earned during years when violations were committed), and up to one-year suspensions for head coaches whose staffs commit violations even without the head coach’s knowledge if the coach has not put in place standards and procedures for instructing and monitoring his/her staff. The Infractions Committee will also be expanded to include 24 members instead of the previous 10 so that panels can be created allowing for hearings to be conducted at

least 10 times every year instead of only five times, which should greatly speed up the adjudication process.

However, in early March 2013 it was announced that because of vocal pushback by a large number of member schools, a couple of the changes would be put on hold. The rules limiting the number of coaches authorized to recruit off-campus and the size, shape, and color of printed recruiting materials that a school can send to recruits were both reinstated, pending further discussion and a possible reworking before the next Board of Directors meeting on May 2. Legislation approved by the BofD may be reversed if a petition signed by a sufficient number of member schools puts it before the membership and 75% vote to override it, and apparently the sense was that these changes might well get reversed in this way. Other parts of the package of rule reforms are also controversial and might trigger an override vote, and the BofD will be revisiting some of them as well on May 2. Interestingly, opposition to the deregulation has come not from less wealthy schools who might be competitively disadvantaged by these steps, but by schools in the major and richest conferences who fear an arms race in recruiting might push their already huge budgets much higher.

## **Section B: Eligibility Requirements**

### **Page 776, insert:**

► NCAA president Mark Emmert announced on January 24, 2013 that the NCAA had hired outside investigator/lawyer Kenneth Wainstein of Cadwalader, Wickersham & Taft to conduct an investigation of the apparent misconduct of NCAA investigators during the lengthy investigation of charges against the University of Miami's athletic program. The claims triggering this outside investigation were that NCAA investigators paid an attorney representing Nevin Shapiro, the Miami booster at the center of the NCAA probe, to obtain and provide them with information obtained through depositions in a separate bankruptcy proceeding, unethical behavior apparently prohibited by NCAA policies. This development caused the NCAA to postpone further investigation of Miami until Wainstein's investigation, which was expected to take only two weeks, was completed. Emmert noted that only a small amount the evidence gathered by the NCAA was compromised by the improper conduct. Emmert also indicated that once this special investigation was completed, he would hire Wainstein to conduct a broader study of the NCAA's enforcement and regulatory structure. In mid-February 2013 Wainstein submitted his initial report to Emmert reflecting that the improper payments were made. The following day the NCAA announced that vice president for enforcement, Julie Roe Lash, had been dismissed even though the report indicated she had done nothing wrong and had approved the improper payment only after being falsely told by NCAA investigator Ameen Najjar that the payment had been cleared by the NCAA's legal department. Najjar was also dismissed even before Lash. Then on February 19, 2013, the NCAA sent Miami a letter indicating that it was pursuing charges of multiple rules violations, including improper payments and benefits given to recruited and current athletes by Shapiro (by his own admission) between 2002 and 2010, as well as a lack of institutional control for failing to monitor Shapiro. A hearing before the Infractions Committee is likely to be held during the summer of 2013.

[Note: Curiously, on June 3, 2011, two days before Nevin Shapiro was to be sentenced for his involvement in running a Ponzi scheme, Investigator Ameen Najjar sent a letter to Judge Susan Wigenton supporting leniency for Shapiro and stating that he had

assisted the NCAA in its investigations of other universities and that he could be helpful in the future.]

## **Section B: Eligibility Requirements**

### **Page 802-803, insert:**

- ▶ The Education Department's Office for Civil Rights issued a "clarification" of its regulations on January 24, 2013 that Section 504 of the Rehabilitation Act of 1973 requires that all schools at any level that receives federal funds must make athletic opportunities available to disabled students equal to those available to students without disabilities. However, the clarification noted that this does not mean that school teams must allow disabled students on the rosters of teams where roster spots are given on the basis of ability or try outs. The instruction is that schools must "afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student." Prior to this, laws passed in 12 states had provided essentially the same requirements. A violation of this directive could result in a cutoff of federal dollars to the offending school district.

## **CHAPTER TEN : INTERCOLLEGIATE SPORTS: COMMERCIALISM AND AMATEURISM**

### **Section A: NCAA Eligibility Rules**

Chapter 10: Section A, Subsection C, page 852, insert:

- ▶ The University of Minnesota declared wrestler Joel Bauman ineligible in early March 2013 after he declined to remove songs and videos that feature him online. NCAA rules state that student athletes are not allowed to use their name or image for commercial use, including songs affiliated with a music career, according to a statement by Minnesota's Director of Compliance J.T. Bruett. The Compliance Office met with Bauman and asked him to remove his likeness from videos and music accounts. Bauman chose not to. As a result he can no longer compete as a Gopher. The 21-year-old said in the nine years he has been writing music he has never made a dime and it's not about the money. "When people ask me, you're choosing music over wrestling, no. I'm choosing inspiring, making a difference, impacting. That's what it's all about," he said.

### **Section A:NCAA Eligibility Rules**

#### **Subsection 3: Professional Contracts**

**Page 855, insert:**

- ▶ In reaction to several Minnesota high school hockey players leaving high school to sign and play with professional teams in the Western Hockey League, the members of the Minnesota Hockey Coaches Associations (the association for high school coaches) appear to have essentially tacitly agreed to "boycott" anyone having direct connections with the WHL. Examples include: (a) Crookston HS teacher and coach of 28 years Jon Bittner was forced to resign from the board of the MHCA because his 16-year old son Paul left school to sign and play with a team in the WHL; (b) Alec Baer, a 15-year old star player for Benilde-St. Margaret was dismissed from his high school team in February 2013 by coach Ken Pauly after he missed a practice in order to visit the facilities and watch a game of the Vancouver Giants in the WHL – he subsequently signed a contract with Vancouver and will play for them on weekends and during breaks while he continues school at Benilde-St. Margaret. The MHCA has openly taken the position that involvement with Major Junior hockey programs is inconsistent with the academic and athletic goals of high school hockey. WHL officials have said they have had their awareness raised and will be more diligent about keeping boundaries with Minnesota high school players.

### **Section B:Judicia Reading of the Scholarship Contract**

**Page 870, insert:**

- ▶ **Robbins v. Kentucky High School Athletic Association** -- A federal district judge from the District of Kentucky on February 18, 2013 denied a motion for a preliminary injunction that would have allowed high school basketball player Jarred Robbins to play basketball for his high school team that season. The Kentucky High School Athletic Association ("KHSAA"), the governing body for high school sports, was the named defendant in the suit filed by Robbins' parents. The association has a transfer

rule that provides that “a student is ineligible for one year from a date of enrollment at the new school if the student participated in varsity sports at the old school after entering the ninth grade.” There are exceptions to the rule and the association may waive the transfer rule where it is deemed unfair to the student. However, KHSAA did not allow Robbins to qualify for any of the exceptions. His parents moved him to the same school as his younger brother in order to ease the burden on them in seeing both their son’s play and transporting them back and forth to school. The court weighed several factors in deciding not to grant the injunction. (1) Public interest in not having every transfer weighed individually as the cost would be great to the association. (2) Whether the plaintiffs would suffer irreparable harm. The court concluded that the harm cuts both ways in that if he were allowed to play the results of the season could not be undone. (3) That the ruling by KHSAA was not clearly erroneous and that the court cannot conclude that it was arbitrary or capricious.

### **Section C: Antitrust Scrutiny of NCAA Rules**

#### **Subsection 3: Athletes Market**

##### **Page 890, insert:**

- ▶ The antitrust lawsuit filed in federal district court in Utah in 2009 by the Utah Attorney General, Mark Shertleff, against the BCS claiming that the BCS’s rules relating to the major post-season Division IA bowl games and the championship game were exclusionary and violated sections 1 and 2 of the Sherman Antitrust Act, was dismissed at Shertleff’s request in October 2012. Shertleff’s tenure as the AG ended at the end of 2012. (Note: *The University of Utah joined the Pac-10 Conference in 2010, making it the Pac-12 and making Utah a member of an automatic qualifier BCS conference.*)

### **Section C: Antitrust Scrutiny of NCAA Rules**

#### **Subsection 1: Product Market**

##### **Page 891, insert:**

- ▶ Former Fiesta Bowl COO Natalie Wisneski pleaded guilty in state criminal court in Phoenix on September 17, 2012 and was sentenced to two years probation for her role in an illegal campaign finance scheme run out of the Fiesta Bowl offices, a class 4 felony under Arizona law. Wisneski had conspired with former Fiesta Bowl CEO John Junker, who also pleaded guilty in late February 2012 to similar crimes, and others to force Fiesta Bowl employees to make campaign contributions to various local and state politicians who supported Fiesta Bowl initiatives and then to use Fiesta Bowl money to reimburse those contributions. Wisneski avoided the presumptive 2-year prison sentence by cooperating with prosecutors in making similar cases against other current and former Fiesta Bowl employees. In addition to these criminal penalties, the BCS put the Fiesta Bowl on probation and fined it \$1 million.

### **Section C: Antitrust Scrutiny of NCAA Rules**

#### **Subsection 3: Athletes Market**

##### **Page 919, insert:**

- ▶ **Bleid Sports v. NCAA** – An organization that used to organize and operate high school basketball tournaments often involving star players being recruited heavily by NCAA Division I schools filed suit against the NCAA on January 2, 2013 in the federal district court in Lexington, Kentucky, claiming that the NCAA’s reinterpreting its By-law 13.11.1.8 to prohibit prospective college athletes from participating in “non-scholastic” events, and NCAA member schools from hosting such events, constituted fraud and a violation of section 1 of the Sherman Antitrust Act. Bleid Sports had operated several such tournaments in the past at venues on college campuses like Kentucky’s Rupp Arena, including at Duke, Louisville and UNLV, but less than 48-hours before such an event was to begin in November 2011 in Rupp Arena, the NCAA ruled that any prospective athletes participating in the tournament would be ineligible for college play, and any college hosting such an event would be in violation of NCAA rules, because the event was not recognized as a “scholastic” event. Bleid Sports had to cancel the tournament costing it and many others who had made arrangements to attend the event substantial losses. Similar events at any on-campus facility were similarly not to be sanctioned by the NCAA, which Bleid Sports alleges caused it to go out of business and lose substantial amounts of money and future profits. The rule that was being reinterpreted states that an NCAA member school “shall not host, sponsor, or conduct a non-scholastic basketball practice or competition in which men’s basketball prospective student athletes . . . participate on its campus or at an off-campus facility regularly used by the institution . . . .” Kentucky had sought a waiver but it was denied.

## **Section C: Antitrust Scrutiny of NCAA Rules**

### **Subsection 3: Athletes Market**

#### **Page 919, insert:**

- ▶ In the famous *O’Bannon* suit in Oakland against the NCAA and its licensing partner Collegiate Licensing Company claiming that the NCAA’s licensing the use of former athletes’ images taken from old television broadcasts in a variety of commercial contexts violates antitrust law and the athletes’ publicity rights, Chief Judge Claudia Wilken on January 29, 2013 denied the NCAA’s motions to dismiss the plaintiffs’ petition to certify a plaintiffs class and make the case a class action, and to dismiss the plaintiffs’ amended complaint that added a claim to include all television game revenues, not just those from rebroadcasts. The judge also set a June 20, 2013 date for a hearing on the question of whether to certify the case as class action. If the case ultimately goes to trial, the judge has set a trial date in June 2014. [*Also Relevant to the IP Publicity Rights Section.*]

## **Section C: Antitrust Scrutiny of NCAA Rules**

### **Subsection 3: Athletes Market**

#### **Page 919, insert:**

- ▶ **Agnew v. NCAA**, 683 F.3d 328 (7<sup>th</sup> Cir. 2012) – The Seventh Circuit on June 17, 2012 affirmed the district court’s dismissal of an antitrust suit brought in Indianapolis by two former college football players, Joseph Agnew and Patrick Courtney, who claimed that the NCAA rule limiting member schools to giving only one year,

renewable athletic scholarships violated section 1 of the Sherman Act by causing an anticompetitive effect on the market for student athletes. They also claimed that limiting the number of scholarships a school may give in each sport violated section 1.

1. Both plaintiffs had received scholarships to play football, Agnew at Rice University in 2006 and Courtney at North Carolina A&T in 2009, but were injured in their freshmen years and thus did not have their scholarships renewed. The NCAA filed a motion to dismiss the claims on the ground that the plaintiffs had failed to identify a relevant market in which competition was restrained. Judge Jane Magnus-Stinson granted the motion on that ground. On appeal, the Seventh Circuit unanimously agreed and affirmed the dismissal. [*But see the next two entries.*]

## **Section C: Antitrust Scrutiny of NCAA Rules**

### **Subsection 3: Athletes Market**

#### **Page 919, insert:**

- ▶ In a major change in its rules, the NCAA membership, in an override vote, in mid-February 2012 barely upheld legislation adopted earlier by the Division I board of directors to allow schools to give multi-year scholarships to athletes. The rule change was opposed by many coaches and institutions, and by petition the change was put to a vote of the 330 schools in the DI membership. It required a 5/8ths vote (62.5% or 207 schools) to override, but the opponents of the rule change only mustered 62.18% or 205 schools. Thus the override vote fell two votes short and the new rule permitting multi-year athletic scholarships was adopted. Chapter 10, Section C, Page 919

## **Section C: Antitrust Scrutiny of NCAA Rules**

### **Subsection 3: Athletes Market**

#### **Page 919, insert:**

- ▶ The California legislature passed, and Governor Jerry Brown signed into law in late August 2012 a bill, SB152, requiring universities in California that earn \$10 million or more in media revenue (now Cal-Berkeley, UCLA, Stanford, USC and probably San Diego State) to provide athletic scholarships to scholarship athletes who are no longer able to compete due to injury. The law also requires these schools to cover insurance deductibles and premiums of low-income student-athletes. This is the first such legislation in the U.S. Similar bills were filed in the Indiana and Oklahoma legislatures, but they never came to vote in either chamber. [**Note:** *This will create the need in California for the establishment of some mechanism to determine when an athlete's not competing is the result of an athletic injury – similar to the injury grievance process in the professional leagues.*] Chapter 10, Section C, Page 919

## **Section C: Antitrust Scrutiny of NCAA Rules**

### **Subsection 3: Athletes Market**

#### **Page 920, insert:**

- ▶ Johnny Manziel and his family filed a trademark for “Johnny Football” on March 2, 2012 that is still pending. In the meantime, JMAN2 Enterprises LLC, Manziel’s

limited liability company formed by his family, is suing Eric Vaughn for selling shirts that read “Keep Calm and Johnny Football.” The NCAA has said that Manziel could keep any court winnings as long as the lawsuit is not perpetrated by a booster with the intent of finding a way to pay Manziel through the lawsuit. This raises the possibility of other college athletes finding ways to be paid through fans selling merchandise with their name and likeness and then receiving settlements for trademark infringement or copyright infringement.

## **CHAPTER ELEVEN : INTERCOLLEGIATE SPORTS: GENDER EQUITY**

### **Section C: Resources**

Chapter 11, Section C, Page 963 insert,

- ▶ **Biediger v. Quinnipiac University**, 691 F3d 85 (2d Cir. 2012) – The federal Second Circuit Court of Appeals on August 7, 2012 affirmed a July 22, 2010 injunction issued by district court judge Stefan Underhill in Hartford, Connecticut, against Quinnipiac University barring the school from eliminating the women’s volleyball team and from counting members of the newly established competitive cheerleading team (as well as some women cross country runners who could not compete in track because they were redshirted) for purposes of complying with Title IX of the 1972 Education Act Amendments. The University had previously been found to be in violation of Title IX by offering insufficient numbers of participation opportunities to women. Then, after a petition from Quinnipiac University to have the injunction lifted because of the school adding some additional roster spots for women, Judge Underhill on March 4, 2013 denied the motion to lift his injunction issued several years earlier barring the University from eliminating any women’s sports from its athletic program due to the school’s non-compliance with Title IX of the 1972 Education Act Amendments. The Underhill noted that although Quinnipiac has made “some effort” to come into Title IX compliance, this progress was insufficient to justify lifting the injunction.

### **Section E: Access**

**Page 981, insert:**

- ▶ Female ice hockey player Shelby Harrington won a preliminary injunction against the New Hampshire Interscholastic Athletic Association that allowed her to continue to play on the Bishop Brady High School boys’ hockey team during her junior year as she did during her freshman and sophomore years. The NHIAA had declared that girls could no longer play on the boys’ hockey team at Bishop Brady because Bishop Brady HS had established a girls’ cooperative ice hockey team with another high school, Trinity HS in Manchester. The NHIAA argued that it was important to the success of the girls’ hockey teams in the state that all girls played on their team – if the most talented girls were allowed to play on boys’ teams, the girls’ teams would be relegated to less competitive intramural type programs and would never develop as quality opportunities for girls. Harrington argued, however, that the boys and girls programs were substantially different (much like baseball and softball have significant differences), for example the girls are not allowed to have contact and the play is much slower, so that forcing her to play in the less rigorous girls program would retard her development and diminish her chances of getting a college hockey scholarship. Nonetheless, the NHIAA argued that the legal regulations were clear that if there are comparable sports offered for both genders, then girls can be required to play on the girls team and only boys on the boys team. On December 8, 2012, Merrimack County superior court judge Richard McNamara issued a preliminary injunction allowing Herrington to play on the boys team until a final ruling could be issued in the case. The judge said he would issue a ruling on the merits by December 19, but this writer is unaware of any such ruling. \_\_\_\_\_

## **CHAPTER TWELVE : INDIVIDUAL SPORTS**

### **Section C: Disciplinary Authority of the Tour**

Chapter 12, Section C, Page 1022 insert,

- ▶ At the time this document “went to print,” the Florida State Boxing Commission” was investigating the gender of a “female” mixed martial arts fighter, Fallon Fox. The Commission had licensed Fox as a woman, who had gender reassignment surgery and supplemental hormonal therapy in 2006 at the age of 31. She is much larger and heavier than most women. As a professional woman MMA fighter, Fox has been unstoppable, having a 5-0 record with all five victories coming with knockouts in the first round, one after only 39 seconds. The Florida license was granted after Fox purportedly presented the Commission with a license she had received from the California State Athletic Commission, but the CSAC has indicated that while Fox did submit an application for licensure, that application and the accompanying medical documentation was still under review and no license had been granted. Fox’s future scheduled fights have now been put on hold while the investigation is pending. Her promoter, Cage Fighting Alliance, indicates that it will do everything it can to allow her back in the ring.

### **Section D: Organizing a Sports Tour**

**Page 1027, insert:**

- ▶ On March 7, 2013 NASCAR fined driver Denny Hamlin \$25,000 for saying in a public statement that the new “Generation 6” cars “did not race as good as the Generation 5 cars.” The comment was made after a race in Las Vegas at which Hamlin finished third and he was asked about the lack of passing that resulted in a single line finish at Daytona and a lackluster event at Las Vegas. NASCAR subsequently explained in a statement that it “wants drivers to have personalities and character and to express themselves, but only if they say positive and not negative things.” NASCAR’s VP of competition, Robin Pemberton stated that “You can’t slam your product. That’s where it crosses a line.”

### **Section F: Olympic Sports**

**Page 1059-60, insert:**

- ▶ [Several prominent American and foreign track & field athletes announced in September 2012 that were going to form and seek certification at least in the United States for a labor union with the primary objective of opposing Olympic by-law 40 that prohibits Olympic participants from advertising for non-Olympic sponsors immediately before and during the Olympic Games. I have not heard that this organization has actually been formed.]

**Section F: Olympic Sports****Page 1073, insert:**

- ▶ The Court of Arbitration for Sport ruled on April 29, 2012 that the British Olympic Association's new rule banning for anyone testing positive for a banned substance is unenforceable because it is inconsistent with the penalties set forth in the WADA Code.

**Section F: Olympic Sports****Page 1076, insert:**

- ▶ In a humorous development, the United States Freshwater Fishing Federation has required contestants in its fishing competitions to be tested for substances banned by the WADA Code. Tests will be conducted randomly as well as on the medal winners at every competition. The first testing by the USADA of fishermen occurred at February's World Ice Fishing Championship in Wausau, Wisconsin. The reason for the testing is because ice fishing leaders are hoping that the sport will become approved as a medal sport at future Winter Olympics, and drug testing is required of all Olympic sports. BTW, the Russian team won the championship in Wausau (the USA finished fourth), and no contestants tested positive, although it was noted that beer and other alcohol products were not tested and are not on the banned substances list, which the fishermen said was a good thing since everyone would have been ineligible if they were.

## **CHAPTER THIRTEEN : PERSONAL INJURY FROM SPORTS**

### **Section A: Torts and Sports**

Chapter 13, Section A, Page 1093 insert,

- ▶ **Bukowski v. Clarkson University**, 19 NY3d 353 , 971 N.E.2d 849 (NY 2012) – The New York Court of Appeals on June 5, 2012 reaffirmed the historic “assumption of the risk” doctrine’s applicability and rejected the personal injury claim of the plaintiff college pitcher who was seriously injured by a line drive hit off of an aluminum bat during an indoor practice session. The plaintiff had claimed that unusual features made the usual assumption of risk doctrine inapplicable – that the practice was indoors, there was a multi-colored pitching backdrop, the lighting was low, etc. The Court rejected the argument noting that the plaintiff was an experienced baseball player who was aware of all the circumstances and willingly consented to participate in the practice.

### **Section B: Criminal Law andS Sports Violence**

**Page 1098, insert:**

- ▶ **Rountree v. Boise Baseball LLC**, \_\_\_ P.3d \_\_\_, 2013 WL 646277 (Idaho 2013) – The Idaho supreme court on March 7, 2013 rejected the historic “baseball rule” that every other jurisdiction in the US that has ruled on this has adopted and found that the Boise Hawks and 17 other related defendants were subject to negligence liability under traditional tort standards to Bud Rountree, a spectator who was injured by a foul ball while in an “Executive Club” area not protected by the netting behind home plate. Although acknowledging that over half of the states’ courts, and legislatures in Arizona, Colorado, New Jersey, and Illinois, have adopted the rule that spectators injured by foul balls and flying bats may not recover against the teams or stadia if they voluntarily chose to sit in an area unprotected by netting, the Idaho supreme court said that it saw no compelling public policy either to limit the duty of care owed to spectators at baseball games or to allow teams/stadia to claim the primary assumption of risk defense even though there was an express disclaimer and waiver on the back of Rountree’s ticket. The court found that to allow such defenses was inconsistent with Idaho’s comparative negligence system

### **Section B: Criminal Law andS Sports Violence**

**Page 1098, insert:**

- ▶ **Coomer v. Kansas City Royals** – The Missouri court of appeals on January 27, 2013 reversed a jury finding of 100% fault by the plaintiff, John Coomer, a Kansas City Royals fan who was badly injured when he was hit in the eye during a Royals home game when he was hit in the eye by a hot dog thrown by the Royals mascot Sluggerrr (who in real life is Byron Shores). The appeals court reversed on the ground that the trial judge had given improper instruction to the jury telling them that the Royal’s defense of primary assumption of the risk was available as a basis for a verdict. The appeals court held that the primary assumption of risk defense was not available because a mascot throwing hot dogs is not an inherent or unavoidable risk associated

with the game of baseball. The case was remanded back for a new trial on the issue of the parties' comparative negligence.

### **Section C: Workers Compensation for Athletes**

#### **Subsection 2: Professional Athletes**

##### **Page 1119, insert:**

**Dryer v. NFL** – In mid-March 2013, a large group of retired NFL players, all class members in the lawsuit filed in 2009 against the NFL in the federal district court in Minnesota claiming that the League had improperly used and continued to use their images in NFL Films' productions without their consent or compensating them, filed papers with the court indicating that they had reached a settlement agreement with the NFL that, *inter alia*, (a) provided for a \$42 million fund established over 8 years by the League to cover various needs of retired players; (b) the NFL would invest \$8 million to cover the legal fees in connection with the creation of an independent image rights licensing agency overseen by a board of retired players and dedicated exclusively to licensing the image rights of retired players; and (c) essentially allowed the NFL unfettered right to use their images in future historical NFL Films productions. The 2012 CBA expressly granted such rights to NFL Films but previous CBA's had not clearly dealt with this issue. However, shortly after the settlement papers were filed, the lead named plaintiff in the class action suit publicly indicated that he and the other six original named plaintiffs opposed the settlement, and their lawyer a few days later filed papers with the court formally objecting to the purported settlement. Since the settlement was the product of mediation by the court-appointed settlement attorney, Dan Gustafson, Gustafson stated publicly that he believed the court would ultimately accept the settlement, probably sometime over the summer. If so, it is expected that Dryer and the other six named plaintiffs would opt out of the settlement and filed a new lawsuit.

### **Section C: Workers Compensation for Athletes**

#### **Subsection 2: Professional Athletes**

##### **Page 1119, insert:**

During the course of the settlement talks in late 2012 between NFL representatives and lawyers for the retired players that led to the settlement agreement noted in the above item, the court imposed a gag order on the parties. However, former Vikings player and plaintiff Bob Lurtsema, who attended the settlement talks, published a letter on the internet detailing the various proposals and counterproposals that had been made. Although the NFL disputed the accuracy of the letter, it filed a motion in late November asking that the court hold Lurtsema in contempt for violating the gag order.

### **Section C: Workers Compensation for Athletes**

#### **Subsection 2: Professional Athletes**

##### **Page 1119, insert:**

► **Washington v. NFL** – In another lawsuit brought by three retired players (Gene

Washington, Diron Talbert and Sean Lumpkin) in the federal district court in Minnesota against the NFL claiming that the League's use of historic game footage in promotional films and other products violated section 1 of the Sherman Antitrust Act, district judge Paul Magnuson granted the NFL's motion to dismiss on June 13, 2012. The judge ruled that the plaintiffs' claims were basically a claim for royalties, not an antitrust action no matter how it was characterized. The NFL had argued that these plaintiffs were nothing more than the same publicity rights claims raised by the plaintiffs in the *Dryer* class action case that was still pending and Judge Magnuson agreed. Insert in Chapter 13, Section C, Page 1119.

## **Section C: Workers Compensation for Athletes**

### **Subsection 2: Professional Athletes**

#### **Page 1119, insert:**

- ▶ **Parish v. NFLPA** – Federal district judge R. Gary Klausner in Los Angeles on May 23, 2012 dismissed a lawsuit filed by a group of retired NFL players (Bernie Parish, Bob Grant, Walter Roberts, Clinton Jones and Marvin Cobb) claiming that the union had breached a duty to the retired players by not negotiating as aggressively as it should have with respect to licensing their publicity rights. Despite statements by some union leaders that the NFLPA speaks for all retired players for licensing purposes, in fact the union has no fiduciary duty to represent the retired players

## **Section D: Back to Torts**

### **Subsection 1: Medical Malpractice**

#### **Page 1120, insert:**

- ▶ As part of the NFL's efforts to increase the safety of players by disciplining players for helmet-to-helmet hits and hits against defenseless receivers, the League announced in November 2012 that it was suspending Baltimore Ravens safety Ed Reed for a helmet-to-helmet hit on Pittsburgh Steelers' WR Emmanuel Sanders when he was a defenseless receiver. However, that suspension was appealed to Ted Cottrell, a former NFL defensive coordinator who was appointed by the NFL and NFLPA to decide appeals arising from on-field conduct, as provided for in the 2011 CBA. Cottrell on November 20, 2012 upheld the inappropriateness of the hit (it was "egregious and warrant[ed] significant discipline"), but he lowered the penalty from a suspension to a \$50,000 fine.

## **Section D: Back to Torts**

### **Subsection 1: Medical Malpractice**

#### **Page 1120, insert:**

- ▶ A separate class action lawsuit against the NCAA involving concussions is still proceeding. This suit was filed by former Eastern Illinois football player Adrian Arrington, Univ. of Central Arkansas football player Derek Owens, and Oiuachita Baptist Univ. soccer player Angela Palacios against the NCAA on September 11, 2011 in federal district court in Chicago claiming that the NCAA had negligently failed to establish safety standards to protect college players from the long-term

effects of concussions. Univ. of Maine ice hockey player Kyle Solomon was added as a named plaintiff in February 2013. Another lawsuit filed by a dozen former players (including Joe Horn, Matt Joyce, and Jerome Pathon) against the NFL in federal district court in New Jersey on December 4, 2012 seeking damages for the long-term medical effects of the NFL and its teams' giving players heavy doses of the pain-killer Toradol during practices and games, which resulted in players being willing and able to play despite suffering from serious injuries, including but not limited to multiple concussions. The plaintiffs have raised claims accusing the league and its teams of negligence, fraud, fraudulent concealment, misrepresentation, and conspiracy

## **Section D: Back to Torts**

### **Subsection 2: Defective Products and Hazardous Facilities**

#### **Page 1125, insert:**

- ▶ The family of late Chicago Bears player Dave Duerson, who committed suicide in 2011, sued not only the NFL but also helmet maker Riddell in Cook County state court in Chicago in February 2012. This suit was also consolidated in Philadelphia.

The NFL filed a lawsuit in California superior court in Los Angeles against the 32 different insurance companies who insure the league and its member teams from liability seeking a declaration that they would be responsible to pay for its litigation defense and to cover any liability the NFL incurs as a result of all of the concussion litigation filed against it. Likewise, the insurers had filed a similar suit in New York supreme court in Manhattan seeking a declaration limiting each of their respective liabilities. Each of the insurance companies acknowledge that they would have some responsibility for league or team liability but each has raised varying arguments to attempt to limit that liability (the policies were for a limited number of years, the policies don't cover this type of intentional tort, etc.). The California court in November 2012 stayed the NFL's suit on the ground that it duplicated the issues raised in the insurers' New York suit, which the NFL has moved to dismiss.

## **Section D: Back to Torts**

### **Subsection 2: Defective Products and Hazardous Facilities**

#### **Page 1125, insert:**

- ▶ The family of former San Diego Chargers linebacker Junior Seau (his widow Gina, his four children, and the trustee of his estate) filed a wrongful death suit against the NFL and helmet manufacturer Riddell, Inc. on January 22, 2013 in California superior court in San Diego County after posthumous tests conducted on his brain months after his suicide found that he suffered from chronic traumatic encephalopathy (CTE) as a result of repeated serious blows to the head. The NFL has countered by raising several arguments, including (a) that Seau committed suicide, which is not a foreseeable result of any football injuries; (b) that Seau played football from the age of seven and undoubtedly received hundreds of blows to the head before he ever played a down in the NFL, so it is impossible to attribute his CTE to his NFL play; (c) that the remedy for work-related claims arising out of his employment as an NFL player is either through arbitration under the CBA or through the workman's

compensation system. Insert Chapter 13, Section C, Page 1129-30

## **Section D: Back to Torts**

### **Subsection 2: Deceptive Products and Hazardous Facilities**

**Page 1125, insert:**

- ▶ **In Re: NFL Players' Concussion Litigation** (E.D. Pa., MDL #2323), consolidating, along others, *Easterling v. NFL* and *Hardman v. NFL* (both class actions) and *Maxwell v. NFL*, *Pear v. NFL*, and *Barnes v. NFL* (all multi- plaintiff suits). The NFL was sued in over 200 lawsuits filed all over the country in 2012 by over 4,000 former NFL players claiming that the NFL had acted both negligently and intentionally in failing to inform the players during their playing careers that concussions suffered while playing could cause long term brain damage leading to a variety of mental disorders. The plaintiffs all claim that for several decades the NFL became increasingly aware of the severe long-term brain damage effects of concussions yet failed to inform the players. All of the suits were either consolidated in the federal district court in Philadelphia or reassigned to Philadelphia for pre-trial purposes under the Multi-District Litigation statute, and assigned to district judge Anita Brody. The plaintiffs then joined to file a new unified class action in Philadelphia, making most of the plaintiffs' suits part of a single suit styled

## **Section D: Back to Torts**

### **Subsection 2: Deceptive Products and Hazardous Facilities**

**Page 1130, insert:**

- ▶ **Easterling v. NFL**. The NFL has initially filed a motion to dismiss on the federal preemption grounds, specifically that the subject of the litigation is a mandatory subject of bargaining and is governed by provisions under collective bargaining agreements in place during the players' careers. Thus, any alleged breach of the CBA provisions governing player safety can only be pursued in arbitration, not tort litigation. However, even if the plaintiffs survive this motion to dismiss, to prevail ultimately on the merits they will not only have to prove the NFL's negligence or malfeasance, but also that their conditions were caused by blows suffered during their NFL careers instead of during high school or college or at other times, and reliance (i.e., that had they been aware of what the NFL knew they would not have played in the NFL). Insert in Chapter 13, Section D Page 1130

## **Section D: Back to Torts**

### **Subsection 2: Deceptive Products and Hazardous Facilities**

**Page 1130, insert:**

- ▶ A group of three defendants in August 2012 agreed to pay \$14.5 million to settle a lawsuit brought on behalf of Steven Domalewski in New Jersey state court for injuries he received that left him essentially brain-dead when he was hit in the head by a line drive off an aluminum bat while pitching in a Police Athletic League game.

The defendants were the manufacturer of the bat (Hillerich & Bradsby), Little League Baseball (that had certified the bat as safe for games involving children), and The Sports Authority (that sold the bat). The settlement revived an unsettled legal issue relating to whether the use of aluminum bats at lower levels of play are an obvious and inherent risk and that injured players should not be barred from recovery from injuries because of the assumption of risk doctrine. In the only court decision addressing this specific issue, a California intermediate appellate court ruled in 2002 that some aluminum bats sufficiently increase the risk to college baseball players so that there were triable issues of fact for a jury. All cases brought since then have been settled.