

2013-14 Sports Law Developments
(from May 15, 2013 through May 10, 2014)

Index:

Agents & Agent Regulation	p.1
Leagues – Labor Matters	p.5
Doping & Drug Testing	p.21
Leagues -- Non-Labor Matters	p.28
Individual Sports	p.46
College & Other U.S. Amateur Sports	p.51
Title IX/Gender Equity & Civil Rights	p.71
Intellectual Property & Broadcasting	p.74
Personal Injury	p.81
International & Olympic Sports	p.83
Appendix A	p.89

CHAPTER One. Moral Integrity of the Sport: The Role of the Commissioner and the Law.

Section C. Challenges to the Best Interests of the Sport. Subsection 1. Misconduct on the Field, Court, or Ice.

- ▶ Washington Redskins safety Brandon Meriweather had a two-game suspension imposed by the NFL’s vice president for football operations Merton Hanks for multiple helmet-to-helmet hits reduced on appeal to one game by NFL appeals officer Ted Cottrell on October 30, 2013, two days after the two game suspension was announced. The one game suspension will cost Meriweather about \$70,000 in lost salary. The suspension was imposed as a result of repeated hits Meriweather made on defenseless receivers, two in Washington’s victory over the Chicago Bears the previous Sunday and another for a hit on Green Bay Packer RB Eddie Lacy in the second week of the season that caused Lacy to receive a concussion and forcing him out of the game, a hit for which Meriweather was fined \$42,000. Ironically, a second helmet-to-helmet hit in the Green Bay game gave Meriweather himself a concussion causing him to miss the rest of that game. Insert Chapter 1, Section C, Subsection 1, Page 33

- ▶ Detroit Lions DT Ndamukong Suh was fined \$100,000 in early September 2013 by the NFL for an illegal block on Minnesota Vikings C John Sullivan in the first week of the 2013 season. This was the largest fine in the history of the NFL for on field conduct because Suh had a reputation for dirty playing and had previously been fined \$30,000 for kicking Houston Texans QB Matt Schaub in the groin. Suh appealed to the NFL appeals officer Matt Birk on the grounds that the fine was excessive, but Birk upheld the fine. Insert Chapter 1, Section C, Subsection 1, Page 33

- ▶ Seattle Seahawks RB Marshawn Lynch was fined \$50,000 by the NFL on January 4, 2014, the day after the Seahawks defeated the New Orleans Saints in the playoffs, for

failing to speak with any member of the media for the entire season until a brief meeting with reporters just prior to the Saints playoff game. The reason the NFL delayed imposing the penalty until after the season was that the league office was unaware that Lynch had refused to meet with reporters, as the standard player contract requires players to do. Insert Chapter 1, Section C, Subsection 1, Page 33

- ▶ Former Detroit Lion and New York Giant LB Barrett Green on July 8, 2013 filed suit against Pro Football Inc. (the Washington Redskins), former Redskins TE Robert Royal, and former Redskins assistant coach Gregg Williams claiming that a career-ending knee injury incurred in a game on December 5, 2004 against the Redskins was the result of a bounty program designed to injure opposing players intentionally and organized by Williams and an “unusual, outrageous, and an obvious cheap shot” by Royal. Williams is the assistant coach who after leaving the Redskins became an assistant at the New Orleans Saints, became implicated in the infamous Saints bounty scandal, and was suspended for the 2012 season as a result. He is now an assistant coach with the Tennessee Titans. Insert Chapter 1, Section C, Subsection 1, Page 33
- ▶ Within the space of one week in early December 2013, both the NBA and the NFL imposed substantial fines against a team coach for misconduct during the course of a game. The NBA imposed a \$50,000 fine on Brooklyn Nets coach Jason Kidd for asking a player to bump into him so he could intentionally spill a cup of coffee on the court late in the game with his team having no remaining timeouts. The stoppage of play while the spill was wiped up enabled Kidd to plan out a final play, which in the end did not work and the Nets lost anyway. Insert Chapter 1, Section C, Subsection 1, Page 33
- ▶ Only a few days later, the NFL fined Pittsburgh Steelers coach Mike Tomlin \$100,000 for his stepping onto the field near the sideline and into the path of Baltimore Ravens kick returner Jacoby Jones as he seemed certain to return a kickoff for a touchdown. Tomlin’s interference caused Jones to have to slow down and change direction, which caused him to be tackled and not to score the touchdown that he would otherwise have made. Tomlin said he did not do it intentionally but rather was simply watching the kickoff return on the Jumbotron and didn’t realize he had stepped into Jacoby’s path. Baltimore won the game 22-20. Insert Chapter 1, Section C, Subsection 1, Page 33
- ▶ The National Federation of High Schools amended its Rule 10-4-5 (the “Fighting Rule”) to allow a coach “to enter the court to diffuse a situation where a fight may break out or has broken out to prevent it from escalating.” Previously, the rule prohibited coaches from going onto the court when altercations broke out or seemed imminent.

This new rule, however, might encourage coaches to put themselves in a position of risk when they enter the court, as Logan (West Virginia) High School boys’ basketball coach Mark Hatcher discovered when he went onto the court when a fight broke out between some of his players and players from opposing Scott High School at the Nationwide Classic on a neutral floor in mid-December 2013. In order to try to

stop others from entering into altercations, Hatcher shoved some people away from his players, two of whom happened to be police officers wearing street clothes, who then arrested Hatcher and charged him with misdemeanor assault and battery. Hatcher was allowed to continue coaching until the end of the game at which time he was taken into custody. Insert Chapter 1, Section C, Subsection 1, Page 33 (misconduct on the field)

Section C. Challenges to the Best Interest of the Sport. Subsection 2. Gambling

- ▶ **NCAA v. Governor of New Jersey**, 730 F.3d 208 (3d Cir. 2013), cert. petition filed on February 13, 2014) – The US 3rd Circuit Court of Appeals on September 16, 2013 affirmed the ruling of the district court striking down New Jersey’s law permitting an expansion of sports gambling as pre-empted by federal law. 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 sports “lottery” betting (and Nevada that had single game sports betting) before the federal law was passed. New Jersey defended on the ground that PASPA, the federal law, was an unconstitutional encroachment on New Jersey’s sovereignty, an 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 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 states that then had such betting and thus was constitutional. New Jersey appealed but the Third Circuit affirmed. New Jersey then petitioned the Third Circuit to rehear the case *en banc*, and four other states (Georgia, Kansas, Virginia, and West Virginia) filed amicus briefs supporting the petition for rehearing. The Third Circuit denied the petition for rehearing *en banc* in early February 2014, and New Jersey then filed a petition for a writ of certiorari with the U.S. Supreme Court on February 13, 2014. Insert Chapter 1, Section C, Subsection 2, Page 38/39
- ▶ India’s cricket captain Mahendra Singh Dhoni on March 18, 2014 filed a lawsuit in the High Court of Madras against private television network Zee TV for defamation, claiming that reports run by the network suggesting that Dhoni was involved in betting and match-fixing were false and had damaged him in the amount of \$16.4M. The court initially enjoined ZEE from broadcasting any more reports on the 32-year

old cricketer for two-weeks while the court hears initial arguments. Dhoni claims that Zee Media Corp., News nation Network, and suspended Indian police service officer G. Sampath Kumar acted in concert to publish scandalous, libelous, and maliciously false statements about him. Insert Chapter 1, Section C, Subsection 2, Page 40

- ▶ **U.S. v. DiCristina**, 726 F.3d 92 (2d Cir. 2013), cert. denied, 134 U.S. 1281, 2014 WL 684077 (Feb. 24, 2014) – The Second Circuit on August 6, 2013 reversed the district court ruling that had found the operator of “Texas Hold’em” poker games not guilty for violating the federal Illegal Gambling Business Act that makes it a crime to operate a gambling business unless state law expressly authorizes it. The appeals court rejected the district court’s finding that the Act did not apply because poker is a game of skill, not chance, and therefore it is not gambling within the meaning of the law. The Second Circuit panel found that the plain language of the Act applied because the defendant’s operation satisfied the three elements required for a violation: (1) the operation was conducted in violation of New York state law, (2) the operation required the attention of five or more persons, and (3) the operation was conducted for more than 30 days or earned the operator more than \$2,000 in one day. The court found that whether the game involved skill or chance was irrelevant for purposes of the IGBA. Insert Chapter 1, Section C, Subsection 2, Page 40

Section C. Challenges to the Best Interests of the Sport. Subsection 3. Drug Use.

- ▶ **The Biogenesis Scandal**. As reported last year, 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. The fallout from this scandal continued in 2013-14. Insert Chapter 1, Section C, Subsection 3, Page 54
- Milwaukee Brewers LF Ryan Braun on July 22, 2013 was suspended without pay for the last 65 games of the 2013 season as a result of overwhelming evidence discovered in the Biogenesis Clinic records that he had used banned substances. Braun accepted the penalty, which reports suggested was negotiated between his lawyers and the Commissioner’s office, and did not appeal it. It cost him roughly \$3.3 million in lost salary. [Note: *While the CBA prescribes that players who test positive for a banned substance will be suspended 50 games for a first offense, 100 games for a second offense, and a lifetime ban for a third offense, the Commissioner did not have to follow that penalty structure because Braun was*

found guilty based on non-analytical evidence, not a positive drug test.] Insert Chapter 1, Section C, Subsection 3, Page 54

- New York Yankees 3B Alex Rodriguez on August 5, 2013 was suspended without pay for 211 games (i.e., the rest of the 2013 season and all of the 2014 season) as a result of evidence discovered in the Biogenesis Clinic records that showed he had used and possessed “numerous forms of prohibited performance-enhancing substances . . . over the course of multiple years.” The suspension, however, was stayed while Rodriguez filed a grievance with the labor arbitrator under the CBA, and he then played the entirety of the 2013 season. The multi-week appeal hearing was held in Manhattan before Santa Monica-based arbitrator Frederick Horowitz (technically a three-arbitrator panel that also included MLB-appointed arbitrator and COO Rob Manfred & MLBPA-appointed arbitrator and general counsel Dave Prouty) starting in late September and going on and off until November 21, 2013. On January 11, 2014, Horowitz issued a decision affirming Rodriguez’s guilt but limiting the scope of the penalty to 162 games (i.e., the entire 2014 season) plus any playoff games the Yankees might play in 2014. The suspension without pay freed-up Rodriguez’s \$25 million salary from the Yankees’ 2014 payroll.

During the hearings in mid-October, after Rodriguez’s lawyers had called a news conference to give a lengthy press briefing on what they claimed was misconduct during MLB’s investigation of Rodriguez that had come to their attention by an insider whistleblower, Arbitrator Horowitz issued an order barring the lawyers for either side from “conducting any press conference or briefing regarding the subject matter of the hearing,” which forced the Rodriguez lawyers to cancel the press briefing. They then asked Horowitz to open the hearings to the public and release all transcripts of the hearings, which request was not granted.

Toward the end of the hearings, Horowitz denied Rodriguez’s request to compel Commissioner Bud Selig to testify, which led Rodriguez on October 3, 2013 to file a 33-page amendment to the complaint in his lawsuit against MLB (see next entry) to accuse Selig of cowardice and to cite Selig’s refusal to testify at the arbitration hearing as further evidence of his vendetta designed to destroy Rodriguez’s reputation, career, and business interests. Rodriguez then refused to attend any more of the hearing sessions and did not testify on his own behalf.

On January 11, 2014, Horowitz issued his 33-page decision finding that there was clear and convincing evidence that Rodriguez had used three banned substances during the relevant time period years and had twice obstructed MLB’s investigation. Thus, the arbitrator found that Rodriguez had violated the joint drug agreement policy; the penalty he imposed was for the entirety of the 2014 season, thus reducing the penalty imposed by MLB from 211 games to 162 games (plus any postseason games the Yankees may play). Horowitz wrote that “[w]hile this length of suspension may be unprecedented for a MLB player, so is the misconduct he committed.” Insert Chapter 1, Section C, Subsection 3, Page 54

- On January 13, 2014, two days after the ruling by Arbitrator Frederick Horowitz, Rodriguez filed a lawsuit with a 42-page complaint (attaching the arbitration

decision) in federal district court in Manhattan against MLB and the MLBPA, claiming that the arbitration award should be set aside because (a) the decision reflected a “manifest disregard for the law,” (b) Horowitz throughout failed to display impartiality as an arbitrator and refused to consider evidence that Rodriguez presented, and (c) the MLBPA breached in its duty of fair representation by failing adequately to represent Rodriguez during the arbitration proceeds, by failing to try to stop the leaking of “prejudicial information” against Rodriguez, and by failing to try to stop MLB’s “abusive investigative tactics.” The complaint also cited several public comments made by then MLBPA executive director Michael Weiner (who has since died of brain cancer) that Rodriguez claims prejudiced him and “corrupted the arbitration process.” Insert Chapter 1, Section C, Subsection 3, Page 54

- Rodriguez filed a lawsuit against MLB on October 3, 2013 in New York state Supreme Court in Manhattan seeking unspecified tens of millions of dollars for tortious interference in Rodriguez’ existing contracts and future business relationships. The suit alleges that MLB’s investigations and recent 211-game suspension was carrying out a vendetta against him that amounted to “vigilante justice” and a “witch hunt” that caused him to lose sponsorship deals with Nike, Toyota, and other sponsors. The complaint also alleges that MLB, and particularly Commissioner Bud Selig, intentionally have tried to “destroy the reputation and career” of Rodriguez. It also alleges that MLB paid Biogenesis founder and CEO Anthony Bosch up to \$5 million in cash, provided him with security, promised to pay for all his legal bills, and promised to indemnify him from any civil liability, all to get Bosch to provide it with falsified evidence implicating Rodriguez. The lawsuit does not admit or deny that Rodriguez used any prohibited substances. On October 16, 2013, Rodriguez’s lawsuit was removed by MLB to the federal district court in Manhattan, claiming that the suit should be heard in federal court under provisions of the Labor Management Relations Act of 1948 (aka the Taft-Hartley Act) and assigned to federal district judge Lorna Schofield. Rodriguez then moved to have the suit returned to the state court and a hearing on this motion was held on January 23, 2014. Insert Chapter 1, Section C, Subsection 3, Page 54
- Rodriguez filed a lawsuit on October 4, 2013 in New York state Supreme Court in Manhattan against Yankees team doctor Christopher Ahmad and New York Presbyterian/Columbia University Medical Center for malpractice. The complaint asserts that Dr. Ahmad misdiagnosed Rodriguez’ left hip injury during the 2012 playoffs by failing to detect a superior labral tear at the time, thereby clearing him to play, which in turn caused an aggravation of the injury that then required surgery and caused him to miss several games at the start of the 2013 season. Insert Chapter 1, Section C, Subsection 3, Page 54
- In early February 2014, Rodriguez voluntarily dismissed all of the above lawsuits he had filed against MLB, the MLBPA, and Dr. Ahmad. By doing so, he accepted

- his suspension for the 2014 season without further effort to prevent it. Insert Chapter 1, Section C, Subsection 3, Page 54
- MLB then on February 18 dropped a lawsuit it had filed in March 2013 in Dade County (Miami) state district court against the Biogenesis of America Laboratory, a related company named Biokem, Anthony Bosch and five other individuals associated with the Lab, seeking damages for intentional interference with contract by supplying banned substances to MLB players knowing that doing so would cause them to violate their contracts with their teams. That suit was thought by many simply to be a vehicle for obtaining documents in discovery that it might not otherwise be able to get. With Rodriguez and all other players having been disciplined without any further challenges, MLB apparently saw no reason to continue with the suit. Insert Chapter 1, Section C, Subsection 3, Page 54
 - MLB announced on August 5, 2013, the same day that it announced Alex Rodriguez' suspension, that twelve other players had been issued and had accepted 50-game suspensions as a result of evidence discovered in the records and subsequent investigation of the Biogenesis Clinic. Those 12 players were: Phillies P Antonio Bastardo; Padres SS Everth Cabrera; Yankees C Francisco Cervelli; Rangers RF Nelson Cruz; Mariners C Jesus Montero; Tigers SS Johnny Peralta; Mets 2B Jordany Valdespin; Padres minor leaguer Fautino de los Santos; Astros minor leaguer Sergio Escalona; Yankees minor leaguer Fernando Martinez; Mets minor leaguer Cesar Puello; and free agent P Jordan Norberto. Insert Chapter 1, Section C, Subsection 3, Page 54
 - The same day MLB announced the above suspensions, it also announced that three other players implicated in the Biogenesis investigation would not receive any additional suspension beyond the 50 games they had already been suspended for an earlier positive drug test. Those players were A's P Bartolo Colon; Blue Jays LF Melky Cabrera; and Padres C Yasmani Grandal. Insert Chapter 1, Section C, Subsection 3, Page 54
 - MLB turned focus from investigating players to investigating the ACES agency firm that had several of the suspended players as clients (many of whom ended their relationship with ACES). The firm is headed by brothers Sam and Seth Levinson. The agent in the firm that had early on been implicated in providing prohibited substances from Biogenesis to at least eight player clients was Juan Carlos Nunez, who had been fired as soon as the facts were revealed. A 2012 investigation by the MLBPA had found Nunez guilty and stripped him of his certification, but the investigation did not find the Levinson brothers to be involved in supplying players with prohibited substances. Thus, in late 2013 MLB turned its own investigation on ACES and the Levinsons. _____ Insert Chapter 1, Section C, Subsection 3, Page 54
- A panel of the US Ninth Circuit Court of Appeals on September 12, 2013 unanimously affirmed the April 2011 conviction of Barry Bonds for obstruction of justice for

having given false testimony in 2003 to a grand jury looking into the Bay Area Laboratory Cooperative (BALCO) and possible violations of federal law for laundering proceeds from the illegal sale of controlled or illegal drugs. Bonds had told the grand jury that he had never been injected with or received injectable substances from BALCO, a statement that was found by the jury to be false and that misled and diverted the attention of investigators and the grand jury away from the relevant inquiry. Bonds then began his sentence of two-years of probation and 30-days of home confinement. Insert Chapter 1, Section C, Subsection 3, Page 54

- ▶ Los Angeles Angels OF Albert Pujols in early October 2013 filed a lawsuit against Jack Clark in Missouri state court in St. Louis claiming that Clark slandered him in August 2013 on Clark's "The King and the Ripper" radio program on WGNU 920 AM in St. Louis when Clark stated that he knew "for a fact" that Pujols had used steroids and other PEDs. Pujols claims that this statement was false since he has never used such substances and that the comment damaged his reputation and caused him personal humiliation, mental anguish, and anxiety. Pujols then voluntarily dismissed his suit in early February 2014 after Clark publically retracted his previous statements in both a press release and on his radio show. Insert Chapter 1, Section C, Subsection 3, Page 54 (drugs) OR Chapter 6, Section C, Page 483 (perhaps after Tony Twist... image used in a negative manner)

- ▶ Lawsuits filed against Lance Armstrong, one in the UK and others in the US, continued through fall 2013 and gave rise to efforts on the part of the plaintiffs to force Armstrong to provide detailed information about his use of PEDs in discovery. One suit against him, however, was dismissed. Those suits, as reported last year, are:
 - The Sunday Times of London filed a suit against Armstrong in the Crown Court in London seeking to recover the \$1.6 million (1 million British pounds) it paid Armstrong in 2006 in settlement of Armstrong's suit against it for defamation when it published an article in 2004 claiming that Armstrong had used illegal substances. Insert Chapter 1, Section C, Subsection 3, Page 54

 - Texas-based insurance firm SCA Promotions filed a lawsuit on February 7, 2013 in Texas state court in Dallas against Armstrong to recover \$12.1 million that it paid to Armstrong as bonuses for his Tour de France victories. SCA claims that the money was paid to him "under fraudulent circumstances." The bonuses were part of a contract Armstrong had with Tailwind Sports, the management company for his U.S. Postal team, which in turn had the bonuses insured by SCA. After Armstrong had been paid \$4.5 million in bonus money and kept winning the Tour year after year, SCA got suspicious about his possible drug use and withheld making additional payments while it investigated. Armstrong and Tailwind then sued SCA, and after several depositions in which Armstrong vehemently denied ever using banned substances, SCA settled in 2006 by paying Armstrong an additional \$7.5 million. Part of the settlement was an agreement that SCA could never reopen the matter, which is Armstrong's initial defense against the current suit. The case was referred to the arbitration panel that

approved the settlement in 2006, which set a March 17, 2014 date for a hearing on the merits. Armstrong's lawyers then sought a court order blocking the panel from holding the hearing and reopening the matter on the ground that the 2006 settlement expressly said that the payment was final and could not be reopened. The district court in Dallas denied the injunction in late February to halt the hearing, but the Texas 5th circuit court of appeals in Dallas reversed on March 4, 2014 and ordered all further proceedings halted pending the court's review of the original settlement to determine if it barred reopening the matter of the bonus payments. As of April 1, 2014 the matter was still under consideration by the appeals court. Insert Chapter 1, Section C, Subsection 3, Page 54

- Two readers of Armstrong's book *It's Not About the Bike*, Rob Stutzman and Jonathan Wheeler, filed a class action suit against him on January 23, 2013 in federal district court in Los Angeles claiming that the book was a fraud perpetrated on everyone who bought it because it claimed that Armstrong had never used any illegal substances. The plaintiffs aver that they would not have bought the book had they known the truth. Insert Chapter 1, Section C, Subsection 3, Page 54
- Former Armstrong teammate Floyd Landis filed a federal whistleblower suit against Armstrong and several other USPS teammates in 2010 under the 1983 False Claims Act in federal district court in Washington, DC, seeking to recover for the government over \$ 40 million in government funds received from the U.S. Postal Service to engage in illegal doping activity. Landis will then be awarded a percentage of that recovery under the statute's whistleblower provisions. The US government then joined as a plaintiff in that suit in 2013 (see next entry). Insert Chapter 1, Section C, Subsection 3, Page 54
- The U.S. Attorney for the District of Columbia, Ronald Machen, on February 21, 2013 joined the United States government as a plaintiff in Landis' suit seeking under the 1983 False Claims Act to recover over \$40 million from Armstrong out of the sponsorship money the US Postal Service paid to sponsor Armstrong's team in the Tour de France. Armstrong attorneys defended on the grounds that (a) the suit is time barred because the sponsorship agreement expired in 2006 so most of the payments to him were made before the six-year statute of limitations period, (b) because the USPS was aware of the allegations of his doping when it entered into the sponsorship agreements in 1998 and 2000, and (c) that the Postal Service was not damaged and in fact has acknowledged that it received over \$100 million in benefits from the sponsorship.

In response to the statute of limitations argument, Landis and the government relied on a provision in the False Claims Act allowing for the recovery of fraudulently disbursed funds ten years back from the time the lawsuit is first filed, in this case 2010, after which \$31 million was disbursed. However, Landis is seeking to recover the full \$40 million by relying on a controversial provision in an obscure statute known as the Wartime Suspension of Limitations Act, which suspends any time bars for claims brought by or on behalf of the

government against fraudulent contractors during wartime, which they claim has been the case since 2002 when the US invaded Afghanistan in the aftermath of the 9-11 attacks on the World Trade Center and the Pentagon. This would bring into play the roughly \$9 million in additional sponsorship dollars paid by the Postal Service to Armstrong's team between 1998 and 2000. The government is not relying on this Act (probably because there is no link between the war in Afghanistan and the sponsorship of Armstrong cycling team) and is willing to settle for recovery of the \$31 million paid between 2000 and 2004, but Landis is relying on the WSLA to try to collect the extra \$9 million. Armstrong still contends that the government is not entitled to recover anything since the Postal Service was aware of the allegations of Armstrong's doping when it renewed its sponsorship contract in 2000.

After a hearing on November 18, 2013, district judge Robert Wilkins on _____ granted motions to dismiss some of Armstrong's teammates as defendants in the suit, but denied Armstrong's motion to dismiss. Insert Chapter 1, Section C, Subsection 3, Page 54

- Armstrong won one suit filed against him for fraud by a group of consumers who had filed suit against him in federal district court in Los Angeles in 2013 seeking over \$5 million in damages based on their claim that Armstrong misled them into buying various products when he advertised them by saying they were his "secret weapon" when in fact illegal doping was his secret weapon. District judge Beverly Reid O'Connell granted Armstrong's motion to dismiss the suit on February 25, 2014 on the ground that he had not committed fraud but had merely engaged in "puffing." Insert Chapter 1, Section C, Subsection 3, Page 54
- ▶ Spain's Supreme Court on February 24, 2014 ordered the French newspaper Le Monde to damages of 300,000 euros to football club Real Madrid, and 15,000 euros to club Barcelona, for publishing a story linking the two clubs to a notorious doping doctor, Eufemiano Fuentes, who was implicated in the infamous Operation Puerto doping scandal. Le Monde wrote in a December 2006 article that it had "seen handwritten notes by Fuentes over 'preparation plans' for Real Madrid and Barcelona. A lower court ruled in favor of the clubs and awarded the damages for injury to the clubs business reputation, and the Supreme Court affirmed them. Insert Chapter 1, Section C, Subsection 3, Page 54 (drugs) or Chapter 6, Section C, Page 483 (negative image like Tony Twist)

Section C. Challenges to the Best Interests of the Sport. Subsection 4. Drug Testing.

- ▶ The NFL and the NFLPA announced in early July 2013 that they had reached an agreement in principle to the protocol to conduct a population study of current NFL players to determine what the normal levels of HGH are in NFL players and the extent to which these levels are significantly different from such levels for people in the general population. This is seen as somewhat of a breakthrough in that it may be the first step on the way to full-blown HGH blood testing of NFL players, which a clause in the 2011 CBA indicated had been agreed to during collective bargaining. As a result of this agreement to conduct a population study, the NFLPA sent a memo

to all NFL players on July 12, 2013 advising them that blood would be drawn from them when they reported to training camp later that month. However, the project was not implemented in 2013 due to an inability of the parties to resolve an arbitration issue under the drug policy. The NFL has agreed to neutral third-party arbitration for appeals from positive drug tests, but not for appeals of discipline imposed for evidence-based violations or for discipline for violations of civil law. Insert Chapter 1, Section C, Subsection 4, Page 56

- ▶ Major League Baseball and the MLBPA announced on March 28, 2014 that they had agreed to amend the collectively bargained drug policy by increasing the testing protocols and the penalties for the use of performance enhancing drugs. Under this new policy, a first-time violation will now result in an 80-game suspension, up from 50-games; a second-time violation will result in a full season (162-game) suspension, up from 100-games; and a third violation results in a lifetime ban as it does under the former policy. Also, players violating the policy will be ineligible to play in the postseason or receive playoff shares in the year the violation is detected. Likewise, the number of tests that can be conducted will increase significantly. The new policy also contains two provisions designed to lessen the problems related to inadvertent ingestion of banned substances. Players will now have year-round access to supplements that do not contain banned substances, and an independent arbitrator now has the authority to reduce suspensions if a player can prove that the banned substances in his body were not taken to enhance performance. The new policies were the result of over a year of negotiations that began right after the parties had agreed on a blood testing protocol in January 2013. Insert Chapter 1, Section C, Subsection 4, Page 57

- ▶ Just prior to the track & field World Championships in Moscow in early August, the IAAF reintroduced the four-year suspension for serious first-time doping offenses. Stating that it was determined to do everything in its power to eradicate cheating, the IAAF Council decided to reintroduce the four-year ban even if WADA and other sporting federations retained the two-year first-time offense ban. Insert Chapter 1, Section C, Subsection 4, Page 58

- ▶ Following the urging of the IAAF (see previous entry), the WADA governing council in mid-November voted at its World Conference in South Africa both to reintroduce the four-year suspension for serious first-time doping offenses, and to adopt a rule barring doping offenders from participating in the next Olympic Games even if the term of their suspension has expired prior to the Games. Other developments to emerge from the World Conference included the adoption of new testing procedures and a commitment to stepping up police-style investigations and intelligence gathering to catch cheats who do not test positive. Insert Chapter 1, Section C, Subsection 4, Page 58

Section C. Challenges to the Best Interest of the Sport. Subsection 5. Sports and Social Ethics. a. Treatment of Minorities by Sports.

- ▶ MLB, joined by representatives of the MLBPA and New York Attorney General Eric Schneiderman, announced on July 16, 2013 that it had adopted new policies designed to strengthen existing policies against harassment and discrimination based on sexual orientation. MLB has adopted a “workplace code of conduct” that has been distributed to all teams and players barring any form of discrimination against gay players. This came only a few months after the NFL adopted a similar set of policies in cooperation with AG Schneiderman that was reported last year. Insert Chapter 1, Section C, Subsection 5a, Page 75

- ▶ Katie Brenny, a former associate golf coach at the University of Minnesota on March 18, 2014 was awarded \$360,000 in damages by Hennepin County (Minneapolis) district judge Thomas Sipkins after finding at the conclusion of a bench trial that within months of her being hired, Brenny had been removed from coaching duties and reassigned to more menial tasks by then golf program director John Harris, who demeaned and belittled Brenny, because he discovered she was a lesbian, and when she appealed to athletic director Joel Maturi she was told either to resign or to go sell tickets. She then filed suit against the University in 2010. Judge Sipkins held that the University violated Brenny’s rights under the Minnesota Human Rights Act that prohibits employment discrimination on the basis of sexual orientation. Insert Chapter 1, Section C, Subsection 5a, Page 75 (discussing discrimination based on sexual orientation)

- ▶ Several legal issues became the subject of intense media scrutiny in late April and early May 2014 after new NBA Commissioner Adam Silver on April 29 announced that he was suspending Los Angeles Clippers owner Donald Sterling for life and fining him \$2.5 million as a result of offensive racist comments the 80-year old Sterling made in a taped phone conversation he had with a “girlfriend,” a 31-year old named V. Stiviano. The commissioner also indicated that he would encourage the owners to take appropriate action to try to force Sterling to sell the Clippers, and it was this statement that drew substantial legal scrutiny. While Art. 13 of the NBA constitution does authorize the termination of a franchise and the league taking control of the franchise assets by a 3/4ths vote of the owners if the target owner engages in any of several enumerated acts of misconduct or failure, it was unclear whether Sterling’s private comments fell within the ambit of any of the triggering acts. However, arguably Sterling’s comments and the fallout therefrom may have violated the terms of a subsequent contract to which Sterling was a party. As of May 10, it was unclear what if any formal action the other NBA owners would be taking to try to strip Sterling of his ownership of the Clippers. The matter is further complicated by the publically announced desire of Sterling’s estranged wife, Rochelle Sterling, to maintain her ownership interest in the team, which she claims is her community property right. Reports are that the team is technically owned by a trust, but there has been no public information about the nature or terms of that trust.

In a related development, the NBA announced on May 9, 2014, that Clippers president Andy Roeser had taken a “forced indefinite leave of absence” and the league had appointed former Citigroup chairman and former Time Warner chairman and CEO Dick Parsons to be the team’s interim CEO. Parsons had previously been

associated with the NBA when he was Time Warner's CEO and the company owned the Atlanta Hawks. Insert Chapter 1, Section C, Subsection 5a, Page 79 (after Rocker) OR Page 80 (after Abdul-Rauf)

- ▶ The Miami Dolphins, "Bullying" Scandal. Dolphins second-year OT Jonathan Martin walked out of the Dolphins camp and disappeared from the team in late October 2013. Shortly thereafter, it was discovered that the reason for Martin's leaving was that he had been repeatedly hazed, harassed, and bullied by fellow offensive lineman, OG Richie Incognito. One example of such bullying was a voice message left by Incognito on Martin's phone referring to Martin as a "nigger" and saying "I'm going to kill you." A number of legal developments ensued. Insert Chapter 1, Section C, Subsection 5a, Page 81 (racial discrimination) OR Chapter 1, Section C, Subsection 1, Page 33 (misconduct)
- Despite Incognito's claiming that this was a familiar way that he and Martin kidded with each other, Dolphin's owner Stephen Ross publically stated that Incognito's behavior was not acceptable. The Dolphins then suspended Incognito indefinitely. Subsequently, Incognito filed a grievance with the NFL's labor arbitrator claiming that under the CBA a player may not be suspended for more than four games. That grievance was heard on an expedited basis on November 21, 2013. The matter was partially settled a week later on November 28 with Incognito agreeing to accept six weeks of suspension (two more than allowed under the CBA) on the condition that he would lose pay for only two of those six games. Incognito was then eligible to suit up and play for the last two weeks of the regular season. However, on December 16 the parties reached an agreement under which Incognito agreed to remain suspended with full pay for the balance of the season. Insert Chapter 1, Section C, Subsection 5a, Page 81 or Subsection 1, Page 33
- Both the NFL and the NFLPA launched separate investigations into the specific details of the incident as well as the broader matter of the culture of hazing and bullying on the Dolphins. The roles of head coach Joe Philbin and GM Jeff Ireland were to be scrutinized as part of the investigation. The NFL investigation was led by New York lawyer Ted Wells while the union's investigation was led by its lead outside counsel during the Saints' "Bountygate" investigation, Washington lawyer Richard Smith, a partner at Fulbright & Jaworski. On February 14, 2014, the NFL released Ted Wells' 144-page report that found, inter alia, that three offensive linemen on the Dolphins (Richie Incognito, John Jerry, & Mike Pouncey) had "engaged in a pattern of harassment" toward Martin, another young offensive lineman, and an assistant trainer, including improper touching and sexual taunting. Wells found that verbal and physical abuse was widespread and even celebrated, and that the targets thought that taking it was just part of the job. Wells referred to the behavior, which began early in the 2012 season, as a "classic case of bullying." His recommendation was to "encourage the creation of new workplace conduct rules and guidelines that will help ensure that players respect each other as professionals and people." Incognito, through his lawyer,

stated that the report was dead wrong and that he never bullied anyone. Insert Chapter 1, Section C, Subsection 5a, Page 81 or Subsection 1, Page 33

- Following release of the Wells Report, Dolphins owner Steve Ross, a New York real estate magnate, announced that he had teamed up with NYU on a series of initiatives, including introducing a bill in the Florida legislature, that would attempt to reverse the culture of bullying throughout the culture of sports. Florida State House Bill 1117, based on a 22-page White paper produced by NYU's Sports & Society Program, introduced in the Florida Senate and House and titled "Athletic Safety, Education and Training," would require the Florida High School Athletic Association to adopt by-laws "regarding respectful conduct" and requiring training, reporting of offensive incidents, and having athletes sign a pledge. The bill would also prohibit harassment in intercollegiate athletics. It would provide for enforcement by the state attorney general. Insert Chapter 1, Section C, Subsection 5a, Page 81 or Subsection 1, Page 33

Note: *Martin signed a new contract in early March 2014 to play for the San Francisco 49ers and his former college coach, Jim Harbaugh.* Insert Chapter 1, Section C, Subsection 5a, Page 81 or Subsection 1, Page 33

CHAPTER Two. Constructing a Players Market From Contract to Antitrust Law.

Section B. Evolving Standards for Contract Enforcement.

- ▶ Former New England Patriots TE Aaron Hernandez and the NFLPA on October 15, 2013 filed two grievances against the Patriots seeking \$6.2 million for lost prior salary and future salary owed under Hernandez's terminated contract. Hernandez's contract was terminated by the Patriots after he was indicted for murdering a friend in early 2013, but the grievances argue that the termination was wrongful and a breach of his contract that allegedly provides that it can only be terminated if he was cut for skill, cap, or injury reasons. The grievances allege that his \$1.32 million for the 2013 season is owed because that money was guaranteed and that another \$3.25 million is owed and payable in 2014 as the last installment on his overall signing bonus for the contract signed in 2012. The remaining money Hernandez claims will be owed in 2014 as what would have been his 2014 salary and workout bonuses. A hearing has been scheduled for May 2014. Obviously, no decision was rendered as of April 1, 2014. Insert Chapter 2, Section B, Page 126 or Chapter 1, Section C, Subsection 1, Page 33 (misconduct, but it's not really misconduct on the field, so more likely Chapter 2 discussion concerning owing sign on bonuses)

Section C. Reserve System and Restraint of Trade.

- ▶ **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 (11th Cir. 2003), subsequently expressly rejected that view and reasserted that the Baseball "Exemption" covered the entire "business of baseball." As of April 1, 2014 the case was still in discovery, with a trial tentatively set for November 2014. Insert Chapter 2, Section C, Page 167

CHAPTER Three. From Antitrust to Labor Law.

Section C. Labor Exemption From Antitrust.

► **NFLPA's Salary Cap Collusion in 210 Cases** -- The NFLPA's appeal of district judge David Doty's ruling dismissing its lawsuit claiming that the NFL colluded to establish a salary cap for the 2010 season in violation of the CBA was heard in St. Louis on January 14, 2014. No decision had been rendered as of May 10, 2014. _____ The history of the case is as follows: U.S. District Court Judge David Doty in Minneapolis, 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 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. A motion filed by the union to reconsider his December 28 ruling was denied by Judge Doty on February 21, 2013. The NFLPA then appealed to the Eighth Circuit.

The NFLPA, however, continued 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.'"

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. That appeal was heard on January 14, 2014 with a decision expected sometime in 2014. Insert Chapter 3, Section C, Page 237-238

Fair Labor Standards Act Cases: Several lawsuits have been filed against various sports organizations alleging that they employed individuals without paying them wages required by the FLSA. Some of those suit are described below: Insert Chapter 3, Page 272 (perhaps creating a new section on FLSA; other labor issues concern unions/collective bargaining issues or players)

- ▶ A group of former Madison Square Garden (MSG) interns filed a class action lawsuit in federal district court in Manhattan against MSG on September 17, 2013 on behalf of an estimated class of 500 former interns claiming that MSG violated the federal Fair Labor Standards Act by “hiring” unpaid college students to perform work that would otherwise qualify them as employees entitled to minimum wages and benefits. Plaintiffs claim that they performed a variety of jobs including supporting ticket and sponsorship sales, administrative projects, and logistics relating to the organization of events at that arena. The claim is that the FLSA requires that persons used for such routine tasks must be treated as employees and properly compensated.

Note: This lawsuit is just one of several that have been brought against various entertainment, fashion, and media companies for similar unfair labor practices concerning the hiring of unpaid student interns. Among defendants in such suits are Gawker Media, Columbia Recordings, and NBC Universal (and its famous Saturday Night Live program). It is common knowledge that in both the sports and entertainment industries unpaid student interns are a common practice. A ruling for the plaintiffs in this or the similar cases might bring an end to this practice that many students regard as valuable educational and networking opportunities and that some start-up companies rely on for early support.

As a result of this litigation, the NFL subsequently decided that for the Super Bowl in New York in February 2014 it would pay a salary to roughly 1,500 local temporary workers necessary to run the game. Such workers in the past have been unpaid volunteers, including those who staff the media center and host social events at MetLife Stadium and pre-game VIP tailgate parties. However, the New York Host Committee continued to use roughly 12,000 unpaid volunteers during game week, but required them to sign a waiver stating that they will not participate in any action, even as a class member, challenging the legality of their volunteer status, and that if there is such a dispute it will be resolved through arbitration, not litigation. Insert Chapter 3, Page 272

- ▶ The federal Department of Labor announced in early 2014 that it was investigating the MLB San Francisco Giants and the Florida Marlins for possibly failing to pay team interns the required minimum wage. This investigation comes on the heels of another DOL investigation against the Giants that in summer 2013 resulted in the team settling a claim for over \$500,000 for underpaying clubhouse attendants who often worked long hours for less than minimum wage and were never paid overtime. Insert Chapter 3, Page 272
- ▶ Three former minor league baseball players filed a class action suit on behalf of over 6,000 current and former minor leaguers in federal district court in San Francisco in early February 2014 against MLB and several MLB teams claiming that minor league salaries described as “below poverty level” (with the scale ranging from \$2,475 for the Rookie League up to \$10,750 for AAA for a five month season) violate the FLSA and federal and state minimum wage laws, specifically citing such laws in California, Arizona, Florida, North Carolina and New York. Two defendants’ defenses may be (a) that minor league players are not covered by the minimum wage statutes because they are employees of seasonal amusement or recreational establishments who receive less than 30% of their revenue in a five-month season are expressly not covered, and (b) the players are “creative professionals” who are also exempted from the minimum wage laws because they need extraordinary time and freedom to develop and hone their skills. Insert Chapter 3, Page 272
- ▶ In summer 2013 a volunteer at All-Star Week festivities at the Javits Center in New York sued MLB in federal district court in Manhattan for violations of the FLSA and federal and new York minimum wage laws. The claim is that he was an unpaid volunteer who should have been classified as an employee under the FLSA standards and thus should have been paid the minimum wage and overtime for his work. MLB will again claim that the volunteer was working for an exempt seasonal or recreational establishment, the All-Star Week organizer. Insert Chapter 3, Page 272
- ▶ Former Oakland Raiderettes cheerleader Lacy T. in late January 2014 filed a class action lawsuit on behalf of current and former Raiderette cheerleaders in Alameda County Superior Court in Oakland, CA, against the Oakland Raiders claiming that while a Raiderette she was paid a total of \$1,250 (\$125 per game) at the end of the football season for ten 8-hour shifts at games, rehearsals, appearances at charity events, and participation in a swimsuit photo-shoot, which effectively comes out to about \$5 per hour, a violation of the federal FLSA and the federal and California minimum wage laws. She also claims that the Raiders, by paying her in a lump sum at the end of the season, violated California law that requires workers to be paid at least twice a month (with some exceptions for “creative professionals”), Finally, she also claims that the Raiders requiring cheerleaders to purchase their own tights, false eyelashes, practice yoga mat, and hairstylist violates California labor regulations that require an employer who requires employees to wear a distinctive uniform to pay the cost of the uniform, including apparel and accessories of distinctive design and color. Insert Chapter 3, Page 272

- ▶ Former Cincinnati Ben-Gals cheerleader Alexa Brenneman in February 2014 filed a class action suit on behalf of all current and former Ben-Gals cheerleaders in federal district court in Cincinnati against the Cincinnati Bengals NFL team alleging that the \$90 she was paid for each home game while a cheerleader violated both the federal FLSA and the federal and Ohio minimum wage laws. Brenneman claims that after considering mandatory practices and 10 charity appearances, as well as the time associated with all of the home games, each cheerleader is paid roughly \$2.85 per hour, well below Ohio's \$7.85 minimum wage and the federal \$7.25 minimum wage. Insert Chapter 3, Page 272

- ▶ Five former members of the Buffalo Bills cheerleading squad, the Buffalo Jills, filed a lawsuit on April 22, 2014 in New York state Supreme Court in Buffalo against the Bills, the company that manages the Jills (Stejon Productions Co.), and the previous managing company (Citadel Communications Co.) claiming that the annual compensation of the plaintiffs when they were members of the Jills was significantly below the \$8 per hour minimum wage required by New York law when the plaintiffs were active members of the squad (the current minimum wage in New York is \$8.75 an hour). The plaintiffs allege that their compensation ranged between \$105 to \$1,800, and that when all of the 20 to 35 events they were required to attend, all of the practice sessions, and all of the games are considered, the compensation is a small fraction of the minimum wage. Also, the Jills have to pay for their \$650 uniforms, their hair and nail treatments, and any other expenses related to their work for the squad. One of the principal defenses will be that the Jills are not employees of the defendants, but rather sign a statement when they are selected acknowledging that they are independent contractors and thus not entitled to the protection of the state's minimum wage law. Plaintiffs assert, however, that their status as employees or independent contractors is determined by IRS regulations and not by what they are forced to sign. The complaint alleges that the Jills are employees because, as IRS regs provide, they are controlled tightly by the team and its management company, which tell the Jills how to walk, talk, dress, and behave even when on their own time. The complaint also alleges that while working as Jills, they were subjected to degrading and harassing conditions that also violate federal and state employment laws. The Bills and Stejon Productions indefinitely suspended all Jills activities two days after the complaint was served on them, a decision that affects the 35 Jills selected for the 2014 season only days earlier. Insert Chapter 3, Page 272

- ▶ Former member of the New York Jets Flight Crew, identified in the complaint as Krystal C., on May 6, 2014 filed suit in Bergen County (New Jersey) Superior Court against the New York Jets claiming that while she and other members of the Jets Flight Crew were paid \$150 per game and \$100 for required special events, they received no compensation for practices or other appearances, which failure violated federal and New Jersey minimum wage laws. Her attorney is California-based Sharon Vinick who also represents the former Raiderettes in their similar lawsuit. Insert Chapter 3, Page 272

CHAPTER Four. Labor Law and Collective Bargaining in Professional Sports.

Section I. Union and the Individual Player.

- ▶ The Professional Referees Association, the organization that employs referees for Major League Soccer, and the Professional Soccer Referees Association, the union representing the MLS referees, reached an agreement on a new collective bargaining agreement that was immediately ratified by the membership on March 19, 2014 after a lockout that saw replacement referees work the first two weeks of the 2014 MLS season. The PRA had locked out the MLS referees just days before the start of the MLS season on March 8, 2014. MLS then started the season with replacement referees, all of whom had refereed professional soccer matches in the past, some in MLS itself. At the time of the lockout, the sides reportedly were less than a half million dollars apart. The Federal Mediation & Conciliation Service's acting director Scott Beckenbaugh was then brought in to help the parties reach a new agreement, which occurred on March 19. The terms of the new CBA were not immediately announced. Insert Chapter 4, Section I, Page 332

- ▶ **Eller v. NFLPA** – A panel of the US 8th Circuit Court of Appeals on September 22, 2013 affirmed the dismissal of a lawsuit that had been filed by a group of former NFL players. Federal district judge Susan Nelson in Minneapolis on May 29, 2012 dismissed the 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 on an incorrect standard of review and on disputed facts that could not have been established without discovery. A hearing on the appeal was held on June 16, 2013 and the panel subsequently affirmed the dismissal. Insert Chapter 4, Section I, Page 351

Section J. Salary Caps and Taxes.

- ▶ The NFL team salary cap for the 2014 season is approximately \$133M. Insert Chapter 4, Section J, Page 357 or Page 359

- ▶ The NBA team salary cap for the 2013-14 season was \$58.68M, with the luxury tax trigger at \$71.75M. In 2014-15 it is estimated that the cap will be \$62.1M, with the luxury tax trigger at \$75.7M. Insert Chapter 4, Section J, Page 357 or Page 358 or Page 359
- ▶ The NHL's salary cap for the 2014-15 season will be approximately \$71M, which is a 12% increase from the 2013-14 cap of \$64.3M. The payroll floor for 2014-15 will be just over \$52M, up from \$44M in 2013-14. Insert Chapter 4, Section J, Page 358
- ▶ The New York Yankees paid \$28.1 million in luxury tax in 2013 on a payroll of \$236 million, which is the highest taxing percentage (50% on every dollar the payroll exceeds the \$178 million threshold level, or soft salary cap) because the Yankees had exceeded the threshold for four consecutive seasons or more. This brings the total luxury taxes the Yankees have paid since 2003 when the system was established to over \$250 million. The Los Angeles Dodgers were the only other MLB team to exceed the luxury tax threshold in 2013 and paid a luxury tax of \$11.4 million on a first-time rate of 17.5%. The third highest payroll was the Boston red Sox, which was \$225,000 under the threshold. Chapter 4, Section J, Page 361
- ▶ Former long-time Indianapolis Colts (and Green Bay Packers for one year) C Jeff Saturday filed suit in early December 2013 against the City of Cleveland, Ohio, in the Ohio Board of Tax Appeals. The City's Board of Income Tax Review had previously rejected Saturday's petition. A similar suit was also filed by former Chicago bears player Hunter Hillenmeyer. The Ohio Board of Tax Appeals promptly ruled in January against Saturday and Hillenmeyer, but on February 27, 2014 the Ohio Supreme Court accepted the plaintiffs petition to hear the case. The cases as of April 1, 2014 were pending before the Ohio Supreme Court.

Both suits claim that by calculating the percentage of the players' annual income that is subject to Cleveland's city income tax under the "game days" method rather than the "duty days" method, the city is violating both Ohio tax laws and the US Constitution. Basically, Cleveland assesses its 2% city income tax against a visiting player's total income by dividing the number of games played that year in Cleveland by the number of games the player plays that year (which means 1/16th of an NFL player's total annual income). Hillenmeyer and Saturday argue that this method is totally unfair in that it taxes players on income that was not earned while in Cleveland and is thus an unconstitutional violation of the players' equal protection rights since other out-of-town workers are not taxed on this basis. The method they argue must be used is to tax the share of the player's annual income determined by dividing the number of days "working in Cleveland" (usually one or two days per each game played there) by the total number of days the player "works" (which includes not only days they play games, but also days they practice or train – roughly 200 such days every year for an NFL players). Thus the plaintiffs claim they should pay Cleveland's 2% tax only on 1 or 2 two-hundredths of their income, not 1/16th. Saturday also claims that he owes no tax to Cleveland for 2008 when the Colts played a game in Cleveland but Saturday remained in Indianapolis due to an injury.

Saturday is seeking \$5,062 refunded to him, and Hillenmeyer is seeking a refund of \$3,294. Cleveland estimates that if it is required to change the way it calculates a visiting player's tax it would cost it over \$1 million a year in revenue. Insert Chapter 4, Section J, Page 361 or Page 363

- ▶ The State of Tennessee legislature on April 7, 2014 voted to repeal the "Professional Privilege Tax" (aka the "Jock Tax") that it had passed only a year before. Under this tax NBA and NHL players were to be assessed a tax of \$2,500 for every game they play in Tennessee, up to a maximum of \$7,500 per year. Both the NBPA and the NHLPA expressed adamant opposition to the tax, which they regarded as inequitable and unconstitutional. The unions noted that this uniform tax levied only against professional athletes is especially burdensome on players who earn at or near the minimum salary, resulting in their essentially earning nothing for the games they play in Tennessee. The unions threatened a lawsuit against the tax, but held off on the promise by legislators that they would introduce and take up a bill in the 2014 session of the legislature to repeal the tax, which they did. However, even after the repeal, while hockey players would stop paying the tax immediately, basketball players will have to pay it for two more years, through the 2015-16 season. Insert Chapter 4, Section J, Page 361 or Page 363

- ▶ The WNBA and the WNBPA tentatively reached a new CBA agreement on February 15, 2014, which was finalized on March 6, 2014, replacing the previous CBA that expired on September 30, 2013. The new agreement runs for eight years, through the 2021 season, although either side can opt out after six years. In addition to new numbers on the same structural issues as in the previous agreement (minimum salaries, salary cap, etc.), the new agreement allows team rosters to increase from 11 to 12. Insert Chapter 4 perhaps but unsure where exactly

- ▶ The National Lacrosse League reached a new collective bargaining agreement with the Professional Lacrosse Players Association in mid-October 2013 that will run through the 2020 season. Notable terms of the new CBA include reducing the qualifying age for unrestricted free agency from 32 to 30, and reducing the number of players each team can tag as its franchise player from two to one each year. The number of regular season games will be increased from 16 to 18 and there will be more teams qualifying for an expanded playoff format. The minimum and maximum base salaries will remain the same as under the old agreement for at least the first two years. Insert Chapter 4, but unsure where exactly

- ▶ A new agreement was reached between MLB and the MLBPA in early October 2013, after somewhat tense negotiations, that continued to allow some major league players to play in winter leagues in 2013-14, as well permitting them as to play in future seasons. The agreement was ratified by the Caribbean Confederation on October 10, 2013, and players began reporting for the winter season shortly thereafter. Pitchers on a MLB 40-man roster will still be barred if they spent a majority of their time in AA and either (a) accumulated more than 140 innings (down from 155 innings in the previous agreement) or (b) appeared in more than 45 games (down from 55 games in

the previous agreement) in the previous season. Likewise, position players will be barred if they had more than 552 plate appearances (up from 502 plate appearances under the previous agreement). The new agreement allows MLB players to play in winter leagues only if the teams/leagues for which they play have higher standards for equipment, playing fields, clubhouses, and bathrooms than were required in the past. The winter leagues in which the players participate are the Venezuelan Winter League, the Mexican Pacific League, the Dominican Winter League, and the Puerto Rican League. Insert Chapter 4, unsure where exactly

- ▶ MLB and Nippon Professional Baseball reached an agreement on December 5, 2013 on a new “posting system” under which a MLB team signing a Japanese player must compensate the NPB team that “posts” (i.e., is losing) the player. The agreement was announced by NPB secretary general Atsushi Ihara. The key provision in the new agreement is a \$20 million posting cap MLB demanded on the “posting fee” a MLB team must pay to an NPB team posting a player (i.e., making a player available for signing by a MLB team). If more than one MLB team offers the same posting fee for a posted player, the player will be free to negotiate with each of those MLB teams and sign with whichever one he chooses.

This agreement achieves two objective of MLB – (1) to hold down posting fees paid to Japanese teams that previously were unlimited and have occasionally exceeded \$40 million (with the most ever posted being \$51.1 million paid by the Boston Red Sox for Daisuke Matsuzaka), and (b) shifting more of the money paid for a Japanese player from the Japanese team to the player, thereby having the greater amount of money paid to the player counted against the luxury tax cutoff (whereas posting fees paid to the player’s team do not count against the luxury tax cap).

While the agreement in theory opened the door for Tohoku Rakuten Golden Eagles pitcher Masahiro Tanaka (and a couple of other star Japanese players who had indicated a desire to play in the U.S.) to sign with a MLB team. Tanaka had a 24-0 record with a 1.27 ERA in 2013 while leading his team to the Japan Series championship. Initially Tohoku Rakuten decided not to post him since the most it could receive is \$20 million. Instead, the Golden Eagles offered to more than doubled Tanaka’s salary that in 2013 was about \$4 million. However, on December 25, 2013 the team announced that it had changed its mind and posted Tanaka. After a bidding war orchestrated by Tanaka’s agent, Casey Close of Excel Sports Management, Tanaka signed on January 21, 2014 a \$155 million, seven-year contract with the New York Yankees. The signing occurred after Tanaka underwent a thorough physical examination by a respected baseball physician whose report was distributed to all 30 MLB teams because of concerns by several teams that Tanaka may have been damaged by being overworked in Japan, as is a common practice in Japan. Tanaka, for example, threw 160 pitches in game 6 of the Japan Series and then threw 15 more pitches the next night as a reliever in game 7. Insert Chapter 4, unsure where exactly

CHAPTER Five. Agent Representation of the Athlete.

Breakdowns in the Agent-Player Relationship. Subsection 3. Agent Conflicts of Interest.

- ▶ The MLBPA and NBPA both in June 2013 granted agent certification to Roc Nation Sports founder Jay-Z, Roc Nation Sports president Juan Perez, and Roc Nation Sports vice president Rich Kleinman. Jay-Z agreed to sell his 1% ownership interest in the Brooklyn Nets as a condition in his getting NBPA certification. Insert Chapter 5, Section B, Subsection 3, Page 398

- ▶ Baseball agent Scott Boras lost a grievance in mid-March 2014 before arbitrator Shyam Das filed against New York Yankees RF pursuant to the MLBPA's agent certification regulations in which Boras was seeking \$1.3 million, 5% of a \$26 million for two-years contract Beltran signed with the St. Louis Cardinals in December 2011, less than three months after he terminated his agent-representation agreement with Boras in October. (Beltran in early 2014 signed a three-year \$45 million contract with the Yankees, but that is not relevant to this grievance.) Beltran had a representation agreement with Boras that would have expired (although it could have been renewed) in February 2012, but Beltran notified Boras in October 2011 that he was immediately terminating that agreement. Beltran then proceeded to negotiate the new player contract with the Cardinals. Boras filed a grievance seeking 5% of that contract amount based on a clause Boras has included in all of his representation agreements stating that if the player terminates the representation agreement "during or after a championship season" and then signs a new player contract "before the following championship season," the player will pay Boras' agency 5% of the value of that new player contract "regardless of who negotiates it on your behalf." Arbitrator Das ruled that this clause was unenforceable because the MLBPA agent certification regulations provide that a player may terminate a representation agreement at any time, and thus when Beltran terminated his agreement with Boras, the clause Boras relied on was also rendered terminated. Boras argues that this ruling will affect agent behavior in that agents will now seek to get whatever deal they can quickly even if it's not in the best interests of the player, but Das stated that it is the MLBPA, the legal exclusive bargaining representative of all the players, who has the legal right and duty to determine what is in the best interests of the players, and the MLBPA certification regulations provide that players may terminate their representation agreements at any time.

Boras currently has a similar outstanding grievance against Chicago Cubs P Edwin Jackson, who signed a \$52 million, four-year contract with the Cubs shortly after terminating his representation agreement with Boras. Presumably, this grievance will be dismissed or decided by Das in favor of Jackson. Boras also has threatened a similar grievance against Seattle mariners 2B Robinson Cano who left Boras' agency for Jay-Z's Roc Nation Agency eight months before signing his current \$240 million, ten-year contract, but no grievance has been filed.

Boras won a grievance in 2008 against former Yankees OF Gary Sheffield who did not renew a representation agreement with Boras and then signed a \$39 million, three-year player contract with the Yankees. Boras then won an award finding that Boras was entitled to compensation for negotiating an "out clause" in his contract with the Los Angeles Dodgers that enabled him to become a free agent that year and

sign with the Yankees. Boras and Sheffield then settled that grievance for \$550,000, but the ruling and result did not raise the issue of the validity of the crucial clause that was the basis for the Beltran & Jackson grievances, and that Das has now ruled is unenforceable. Insert Chapter 5, Section B, Subsection 3, Page 398

► **Oakley v. Nike** – U.S. district judge James Selna in Santa Ana, California, on December 18 issued a bench verdict finding in favor of defendant Nike in a lawsuit filed by Oakley in 2012 claiming tortious interference with Oakley’s contractual relationship with professional golfer Rory McIlroy. Oakley had claimed that when McIlroy signed an endorsement deal in 2012 with Nike, he breached his expiring contract with Oakley that required him to give it the right to match any offer from another company for an endorsement deal. Thus, it filed a five claim suit against McIlroy and Nike, claiming breach of contract against McIlroy and inducing the breach against Nike. McIlroy settled with Oakley on November 24, 2013, but the case against Nike proceeded. Finally, after a trial Judge Selna ruled in favor of Nike, dismissing all remaining claims after finding that Nike had told McIlroy and his agent, Conor Ridge of Horizon Sports Management, that it was not interested in signing a contract until McIlroy was legally free to do so and that Ridge had then told Nike that Oakley was not going to match Nike’s offer.

Meanwhile, McIlroy has filed suit against his former agent Ridge and Horizon Sports Management in Commercial Court in Dublin, Ireland, raising various claims that Ridge acted without authority and misrepresented McIlroy in his dealings with Oakley and Nike. Horizon filed counterclaims alleging that McIlroy acted in bad faith. The case is scheduled to go to trial in October 2014. McIlroy has since started his own management company. Chapter 5, Section B, Subsection 3, Page 398/399 (agent-player breakdown) OR Chapter 6, Section C, Page 504 (publicity rights)

Section C. Emergence of Agent Regulation.

► As of April 1, 2014, 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, Maine, Massachusetts, Montana, New Jersey, Puerto Rico, Vermont, and Virginia.

--This list can be updated at any time by checking the NCAA’s web site at

<http://ncaa.org/wps/wcm/connect/public/ncaa/resources/uniform+athlete+agents+act+homepage>

Insert Chapter 5, Section C, Page 405 (discussing states enacting UAAA)

Note: *This breakdown is exactly the same as it was last year, although some states did amend some of the provisions in their versions of the UAAA.*

- The Uniform Law Commissioners’ committee established in 2012, and chaired by Dale G. Higer, a retired attorney from Boise, Idaho, to consider revising the UAAA in some significant ways to strengthen the impact of the law has held several hearings. The drafting committee met for two days in October 2013 in Chicago and again in spring 2014. Proposed revisions are expected to be presented to the full National Conference of Commissioners on Uniform State Laws for promulgation in summer 2014. A memo presented to the committee proposing a number of amendments was prepared and signed by a group of 66 NCAA member schools’ ADs as well as five NFLPA certified agents (including former SLA president Tony Agnone). One of the proposals garnering a lot of support is to expand coverage of the law to include runners, financial advisers, and marketing agents of athletes. (See Appendix A for the minutes of the most recent Committee meeting on March 21-22, 2014 for a look at how the Committee is looking at many of the issues.) In early April, 2014, the Drafting Committee issued a draft of a proposed UAAA, which can be accessed on the Uniform Law Commission’s web site at www.uniformlaws.org. More comments will be taken and the Committee will meet again in July and in November 2014, to develop a final draft that will be submitted to the full National Conference of Commissioners on Uniform State Laws for promulgation in summer 2015. Insert Chapter 5, Section C, Page 405

- ▶ Arbitrator Roger Kaplan ruled on October 22, 2013 that 29-year old former college football player Cleodis Floyd must be certified by the NFLPA as certified contract adviser (i.e., agent) even though the 29-year old was denied certification by the NFLPA’s certification committee because of his felony conviction for bank fraud while he was in college at Colorado State. The arbitrator noted that Floyd’s crime was committed while he was very young and that since his conviction he has worked many jobs, performed charitable work, graduated from law school, and passed the Washington state bar exam, all without any legal problems. Insert Chapter 5, Section C, not sure what page

Section D. Agents, College Athletes, and NCAA Rules.

- ▶ It was reported in late September 2013 that long-time lawyer to all of the major men’s sports unions, Jeffrey Kessler, was organizing a new college sports division within his new New York law firm, Winston & Strawn, that will represent players, coaches, schools, and conferences against what Kessler describes as “the unbridled power and influence” of the NCAA. This is not really a legal development per se – yet. But it does signal that Kessler believes there is potential in bringing lawsuits against the NCAA and it could portend a lot of litigation problems for the NCAA in the near future. Insert Chapter 5, Section D, Page 432/433
- ▶ Following a similar set of rules adopted by North Carolina (see last year’s Recent Developments document), Arizona State University has promulgated a set of rules that purport to govern all contacts between ASU student-athletes and agents. The new rules issued prior to the 2013 football season first defines the category of

individuals subject to the rules to include agents, financial advisers, marketing representatives, brand managers, or anyone associated with any such person, or anyone who, directly or indirectly, recruits or solicits a student-athlete to enter into any kind of representation agreement. It exempts a spouse, parent, sibling, grandparent, or legal guardian, or anyone that is representing a professional sports team or organization. The key provision in the policy permits contact with an ASU student-athlete only with the permission and under the conditions set by the head coach, and that such contact must be limited to on-campus facilities and scheduled through the ASU athletic compliance office. It prohibits any contact by telephone, email, text, or social media unless approved in advance by the ASU compliance office, and it expressly prohibits any off-campus face-to-face meeting (e.g., home visit) with the student-athlete or anyone associated with him/her (e.g., a family member). As noted in last year's entry relating to North Carolina's policy, it is unclear what ASU intends to do to enforce this policy if agents and/or student-athletes decide to disregard it. Insert Chapter 5, Section D, Page 425 or 432

- ▶ Orange County, North Carolina, district attorney Jim Woodall filed multiple-count indictments against two agents implicated in the NCAA investigation and penalties related to the University of North Carolina issued in 2012. The first indictment, against Jennifer Wiley Thompson, was filed in early October 2013 charging her with funneling over \$2,000 in cash and two \$579 round-trip plane tickets to Tar Heel football player Greg Little in fall 2010 to induce him to sign an agency contract with Georgia-based agent Terry Watson and his Watson Sports Agency, in violation of North Carolina's version of the UAAA regulating agents. That indictment was followed by a 14 felony-count indictment against Watson himself, as well as three other "runners" associated with Watson, under the North Carolina UAAA and for obstruction of justice, all related to Watson's providing a host of illegal benefits (including money, hotel rooms and airplane tickets) in 2010 to NC football players Marvin Austin, Greg Little, and Robert Quinn, all of whom now play in the NFL, to induce them to sign an agency contract with him. Each violation could potentially result in up to 15 months in prison and civil penalties of up to \$25,000. Insert Chapter 5, Section D, Page 432
- ▶ William Morris Endeavor Entertainment (WME) and Silver Lake Partners on December 18, 2013 completed an agreement to purchase IMG Worldwide agency from Forstmann Little & Co. for what was reported to be \$2.4 billion, and amount \$750 million greater than what private equity firm Forstmann Little paid for IMG in 2004 to the heirs of the firm's founder Mark McCormick. The sale was consummated in mid-March 2014. The purchasers put up \$450 million of their own capital and borrowed the remaining \$1.95 billion. WME's co-CEOs are Patrick Whitesell and Ari Emanuel. Since WME was already a major player in the talent representation business, particularly in the entertainment and fashion industries, the addition of IMG's portfolio will extend its brand and give it strategic strength through diversification at a time when the film and TV industries are showing a decline in revenues. Insert Chapter 5 somewhere

- ▶ Creative Artists Agency (CAA) acquired Inside Sports and Entertainment Group (ISEG) in late February 2014 to its sports representation business, enabling it to expand its variety of sales and marketing services to include corporate hospitality, event management, and production. ISEG was established in 2004 and has since grown significantly to include the hospitality, management and marketing functions with clients that include Microsoft, Morgan Stanley, Verizon, Merrill Lynch, Goldman Sachs, and American Express. At the time it was acquired by CAA, ISEG annually managed over 250 events a year for its corporate clients, most of them being sporting events or connected to sporting events. Insert Chapter 5 somewhere

CHAPTER Six. Sports Broadcasting, Merchandising, and Intellectual Property Law.

Section B. Copyright in the Game Broadcasts.

[For a detailed description of developments in the spate of lawsuits involving the use of current and former college student-athletes' identities in video games and in television broadcasts, see the entries in the Section on Developments in College and High School dealing with the *O'Bannon*, *Hart*, *Keller* and other cases.]

- ▶ **USTA v. VSW Productions**, [unpublished] (SDNY 2013) -- Federal district judge Nelson Roman in Manhattan on July 22, 2013 denied "without prejudice" a motion filed by defendant VSW Productions, the filmmaker of a documentary film on Venus and Serena Williams, to dismiss a lawsuit for copyright infringement filed in early 2013 by the USTA. The complaint claims that the filmmaker used without permission footage in the documentary taken from official film footage taken at the US Open for which the USTA holds the copyright. VSW had moved to dismiss arguing that (a) its use of the copyrighted footage was protected by the First Amendment, and (b) that the footage used (e.g., Serena's famous tirade against a lineswoman) was of a sufficiently limited and socially important nature to be covered by the Fair Use Doctrine. Judge Roman rejected both arguments. Insert Chapter 6, Section B, Page 457
- ▶ Senators John McCain (R-AZ) and Richard Blumenthal (D-Conn) on November 12, 2013 introduced a bill titled the Furthering Access and networks for Sports (FANS) Act that would (a) remove the relevant language in the 1961 Sports Broadcasting Act and rewrite the FCC regulations to require lifting of local blackouts of all televised games; (b) condition the continued antitrust exemption in section 1 of the Sports Broadcasting Act on leagues including provisions in any licensing contracts they enter into prohibiting any video licensee from removing games from a cable or satellite distributor (which would ensure that games are not blacked out because of contract disputes between broadcasters and cable/satellite companies; (c) condition the antitrust exemption in the Sports Broadcasting Act on leagues making all games available, for a fee or otherwise, over the Internet when the game is not available via television; and (d) extend the Curt Flood Act to make clear that the baseball exemption does not apply to television contracts. Congressman Brian Higgins (D-

NY) introduced an identical companion bill in the House the same day. Insert Chapter 6, Section B, Page 458 (or footnote c on 458) or Chapter 7, Section D, Page 659

- ▶ FCC Chair Mignon Clyburn circulated a proposal to the Commission members on November 1, 2013 that would, if adopted, ban sports blackouts of otherwise televised games even if the game is not sold out 72-hours in advance of its start. Clyburn's argument stated that "Changes in the marketplace have raised questions about whether these rules are still in the public interest, particularly at a time when high ticket prices and the economy make it difficult for many sports fans to attend games." In the NFL, blackouts have become infrequent with only 6% of games blacked out in their home markets in the 2011 and 2012 seasons. Seven weeks later, on December 18, 2013, the FCC formally voted to consider eliminating its rule providing for blackouts of sporting events in the local territory of a game that is not sold out at least 72-hours in advance of the start of the game. Although the NFL, the league primarily affected by the blackout rule, has opposed the change, the FCC's action would not make blackouts illegal and thus leagues would still be able to enter into contracts with networks and cable outlets that would include provisions that result in local blackouts of non-sold-out games. The NFL on February 24, 2014 filed comments opposing the FCC's proposed change to its 38-year old rule on the grounds, inter alia, that (a) the rules are required by Congressional intent in the SBA and other enactments; (b) there are very few blackouts of NFL games (there were only two during the 2013 season) so the current rule works well for the leagues and fans alike; and (c) the specter of a blackout often prompts fans and local businesses to buy blocks of tickets, a practice that would probably end if the threat of a local blackout were lifted, putting game attendance at risk and thereby risking a diminishment of the game experience for live attendees and TV viewers alike. Insert Chapter 6, Section B, Page 458 (or footnote c) or Chapter 7, Section D, Page 659

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buy blocks of tickets, a practice that would probably end if the threat of a local blackout were lifted. Insert Chapter 6, Section B, Page 458 or Chapter 7, Section D, Page 659 (both discussing blackouts) same as above but last 5 lines are different

- ▶ Liga-TV, a company established by the Russian Football premier League to run Nash Football, the TV network that broadcasts all RFPL matches, won a judgment in mid-January 2014 from a Moscow, Russia, court for approximately 93 million rubles (\$2.8 million) against LiveTV.ru for pirating Nash Football's signals and illegally rebroadcasting matches to its subscribers. Nash Football is available to over 250,000 Russian subscribers via satellite and cable at 149 rubles (\$4.50) a month. Prior to this case, illegal broadcasts had never been challenged in court in Russia. The victory, however, may be Pyrrhic since LiveTV has disbanded and reformed under a new domain name, registered in Kazakhstan, which puts it beyond the scope of the jurisdiction of Russian courts. It is unknown whether Kazakhstani courts would be willing to enforce Russian copyright laws for such illegal broadcasts. Insert Chapter 6, Section B, Page 465

- ▶ The English Premier (Football/Soccer) League secured a judgment from the English High Court in mid-July 2013 that found FirstRowSports and a group of the six major UK-based Internet service providers had violated section 97A for the UK's Copyright and Patents Act of 1988 by streaming live EPL football matches to subscribers without a license from the EPL. The judge found that FirstRowSports was making millions of pounds from copyright infringement "on a large scale" by making soccer match broadcasts available on its web site www.FirstRow1.eu to persons who were not entitled to receive them. The court enjoined the defendant Internet service providers from providing future access to FirstRowSports broadcasts. The Internet service providers are British Sky Broadcasting (BSkyB), BT, Everything Everywhere, TalkTalk, Telefonica UK, and Virgin Media.

This judgment was followed four-months later with a conviction secured in November 2013 by the Federation Against Copyright Theft against the owner of FirstRowSports that had continued to stream live football matches picked up from BSkyB telecasts to about 10,000 subscribers paying approximately \$40 a month for access to the illegal rebroadcast. The criminal court imposed a two-year custodial sentence on FirstRowSports' owner as a result of his fraud and copyright infringement. (I have no information about what Internet service provider allowed FirstRowSports to access the Internet after the above noted injunction or, assuming it was one of the enjoined providers, what legal consequence may have fallen on that provider.) Insert Chapter 6, Section B, Page 465

- ▶ Four creditors of Comcast SportsNet Houston (who are also affiliates of Philadelphia-based Comcast Corp.), filed an involuntary Chapter 11 bankruptcy protection petition against CSNH on September 27, 2013, with the case being assigned to US Bankruptcy Judge Marvin Isgur. The petition was triggered by fears that without bankruptcy protection, the MLB Houston Astros would terminate an exclusive rights agreement it has with CSNH's parent company, Houston Regional Sports Network, which is a joint venture partnership of the Astros (46.5% ownership), the NBA

Houston Rockets (31% ownership), and Comcast (22.5% ownership). The Astros, not surprisingly, moved in early October 2013 to dismiss the bankruptcy petition so they could pursue separate broadcast deals they say are essential to their ability to generate enough revenues to be competitive in MLB, but shortly thereafter the Rockets filed a pleading with the court opposing the motion to dismiss and supporting continuation of the bankruptcy proceeding while the parties tried to iron out their differences. The Rockets argued that dismissing the petition would then allow the Astros to terminate their rights agreement with CSNH, which in turn would mean the death knell for the regional network and the Rockets' rights agreement. Apparently, the Rockets are content with simply receiving the fees under their agreement with HRSN (which broadcasts their games only in the Houston region) while the Astros claim to need not only their rights fees but also a significant profit from the partnership (which has the rights to broadcast over a much larger five-state area in which interest in the Astros has waned after three consecutive 100+ loss seasons) in order to maintain sufficient revenues to field a quality team on the field. Judge Isgur in early February 2014 denied the Astros' motion to dismiss the petition and ruled that placing CSNH in Chapter 11 reorganization bankruptcy was appropriate because, despite the Astros' contention that the case is futile because CSNH cannot be profitable since it has been unable to arrange carriage deals with DirecTV, AT&T U-Verse, and Suddenlink, there was no evidence that with a proper business plan the network cannot be profitable and enable it to be seen across the Houston area and, for Astros' games, across a five-state region.

The ruling was immediately appealed by the Astros to the federal district court and assigned to Judge Lynn Hughes. Judge Hughes in late March called an informal meeting of the principal parties (Rockets owner Leslie Alexander, Astros owner Jim Crane, Comcast senior VP Robert Pick, and Rockets and Astros senior leadership, along with their lawyers) in order to try to work out a resolution of all the issues.

_____ Insert Chapter 6, Section B, Page 474 or Page 476

- ▶ Meanwhile, Astros' owner Jim Crane on November 21, 2013, just over a month after the bankruptcy petition was filed, filed a lawsuit against former Astros owner Drayton McLane, Comcast, and NBC Universal claiming that they committed fraud, breach of contract, and civil conspiracy in connection with Crane's purchase in 2011 of the Astros' 46% interest in the Houston Regional Sports Network, the parent of Comcast SportsNet Houston. In effect, the suit accuses the defendants of falsely representing that the HRSN was profitable when in fact it was in dire financial condition, "overpriced, and broken." To make a complicated story short, Crane alleges that the business model for CSNH was not viable because the subscriber fees needed to keep it afloat were so high that no cable distributor (other than Comcast itself) would carry the network. The Houston Rockets and its owner Leslie Alexander were not named in the suit. _____ Insert Chapter 6, Section B, Page 474 or 476

Section C. Player Publicity Rights.

► **Jordan v. Jewel-Osco**, ___F.3d___ (7th Cir. 2014) – The Seventh Circuit court of appeals on February 19, 2014 reversed a lower court’s dismissal of Michael Jordan’s publicity rights infringement lawsuit against Jewel-Osco relating to an ad the defendant company ran in 2009 on the occasion of Jordan’s induction into the Basketball Hall of Fame. The ad that ran in *Sports Illustrated* featured a pair of gym shoes with the number 23 on them, the Jewel-Osco logo, and the words “Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was ‘just around the corner’ for so many years.” (“Just around the corner” is the Jewel-Osco slogan.) Jordan then sued for \$5 million claiming that the ad misappropriated his identity and infringed on his Illinois publicity rights. The federal district judge in Chicago dismissed the suit in 2012 after finding that because the ad was “noncommercial speech,” it was protected by the First Amendment. The 7th Circuit rejected that argument and reversed, finding that classifying this kind of clearly commercial advertising as “constitutionally immune noncommercial speech would permit advertisers to misappropriate the identity of athletes and other celebrities with impunity.” The court found that “the ad is properly classified as a form of image advertising aimed at promoting the Jewel-Osco brand,” and thus is not of sufficient First Amendment weight as to outweigh Jordan’s state law publicity rights. The case is now back in the district court for further proceedings.

A second \$5 million suit by Jordan against Dominicks Restaurants for a similar congratulatory ad in 2009, where the ad said that the steakhouse, like Jordan, was “A cut above,” is scheduled for trial later in 2014. Insert Chapter 6, Section C, Page 481/482

► **Dryer v. NFL** – In mid-March 2013, a large group of retired NFL players, all class members in the lawsuit led by John Dryer 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 and on licensed memorabilia 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 five 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. On April 7, 2013 district judge Paul Magnuson gave preliminary approval, expressly calling those who objected to the settlement as “not enough”

to be like petulant “children denied dessert” who are never satisfied. A final order of approval was subsequently issued on November 1, 2013 with Judge Magnuson calling the settlement “one-of-a-kind and a remarkable victory for the class as a whole.” Several legal developments occurred related to this: . Insert Chapter 6, Section C, Page 489

- John Dryer, the other five named plaintiffs (Elvin Bethea, Jim Marshall, Dante Pastorini, Joe Senser, and Ed White), along with 2,134 other class members formally opted out of the settlement in August 2013, leaving them free to pursue new litigation raising the same claims once the initial case was finally resolved. Dryer indicated that he objected to the settlement because it granted NFL Films such broad rights to use the images of former NFL players that it arguably would limit his acting career. The NFL denies this. Others objected because direct payments wouldn’t be made to the former players and that the varying benefits would not be fairly distributed. . Insert Chapter 6, Section C, Page 489
 - Dryer and the other named plaintiffs refiled the suit in Minnesota, damages discovery is proceeding now, and a trial is expected before Judge Magnuson toward the end of this year. . Insert Chapter 6, Section C, Page 489
 - **Tatum v. NFL & Thompson v. NFL** - Roughly 700 other “opt-outs” filed a class action lawsuit in mid-August in federal district court in Pittsburgh (led by Denise Tatum, widow of Jack Tatum) raising the same claims; Reportedly there was another individual suit filed in Pittsburgh (Thompson) – both *Tatum & Thompson* were recently transferred to Minneapolis and Judge Magnuson. . Insert Chapter 6, Section C, Page 489
 - **Culp v. NFL** – Another group of “opt-outs” filed a class action lawsuit in federal district court in New Jersey on August 20, 2013. In addition to the publicity rights claim raised in *Dryer*, this suit also makes the federal claim of false endorsement, arguing that viewers of the NFL Films productions are given the false impression that the retirees endorse the videos. The named plaintiffs in this new case included Curley Culp, John Riggins, Dave Casper, Tom Mack, Ron Yary, Mike Bass, Willie Buchanon, Roman Gabriel, Joe Kapp, and Phil Villapiano. A motion to transfer to Minnesota is pending and the case will probably end up before Judge Magnuson. . Insert Chapter 6, Section C, Page 489
- **NOTE - Judge Magnuson on September 5, 2013 ordered the lawyers who filed the *Tatum* and *Culp* suits, to dismiss the suits because they were violating an injunction entered by him against new suits being filed while the *Dryer* settlement was being considered for approval. Judge Magnuson stated that the filing of the new suit had “shocked the conscience of the court” by ignoring the court’s injunction. The *Tatum* and *Culp* plaintiffs appealed this to the 8th Circuit, but it was mooted by the final settlement approval. The two suits then proceeded after the *Dryer* settlement was approved. . Insert Chapter 6, Section C, Page 489
- Approximately 24,000 other class members, or roughly 90% of the total class population, did not opt out and are bound by the terms of the settlement. Insert Chapter 6, Section C, Page 489

- ▶ **Univ. of Alabama Bd. Of Trustees v. New Life Art, Inc.** -- Federal district judge Abdul Kallon in Birmingham, Alabama, on September 29, 2013, dismissed the University of Alabama's trademark suit against artist Daniel Moore involving Moore's series of paintings of "Great Moments in Crimson Tide Football History." This was the final ruling in a case that was on remand from the Eleventh Circuit that meant a total victory for the artist. The 11th Circuit had already ruled on June 11, 2012 that artist Daniel Moore did not have to obtain or pay for a trademark or athlete publicity rights license from the University of Alabama to paint and sell his artwork depicting famous moments in Crimson Tide football history. See 683 F.3d 1266 (11th Cir. 2012). 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. However, the issue of whether the scenes could be reproduced on smaller functional products like coffee mugs and then sold was not decided because such use might be entitled to less aggressive First Amendment protection. The question of whether the First Amendment protected such use was remanded to the district court to create a record and balance the considerations outlined by the appeals court. Judge Kallon's ruling on September 29, 2013 found that even these uses did qualify for First Amendment protection and thus dismissed the last of the University's arguments and claims. Insert Chapter 6, Section C, Page 489 (discussing artist value use) or Section D, Page 512/513 (owner trademarks)
- ▶ Six members of the 1985 Chicago Bears Super Bowl-winning team (Richard Dent, Steve Fuller, Willie Gault, Jim McMahon, Mike Richardson & Otis Wilson) that under the moniker of "The Shufflin Crew" starred in a then-famous video called "The Super Bowl Shuffle" (e.g., "We're not here to start no trouble; we're just here to do the Super Bowl Shuffle") on February 1, 2014 filed a lawsuit in Cook County (Chicago) circuit court against Julia Meyer, who purports to own the rights, title and interest in "The Super Bowl Shuffle," and Renaissance Marketing Corporation, the exclusive licensing agent for "The Super Bowl Shuffle." The video was produced and released in September 1985, during the 1985 season, and became a mainstream phenomenon, selling more than a half-million copies and reaching number 41 on the US Billboard chart. The six players claim that the defendants' licensing the performance of the famous video constitutes an illegal commercial exploitation of their identities, images, names, likenesses, voices and performances that infringes on their Illinois publicity rights. Attached to the complaint is an alleged "royalty agreement" that purports to limit the rights that the Shufflin Crew granted to the producer of the video, who apparently later assigned the rights to Julia Meyer. Another aspect of the complaint is that the "royalty agreement" denies the producer the right to assign the rights to the video to a third party without the written consent of a majority of the performers, which was apparently never obtained. The plaintiffs

assert that the purpose for their doing the video was to raise money that would be used to help Chicago's neediest families. Insert Chapter 6, Section C, Page 503

- ▶ Six members of the 1985 Chicago Bears Super Bowl-winning team (Richard Dent, Steve Fuller, Willie Gault, Jim McMahon, Mike Richardson & Otis Wilson) that under the moniker of "The Shufflin Crew" starred in a then-famous rap video called "The Super Bowl Shuffle" (e.g., "We're not here to start no trouble; we're just here to do the Super Bowl Shuffle") on February 1, 2014 filed a lawsuit in Cook County (Chicago) circuit court against Julia Meyer, who purports to own the rights, title and interest in "The Super Bowl Shuffle," and Renaissance Marketing Corporation, the exclusive licensing agent for "The Super Bowl Shuffle." The video was produced and released in September 1985, during the 1985 season, and became a mainstream phenomenon, selling more than a half-million copies and reaching number 41 on the US Billboard chart. The six players claim that the defendants' licensing the performance of the famous video constitutes an illegal commercial exploitation of their identities, images, names, likenesses, voices and performances that infringes on their Illinois publicity rights. Attached to the complaint is an alleged "royalty agreement" that purports to limit the rights that the Shufflin Crew granted to the producer of the video, who apparently later assigned the rights to Julia Meyer. Another aspect of the complaint is that the "royalty agreement" denies the producer the right to assign the copyrights to the video to a third party without the written consent of a majority of the performers, which was apparently never obtained. The plaintiffs assert that the purpose for their doing the video was to raise money that would be used to help Chicago's neediest families. One line rapped by Walter Payton in the video goes: "We're not doin this because we're greedy; the Bears are doin this to feed the needy." Insert Chapter 6, Section C, Page 503 same subject as entry above, but worded slightly differently

- ▶ **Parrish v. NFLPA**, ___ F.3d ___ (9th Cir. 2014) -- The Ninth Circuit Court of Appeals in late March 2014 affirmed the district court's dismissal of a lawsuit brought against the NFLPA by five former NFL players (Bernie Parish, Bob Grant, Walter Roberts, Clinton Jones and Marvin Cobb) who had not signed group licensing agreements with the NFLPA. Federal district judge R. Gary Klausner in Los Angeles on May 23, 2012 had dismissed the lawsuit in which the players claimed 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.

This suit had followed a successful suit brought by other former NFL players in which the plaintiff had won a verdict in 2008 against the NFLPA for not aggressively promoting and marketing them. That case was then settled while on appeal for \$26.25 million. But district judge Klausner and the Ninth Circuit ruled that the five plaintiffs in the *Parrish* suit were not entitled to recover because unlike the earlier plaintiffs in the 2008 case, these former players had never signed group licensing agreements with the NFLPA and thus the union had no duty to them. Insert Chapter 6, Section C, Page 504

- ▶ **Gotta Have It Golf v. ETW Inc.** -- A six-person all-female jury in Miami-Dade County circuit court on March 12, 2014 returned a \$668,000 verdict in favor of Gotta Have It Golf, owned by Bruce Matthews, against Tiger Woods' licensing company ETW Inc. after finding that ETW Inc. had breached its contract with Gotta Have It Golf by failing to provide the contracted for number of autographed merchandise and photographs. After interest is added, the total amount awarded will approach \$1.3 million. Gotta Have It Golf had sought \$1.75 million in damages, plus attorneys' fees. Insert Chapter 6, Section C , Page 504

- ▶ Sports memorabilia collector and seller Eric Inselberg filed a lawsuit in Bergen County (NJ) superior court on January 29, 2014 (just days before Peyton Manning was to play in the Super Bowl only a few miles away in MetLife Stadium) against Eli Manning, the New York Giants, Giants equipment manager Joe Skiba, Skiba's brother Ed Skiba, Giants locker-room manager Ed Wagner Jr., Giants dry cleaner Barry Barone, Giants CEO John Mara, team lawyer William Heller, and Giants CFO Christine Procops claiming that the defendants engaged in an extensive, multi-year fraudulent conspiracy to produce and sell fake autographed equipment that was supposedly worn by Manning during games but that in fact was not. Inselberg had been indicted by federal prosecutors in Rockford, Illinois, in 2011 for memorabilia fraud for selling bogus used sports jerseys, but the charges were dropped when Inselberg convinced the prosecutors that Giants' officials had lied about their relationship with him in order to cover up their own fake-memorabilia sales. The complaint alleges that working with the other defendants, Manning frequently signed jerseys and helmets that were intentionally made to look worn and beat-up and then sold as having been worn during important games (e.g., Manning's 2004 rookie season, the 2008 and 2012 Super Bowls, etc.). Inselberg claims that the defendants' conduct has damaged his reputation in his extensive sports memorabilia business and cost him in the "eight-figures." Inselberg was so well known and regarded in the business that the Giants relied on him to start the team's Legacy Club, a historical showcase for the Giants at MetLife Stadium, which resulted in Giants CEO John Mara naming him the official "Giants Memorabilia Collector." Inselberg claims that the fraudulent racket was operated under the direction of top Giants management. Insert Chapter 6, Section C, Page 504

- ▶ Los Angeles Laker G Kobe Bryant settled his lawsuit filed in state court in New Jersey against Goldin Auctions and its president Ken Goldin in early June 2013 to enjoin the sale of numerous items of memorabilia that had been consigned without Kobe's knowledge or permission to Goldin for auction by Kobe's parents, Pamela and Joe Bryant, for a payment of \$450,000 that was then used to buy a house for Joe Bryant in Las Vegas. Goldin had also countersued claiming that Pam was the lawful owner of the items and Kobe was interfering with his business relationships. The specific terms of the settlement were not disclosed, but it later became clear that while over 90% of the items originally consigned to Goldin were returned to Kobe and not auctioned off, at least six of the most valuable items were left for Goldin to auction off, which he eventually did for an amount that at least covered his initial \$450,000

outlay. Also, Pam and Joe Bryant issued a public apology to both Kobe and Goldin for the unintended pain and inconvenience the episode caused them. Insert Chapter 6, Section C, Page 504

- ▶ Johnny Manziel continued to file for several trademarks with the US Trademark Office. One petition, however, had already been filed for by a friend of Manziel's, Nate Fitch, for the phrase "The House That Johnny Built" (referring to Kyle Field at Texas A&M. It remains undetermined whether Fitch will be allowed to receive the trademark for a phrase that refers to a specific living individual without the consent of that individual. Insert Chapter 6, Section C, Page 504

Section D. Owner Trademark Rights.

- ▶ **Action Ink Inc. v. New York Jets**, ___ F.Supp.2d ___, 2013 WL 5532381 (ED La. 2013) – Federal district judge Jane Triche Milazzo on October 4, 2013 granted the New York Jets motion to dismiss a lawsuit filed against it by Action Ink Inc. that had claimed that the Jets had infringed on Action Ink's registered trademark "Ultimate Fan." Action Ink had sued the Jets in federal district court in New Orleans in 2012 claiming that the Jets use of the term "Ultimate Fan" in a 2010 Facebook app and on other social network sites created "a likelihood of confusion in the minds of potential customers of Action Ink's and thus violated Louisiana's unfair competition law. Action Ink asserted that it had first used the term "The Ultimate Fan" in a 1983 promotion for the NBA and that it registered the term with the US Patent and Trademark Office in 1985. The Jets acknowledged that Action Ink had owned the mark but argued that it had abandoned it by failing to use it in commerce on any goods or services for at least three consecutive years. Judge Milazzo agreed with the Jets, ruled that Action Ink's registration in the mark should be cancelled since it had been abandoned, and dismissed the state law based lawsuit. Insert Chapter 6, Section D, Page 512/513
- ▶ Nike and Under Armour on February 10, 2014 settled a lawsuit that Under Armour had filed in federal district court in Baltimore claiming that Nike was infringing on the Under Armour unregistered trademark "I Will" in its advertising. Nike had defended on the ground that "I Will" is not famous and is not identified with the Under Armour brand in the minds of consumers. The terms of the settlement were not disclosed. Insert Chapter 6, Section D, Page 512/513
- ▶ **Nike v. DBV Distribution** – Nike filed a lawsuit in early January 2014 in federal district court in Oregon against DBV Distribution and Dragon Bleu Sari, the holder of a registered trademark "Venum" used on MMA sportswear, claiming that the defendants' use of the Venum mark infringed on Nike's Venum trademark. Nike alleges that it has owned and used the Venum trademark in connection with athletic apparel since 2002, including a bat bag, Kobe Bryant shirts, shorts & warm-ups, and women's sportswear. Nike also notes that the US Trademark Office initially refused to register the Venum mark due to likely confusion with the Venum mark. The defendants answered by denying that there is any likelihood of confusion, pointing

out that before the Venum mark was first used, Nike only used the Venom mark in connection with ski and snowboard gear and only expanded it to other sportswear after they started using the Venum mark with MMA sportswear. Defendants also note that after full argument, the US Trademark Office did grant Dragon Bleu registration for Venum for use with MMA sportswear. Insert Chapter 6, Section D, Page 528 (reverse confusion) or Page 524 (likelihood of confusion)

- ▶ **Blackhorse v. Pro Football, Inc.** -- For the second time in the past several years, a group of Native Americans headed by Navajo psychiatric social worker Amanda Blackhorse 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. As of April 1, 2014, the petition was still pending without a decision by the Board. Insert Chapter 6, Section D, Page 530

- ▶ In June 2013 the U.S. Department of Education’s Office of Civil Rights dismissed a complaint filed in February 2013 by the Michigan Department 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 alleged 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 had granted the requested order, it certainly would have changed 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.” However, the OCR dismissed the complaint because it found there was a lack of evidence that any student was actually harmed by the use of any of the mascot names at issue. Currently, only Oregon bans such use of Native American symbols through regulations issued by the state Board of Education. Insert Chapter 6, Section D, Page 530

Section E. Group Marketing of Intellectual Property Rights.

- ▶ An issue has arisen between several major college football programs and the shoe companies that have lucrative sponsorship agreements with the school over the practice of many players of having their ankles/shoes “spatted” by tightly taping the ankles outside of the shoes in a way that covers up the logos of the shoe company

(Nike, Adidas, or Under Armour). Of the known 54 shoe contracts between companies and Division I-A football programs, at least 22 specifically ban the practice of sparring, although most of them do provide for some exceptions that vary from contract to contract and whose interpretation is often unclear. It is fairly clear that under these 22 contracts, sparring solely for the purpose of fashion is not permitted without the university paying a rebate to the shoe company, but in most cases the players wishing to be spatted are doing it to protect their ankles from injury. In those cases it becomes a health and safety issue. Negotiations between schools and the shoe company sponsors will undoubtedly continue with the shoe companies wanting the exposure they are paying for and the schools caught between pressures to protect the health and safety of their players and the revenue that the shoe contracts provide. Insert Chapter 6, Section E, Page 531/532

CHAPTER Seven. Franchise, League, and Community.

Section A. The Nature of a Sports League.

- ▶ **American Needle v. NFL** – On remand from the Supreme Court’s famous decision in 2010 holding that the NFL was not a single entity for section 1 Sherman Antitrust Act purposes and thus that its internal actions and rules were subject to some type of rule of reason review, federal district judge Sharon Coleman in Chicago in early April 2014 denied the NFL’s motion to dismiss on the grounds that the league could not violate the rule of reason simply by giving an exclusive license to Reebok in 2000 to put NFL logos on caps and thus not renew its license with cap-maker American Needle. The judge also denied American Needle’s motion for summary judgment. Thus facing a rule of reason jury trial, the NFL agreed to enter into settlement talks in April 2014 supervised by a magistrate judge. Insert Chapter 7, Section A, Page 580
- ▶ The Washington state court of appeals on September 8, 2013 affirmed the dismissal of a lawsuit filed by the International Longshore and Warehouse Union against the City of Seattle and investor Chris Hansen that had sought an injunction against continuing to develop plans for a new \$490 million NBA and NHL arena in downtown Seattle. The ILWU claimed that allowing the plans to be developed before environmental studies were completed would create an irreversible momentum that would make it impossible to stop the construction even if the studies proved what the ILWU contended was true – that the arena would create traffic congestion near the Seattle waterfront that would interfere with container shipping and nearby business resulting in a loss of longshoremen jobs. The trial court dismissed the suit and the appeals court affirmed, holding that merely developing plans would not preclude requiring the arena to conform to environmental requirements. Insert Chapter 7, Section A, Page 582
- ▶ Two Sacramento, CA, taxpayer groups’ lawsuit in state superior court seeking an injunction to require a public referendum on the city’s planned \$258 million contribution to the construction of a new \$448 million downtown basketball arena for the NBA’s Kings was dismissed on February 26, 2014 by Superior Court Judge

Timothy Frawley on the grounds that the petitions obtained by the two groups to force the referendum were riddled with errors. The two groups, Sacramento Taxpayers Opposed to Pork (STOP) and Voters for a Fair Arena Deal (VFAD), had obtained and submitted more than 22,000 signatures from city voters on a petition supporting a ballot measure that would, if approved, have required voter approval of any public contributions toward building or maintaining sports facilities. City Clerk Shirley Concolino refused to accept the petitions because she disqualified the signatures on the ground that the petition language had omitted key legal terms. STOP then filed the lawsuit challenging the Clerk's decision and asking the court to order the referendum. Judge Frawley, however, upheld the Clerk's ruling, citing "fatal flaws in the petition language. STOP and VFAD admitted that there were mistakes made in drafting the petitions but that they were too minor and unimportant to block a public vote. The Clerk and the Judge disagreed, with Judge Frawley saying that the "volume and magnitude" of the mistakes required that the suit be dismissed. (Side note: *The lawsuit was partially funded by a secret \$100,000 donation from Chris Hansen, the investor who unsuccessfully tried to buy the Kings and move them to Seattle in 2013. Other major financial support came from an agribusinessman who lives outside of Sacramento, and from a group of nonunion electrical contractors who are angry that the arena will be built exclusively with union labor.*)

In mid-March 2014, the project cleared another legal hurdle when Sacramento superior court judge Raymond Cadel, in an eminent domain lawsuit brought by the city to obtain ownership of property that is part of the site of the new arena that used to be a former Macy's furniture and men's clothing store, granted the city exclusive control of the property. Further proceedings to determine the actual sale price will not come for several months.

However, a couple of legal hurdles remain as of April 1, 2014 before construction of the new arena can begin. Another lawsuit brought by many of the same individuals as in the STOP suit seeks an injunction stopping the project on the ground that the city officials lied to the public about the true value of the new arena. This case is also before Judge Frawley. Finally, The City Council is scheduled to certify an environmental impact statement sometime in April 2014 and legal challenges to that are likely to follow. Insert Chapter 7, Section A, Page 582 or Chapter 2, Section C, Page 156 (taxpayer rejected building of stadium arenas)

- ▶ Oklahoma Senator Tom Coburn (R) has tried unsuccessfully, but will continue to try, to attach an amendment to legislation that would amend section 501(c)(6) of the Internal Revenue Code to make sports leagues and governing organizations taxable entities. Currently, the NFL, NHL, and the PGA Tour are all non-taxable entities claiming that status under section 501(c)(6) as essentially trade associations that facilitate the business of taxable member entities/persons but that do not engage in "a regular business of a kind ordinarily carried on for profit." As part of the deal with Congress in 1966 that led to legislation allowing the merger of the old AFL and NFL on condition the NFL add new franchises in New Orleans and Atlanta, section 501(c)(6) was amended expressly to cover professional football leagues, even though the NFL had been claiming non-tax status since 1942. While the NFL defends its

non-tax status, it also claims that were it to become a taxable entity, it would not result in it having to pay much if any tax since all of its revenue after league expenses are paid is passed through to its member clubs that pay tax on that revenue. The NBA and MLB do not claim non-tax status and file returns as taxable entities, and they pay little or no tax.

In early December 2013 Sen. Coburn did introduce a bill that specifically would make the PGA Tour a taxable entity. Insert Chapter 7, Section A, Page 583

- ▶ The Minnesota Vikings, the State of Minnesota, and the City of Minneapolis faced various legal hurdles to completing the financing and construction of the new \$1 billion stadium to be built on the site of the old Metrodome that was demolished in late January 2014: Insert Chapter 7, Section A, Page 582/583
 - A lawsuit filed by plaintiffs Josef Halpern and Ada Reichmann against Minnesota Vikings owner Zygi Wilf, his family, and their New Jersey-based Garden Homes real estate company threatened to derail the financing arrangements for the new football stadium for the Vikings in Minnesota. The lawsuit brought by a group of co-investors in various development projects in New Jersey claimed that Wilf and his family committed fraud, breach of contract and breach of fiduciary duty in order to cheat the investors out of their fair share of business revenues. On September 9, 2013, New Jersey superior court judge Deanne Wilson ordered Wilf and his brother Mark to disclose their personal wealth and financial information during discovery, and later on August 6, 2013 Judge Wilson held that the Wilfs had indeed engaged in fraud and later set the damages they would have to pay to the plaintiffs at \$106 million. (Judge Wilson also ruled that the Wilf's did not have to pay these damages to the plaintiffs until they had exhausted their appeals, which could take up to three years, although the judgment will accumulate post-judgment interest at an annual interest rate of 2.25%.) These developments led lawmakers and others in Minnesota who opposed the public support for the new stadium to argue that the stadium project should be halted until Wilf could establish that he had the financial wherewithal to meet his obligations toward the stadium project. However, neither the NFL nor officials in Minnesota took any action against Wilf and no formal effort was made to delay construction of the new stadium. Insert Chapter 7, Section A, Page 582/583
 - Three Minneapolis residents, former mayor candidate Douglas Mann, his wife, and former school board member David Tilsen, filed a lawsuit directly with the Minnesota Supreme Court on January 10, 2014, the day before \$468 million worth of stadium bonds were to be offered for sale, against the Minnesota Sports Facilities Authority seeking a writ of prohibition and a declaration that the sale of the bonds, which are critical to the financing of the \$1 billion new stadium for the Minnesota Vikings, would violate the Minnesota state constitution because it would obligate Minneapolis taxpayers to dedicate sales tax revenue to repaying the bonds without having given them the opportunity to vote on the bonds through a referendum. The MSFA decided to delay the sale of the bonds pending the resolution of the suit. Then on January 21, 2014 the Minnesota Supreme Court in

- a five-page opinion dismissed the suit on the ground that it did not have first instance jurisdiction in the case. This suit was similar to one filed in summer 2013 by Mann, which was dismissed by a Hennepin County district court judge, and then the dismissal was affirmed by the Minnesota court of appeals on January 21, 2014, the same day that the Supreme Court denied jurisdiction in the other lawsuit. The court of appeals ruled that the appeal from the dismissal of the first suit was not filed in a timely manner. The bond sale then went forward and the project proceeded on schedule. Insert Chapter 7, Section A, Page 582/583
- Three community activists, Stephanie Woodruff, former City Council president Paul Ostrow, and Dan Cohen, filed suit in Hennepin County district court in early January 2014 against the City of Minneapolis seeking an injunction to halt the City's plans to create a park that is integral to the \$400 million Downtown East development project that is adjacent to and part of the overall plans for the new Vikings stadium – a development that will include two office towers for Wells Fargo Bank, roughly 400 apartment units, retail shops, and restaurants. The plaintiffs claimed that the City Council did not have legal authority to buy, own and operate parkland in the city – that only the Minneapolis Park and Recreation Board had that legal authority to create and operate city parks. The plaintiffs, however, dropped the lawsuit on January 20, 2014 when district judge Mel Dickstein required them to post a \$10 million surety bond, which the plaintiffs said was insurmountable. They stated that they would continue to pursue their concerns through political channels, namely the City Council and the court of public opinion. Insert Chapter 7, Section A, Page 582/583
 - ▶ The Atlanta Braves announced in November 2013 that it would move into a new stadium in suburban Atlanta's Cobb County financed partially by Cobb County through the sale of \$368 million in revenue bonds issued by the Cobb-Marietta Coliseum Authority that will be repaid through an increase in property taxes on Cobb County residents. This controversial relocation was certain to attract legal challenges, and the first was filed in early December 2013 in Cobb County Superior Court by an anonymous plaintiff under the pseudonym Jane Doe seeking a declaratory judgment that the revenue bonds should not be validated because it violates the Georgia Constitution that plaintiff claims requires that the principal and interest on the bonds be paid solely from revenues generated by the project itself, not general taxpayers. Attorneys for the governmental bodies involved indicated that they believed the suit to be frivolous given that the constitutionality of similar bonding arrangements have been consistently upheld by the courts. _____ Insert Chapter 7, Section A, Page 582/583
 - ▶ Lehman Brothers Holdings filed suit on October 23, 2013 against Giants Stadium LLC (a subsidiary company of the New York Giants Football Team related to the team's participation in building, owning, and operating MetLife Stadium in the Meadowlands, NJ) in US Bankruptcy Court in Manhattan claiming that Giants Stadium LLC owes it \$100 million as a result of Giants Stadium LLC's termination of interest rate swap transactions in 2008 when Lehman Brothers filed for

bankruptcy. The swaps were an integral part of the financing for MetLife Stadium. Lehman Brothers claims that Giants Stadium took advantage of Lehman Brothers' bankruptcy filing to undertake "a contorted plan" to avoid its obligation to pay tens of millions of dollars when it terminated the swaps. This case is likely to drag on for several years. Insert Chapter 7, Section A, Page 582/583 (to group with other litigation involving stadiums)

- ▶ St. Louis-based Taylor Turf Installation Inc. filed a lawsuit in mid-January 2014 in Bergen County Superior Court (New Jersey) against MetLife Stadium's operators (namely New Meadowlands Stadium Co. LLC) and Georgia-based Turf Industry Inc. d/b/a UBU Sports claiming that it is owed \$292,000 plus interest for the defendants failing to pay it for installing the turf in the stadium in summer 2013, just before the season in which MetLife Stadium was to host the Super Bowl. Apparently, neither defendant denies that Taylor Turf is owed the money, but they disagree over which of them is responsible for paying it. It is expected that the matter will be resolved without need for extensive litigation. Insert Chapter 7, Section A, Page 582/583 (to group with other litigation involving stadiums)
- ▶ The Administrative Court of Paris ruled on October 18, 2013 that plans to renovate and expand Stade Roland Garros, including adding a retractable roof over center court, could go forward. The renovation plans had been put on hold in March 2013 after a lower tribunal had sided with local residents who had complained that the development could harm the neighborhood environment. The project is now in progress and is scheduled to be completed in 2017. Insert Chapter 7, Section A, Page 582/583 (group with other stadium issues)

Section B. Franchise Ownership Rules.

- ▶ Because Manchester United of the English Premier League is publically traded on the New York Stock Exchange, it came under scrutiny and was investigated starting in late April 2014 when it suddenly dismissed its manager (the equivalent of the head coach) David Moyes after only 10-months on the job. Moyes had been his legendary predecessor Alex Ferguson's hand-picked choice the year before to succeed him. The legal concerns are that the sudden dismissal, after what for this team was a disastrous season that saw the team fail to qualify for European competitions, may have violated the NYSE's and the United States' SEC trading rules by timing the dismissal in order to manipulate the stock price, which went up 7% the day after the dismissal was announced, and up over 11% in the following week. _____ Insert Chapter 7, Section B, Page 602/603
- ▶ Indianapolis Colts owner Jim Irsay, who has had a history of addiction to pain killers and substance abuse, was arrested early in the morning of March 18, 2014 after being pulled over in his car in suburban Hamilton County near his home north of Indianapolis for driving erratically, and then failing a sobriety test and having four different controlled substances in his car in mislabeled pill bottles. The next day he checked into a rehab facility. Irsay's eldest daughter, Carlie Irsay-Gordon, who has

been a team vice president since 2007, will function as the team owner in Jim Irsay's absence. [League discipline expected as of April 1, 2014.] Insert Chapter 7, Section B, Page 603 (franchise ownership) OR Chapter 1, Section 3, Subsection 3, Page 54 (drug use?)

- ▶ Cleveland Browns owner Jimmy Haslam's co-owned company, which he owns along with his brother Tennessee Governor Bill Haslam, Pilot Flying J (a Nashville, Tennessee, based company of which he is the CEO that owns a large chain of truck stops and is the nation's largest diesel fuel retailer), reached a settlement in a class action lawsuit in Nashville federal district court under which the Pilot Flying J will pay \$84.9 million to 5,500 trucking companies that were allegedly cheated out of promised rebates by Pilot Flying J. The settlement was approved by federal district judge James Moody on November 24, 2013 without an objection from any class members and less than 1% of the class opted out of the settlement. Although an FBI investigation into the cheating scandal that engulfed the company continues, this settlement lifted a financial cloud over Haslam that reportedly threatened his ownership of the Browns. When this scandal broke in 2012, Haslam just a year earlier had purchased the Browns from former owner Randy Lerner. Haslam has denied any knowledge of company wrongdoing and the NFL has taken no steps to discipline him or remove him from operational control of the Browns. Insert Chapter 7, Section B, Page 603
- ▶ Mikhail Prokhorov announced on March 24, 2014 that he was "relocating" his solely owned company Onexim Sports & Entertainment, the corporate owner of the Brooklyn Nets, to Russia "in keeping with the Russian government's call on Russian businesses and businessmen to repatriate their assets to help combat new U.S. sanctions" in the wake of the Russian annexation of the Crimea from the Ukraine. In effect, the Brooklyn Nets will be owned by a Russian company, which Prokhorov claims does not violate any NBA rules. Insert Chapter 7, Section B, Page 604 (franchise ownership rules) OR Chapter 7, Section C, Page 651 (relocation, although not a physical location of the team, so more likely p. 604)

Section C. Admission and Relocation of Sports Franchises.

- ▶ **City of San Jose v. MLB** – US senior district judge Ronald Whyte on October 11, 2013 dismissed an antitrust case filed by the City of San Jose, California, against MLB that had claimed that the rules interfering with the relocation of the Oakland A's home stadium venue from Oakland to San Jose (i.e., the right of the San Francisco Giants to veto the move into what is designated as the Giants' home territory) violates section 1 of the Sherman Antitrust Act. The suit was filed on June 17, 2013 in federal district court in San Jose. The court dismissed the suit (two federal and two state antitrust claims, and the two tort claims by refusing to take ancillary jurisdiction, which have been refiled in state superior court in Los Angeles) on the ground that all matters relating to the "business of baseball," including franchise location and relocation matters, are immune from antitrust scrutiny under the 1922 Supreme Court decision in the famous *Federal Baseball* case, and

reaffirmed in 1972 by the Supreme Court in *Flood v. Kuhn*. Judge Whyte expressly rejected the City's argument that the immunity was limited to player restraints. San Jose has appealed the dismissal to the Ninth Circuit. Insert Chapter 7, Section C, Page 605/606 or Page 620/621

- ▶ The State of Maryland's attorney general filed a counterclaim on January 13, 2014 on behalf of the University of Maryland against the Atlantic Coast Conference in the ACC's lawsuit in state district court in Greensboro, North Carolina, seeking damages of \$157 million (including punitive damages) in connection with the ACC's dispute with the University of Maryland over the University's move from the ACC to the Big Ten Conference. The ACC's suit was filed in late November 2012 against the University to recover a \$52 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 after it was announced that the Terrapins would move to the Big Ten beginning in 2014. The University filed a motion to dismiss this suit and then 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. All of these suits continue. Insert Chapter 7, Section C, Page 618 (relocation per Sean Richards in exemplar); though switching divisions is discussed in baseball context in Chapter 1, Section B, Page 28
- ▶ The NHL on August 5, 2013 completed the \$170 million sale of the Phoenix Coyotes from league ownership to an eleven-investor group named Ice Arizona, headed by George Gosbee and Anthony LeBlanc, thereby ending a tumultuous four-year saga that has been detailed every year in this report. Gosbee will be the board chair and governor for the Coyotes and LeBlanc will be the alternate chair and CEO. The new owners indicated that the Coyotes will remain in Arizona and play in Glendale at the Jobing.com Arena. The new owners had already completed a 15-year, \$225 million leasing agreement with the City of Glendale to keep the team playing in the arena. The NHL had bought the team in 2009 for \$140 million after successfully fending off efforts by the former owner to use a bankruptcy proceeding to sell to a new owner that wanted to relocate the team to Hamilton, Ontario. Insert Chapter 7, Section C, Page 629
- ▶ Major League Soccer announced on February 19, 2014 that it had purchased its Southern California franchise, Chivas, the league's worst performing franchise from just about every aspect, from owners Jorge Vergara and Angelica Fuentes. MLS will operate the club for the 2014 season but will be looking for a new ownership group to which it can sell the team at the first opportunity. The team will continue to be named Chivas during 2014, but it will be rebranded before the 2015 season. Insert Chapter 7, Section C, Page 629

- ▶ MLS's purchase of its Chivas franchise (see previous entry) was announced the same day that MLS also announced that a lawsuit brought against Chivas by two former assistant coaches had been settled on undisclosed terms. Former MLS Chivas youth coaches Daniel Calichman and Theodoros Chronopoulos had filed a lawsuit on May 29, 2013 in California state superior court in Los Angeles claiming that their termination as coaches in early 2013 by Chivas USA owner Jorge Vergara (and his wife Angelica Fuentes) constituted unlawful discrimination on the basis of national origin because the reason they were fired was that they are not Mexican or Latino or of such descent. The plaintiffs claim that after Jorge Vergara acquired ownership of the team in summer 2012, in a November 2012 meeting of all coaches and staff he made the statement that "[i]f you don't speak Spanish, you can go work for Galaxy unless you speak Chinese, which is not even a language." Plaintiffs also allege that after Vergara made this statement, numerous non-Latino staff and players either resigned or were replaced. Insert Chapter 7, Section C, Page 629 OR Chapter 1, Section C, Subsection 5a (discrimination), Page 80
- ▶ The NHL and Wayne Gretzky on December 3, 2013 reached an agreement that paid him approximately \$8 million to reimburse him for his personal losses incurred as a result of the Phoenix Coyotes bankruptcy in 2009. Gretzky had held a small ownership interest in the Coyotes, and was owed \$8 million as a creditor by the team, until then team owner Jerry Moyes filed for bankruptcy in 2009, which resulted in the league taking ownership of the team before selling it in 2013. Insert Chapter 7, Section C, Page 629
- ▶ A federal bankruptcy judge in Phoenix in early October 2013 dismissed the NHL's claims against Jerry Moyes for expenses the league incurred in litigating the bankruptcy proceeding that Moyes filed in 2009 and ultimately lost. After the NHL took over ownership of the team in 2010, it filed the claims with the bankruptcy court claiming that it was entitled to the reimbursements because Moyes' filing had breached his contract with the league as well as his fiduciary duty to the league. The court rejected the argument that Moyes' actions justified a reimbursement of the litigation expenses. Insert Chapter 7, Section C, Page 629
- ▶ The New York Giants and Jets together filed a lawsuit in New Jersey state superior court in Newark in summer 2013 against the New Jersey Sports and Exposition Authority and Triple Five, the company developing a shopping and entertainment complex called American Dream Meadowlands. This development, originally called Meadowlands Xanadu, is being built on long-vacant land adjacent to the \$1.5 billion stadium at the Meadowlands that is jointly owned by the two NFL teams. The teams sought an injunction to stop the development on the ground that it was a breach of the original contract between the teams and the NJSEA that provided for a shopping center. The teams did not object to the original plan for the development, but after the stadium was built an amended plan for the development provided for the addition of a 639,000 square-foot amusement and water park that the Giants and Jets claim would seriously interfere with their ability to handle their crowds on game days. The defendants filed a motion to dismiss relying on a finding by the NJSEA that the new

expanded development would not have an adverse effect on football game days, but on August 26, 2013 Judge Peter Doyne denied the motion in a 53-page opinion on the ground that it was the court, not the NJSEA, who had the authority to determine if the expanded development constituted a breach of the teams' contract with the NJSEA. The judge urged the parties to proceed to mediation to come up with what should be a resolvable disagreement – a compromise in which neither side gets all that it wants.

Then on March 11, 2014 the Giants and Jets announced a settlement in this lawsuit. The terms of the settlement were not immediately announced, but the deal will allow the project now to proceed, undoubtedly with provisions that the park would limit or shut down operations on days when NFL games, international soccer matches, or concerts are taking place in the Stadium, and possibly the payment of some compensation to the teams. Insert Chapter 7, Section C, Page 639/640

Section D. League-Wide Television Contracts.

- ▶ **Laumann v. NHL** and **Garber v. Office of the Commissioner of Baseball**, 907 F.Supp.2d 465 (2012) -- These are two companion, parallel (but not consolidated) cases filed in 2013 in the federal district court in Manhattan against the NHL & MLB, nine MLB and nine NHL clubs, numerous regional sports networks, DirecTV, and Comcast. The suits claim that the defendants violate sections 1 & 2 of the Sherman Antitrust Act by engaging in a three-tier horizontal and vertical conspiracy to divide territories: the clubs agree not to sell local TV rights outside their home territories and to sell exclusively “out-of-market” rights through the league; the RSNs then agree not to sell local rights outside of their territories; the retailers agree to carry out this scheme via their technological blackout of out-of-market games in return for the agreement of the clubs and RSNs not to make local games available on the internet to those who do not subscribe to one of the retailers. District judge Shria Scheindlein (who at one time decided and then was reversed in the *Maurice Clarett* case) on December 5, 2012 denied the defendants' Rule 12b(6) motion to dismiss, although some of the named plaintiffs, including Fernanda Garber herself, were dismissed because their claimed injuries were too remote. See 907 F.Supp.2d 465 (2012). Judge Scheindlein deferred a decision on class certification until after discovery concludes, which will be late in 2014. The judge and Magistrate Judge Michael Dolinger have issued various procedural rulings, but none since the dismissal motion was denied on any substantive issues. See 2013-1 Trade Cases ¶ 78,286 (March 6, 2013); 2013 WL 5310107 (Sept. 12, 2013); 2013-2 Trade Cases ¶ 78,598 (Nov. 25, 2013). Fact discovery ended in November 2013; expert discovery continued into 2014. The defendants have indicated that they will file a summary judgment motion on April 8, 2014 (the week after this document was finalized). Insert Chapter 7, Section D, Page 659

- ▶ The NBA and its four member teams that had been members of the ABA and joined the NBA in 1976 as part of the overall settlement of the ABA's *Robertson* litigation against the NBA (the now Brooklyn Nets, Indiana Pacers, Denver Nuggets, and San Antonio Spurs) announced on January 7, 2014 that they had reached a settlement with brothers Ozzie and Daniel Silna (now ages 80 and 69), the former owners of the old

ABA St. Louis Spirits by paying the Silnas a one-time \$500 million payment that will end (almost) perpetual annual payments of a share of the four former ABA teams' league television revenues. This will resolve a lawsuit filed in federal district court in Manhattan by the Silnas in which they sought a judicial declaration that the NBA and the four former ABA teams were in breach of the 1976 *Robertson* settlement agreement by not paying them what they claimed was their share of league revenues derived from broadcast sources that did not exist in 1976. As part of the overall *Robertson* settlement the four ABA teams were taken into the NBA (the Pacers, Nuggets, Spurs, and Nets) and the ABA's St. Louis Spirits and Kentucky Colonels were disbanded. As compensation for agreeing to disband, the owners of the Virginia Squires received nothing, John Y. Brown (owner of the Colonels) received a one-time payment of \$3 million, and the owners of the Spirits, the Silna brothers, were paid \$2.2 million and were to be paid in perpetuity one-seventh of the revenue received by the four former ABA teams every year from national league TV contracts. (Some have characterized this as the greatest deal in sports history, if not all of American business history.) Over the 38 years since, the Silna brothers have reaped a windfall of almost \$300 million, costing each of the four old ABA teams up to as much as \$5 million a year. As new types of broadcast revenue streams other than network TV contracts have come on line, the NBA has declined to include those new revenue streams in calculating the payments made to the Silnas. These new revenue sources include cable networks, international broadcasts, internet streaming, the NBA Network, and the NBA League Pass. The NBA has tried to buy out the Silnas for years, but negotiations had always stalled. So the Silnas filed their lawsuit in November 2011 (Technically, they asked the judge to reopen the old *Robertson* antitrust suit settlement agreement), and the NBA filed a motion to dismiss the petition on September 5, 2012, before federal district judge Loretta Preska (with the original *Robertson* case judge, Robert Carter, having retired), arguing that the intent of the 1976 settlement was to pay the Silna brothers only a percentage of the television revenue earned from national television broadcasts under over-the-air network league contracts, not all league television revenue from the other sources that did not exist in the 1970s. The \$500 million settlement, that will be financed through a private placement of notes by JP Morgan Chase and Merrill Lynch, now finally resolves the matter. However, the Silnas will continue also to receive some television money from the four former ABA teams through a partnership that is to be formed by them and the four teams, but the terms of the partnership allow the four teams to buy them out of that arrangement at some point in the future. Insert Chapter 7, Section D, Page 659 or Page 660/661

- ▶ **The Tennis Channel Inc. v. Comcast Communications LLC**, 717 F.3d 982 (DC Cir. 2013), cert denied, ___ US ___, 2014 WL 684090 (2014) – A panel of the DC Circuit ruled on May 28, 2013 that Comcast did not violate the FCC's program carriage rules by not carrying the Tennis Channel on the tier and under the terms and conditions sought by the Tennis Channel. The Tennis Channel has tried for years to be placed on Comcast's basic service package of channels that serves well over 21 million homes. Judge Stephen Williams wrote that it does not violate the law for a cable carrier to discriminate among networks in carriage arrangements if they do so for

financial instead of anticompetitive reasons. In so holding, the court reversed the December 2012 ruling of FCC administrative law judge Richard Sippel who had ordered Comcast to place the Tennis Channel on the same tier as it placed other sports channels it (or its subsidiary NBCUniversal) owned, like the Golf Channel and NBCSN. The full FCC upheld that ruling. Then on February 24, 2014, the U.S. Supreme Court denied the petition for a writ of certiorari by the Tennis Channel, putting an end to this lengthy litigation. (*This development also relates to the section below on Intellectual Property & Broadcasting.*) Insert Chapter 7, Section D, Page 679

CHAPTER Eight. Monopoly in Professional Sports.

CHAPTER Nine. Intercollegiate Sports: Due Process and Academic Integrity.

Section A. The Tarkanian Saga and Procedural Due Process.

- ▶ **The City Paper v. Tennessee Secondary School Athletic Association** – The Tennessee Court of Appeals in early May 2014 ruled that the records of the TSSAA, as a private entity that nonetheless functions as the “functional equivalent” of a state government agency and whose governing board is made up almost exclusively (17 of 18 board members) of public high school officials, are subject to the state’s Open Records Act. It therefore required that the TSSAA’s record relating to the alleged financial aid improprieties of Montgomery Bell Academy (a private school) had to be released to a now-defunct Nashville weekly newspaper that had requested the documents under the state Open Records law. Insert Chapter 9, Section A, Page 762

- ▶ In an unusual and unprecedented case, the Pennsylvania Interscholastic Athletic Association (PIAA) overturned a decision of the Western Pennsylvania Interscholastic Athletic League (WPIAL) that allowed Washington High School not to have to forfeit the first five games of the 2013 football season for using an ineligible player, which meant that Washington HS retained its 6-2 record and second place finish in the Class AA Interstate Conference and thus made it into the post-season playoffs. The problem arose when officials at Washington HS discovered that senior player Quorteze Levy, who had transferred in from another school for ninth grade, had repeated his freshman year (i.e., he had taken ninth grade at his previous school and then repeated it at Washington HS upon transferring). State rules only allow a student four years of athletic eligibility, which meant that Levy was technically not eligible during his senior year even though he had not played at his former school and thus had only played for three years. The school notified the WPIAL and applied for a hardship waiver. The WPIAL granted the waiver but ruled that it could not make the waiver retroactive, thus requiring Washington HS to have to forfeit the five games Levy had played in before the waiver was granted. Washington HS appealed that decision to the PIAA, which reversed the earlier ruling, unanimously ruling that the PIAA eligibility rule only allows waivers to be for full semesters, not partial semesters. Thus the PIAA backdated Levy’s waiver to the start of the fall semester, which meant that Washington did not have to forfeit the five

games in which levy played. It still had to forfeit one game for a different rule violation, but that did not knock it out of the playoffs. Insert Chapter 9, Section A, Page 763 (perhaps in discussion of TSSAA high school violations of rules) OR Chapter 9, Section C, Page 814/815 (academic transfer rules) OR Chapter 10, Section B, Page 867 (discussion of transfer regulations pertaining to NCAA, not high school)

- ▶ A notable case relating to student transfers involved Grady High School in Atlanta. The Georgia High School Association announced in early December 2013 that it was investigating allegations that as many as 20 members of the Grady Grey Knights (that finished with an 8-3 record in 2013) were recruited by Grady head football coach Ronnie Millen, Sr., and that the parents of these players had faked home addresses so the players could be enrolled at Grady. If the allegations prove to be true, Fulton County district attorney indicated that criminal fraud charges could be brought against the parents and/or staff members at Grady High School. Insert Chapter 9, Section A, Page 763 (perhaps in discussion of TSSAA high school violations of rules) or Chapter 9, Section C, Page 814/815 (academic transfer rules) or Chapter 10, Section B, Page 867 (discussion of transfer regulations pertaining to NCAA, not high school)

[Note: There appeared to be an uptick in the number of cases involving state high school association rules governing transferring players, with most states requiring that a player who transfers high schools must sit out a year of competition unless the player can establish the application of one of various exceptions that vary from state to state. The flip side of these rules is that a high school found to have recruited a player enrolled at another school will be sanctioned.] Insert Chapter 9, Section A, Page 783 OR Chapter 9, Section C, Page 814/815 OR Chapter 10, Section B, Page 867

- ▶ After an almost four-year highly watched investigation of the University of Miami's athletic program that saw the NCAA embarrassed in 2012 by its investigative tactics (namely paying the lawyer of UM athletic booster Nevin Shapiro, who was under criminal indictment and later convicted for running a Ponzi scheme, to provide information related to her client's involvement with student-athletes), the NCAA Infractions Committee on October 21, 2013 issued a 102-page report against the University finding numerous major infractions of NCAA rules, including the dreaded lack of institutional control for its failure to monitor and control a major booster, the football and men's basketball coaching staffs, and student-athletes. The Committee found that Shapiro had provided hundreds of thousands of dollars (most likely mostly stolen from clients) to at least 72 Miami athletes and recruits from 2002 to 2010. The penalty imposed was three-years of probation and the loss of nine football scholarships over the upcoming three years, which came on top of the self-imposed penalties Miami had placed on itself that included a ban on playing in bowl games in 2011 and 2012. University president Donna Shalala, who had threatened to challenge in court any substantial penalties on top of the self-imposed bowl ban, said the University would accept the penalty and put an end to a "challenging chapter" in the school's history. Also penalized by the NCAA Report for other infractions were once

Miami head basketball coach Frank Haith (now the head coach at the University of Missouri) who was suspended for the first five games of the 2013 season, and former UM assistant football coaches Clint Hurtt (now at Louisville) and Aubrey Hill (now retired) who got two-year show cause penalties. Insert Chapter 9, Section A, Page 772 or Page 776

► The Sandusky-Penn State Saga:

- The criminal defendants charged in connection with an alleged cover-up of Jerry Sandusky's child sexual abuse crimes all pleaded not guilty in late July 2013. Then after hearing two days of testimony presented by the prosecutor's office in a preliminary hearing, magisterial judge William Wenner ruled that there was sufficient evidence to proceed to trial. The 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 2012 against former Penn State president Graham Spanier. Insert Chapter 9, Section A, Page 776 (NCAA sanctions discussion) or Page 772 (scandals, but largely involving payments made to athletes)

• **Paterno v. NCAA** – The wife and children of former Penn State football coach Joe Paterno, Paterno's estate, along with five members of the Penn State board of trustees, filed a lawsuit on May 29, 2013 against the NCAA in state district court in Bellefonte, PA, claiming that by rushing to judgment and falsely publicly accusing Joe Paterno of covering up Jerry Sandusky's criminal behavior, the NCAA and its president Mark Emmert mishandled a criminal matter, exceeded the lawful authority of the NCAA, tortiously interfered with contractual relationships enjoyed by the Paterno family and Penn State, and defamed the Paterno name. The lawsuit is seeking an order setting aside the consent agreement between the NCAA and Penn State, which would lift many of the sanctions imposed by the NCAA, especially the removal of 112 wins the Penn State team earned while Paterno was the head coach, a sanction that posthumously stripped away Paterno's distinction of being the Division IA head coach with the most career victories. This suit followed the family's release on February 11, 2013 of a lengthy report that they had 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 commissioned by the board of trustees implicating Coach Paterno in the cover-up of Sandusky's crimes was in many respects factually wrong, speculative, and fundamentally flawed.

Argument was heard by Senior Judge John Leete in late October 2013 on the NCAA's motion to dismiss on the grounds that none of the plaintiffs has standing to raise the claims (e.g., arguing that the vacated wins did not belong to Paterno, they belonged to Penn State during the time that Paterno was an employee of the University), and on the ground that Penn State is an indispensable party that was

not joined. Judge Leete issued a 25-page decision on January 7, 2014, denying the motion to dismiss some of the claims (e.g., civil conspiracy and commercial disparagement), but he did dismiss the interference with contractual relations claim on the ground that an indispensable party, Penn State, had not been joined as a defendant. However, the judge allowed the Paternos to file an amended complaint adding the University as a party. Insert Chapter 9, Section A, Page 776 or Page 772

- **Corbett v. NCAA** – The antitrust lawsuit filed against the NCAA on January 2, 2013 by Pennsylvania governor Tom Corbett using the state’s *in parens patriae* jurisdiction, claiming that the plethora of severe sanctions imposed by the NCAA and its president Mark Emmert in 2012 in the wake of the Sandusky child sexual abuse scandal constituted a violation of sections 1 and 2 of the Sherman Antitrust Act, was dismissed on June 6, 2013 by federal district judge Yvette Kane in Harrisburg. Judge Kane ruled that simply because Penn State will be able to offer fewer scholarships over a period of four years does not plausible support the claim that fewer scholarships at Penn State will result in a market-wide anticompetitive effect. Insert Chapter 9, Section A, Page 776 or Page 772
- The Commonwealth Court of Pennsylvania on April 8, 2014 voted 6-1 to deny a motion filed by the NCAA to dismiss a lawsuit filed by Pennsylvania state senator Jake Corman and state treasurer Rob McCord in state court in Harrisburg seeking an order to require the NCAA to spend the \$60 million in fines collected from Penn State on efforts to aid child abuse victims in the State of Pennsylvania. The plaintiffs contend that the moneys paid in fines to the NCAA are state funds legally under the oversight of the state Senate Appropriations Committee that Corman chairs, and that the NCAA’s refusal to comply with the Senate’s desire to have the money spent entirely within the State of Pennsylvania violates Pennsylvania state law, particularly a statute known as the Endowment Act passed in February 2013 that provides that the \$60 million in fines 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 NCAA argued in its motion to dismiss that requiring the money to be spent entirely within Pennsylvania violates the July 2012 consent decree that Penn State signed when it accepted the NCAA’s penalties and that because it is “special legislation” directed solely against the NCAA it violates the US and Pennsylvania constitutions. The Commonwealth Court, with Judge Anne Covey writing for the 6-1 majority, found (a) that the Endowment Act was not unconstitutional special legislation because it might apply in the future to any of the state’s publically supported colleges if they entered into an agreement requiring them to pay out \$10 million or more, and (b) that even if the agreement were binding on the state, the consent decree only provided for how the money was to be spent (i.e., on aiding child abuse victims), not where it would be spent (i.e., in Pennsylvania as opposed to nationwide). Thus, the Endowment Act is neither unconstitutional nor inconsistent with the consent decree, and the suit requiring the money to be spent

- in accordance with the Endowment Act can proceed. But the court also denied Corman's and McCord's motion for summary judgment that would have required the NCAA to comply with the Endowment Act, finding that there was still disputed questions of fact that needed to be resolved before any final judgment could be entered. The court in its opinion also took the extraordinary step of *sua sponte* adding Penn State as an essential party to the litigation. Insert Chapter 9, Section A, Page 776 or Page 772
- The lawsuit filed by the NCAA the day after the Endowment Act was signed into law, February 20, 2013, against the State of Pennsylvania, Governor Tom Corbett, and several other Pennsylvania state officials 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, is still pending. Insert Chapter 9, Section A, Page 776 or Page 772
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- Of the 32 different lawsuits or claims filed against Penn State by those claiming to be victims of Jerry Sandusky's sexual abuse, 26 were settled in August and September for a total of \$59.7 million that will be paid by the University out of revenues from interest on university loans and insurance, not from tuition, taxpayer subsidies, or donations to the university. Claims by victims identified at Sandusky's trial as Victims 2 (who was Sandusky's adopted son), 3,5, 7 and 10 and two others not identified during that trial were settled in late August, and another 19 of the claims were settled in October. The overall settlements were announced on October 28, 2013. All 26 of these claimants were required to release all other claims arising from the Sandusky matter, and the agreements are subject to a confidentiality clause. Six claims remain. The university said in announcing the settlements that some of the remaining six claims have no merit and will not be settled, while negotiations continue on some others. Insert Chapter 9, Section A, Page 776 or Page 772
 - The NCAA announced on September 24, 2013 that it was reducing one of the penalties assessed against Penn State in the wake of the Sandusky scandal. In addition to the \$60 million fine, the post-season football ban for 2012 through 2015, and the vacating of all Penn State's football wins from 1998 through 2011, the NCAA originally reduced the number of scholarships the football program could give from 2012 through 2015 to 15 a year and no more than a total of 65. But the NCAA on September 24 gradually reinstated some of these scholarships so that it can give 20 in 2014 and 2015, and 25 thereafter, so that the total number of players on scholarship can be 75 in 2014, 80 in 2015, and a full allotment of 85 in 2016 and beyond. President Mark Emmert stated that the reason the scholarships were being restored was not because the original reductions were too sever, but because of strong good-faith efforts by Penn State to change the football obsessed culture at the university and to adopt many of the 119 recommendation in Former FBI director Louis Freeh's report to the board of

trustees in the wake of the Sandusky revelations. Insert Chapter 9, Section A, Page 776 or Page 771

Section B. Eligibility Requirements.

- ▶ A grand jury in Orange County North Carolina in the last week of December 2013 returned an indictment for fraud against University of North Carolina professor Julius Nyang'oro, an internationally respected scholar and longtime chair of the African and Afro-American Studies Department. The indictment arises after two reports on the activities of the African and Afro-American Studies Department, one internal and one conducted by former NC governor James Martin, found that numerous courses offered by the department enrolled large numbers of football and basketball student-athletes who usually got high grades despite doing little or nothing in the courses. In particular, Professor Nyang'oro's course, AFAM 280: Blacks in North Carolina, in the summer of 2011 enrolled nineteen students, eighteen were current members of the football team and the other student was a former football player, all steered to the course by athletic department academic advisers. The reports revealed that this course never met and that the papers on which the students were purportedly graded were never written. This example was consistent with what the reports found was widespread academic fraud in dozens of courses, and with at least 560 suspicious unauthorized grade changes made with forged faculty signatures. The indictment against Professor Nyang'oro, who chaired the department for 20 years, states that he "unlawfully, willfully and feloniously [accepted payment for teaching his courses] with the intent to cheat and defraud" the university, a virtually unheard of charge. Also named in the indictment as an unindicted participant in the scheme was the manager of the department, Deborah Crowder, who retired in 2009 after 30-years of service in that position. Insert Chapter 9, Section B, Page 777 (maintaining academic eligibility) or Chapter 9, Section C, Page 842 (denying educational opportunities to athletes)

- ▶ On April 8, 2014 the Student Athletes Human Rights Project, a Durham, NC, based student-athletes rights organization established in 2012 by Emmett Gill, an assistant social work professor at North Carolina Central University, filed a federal Title IX complaint with the Office of Civil Rights of the Education Department against the University of North Carolina claiming that the University denied educational opportunities to male African-American athletes on the football and men's basketball teams, and thus unlawfully discriminated against them, by shuttling them into phony classes in the Department of African-American Studies that never met and required virtually no work yet generally handed out inflated grades (see previous entry). The complaint alleges that male student athletes on the two revenue-generating teams are denied a quality education and are not provided the same treatment and quality of services, including course advising, as female student-athletes. Insert Chapter 9, Section B, Page 777 (maintaining academic eligibility) or Subsection 1, Page 785 (racial issues and academic eligibility) or Chapter 9, Section C, Page 842 (denying educational opps to athletes)

Section B. Eligibility Requirements. Subsection 1. Admission Standards.

- ▶ Former Rutgers University basketball player from 2011-13 Derrick Randall (who transferred to the University of Pittsburgh in 2013) on December 9, 2013 filed a lawsuit in federal district court in Trenton, NJ, against Rutgers University and former Rutgers men's basketball coach Mike Rice, former AD Tim Perneti, former assistant coach James Martelli, Rutgers president Robert Barchi, Rutgers CFO for intercollegiate athletics Jane Purcaro, and Rutgers Board of Governors chair Mark Hershhorn claiming that the defendants violated their fiduciary duty to him, directly or indirectly committed assault and battery on him, and committed intentional infliction of emotional distress. Randall alleges that as a learning disabled student he was unlawfully placed into a hostile environment and subjected to physical, mental and emotional abuse at the hands of Rice and Martelli that caused him to suffer severe emotional trauma, and that the other defendants knew of this illegal behavior and allowed it to continue. The complaint asserts that the ball-throwing, hate-spewing antics of Rice caused Randall to lose confidence in himself and that Rice's conduct included "hurling basketballs at [Randall's] head and legs and hitting, grabbing, striking and shoving him . . . [along with] violent screaming, cursing and other humiliating tactics, including the use of homophobic slurs and other shockingly derogatory and discriminatory name-calling." This suit was further fallout from the scandal that engulfed Rutgers basketball during the 1012-13 season after a video of Coach Rice surfaced showing him shoving, kicking, and throwing a basketball at several players while berating them in harsh terms. The episode resulted in Rice, Perneti, and Martelli all resigning. (See last year's Recent Developments.) learning disability is discussed in Chapter 9, Section B, Subsection 1, Page 796, but applies to eligibility to play, not discrimination or heinous treatment by others

- ▶ The National Association for the Deaf in September 2013 filed a lawsuit against the University of Maryland at College Park in federal district court in Maryland claiming that the University's failure to provide close captioning of announcements and commentary made over the public address system at both football games at Byrd Center and all events at Comcast Center violates Title II of the Americans With Disabilities Act and the Rehabilitation Act of 1973. This suit joins a similar suit filed in January 2013 by the Arizona Attorney General's Office in federal district court in Phoenix against the Arizona Cardinals for its failure to provide such captioning at University of Phoenix Stadium in Glendale. These suits follow similar suits brought against Ohio State University (*Sabino v. Ohio State University*) and the Washington Redskins (*Feldman v. Pro Football Inc.*). In *Sabino* the parties reached a settlement in October 2010 that included a provision under which Ohio State now provides, *inter alia*, such closed captioning at all events at Ohio Stadium. In *Feldman*, the plaintiff obtained an injunction requiring such closed captioning on the stadium video boards (instead of on hand held devices the team did provide) of all aural programming including music lyrics, and the injunction was upheld by the Fourth Circuit. It seems likely that plaintiffs will obtain what they seek in the two existing cases, and facility consultants today advise all facility operators to provide such closed captioning for all official aural programming. Insert Chapter 9, Section B, Subsection 1, Page 796

(ADA expanded to cover learning disabilities) or Page 812/813 (discussing public accommodations) or Chapter 13, Section E, 1143/1144 (although not a player with a disability, still related to disabilities)

Section B. Eligibility Requirements. Subsection 3. Age and Experience.

- ▶ **Indiana High School Athletic Ass'n v. Schafer**, 1 NE3d 164 (Ind. Ct. App. 2013)(case #37A03-1303-CP-86) – A Jasper County trial court order to pay over \$86,000 in litigation costs, including attorneys' fees, against the Indiana High School Athletic Association was affirmed by the Indiana Court of Appeals in a case that it said involved the IHSAA continuing to try to enforce eligibility rules that have repeatedly been found by the courts to be arbitrary and capricious. Senior judge (and former Indiana Supreme Court Chief Justice) Randall Shepard wrote that “[a] trial court may award attorney’s fees when a party continues to litigate the case after the party’s claims have become frivolous, unreasonable, or groundless,” which the court said clearly applied in the case in which the IHSAA had ruled a student, Shane Schafer, ineligible to compete in basketball for Andrean High School because he was too old after he had been forced to withdraw from school because of a medical condition and then to repeat a grade when he re-enrolled. The appeals court found that the IHSAA had previously lost similar cases and that it was thus reasonable for the trial judge to conclude that the ISHAA’s position in the current case was unreasonable. Insert Chapter 9, Section B, Subsection 3, Page 813 (age eligibility)
- ▶ Congressman Tony Cardenas (D-CA) filed HR 3545 in early November 2013, called the Collegiate Student Athlete Protection Act, that inter alia would require any institution of higher learning that generates more than \$10 million annually from media payments for athletic programming (a) to guarantee that any student receiving an athletic scholarship will be guaranteed to receive that level of assistance for five years or until he/she graduates, whichever comes first; (b) to provide adequate health insurance for all student-athletes so that they would be assured that all expenses related to the treatment and recovery of injuries suffered while performing their sport would be covered; (c) to provide a student-athlete facing disciplinary action to be granted a formal administrative hearing and at least one appeal; (d) to grant or deny a request to transfer within seven days of submission; (e) to provide annual baseline concussion testing for each student-athlete participating in a contact sport; and (f) to provide educational workshops that provide student-athletes with information about the dangers of concussions, financial aid and debt management, budgeting, time management skills, academic resources available, and the school’s responsibilities and obligations with respect to the matters covered by the Act. Insert Chapter 9 or Chapter 10, but not sure where

CHAPTER Ten. Intercollegiate Sports: Commercialism and Amateurism.

Section A. NCAA Eligibility Rules. Subsection 1. Pay Outside College.

- ▶ An NCAA investigation was triggered in early August 2013 that threatened to derail the college football careers of two of the most highly touted and talented players in the country, Texas A&M's Heisman-winning QB Johnny Manziel and the University of South Carolina's DE Jadeveon Clowney. The investigation was initially caused by a report aired on ESPN's *Outside The Lines* autograph broker Drew Tieman had told ESPN that Manziel had been paid to sign several items that were then offered for resale, Manziel as much as a "five-figure fee." Two other witnesses said they saw Manziel signing hundreds of items but had no knowledge of whether he received any money for doing so. Subsequently, rumors surfaced in the media that Clowney too had been paid to sign memorabilia items for resale. A large number of college players' autographs are on merchandise items that are offered for sale regularly on eBay, but absent evidence to the contrary it is assumed that the players were not compensated for autographing the items. But the ESPN report was that Manziel, and later Clowney, had been paid for their autographs. However, apparently, Tieman and any other possible witnesses were unwilling to talk to NCAA investigators. In the end, the NCAA could not find that either Manziel or Clowney received any compensation for their autographs, although Manziel was found to have violated NCAA rules by allowing himself to be used for commercial purposes even though he personally did not profit from it. As a result, Manziel was suspended for the first half of the Aggies first game of the 2013 season, a game against Rice that the Aggies won easily. Insert Chapter 10, Section A, Subsection 1, Page 850 (pay outside college) or Page 852 (athletes earning \$ themselves)

Section C. Antitrust Scrutiny of NCAA Rules. Subsection 3. Athletes Market.

- ▶ Rock v. NCAA – One month after the Seventh Circuit affirmed the dismissal of an antitrust suit brought in Indianapolis against the NCAA claiming that the 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, see Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012), a similar lawsuit challenging the same "one year at a time scholarship" rule as a section 1 antitrust violation was filed in July 2012 in the same Indianapolis federal district court by former Gardner-Webb University quarterback John Rock who alleged that when he committed to Gardner-Webb he was assured that he would have his scholarship for four years but lost his scholarship after two years because of a coaching change. The same district judge as in Agnew, Judge Jane Magnus-Stinson, promptly granted the NCAA's motion to dismiss on the same ground on which she had dismissed *Agnew* – that the plaintiff had failed to establish a relevant market that he had claimed was the market for all college student-athletes. However, Judge Magnus-Stinson, citing language in the Seventh Circuit's affirmance of the *Agnew* dismissal, on May 24, 2013, granted Rock permission to amend his complaint to assert the much narrower relevant market specifically limited to Division I-A college football players.

_____ Insert Chapter 10, Section C, Subsection 3, Page 919 (limitation of athletic scholarships)

- ▶ **Alston v. NCAA** (N.D.Cal.) – Former Univ. of West Virginia football player Shawne Alston on March 5, 2014 filed a class action antitrust suit in federal district court in San Francisco against the NCAA and the five DI so-called “power conferences” claiming that NCAA rules barring DI athletic programs from providing student-athletes with financial aid covering the “full cost of attendance” constitutes an agreement among members schools to limit the compensation of the student-athletes in violation of section 1 of the Sherman Act. Alston claims to represent a class consisting of all current and former DI football players in the five power conferences since February 2010. The suit asks for damages for all class members equal to the difference between what they received and the full cost of attendance (trebled under section 4 of the Clayton Act). Alston was a running back at WVU from 2009-12. Alston is represented by attorneys Steve Berman and Bruce Simon who also represent some plaintiffs in the consolidated cases under the O’Bannon case. Insert Chapter 10, Section C, Subsection 3, Page 919 (athletic scholarship limitations)

- ▶ **Jenkins v. NCAA** (D.N.J.) – Four named plaintiffs represented by Winston & Strawn lawyer Jeffrey Kessler on March 17, 2014 filed a class action antitrust suit in federal district court in Newark, NJ, against the NCAA and the five so-called “power conferences” in Division I (but not against any specific schools) claiming that the NCAA rules limiting DI schools to providing athletic aid covering tuition, fees, books, room, and board manifest a “cartel” that unlawfully fixes compensation in the student-athlete labor market in violation of section 1 of the Sherman Act. The four named plaintiffs are current Clemson football DB Martin Jenkins and former California OL Bill Tyndall, UTEP TE Kevin Perry, and Rutgers basketball F J.J. Moore who claim to represent the class of current and former DI-A football and DI men’s basketball players. The suit asks for damages only for the individual plaintiffs and only an injunction on behalf of the class. _____ Insert Chapter 10, Section C, Subsection 3, Page 919 (athletic scholarship limitations)

- ▶ **The Player Publicity Rights Litigation (O’Bannon et al.):**

• **In re NCAA Student-Athlete Name & Likeness Licensing Litigation (initially O’Bannon v. NCAA)** (ND Cal. 2013) – This is the putative class action antitrust suit originally filed by a group of former NCAA DI-A football and DI men’s basketball players, led by former UCLA men’s basketball star Ed O’Bannon and including former NBA greats Bill Russell and Oscar Robertson, against the NCAA, video game developer Electronic Arts, and the NCAA’s licensing agent Collegiate Licensing Inc., claiming that the exclusive licensing of the former athletes’ likenesses in various commercial forms (originally focusing on video games) monopolized and restrained trade in the market in which college athletes’ publicity rights are licensed in violation of sections 1 & 2 of the Sherman Act. On October 25, 2013 district judge Claudia Wilken in Oakland, CA, denied defendant NCAA’s motion to dismiss for failure to state a claim. In so doing, Judge Wilken rejected the NCAA’s arguments that

plaintiffs had failed to identify a cognizable relevant market and that the use of plaintiffs' likenesses in the targeted ways were protected by the First Amendment.

Then on February 20, 2014 Judge Wilken, after a two-hour oral argument, denied both parties motions for summary judgment and scheduled a jury trial to begin on June 9, 2014. A week later Judge Wilken ordered the parties to enter into settlement negotiations supervised by Magistrate Judge Nathanael Cousins acting as mediator. On April 11, 2014 Judge Wilken issued a number of substantive and procedural rulings, arguably most important among them (a) denying an NCAA motion to dismiss some claims by holding that the First Amendment does not guarantee entities unlimited rights to broadcast college football and basketball games or use player images in video games, (b) denying the NCAA the right to use as one of its procompetitive arguments at trial that its amateurism rules enable increased support for many student-athletes in non-revenue producing sports, and (c) reiterating her earlier ruling that the plaintiffs may not collectively sue as a class for damages. In late April the NCAA filed a motion asking the judge either to sever the claims relating to whether the plaintiffs should be compensated for the use of their images in video games from the other claims and/or then to postpone the trial on these claims related to the video games until the judge has ruled on the settlement reached between the plaintiffs and Electronic Arts (see below) and until the Supreme Court decides what to do with the NCAA's petition for cert. that asks the Court to reverse Judge Wilken's decision and find that its use of the images in video games and game broadcasts is protected by the First Amendment. _____ Insert Chapter 10, Section C, Subsection 3, Page 919/920

[**Note: A significant development in this case occurred during the last week of July 2013 when the complaint was amended to, inter alia, add six current student-athletes as plaintiffs, Arizona LB Jake Fisher, Arizona K Jake Smith, Clemson DB Darius Robinson, Vanderbilt LB Chase Garnham, Minnesota TE Moses Alipate, and Minnesota WR Victor Keise. This development greatly increased the stakes in the litigation by (a) adding a claim challenging the real time broadcasting of college games that inherently uses the images of current student-athletes who are playing in the game, which is a huge revenue source for college athletic programs, and (b) conceivably could undermine the fundamental definition of "amateurism" that characterizes the NCAA's eligibility structure.] Insert Chapter 10, Section C, Subsection 3, Page 919/920

- **In re NCAA Student-Athlete Name & Likeness Licensing Litigation (Keller v. Electronic Arts)**, 724 F.3d 1268 (9th Cir. 2013) – This is the putative class action filed in federal district court in Oakland, CA, by a group of former college football players, led by former Arizona State and Nebraska QB Sam Keller, against Electronic Arts, the NCAA, and Collegiate Licensing Inc., claiming that the licensing and use of the likenesses of the plaintiffs in EA's video games (by using digital images of players who resemble closely the plaintiffs) violated their California state-law publicity rights. The case was then consolidated with the *O'Bannon* case noted above, both of which were filed in the Northern District of California, because even though one involved federal antitrust claims and the other state law publicity rights claims they

both arise from the same basic set of alleged facts. A panel of the Ninth Circuit US Court of Appeals, by a 2-1 vote, on July 31, 2013 affirmed district Judge Claudia Wilken's 2010 denial of the defendants' motion to dismiss the complaint on the ground that it was barred by California's procedural bar on suits characterized as "strategic lawsuits against public participation" (SLAPP). In so ruling, the panel majority held that because the challenged use of plaintiffs' likenesses was not transformative, it was not protected by the First Amendment and thus the suit did not fall under California's anti-SLAPP statute. Insert Chapter 10, Section C, Subsection 3, Page 919/920

- **Hart v. Electronic Arts**, 717 F.3d 141 (3d Cir. 2013) – This is the putative class action filed in federal district court in New Jersey by a group of former college football players, led by former Rutgers QB Ryan Hart, against Electronic Arts claiming that the licensing and use of the likenesses of the plaintiffs in EA's video games (by using digital images of players who resemble closely the plaintiffs) violated their New Jersey state-law publicity rights. A panel of the Third Circuit US Court of Appeals in Philadelphia, by a 2-1 vote, on May 21, 2013 reversed the decision by district judge Freda Wolfson to dismiss the complaint on summary judgment on the ground that the use of plaintiffs' likenesses was protected speech under the First Amendment. See 808 F.Supp.2d 757. In reversing the dismissal and reinstating and remanding the case, the panel majority found that because the use of plaintiffs' likenesses was not transformative, it was not protected by the First Amendment. Insert Chapter 10, Section C, Subsection 3, Page 919/920

- **In re NCAA Student-Athlete Name & Likeness Licensing Litigation & Hart v. Electronic Arts** – Electronic Arts and Collegiate Licensing announced on September 26, 2013 that they had reached a comprehensive settlement agreement with all of the plaintiffs in the *O'Bannon*, *Keller*, and *Hart* litigations (see above) that resulted in the dismissal of the *Keller* and *Hart* cases and leaves the NCAA as the sole defendant in the *O'Bannon* case. The NCAA's general counsel Donald Remy immediately indicated that the NCAA would not settle the *O'Bannon* case and would fight the claims all the way to the US Supreme Court if necessary. The terms of the settlement were not announced, but subsequent reports were that it will result in the payment of \$40 million into a fund that will be distributed to thousands of former and current student-athletes, with one plaintiffs attorney estimating that as many as 100,000 athletes may be eligible for some compensation from the settlement pool in some amount.

If current student athletes receive compensation from this fund, it will apparently not violate the NCAA's "extra benefits" rules prohibiting student-athletes from receiving compensation as a result of their athletic skills because of an NCAA ruling a year ago allowing Texas A&M QB Johnny Manziel to receive a damages settlement payment in a case he had filed against a T-shirt manufacturer that had made and sold T-shirts with the words "Johnny Football" on the front, which Manziel claimed infringed a registered trademark that he owned. The NCAA ruled that student-athletes may receive damages settlements against infringers of their IP rights provided the infringer is not a school booster essentially using infringement and lawsuit

settlement as a ruse to funnel money to the athlete. Insert Chapter 10, Section C, Subsection 3, Page 919/920

- The U.S. Supreme Court on January 13, 2014 denied an appeal by the NCAA to intervene in the *Keller* case for the purpose of continuing to pursue the petition for a writ of certiorari to the Court from the 9th Circuit's decision. Because of the settlement noted in the previous entry, Electronic Arts and Collegiate Licensing had moved to dismiss the petition for certiorari in the case, but the NCAA wanted to be allowed to continue with the appeal in order to protect what it regarded as important First Amendment issues and to prevent the settlement from possibly increasing the NCAA's potential damages in the *Keller*, *Hart*, *O'Bannon*, and similar cases. Insert Chapter 10, Section C, Subsection 3, Page 919/920
- NCAA v. Electronic Arts & Collegiate Licensing Co.** – The NCAA filed a lawsuit on November 4, 2013 in Fulton County (Georgia) superior court against Electronic Arts and Collegiate Licensing Co. claiming that the two defendants breached their contracts with the NCAA and violated their fiduciary duty to the NCAA. The claims are that EA breached its contract with the NCAA by failing to abide by its obligation not to use digital athlete images in its football and basketball video games that resembled specific current or former student-athletes, and that CLC breached its contract with the NCAA by failing to supervise EA adequately. The NCAA not only asked for a judgment that would require EA and CLC to indemnify the NCAA for any damages it incurs as a result of the *Hart*, *Keller*, and *O'Bannon* lawsuits, it also sought to prevent the consummation of the settlement agreement between the defendants and plaintiffs in those lawsuits (see previous entry). The suit is the byproduct from EA's and CLC's settlement of those three litigations, which left the NCAA as the sole remaining defendant fearing that it might be left holding the bag on the total liability that might be found in those cases. The rift between the NCAA and EA began to reveal itself in July 2013 when the NCAA informed EA that it (the NCAA) was ending its licensing agreement and denying EA the authority to use the NCAA's name and logos in its video games. Insert Chapter 10, Section C, Subsection 3, Page 919/920
- Lightborne v. Printroom Inc.** – Another putative class action lawsuit arising from the same licensing issues was filed in federal district court in Oakland, CA, in June 2013 on behalf of a group of former DI-A football players, led by former Texas-El Paso football player Yahchaaroah Lightbourne, against Printroom Inc. (aka Professional Photo Storefronts, Inc.) and Brand Affinity Technologies, Inc., claiming that the defendants' partnership with CBS Interactive College Sports in creating and managing the web sites of over 100 NCAA DI athletic programs unlawfully conspires with the college athletic programs to use the images of the plaintiffs on their web sites without compensation in violation of their state law publicity rights. The lawyer filing this case is Steve Berman who also represented the plaintiffs in the *Keller* lawsuit. Berman indicated at the time this case was filed that the NCAA and CBS might later be named as co-defendants but they were not in the initial complaint. The case was assigned to district judge James Selna, not Claudia Wilken who was

assigned the consolidated *O'Bannon* and *Keller* cases. Insert Chapter 10, Section C, Subsection 3, Page 919/920

- **In re NCAA Student-Athlete Name & Likeness Licensing Litigation (Brown v. Electronic Arts)**, 724 F.3d 1268 (9th Cir. 2013) – Yet another lawsuit involving licensing issues was filed in federal district court in Oakland, CA, by Pro Football HOFer Jim Brown against Electronic Arts claiming that the use of his likeness by Electronic Arts in video games (by using digital images of a player who resembles him closely) violated the federal Lanham Act by misleading consumers into believing that he had endorsed the video games. The Ninth Circuit affirmed district judge Wilken's dismissal of this claim in the same decision that allowed the *Keller* case to proceed. Insert Chapter 10, Section C, Subsection 3, Page 919/920

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- ▶ NLRB Chicago Regional Director Peter Sung Ohr on March 25, 2014 issued a ruling that scholarship holding members of the Northwestern University football team were employees of the University and thus eligible to hold a certification election to determine if a majority of the members of the bargaining unit would elect to be represented by a union. This development began when former Northwestern University quarterback Kain Colter and college athlete advocate Ramogi Huma in January 2014 announced the formation of the National College Athletes Players Association (the NCAPA), which was financially backed by the United Steelworkers Union. Then on January 28, 2014, an undisclosed number of current Northwestern University football players filed a petition with the National Labor Relations Board's Chicago Regional Office, seeking to have the NCAPA recognized as the certified collective bargaining representative of the Northwestern football players. Northwestern Univ., the Big-Ten Conference, and the NCAA all immediately indicated their opposition to the petition on the ground that the players were not eligible under the NLRA to be represented by a union because they were not employees, but rather college students engaging in an extracurricular activity. A hearing was held on the petition in late-February and early-March before NLRB hearing examiner Joyce Hofstra and the parties submitted their briefs to Regional Director Peter Sung Ohr on March 11, 2014. Two weeks later Ohr ruled in favor of the petitioning players after finding that they were indeed employees because, inter alia, they were compensated, performed services for the University, and were under the control of supervisors (i.e., coaches) employed by the University. The certification election by the Northwestern scholarship football players was held on April 25, 2014, but the ballots were not counted and were impounded pending action by the full NLRB that had announced on April 24, the day before the election, that it would hear Northwestern's appeal from the Regional Director's decision. _____ Insert Chapter 10, Section C, Subsection 3, Page 921 (athletic scholarship recipients as employees and NLRA)
 - ▶ The NCAA's DI Board of Directors on April 24, 2014 tentatively approved a rough outline of proposed changes to the governance structure of Division I and changed rules to loosen amateurism restrictions. Under the new governance structure, (a) the five "highest-resourced" conferences (the SEC, Big 10, ACC, Big 12, and Pac 12)

would be granted autonomy with respect to rules on various specific matters affecting the interests of student-athletes such as financial aid, providing insurance, academic support, and other types of supplemental support, and (b) the DI board of directors membership would be expanded to include the chair of the DI student-athlete advisory board, the chair of a new advisory group that would always be an athletic director, the most senior member of the DI Faculty Athletic Representatives Association, and a senior women's administrator. After getting feedback, the permanent restructuring proposal is to be voted on by the board of directors in August 2014. The rules changes eliminated limits on the providing of food to student-athletes and added a sixth year to the period S-As have to complete their eligibility if they transfer and have to sit out a year. Insert Chapter 10, Section C, Subsection 3, Page 920 (scholarship limitations) OR Chapter 9, Section B, Page 795 (discussing reform of NCAA)

CHAPTER Eleven. Intercollegiate Sports: Gender Equality.

Section C. Resources.

- ▶ Mark Rossmiller, the parent of a female student at a college in California, filed a complaint with the U.S. Department of Justice in late April 2014 asking the Department to take appropriate action against the Department of Education's Office of Civil Rights that Rossmiller says has refused to do anything to correct gross violations of Title IX's three-pronged test for athletic participation opportunity compliance of which the OCR has been aware of for years. Rossmiller asserts in the complaint that the OCR has been aware of irrefutable evidence that he and others have provided of Title IX violations at numerous California colleges but that it has consistently declined to take any action asserting that the schools met the third prong of the test on the grounds that the schools show that the interest and abilities of women were being fully and effectively accommodated. Critics of the OCR's enforcement activity argue that when it receives so-called "mass complaints" brought against a large number of schools, it has a tendency to dismiss them because of the difficulty of investigating so many schools at once. The issue will now be investigated by the Civil Rights Division of the Justice Department. Insert Chapter 11, Section C, Page 963

Section E. Access.

- ▶ **Beattie v. Line Mountain School District**, [unpublished](C.D. Pa. 2014) -- Federal district judge Matthew Brann in Williamsport, PA, on January 13, 2014 ruled that the Line Mountain School District was required by Title IX of the Education Amendments of 1976 to allow a girl, Audriana Beattie, to be a member of the previously all-boys wrestling team at her middle school. Audriana's parents, Brian and Angie Beattie of Herdon, PA, had filed the complaint on behalf of their daughter claiming that the school's refusal to allow her to participate on the wrestling team, when there was no girls wrestling team, was an unlawful discrimination against her on the basis of her gender. The judge agreed, noting that while the school district

argued that there were psychological, physical, and moral risks for girls wrestling with boys, it did not present any expert testimony or any other evidence to support those claims. Insert Chapter 11, Section E, Page 988 (note 2 discussing girls on boys' wrestling team)

- ▶ **Hayden v. Greensburg Community Sch. Corp.**, ___ F.3d ___ (7th Cir. 2014) – In a 2-1 decision, the U.S. Seventh Circuit Court of Appeals ruled that the “short hair policy” of Greensburg (IN) High School boys’ basketball coach violated both the Equal Protection clause of the 14th Amendment to the U.S. Constitution and Title IX of the Education Amendments of 1976. Patrick and Melissa Hayden filed their suit against the school when their son A.H. Hayden was not allowed to practice or play with the basketball team because his hair did not conform to the coach’s policy that all the players’ hair must be cut above the ears, eyebrows and collars, a policy he says he has in order to promote team unity and project a clean cut image for the team. The district court in Indianapolis dismissed the complaint on summary judgment in part because the policy only applied to the boys’ basketball team, not all boys athletic teams. Finding that because the policy does not apply to members of the girls’ basketball team, it is clearly discriminatory and thus violates both the Equal Protection clause and Title IX. Judge Ilana Rovner wrote that the policy was quite strict given today’s standards of acceptable men’s hair length, noting that even a couple of male judges on the circuit court would be in violation of the policy. Judge Daniel Manion dissented. Insert Chapter 11, Section E, Page 991

CHAPTER Twelve. Individual Sports.

Section B. Eligibility to Play.

Mixed Martial Arts:

- ▶ **Zuffa v. State of New York**, [unpublished] (SDNY 2013) – Federal district judge Kimba Wood in Manhattan on October 3, 2013 dismissed six of seven claims brought by Zuffa in a lawsuit filed in early 2012 against the State of New York challenging the constitutionality of the New York law banning mixed martial arts in the state. The motion to dismiss was filed a year earlier, in October 2012, and argued in February 2013. Judge Wood rejected the legal basis for all but one of the claims raised by Zuffa. Notably, Judge Wood rejected the First Amendment argument that the ban on MMA violated Zuffa’s right of free expression on the ground that MMA “lacks essential communicative elements” so that no expression is being suppressed. The one claim that was allowed to proceed is the one claiming that the ban is unconstitutionally vague since it is unclear from the statutory language what types of events exempt organizations are allowed and not allowed to promote. Insert Chapter 12, Section B, Page 1001 (going along with boxing being outlawed in some states)

Section D. Organizing a Sports Tour.

Motorsports:

- ▶ NASCAR on September 9, 2013 levied the biggest penalty in its history for race manipulation and in an unprecedented move changed the makeup of the Chase for the Sprint Cup playoffs field two days after the field was presumably set. NASCAR fined Michael Waltrip Racing \$300,000 and removed MWR driver Martin Truex Jr. from the Sprint Cup championship playoff field after determining that in the last race of the season in early September at the Federated Auto Parts 400 at Richmond International Raceway, MWR drivers Clint Bowyer and Brian Vickers intentionally manipulated the outcome of the race under orders from the team. As one example of race manipulation, Bowyer spun his car in front of a group of drivers allowing Truex to finish high enough to get the last spot in the championship playoff field. To remedy this manipulation, NASCAR removed Truex from the championship playoff field and inserted the next driver in the standings, Ryan Newman, into the last spot in the field. Furthermore, after reviewing radio communications between MWR general manager and VP of business development Ty Norris and Vickers in which Norris told Vickers to interfere with other drivers so Truex could finish ahead of them, NASCAR also suspended Norris indefinitely. However, no suspensions or points penalties were assessed against Bowyer or Vickers, which meant that Bowyer started the Sprint Cup championship playoffs only 15 points behind leader Matt Kenseth. Insert Chapter 12, Section D, Page 1027 (authority to fine)

- ▶ IndyCar League filed a lawsuit against Radio e Televisao Bandeirantes Ltda., the promoter of a scheduled IndyCar race in Sao Paulo, Brazil, in Indiana state superior court in Marion County (Indianapolis) in early December 2013 claiming that RTB breached its contract with IndyCar by failing to pay a \$10 million sanctioning fee for the 2013 race that was held in early May (payments were due yet unpaid on August 17 and September 17, 2013) and by declining to hold a race in 2014 as the contract that runs through 2019 provides. The suit was then removed by RTB to the federal district court in Indianapolis in mid-December. The Sao Paulo race has historically been the second most profitable event for IndyCar (behind only the Indianapolis 500) netting about \$2 million. In 2013 the race was held in early May but because IndyCar is starting a new IndyCar road race at the Indianapolis Motor Speedway on May 10, and RTB claims that due to road work, planned closures, and other event commitments, there is no other suitable time to hold the race in Sao Paulo in 2014. Thus, the Sao Paulo race is not on the IndyCar schedule in 2014, which IndyCar CEO Mark Miles asserts violates RTB's contractual commitment to find a suitable venue for the race in Sao Paulo through 2019. Insert Chapter 12, Section D, Page 1040 (unclear where to place, but seemingly involves the organization of a racing tour)

Golf:

- ▶ PGA Tour professional Vijay Singh's lawsuit filed in May 2013 against the PGA Tour in New York state supreme court in Manhattan claiming that he had been treated unfairly by the PGA Tour in connection with an episode in early 2013 in which he acknowledged that he had used deer antler spray had a mixed ruling on the PGA

Tour's motion for summary judgment. When Singh admitted in a *Sports Illustrated* article to using deer antler spray, the PGA Tour announced that it was going to suspend him from the tour because deer antler spray contained IGF-1, a substance banned by the Tour's substance abuse policy. However, after Singh appealed that decision to the Tour's disciplinary committee, the Tour dropped the case when it obtained a ruling from the World Anti-Doping Agency that deer antler spray did not in fact contain a banned substance. Singh then filed suit against the Tour the day before the start of the 2013 Players' Championship making seven legal claims from defamation to intentional infliction of emotional distress. Supreme court (trial) judge _____ on February 17, 2014 partially granted and partially denied the PGA Tour's motion for summary judgment by dismissing five counts but denying the motion as to two claims, one that the Tour treated Singh disparately from other Tour members under the substance abuse policy and one that the Tour wrongfully withheld \$100,000 in PGA Tour earnings while the case was being investigated. Those claims will be tried to a jury if the parties do not reach a settlement. Insert Chapter 12, Section D, Page 1027 (disciplinary authority of tour) OR Chapter 1, Section C, Subsection 3, Page 52 (drugs)

CHAPTER Thirteen. Personal Injury From Sports.

Section A. Torts and Sports.

[See numerous previous entries for developments relating to the many lawsuits at the professional, collegiate, and youth levels relating to concussions and the issues surrounding the prevention and treatment of concussions.]

- ▶ **Coomer v. Kansas City Royals** – The Missouri Supreme Court continued to deliberate over a 2012 Court of Appeals ruling that in turn had overturned a Jackson County jury verdict in favor of the Kansas City Royals MLB team that had found the team not liable for injuries to John Coomer when Coomer sustained serious eye injuries when he was hit in the eye during a September 2009 Royals game by a hot dog thrown (behind the back) by the Royals mascot. The jury had indicated in jury interrogatories that it found Coomer completely at fault for his injuries because he wasn't aware of what was going on around him and thus had assumed the risk of whatever happened during the game. The appeals court overturned that verdict holding that while being struck by a foul ball is an inherent risk fans assume at games, being hit by a hot dog is not. The Royals appealed that decision to the state Supreme Court, which took transfer (the state equivalent of granting certiorari) on April 30, 2013. The case was then argued in late October 2013 largely around the issue of whether the historic "Baseball Rule" that normally protects teams from liability for spectators being hit with foul balls extends to the activities of mascots, and whether what the mascots do during games is an essential part of the game. Insert Chapter 13, Section A, Page 1098
- ▶ Natalie O'Loughlin, the mother of teenage tennis player Julia O'Loughlin, filed suit in federal district court in Manhattan in March 2014 against the US Tennis Association

claiming that the USTA negligently caused her daughter to suffer bulimia during the time she trained at the USTA's Evert Tennis Academy in Florida in 2010-11. The complaint alleges that the USTA knew that Julia, an up and coming player, had an eating disorder but their staff at the Academy pushed her to lose more weight, which ultimately forced her to be committed to a treatment facility. An identical suit was filed in August 2013 in state court in Florida but it was dismissed for lack of jurisdiction. Insert Chapter 13, Section A, Page 1093 (tort) OR Chapter 13, Section D, Page 1124 (medmal)

Section B. Criminal Law and Sports Violence.

- ▶ A lawsuit filed in 2006 in the Crown Court in Toronto by former Colorado Avalanche player Steve Moore against former Vancouver Canucks (and current Detroit Red Wings) player Todd Bertuzzi, seeking C\$38 million for injuries Moore suffered when Bertuzzi assaulted him with his hockey stick during a game in Vancouver in 2004, was still pending and is slated for trial later in 2014. Insert Chapter 13, Section B, Page 1102
- ▶ Seventeen-year old Jose Domingo Teran pleaded guilty in Salt Lake City juvenile criminal court on August 4, 2013 to homicide and was immediately sentenced to three-years in a juvenile detention facility. Teran was charged with homicide by assault, a third-degree felony in Utah, in Salt Lake County juvenile court on May 7, 2013, after 46-year old Ricardo Portillo died a few days after Teran punched him in the head. Teran was playing goalie in a youth soccer match on April 27, 2013, when Portillo, who was refereeing the match, called a foul and issued Teran a yellow card. Immediately thereafter, as Portillo was writing notes about the yellow card, Teran snuck up on him and punched him in the lower left jaw area with a closed fist, causing Portillo to suffer a traumatic brain injury that left him in a coma for a week until he died. District attorney Sam Gill has moved to have Teran classified as an adult so the case can be tried in criminal court and Teran sentenced as an adult. The charge for this type of act that intended to injure but kill is not considered murder or manslaughter in Utah, but rather homicide by assault, which is punishable by a much lower prison term. Insert Chapter 13, Section B, Page 1102
- ▶ Rampano (NY) High School football coach Duffman Pannell, age 43, was charged with second-degree felony assault in late October 2013 for violently hitting 15-year old junior Brandon Girault, a player on his team, in the head with a football helmet during a practice. The blow caused Girault to bleed profusely from above his left eye, resulting in the charge because of the severity of the injury and because it endangered the welfare of a minor. Insert Chapter 13, Section B, Page 1102

Section C. Workers' Compensation for Athletes. Subsection 1. College Athletes.

- **Tonn v. NCAA** – In the first concussions-related suit against the NCAA by a current student-athlete, Stanford female cross-country runner Jessica Tonn filed suit in federal district court in Los Angeles in early March 2014 against the NCAA claiming that she received a head injury that was caused and exacerbated by the

NCAA's negligent failure adequately to educate coaches and athletes about concussions and its failure to implement proper guidelines and procedures to detect and treat head injuries. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker's comp) or Section D, Subsection 1, Page 1125 (medmal)

•**DuRocher v. NCAA & Riddell Inc.** – A purported class action was filed in federal district court in Indianapolis on October 2, 2013 against the NCAA and football helmet manufacturers Riddell Inc. and Kranos Corp. (dba Schutt Sports) claiming that the defendants knew of the inadequacy of the helmets used by college football programs but allowed them to continue to be used, which use resulted in head injuries to all former NCAA football players who suffered concussion-like symptoms while playing football and later developed symptoms including chronic headaches, dizziness, dementia or Alzheimer's disease. The claims against the helmet manufacturers also included a strict products liability claim that asserts that the helmets were defective. Unlike the other ten suits against the NCAA that were consolidated in Chicago, the Multidistrict Panel agreed with the plaintiffs in this case that the focus of the litigation on equipment rather than medical knowledge, and the inclusion of the helmet manufacturers as defendants, made this case unsuitable for consolidation with the others. Thus the case remained before the district court in Indianapolis. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker's comp) OR Section D, Subsection 2, Page 1130 (defective products)

•**Sheely v. NCAA** – The family of former Frostburg State University football players Derek Sheely who died in August 2011 after suffering brain injury during preseason football practice filed a wrongful death lawsuit against the NCAA, helmet manufacturer Kranos Corp. (dba Schutt Sports), and three Frostburg State employees in 2013 in Maryland state court in Montgomery County, claiming that all defendants were in some respect negligent in the events that led to Derek's injury and death. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker's comp) OR Section D, Subsection 2, Page 1130 (defective products)

Generally -- The NCAA has responded to all of the above lawsuits by arguing that while the Association has responsibly addressed the issue of head injuries through a combination of changes to playing rules, equipment requirements, and medical best practices, it does not have a legal duty to protect student-athletes. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker's comp) OR Section D, Subsection 2, Page 1130 (defective products) → (depending on where all the NCAA cases get placed)

► **Concussions Litigation.** The seven-member U.S judicial Panel on Multidistrict Litigation on December 17, 2013, after a December 5 hearing in Las Vegas, ruled that ten different lawsuits raising the core issue of whether the plaintiffs' head injuries were caused by the NCAA and member universities of concealing the long-term risks of concussions and subconcussive head trauma must all be consolidated for all pre-trial proceedings in the Northern District of Illinois in Chicago where the first of these

cases, **Arrington v. NCAA**, was filed. The panel stated that all of the ten cases involve common questions of fact and seek similar remedies for different groups of former student-athletes, so that the consolidating of the cases would “serve the convenience of the parties and witnesses” and would promote efficient litigation. Also, two of the cases had motions for class certification that would include many of the same purported class members. The cases will now all be overseen by federal district judge John Zee. Among the cases consolidated now in Chicago include the following: Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker’s comp) or Section D, Subsection 1, Page 1125 (medmal)

- **Arrington v. NCAA** - The purported class action concussions lawsuit filed in September 2011 in federal district court in Chicago against the NCAA by former Eastern Illinois football player Adrian Arrington, Univ. of Central Arkansas football player Derek Owens, and Ouachita Baptist Univ. soccer player Angela Palacios, claiming that the NCAA had negligently failed to establish safety standards to protect college players from the long-term effects of concussions, continued in discovery. Univ. of Maine ice hockey player Kyle Solomon was added as a named plaintiff in February 2013. The parties entered into mediation in August 2013, which was still in process when the ten similar lawsuits were all consolidated. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker’s comp) or Section D, Subsection 1, Page 1125 (medmal)
- **Walker v. NCAA** - A separate class action lawsuit making many of the same claims as in the Arrington case was filed on September 3, 2013 in federal district court in Chattanooga, Tennessee, by three former college football players, Chris Walker and Ben Martin who had played defensive end at the University of Tennessee and Dan Ahern who had played offensive guard for North Carolina State. The complaint claims that the NCAA negligently failed to do enough to prevent, diagnose, and treat brain injuries caused by head trauma received while playing college football. All three named plaintiffs claim to have suffered repetitive head trauma during practices and games and now suffer from headaches, poor memory, ringing in the ears, and sleep problems. None of them played in the NFL. Shortly after the complaint was filed, the *Arrington* plaintiffs’ lawyers filed a motion with the court in Chattanooga seeking to have the *Walker* case transferred and consolidated in Chicago with *Arrington*. The Multidistrict Panel’s ruling accomplished that result. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker’s comp) or Section D, Subsection 1, Page 1125 (medmal)
- **Wells v. NCAA** -- Mary Shelton Wells, a 23-year old former soccer player for Samford University in Birmingham, Alabama, filed a lawsuit on October 9, 2013 against the NCAA in federal district court in Mobile, Alabama, claiming that the NCAA negligently failed sufficiently to inform her and other athletes about the dangers of concussions resulting in her continuing to play and to receive multiple concussions during her playing career that has left with a condition causing her to suffer chronic migraine headaches. Wells alleges that had the NCAA provided her with the information it knew about the dangers of concussions, she would not

have played at the college level. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker's comp) or Section D, Subsection 1, Page 1125 (medmal)

•**Doughty v. NCAA** -- Stanley Doughty, a former University of South Carolina defensive lineman on the football team (who also spent one year with the NFL's Kansas City Chiefs in 2007), filed a lawsuit on October 23, 2013 in federal district court in Columbia, SC, against the NCAA claiming that the NCAA breached its duty to student-athletes by acting negligently and recklessly endangering student-athlete health when it failed to adopt rules to protect athletes despite being aware of long-standing and overwhelming evidence of the dangers of multiple brain trauma resulting from playing football. Doughty also claims the NCAA acted negligently in failing to educate football student-athletes about the risks of repeated head impacts. He alleges that repeated head impacts he suffered while playing for South Carolina caused brain injuries that prematurely ended his professional football career. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker's comp) or Section D, Subsection 1, Page 1125 (medmal)

•**Powell v. NCAA** -- Former University of Kansas FB Christopher Powell filed a lawsuit on November 14, 2013 against the NCAA (but not the University) in federal district court in Kansas City claiming that the negligence of the NCAA in failing to adopt rules that adequately protected student-athletes from head trauma resulted in his sustaining at least four concussions during his football career at Kansas from 1990-94, which in turn have caused him to suffer ever since from serious neurologic and cognitive deficits. Insert Chapter 13, Section C, Subsection 1, Page 1113 (college worker's comp) or Section D, Subsection 1, Page 1125 (medmal)

Section C. Workers' Compensation for Athletes. Subsection 2. Professional Athletes.

- ▶ California governor Jerry Brown on October 8, 2013 signed into law a bill passed by overwhelming bipartisan majorities of the legislature that limits the population of professional athletes and former professional athletes who may file workers compensation claims under California's generous workers compensation system. The NFL and MLB had pushed and lobbied for the legislation. The new law provides that the only current and former football, baseball, basketball, ice hockey, and soccer players who may file workers compensation claims under California's system are those who played for a California-based team for either at least two years or at least 21 percent of their playing career, or who can establish that the injury giving rise to the claim was incurred while playing in California. An athlete who does not meet these requirements will still be able to file claims in the state in which the team for which he played is based. California had become the venue for hundreds of athlete claims by players who had never been based in California, causing the California Insurance Guarantee Association to pay out roughly \$42 million in claims to professional athletes between 2002 and 2012. Insert Chapter 13, Section C, Subsection 2, Page 1114 (before *Brumm v. Bert Bell*) or Page 1120 (after *Brumm*)

Section D. Back to Torts. Subsection 1. Medical Malpractice.

- ▶ Donovan Hill, a paralyzed 15-year old former Pop Warner football player on the Lakewood (CA) Black Lancers, and his family filed suit in early November 2013 in Orange County (California) superior court against numerous defendants claiming that their negligence in monitoring the safety practices of games played under their jurisdiction caused Hill, then 13, to become paralyzed for life. The defendants include the national Pop Warner Football organization based in Langhorne, PA, Lakewood Pop Warner, the Orange Empire Confederation (the local youth football league), the assistant commissioner of the Orange Empire, the head coach and four assistant coaches of the Black Lancers, the president and athletics director of Lakewood Pop Warner in 2011 when the incident occurred, as well as the spouses of each of the individual defendants. Hill suffered his catastrophic spinal cord injury in a game on November 6, 2011 when he initiated a tackle by lowering his arms and leading with his head directly into the ball carrier. The essence of the suit is that Hill was taught by an uncertified group of coaches to tackle in this unsafe manner, that he did so repeatedly and was never instructed not to, and that the various supervising organizations never took steps to insure that coaches would teach and supervise their players in a safe manner. Insert Chapter 13, Section D, Subsection 1, Page 1125

Head Injury Litigation:

- ▶ **In Re: NFL Players' Concussion Litigation** (E.D. Pa., MDL #2323), consolidating, among 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 and the plaintiffs agreed to settle this litigation for \$765 million in late August 2013. The NFL was sued in over 200 lawsuits filed all over the country in 2012 by over 4,000 former NFL players or the families of deceased 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 claimed 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 **Easterling v. NFL**. On July 8, 2013, while an NFL motion filed in late August 2012 to dismiss on the ground that these were should be brought under the arbitration provisions of the CBA rather than in judicial litigation was still pending, district judge Anita Brody ordered the parties to mediate the dispute and appointed retired federal judge Layn Phillips to oversee the negotiations. Less than two months later, on August 28, 2013, the parties announced the \$765 million settlement.

The parties also announced in a court filing on January 6, 2014 that they had agreed that the NFL would pay \$112.5 million in legal fees to the plaintiffs' lawyers,

and in the same filing asked for the court to give preliminary approval to the settlement.

On January 13, 2014, Judge Brody denied the parties' motion for preliminary approval of the settlement, but without prejudice, in an opinion that expressed doubts about the sufficiency of the settlement amount and method of distributing the settlement amount (witnessed by the number of new suits filed by class members opting out after the settlement was announced). The judge stated that "I am primarily concerned that not all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis or their related claimants will be paid. . . . In various hypothetical scenarios, the Monetary Award Fund may lack the necessary funds to pay Monetary Awards for Qualifying Diagnoses." She then ordered the plaintiffs lawyers to provide proof that the amount of the settlement would be sufficient to cover all eligible retirees. Insert Chapter 13, Section D, Subsection 1, Page 1125

[There was also concern raised that some of the various plaintiffs' lawyers (notably Christopher Seeger of firm Seeger Weiss, the plaintiffs' lead settlement negotiator) were negotiating deals with individual class members whereby they would get both a share of the separately established common fund for attorneys' fees and a share of the individual class members' recovery. In mid-December 2013 Judge Brody appointed a special master, Perry Golkin, to look into these objections and make recommendations to her.] Insert Chapter 13, Section D, Subsection 1, Page 1125

[There was also concern raised over a clause in a release form that all plaintiff class members would have had to sign to receive benefits that provided that the player would not sue the NCAA or any other collegiate, amateur, or youth football organizations or entities for any cognitive injuries suffered from playing football. The NFL had indicated that it needed such a clause because if players who received benefits under the settlement were then to sue and recover damages from some other entity for the same injuries, those entities could then turn around and seek contribution from the NFL.] Insert Chapter 13, Section D, Subsection 1, Page 1125

► Several lawsuits raising essentially the same claims as were raised in the *Easterling* case were filed after the announced settlement in the *Easterling* case. Among these subsequent suits is (a) one filed on November 13, 2013 in federal district court in Manhattan by former Pittsburgh Steeler and Washington Redskin WR Randle El and three other former NFL players, and (b) another filed in mid-December by the estate of former Pittsburgh Steelers center Mike Webster in Superior Court in Los Angeles, California, and joined by 65 other plaintiffs, including five estates of deceased former players in February 2014 (and which was removed to federal district court in L.A. in mid-March 2014), and (c) a third filed in early December in federal district court in San Francisco by former Dallas Cowboys quarterback Craig Morton. (d) & (e) Two additional suits brought by different groups of former NFL players have also been filed in September 2013 in federal district courts in New Orleans and Chicago raising essentially the same claims as in the *Easterling* case. [There may be others as well.] Insert Chapter 13, Section D, Subsection 1, Page 1125

- ▶ In a case related to the concussions litigation noted in the previous item, a California state court of appeals dismissed a suit filed by the NFL against several of its insurance companies seeking a declaration that the policies covered the liability at issue in the concussions case. The NFL had filed the 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. The NFL appealed the stay, which led to the California appeals court ordering the suit dismissed because the proper venue was in New York where the insurance companies' suit is proceeding as of April 1, 2014. Insert Chapter 13, Section D, Subsection 1, Page 1125

- ▶ Five former members of the NFL's Kansas City Chiefs on December 3, 2013 filed a lawsuit against the Chiefs (but not the NFL) in the circuit court of Jackson County (MO) in Kansas City claiming essentially what the plaintiffs had claimed in the consolidated litigation against the NFL that preliminarily settled in August 2013 for \$765 million (see above entries) – that the Chiefs had known of the dangers of concussions at the time the plaintiffs started playing for the team, failed to disclose those risks to the players, provided them with inaccurate and misleading information about the risks of head trauma, and fraudulently concealed accurate information about the risks from the players. The players' spouses are also named plaintiffs, claiming that as a result of the Chief's malfeasance the spouses were deprived of support, companionship, and comfort from their husbands and burdened with substantial medical bills. The five plaintiffs were Louis Cooper, Leonard Griffin, Christopher Martin, Joseph Phillips, and Kevin Porter. Notably, these plaintiffs played for the Chiefs during the period from 1987 through 1993 when there was no collective bargaining agreement in place (and arguably the NFLPA had ceased to exist as a union between 1989 and 1993), which the plaintiffs claim bars the Chiefs from having the case dismissed and submitted for arbitration under a CBA. Likewise, while normally a lawsuit against an employer (like the Chiefs) for injuries sustained while working for that employer is barred by workers' compensation law, there is an unique provision in the Missouri workers comp law that makes an exception for "occupational disease" if the workers decline workers comp coverage, which the plaintiffs argue their head injuries qualify as thus taking the case out from under the workers comp statute. (This might also make the St. Louis Rams vulnerable to such claims.)

Nine additional Chiefs players from between 1987 and 1993, including Hall of Famers Albert Lewis and Art Still, joined this lawsuit as plaintiffs on December 20,

2013, and the complaint was amended to include a claim of negligence alleging that artificial-turf fields during that time period contributed to concussions and non-concussive head trauma. Insert Chapter 13, Section D, Subsection 1, Page 1125

- ▶ Former Kansas City Chiefs players Joseph Horn and Tamarick Vanover on December 30, 2013 filed suit against the team in circuit court of Jackson County (MO) in Kansas City claiming that the team negligently allowed them to play despite knowing of the nature and long-term effects of concussive and sub-concussive head injuries. The complaint asserts that the team intentionally misrepresented the risks and fraudulently concealed those risks from them, which led them to play with injuries in reliance on the team's misrepresentations. Insert Chapter 13, Section D, Subsection 1, Page 1125
- ▶ Cheryl Shepard, the mother of the late Kansas City Chiefs LB Jovan Belcher filed a wrongful death lawsuit against the Chiefs on December 31, 2013 in circuit court of Jackson County (MO) in Kansas City. Belcher, then 25 years old, on December 1, 2012 shot his girlfriend Kasandra Perkins to death and then drove to Arrowhead Stadium and shot himself to death in front of several members of the Chiefs' staff. The complaint claims that the Chiefs are responsible for the brain injuries suffered over Belcher's four year NFL career that caused the mental disorder that in turn caused him to suffer from the irresistible impulse leading him to kill Perkins and himself. The suit asserts that even though they knew of Belcher's injuries, the coaches "engaged in a systematic campaign of mental abuse to 'motivate' him to play through his injuries," and that the team required Belcher to return to play well before he should have. The suit was filed 17 days after Belcher's body was exhumed in Long Island, NY, to search for signs of concussions-related brain degeneration. Insert Chapter 13, Section D, Subsection 1, Page 1125
- ▶ The Highlands School District (near Pittsburgh, PA) on January 28, 2014 settled a lawsuit filed against it, principal Thomas Shirey, assistant principal Walt Hanzlik, and athletic trainer Mike Rizzo, in Pennsylvania district court by former student and football player Zachary Alt. The suit claimed that the defendants allowed him to continue playing football for the school in 2007 despite his suffering repeated head injuries, and that he was damaged thereby. The school district defendant filed an offer to settle the case for \$20,000, which if Alt had rejected would have denied his ability to recover attorney's fees if ultimate damages in the case would have been less than \$20,000. Alt accepted the offer on January 28 and his attorney subsequently filed a motion for attorney's fees. Chapter 13, Section D, Subsection 1, Page 1125 (medmal)
- ▶ **Hill v. Slippery Rock University** -- The parents of Slippery Rock University student Jack Hill Jr., who died on September 11, 2011 following a late night basketball practice when his lungs and liver stopped functioning as a result of the combination of extreme exertion and sickle cell trait, filed a wrongful death suit against the University, the University's separate Health Center, and the NCAA on September 7, 2013 in Allegheny County (Pittsburgh) Common Pleas Court. Jack Hill Sr. and

Cheryl Hill of Roselle, NJ, claim that when their son collapsed, instead of being given the immediate medical attention he needed, he was left lying unattended for several minutes waiting for the EMT ambulance to arrive. They also claim that the school and its medical center failed adequately to diagnose their son's sickle cell trait and thus failed properly to monitor him and to train their coaching and training staffs to deal with the potential consequences of such a collapse. The claim against the NCAA was that the NCAA failed to have rules that would have required the school to provide adequate training and procedures to deal with sickle cell trait athletes. Insert Chapter 13, Section D, Subsection 1, Page 1125 (medmal)

- ▶ The Indiana legislature passed, and Governor Mike Pence signed into law, in March 2014 a bill making Indiana the first state to require all high school and youth football coaches in the state to undergo concussion training, learning how to identify possible concussions and how to deal with them. The bill also mandates a 24-hour waiting period for any high school or youth football player who suffers a concussion before they can return to any type of physical activity. (Note: *The bill only applied to the sport of American football.*) Insert Chapter 13, Section D, Subsection 1, Page 1125 (medmal)
- ▶ **Leeman v. NHL** -- Ten former NHL players who played during the 1970s, 1980s, and/or 1990s filed a class action "concussions" suit against the NHL and the NHL Board of Governors on November 24, 2013 in federal district court in Washington, DC, claiming essentially what the NFL players claimed in their suits – namely that the league acted negligently and fraudulently when it "knew or should have known" about the dangers of head trauma and concussions yet took no remedial measures to prevent its players from the harm of head injuries until 1997 (when the league created a program to research and study brain injuries), and even thereafter took no action to reduce the frequency and severity of concussions until 2011, and that the plaintiffs relied on the NHL's silence to their detriment and now suffer from the effects of repeated head trauma, including sleep disorders, memory loss, depression, and even dementia. The plaintiffs' complaint focusses on their allegations that the NHL encourages and glorifies "enforcers" and fighting, thereby promoting a "culture of violence," and that the NHL has done nothing to discourage or make illegal body checking (which often leads to blows to the players' heads). The name plaintiffs are Gary Leeman, Bradley Aitken, Darren Banks, Curt Bennett, Richard Dunn, Warren Holmes, Robert Manno, Blair James Stewart, Morris Titanic, and Richard Vaive. [*There are media reports of two other "concussions" lawsuits filed against the NHL, but I had no information about them when this document was finalized.*] Insert Chapter 13, Section D, Subsection 1, Page 1125

[See the Section on College Issues for a similar set of lawsuits filed by former college student-athletes claiming that the NCAA and/or member universities are liable for medical conditions resulting from head trauma suffered while playing college football.] Insert Chapter 13, Section D, Subsection 1, Page 1125

Section D. Back to Torts. Subsection 2. Defective Products and Hazardous Facilities.

- ▶ Former Detroit Lions RB Jahvid Best filed a lawsuit against the NFL, helmet-maker Riddell, and Riddell's parent Easton-Bell Sports Inc. on January 28, 2014 in Wayne County (MI) Circuit Court claiming their liability for injuries he suffered while an NFL player. He alleges that the NFL failed adequately to protect players from concussions when "it was aware of the evidence and the risks associated with repetitive traumatic brain injuries." Best admittedly suffered two concussions while playing college football for the Univ. of California Golden Bears and claims that the NFL was negligent in then allowing him to be the 30th player drafted in the first round in 2011. Then as a Lions player he alleges that he suffered multiple concussions before being released in 2013. Best does not allege that he currently suffers from any of the severe symptoms that have resulted in disability or death as alleged in the other lawsuits, but he argues that such symptoms are highly likely to occur in the future and he wants the defendants to set up a medical compensation fund to pay for these problems as they arise in the future. The Lions are not named in the lawsuit because under Michigan law Best is limited to filing a workers compensation claim (which he has done) unless he is able to establish an intentional tort by the employer team.

Note: As of February 2, 2014, when Riddell's exclusive contract with the NFL expired, Riddell is no longer the official helmet provider of the NFL. Insert Chapter 13, Section D, Subsection 2, Page 1130

- ▶ Four former NFL players (journeyman Jimmy Williams, Saints and Redskins Rich Mauti, Dolphins Jimmy Keyes, and Packers Nolan Franz) and their wives filed a lawsuit on September 2, 2013 against the NFL and Riddell in federal district court in New Orleans claiming that the league and helmet maker falsely claimed that the Riddell helmet would protect them against concussions, which the players relied on to their detriment when they suffered several concussions that have caused them to suffer from various brain diseases since retiring from football. There is also a strict products liability claim included in the complaint. Insert Chapter 13, Section D, Subsection 2, Page 1130
- ▶ Although not filed by current or former NFL or college players, Riddell is currently the defendant in four class action lawsuits filed against it between December 2013 and March 2014 by various young football players. The suits were filed in Florida, then two in New Jersey (Aronson & Thiel), and finally in California (with more quite likely). The suits all purport to represent a class of youth or high school players in, respectively, Florida, Illinois, New Jersey, and California who suffered head injuries while wearing the Riddell Revolution helmet. Since all of the suits raise essentially the same factual and legal issues, it is almost certain that Riddell will petition the Judicial Panel on Multidistrict Litigation to consolidate the cases. The factual underpinning of the suits is that Riddell falsely advertised the Revolution helmet as protecting the player who wore the helmet as being 31% less likely to suffer a

concussion as compared to players who wore other helmets. Insert Chapter 13, Section D, Subsection 2, Page 1130

NOTE: There have been scores of cases filed during the 2013-14 cycle by youth league or high school players, as well as a few by college athletes, injured while practicing or playing in games against their leagues, league officials, schools, school districts, coaches, facility operators, and others somehow connected with the activity, all claiming that the defendants were negligent for any of a number of alleged reasons, including faulty supervision, teaching dangerous techniques, allowing a player to play when injured or under severe conditions, allowing play with defective equipment or in defective facilities, falsely inducing players to participate, etc. Critics of these lawsuits contend that they are driving up the costs of operating and the costs of insurance and thus jeopardizing the ability of the program to exist. Supporters of the suits say that too many kids are playing under dangerous conditions and that safety of the kids must be the top priority, so it is appropriate to impose costs required to make conditions and activities safe. Insert Chapter 13, Section D, Subsection 1, Page 1125 or Section D, Subsection 2, Page 1133 (hazardous facilities & equipment)

ITEMS NOT SPECIFICALLY REFERRING TO CASEBOOK TOPICS

► NFLPA executive director DeMaurice Smith will have competition for his job when his contract comes up for renewal in early 2015. Sean Gilbert, who has been openly critical of Smith for being too willing to allow Commissioner Roger Goodell to have too much power in player discipline cases and for agreeing to salary cap violation penalties for the Cowboys and Redskins in the supposedly uncapped year of 2010, announced in September 2013 that he will run for the position when it next becomes open.

► Former NBPA executive director Billy Hunter on May 16, 2013 filed suit in California Superior Court in Los Angeles County against the NBPA, its then president Derek Fisher, and Jamie Wior claiming that his termination as executive director on February 16, 2013 by a 24-0 vote of the union's board of player representatives constituted a breach of contract, and that the nine-month investigation report of the NBPA's finances and business practices under his leadership conducted by Paul, Weiss, Rifkind, Wharton & Garrison, coupled with public statements by Fisher, constituted defamation that has damaged his reputation. At a minimum, Hunter is seeking at least the \$10.5 million in salary that he was entitled to under his contract that was terminated for cause by the union's board.

On January 14, 2014 Judge Huey Cotton dismissed all of Hunter's claims (all claims against Wior, 12 of the 14 against Fisher) except for the breach of contract claims against the NBPA and Fisher, provided he amends his complaint to clarify his allegations to state that the alleged breach is limited to their failure to pay his salary in the event of termination as his employment contract provided.

- ▶ Art Shell, the former all-pro Oakland Raiders lineman who had served as one of the two designated appeals officers appointed by the NFL and NFLPA to hear appeals from player discipline handed out by the league for on-field conduct since 2002 was removed from that position in late July 2013. Shell was replaced by the just-retired Baltimore Ravens center Matt Birk, who played in the Super Bowl only a few months earlier. The other appeals officer Ted Cottrell remains in that position.
- ▶ Los Angeles Clippers all-star G Chris Paul on August 21, 2013 was elected as the president of the NBPA in a close vote by the board of player representatives against free agent G Roger Mason, Jr., who then was elected first vice president. Paul replaced Derek Fisher, who had been instrumental in pushing for the investigation of former executive director Billy Hunter and in Hunter's ouster in February 2013. LeBron James had seriously considered running for the presidency but decided against doing so because of his other commitments.
- ▶ The Cuban government announced in late September 2013 that it will now allow Cuban athletes "to sign contracts with foreign professional sports leagues" provided they are available for play in annual national tournaments in Cuba. The new policy went into effect for baseball players on November 1, 2013 and for all other athletes in other sports on January 1, 2014. This new policy, which is clearly designed to decrease the large number of athlete defections, especially to the US by baseball players, is a radical departure from the previous ban on Cuban athletes signing and playing outside of Cuba. The policy provides that Cuban athletes playing abroad will be allowed to keep their earnings from foreign teams, provided they pay taxes to the Cuban government, and they will be guaranteed compensation from the state for accomplishments in national and international competitions as well as a pension when they conclude their athletic careers. This, however, does not change US policy set by the Treasury Department's Office of Foreign Assets Control that provides that in order to get a visa to play in the United States, Cuban must prove that they have a permanent residency outside of Cuba, so it is unclear how many more Cuban players will be able to sign and play in MLB.
- ▶ A company named Fantex Inc. offered in November 2013 to sell 421,000 shares at \$10 apiece to investors who will collectively own 10% of the lifetime earnings of 29-year old San Francisco 49er TE Vernon Davis. Davis would get an immediate payment of \$4 million in exchange for giving up that 10% of all his future earnings. Fantex had previously planned to sell stock in 10% of the lifetime earnings of Houston Texans RB Arian Foster, but it cancelled the offering when Foster suffered a season-ending injury.
- ▶ Congressmen Roger Williams (R-TX) and Mike Doyle (D-PA) announced on November 12, 2013 that they were organizing a new group in Congress to be called the Congressional Baseball Caucus, which will be composed of all members who represent jurisdictions in which one or more professional baseball teams are located. The group was officially recognized by the House Administration Committee on October 24, 2013. The numerous members who have signed up to join this new

caucus group have mostly indicated that the primary purpose behind the group was not to focus on issues affecting baseball as much as to establish a forum in which the partisan tensions besetting Congress today can be lessened through a bipartisan group of legislators with something in common who can bond by “talking sports and sharing baseball stories.”

- ▶ **Finkelman v. NFL** – After Josh Finkelman of New Brunswick, NJ, purchased two tickets for the 2014 Super Bowl for \$4,000, he filed a class action lawsuit on January 7, 2014 in federal district court in Newark, New Jersey, claiming that the NFL’s method of distributing tickets for the Super Bowl violates New Jersey’s Consumer Fraud Act. The NFL distributes tickets for the game through various channels, such as to the 32 member teams and current NFL players (many of whom then resell the tickets that end up being purchased on the secondary market, often for far more than the face price), and it makes only 1,000 tickets available for sale at face price to members of the general public selected through a lottery. Finkelman cites to a provision in the New Jersey statutes that he claims prohibits a promoter of any public event from withholding more than 5 percent of the tickets from sale to the general public (or in other words promoters must sell at least 95% of the tickets to the general public). By selling only a little more than 1% of Super Bowl tickets to the general public, Finkelman claims results in tens of thousands of fans being either denied access to the game or being forced to pay higher prices on the secondary market for their tickets. He claims that the NJ Consumer Fraud Act provides for treble damages to everyone in the class of persons who have paid more than face value through the secondary market for 2014 Super Bowl tickets, which will bring total damages to hundreds of millions of dollars. The NFL noted in a press release that over 75% of all tickets are distributed to the member clubs who in turn sell them at face price to the general public, but Finkelman asserts that these tickets are sold only to season ticket holders who do not qualify as members of the “general public” as the statute requires.
- ▶ The same week as the Buffalo Bills were sued by five former cheerleaders for violating minimum wage laws (see previous entry), the Bills announced that it had settled a class action lawsuit filed against it in federal district court in Tampa, Florida, by Jerry Wojcik, a Bills fan living in Florida who claimed that the team breached a text service contract with him by sending him 13 messages over two weeks when it promised to send no more than 5 per week. Although the suit was generally treated by the media as frivolous, the Bills decided that it would be cheaper and better to deal with a class of its loyal fans by reaching a settlement. Under the settlement, the Bills will provide up to \$2.5 million in debit cards to fans who had signed up for the team’s text service, another \$562,500 to the plaintiffs lawyers, and \$5,000 cash to Wojcik as the class representative. The debit cards, worth between \$57.50 and \$75 depending on which class tier a fan is assigned to, can only be used to purchase merchandise either at Ralph Wilson Stadium or on the team’s web site. The Bills revealed that roughly 39,750 phone numbers were registered with the now defunct text-messaging service.
- ▶ Federal district judge Barbara Lynn in Dallas, TX, on July 9, 2013 denied the named plaintiffs’ class certification in the lawsuit related to the fiasco at Super Bowl XLV in

Arlington, Texas, in which the 2011 game was marred by temporary seats not being ready in time for thousands of fans who had bought tickets for the seats and had traveled to Dallas for the game. Several suits were filed by the disrupted fans seeking compensation. Most of the fans eventually agreed to the NFL's settlement terms, but possibly a few thousand potential class members did not, and the Dallas court has allowed part of the initial lawsuit brought by nine named plaintiffs to proceed, but not as a class action because the claims of the different plaintiffs were too differentiated. Those prospective plaintiffs fell into at least four different categories: (a) those who did not get into see the game (some of whom watched it on a nearby big screen TV), (b) those who got to their seats but well into the game, (c) those who were moved to new seats but missed much of the game, and (d) those who were moved to seats with obstructed views and also missed much of the game. Judge Lynn determined that each possible class member's damage claim was too individualized to warrant treating them as a similarly situated class. Barring a settlement, the case is expected to go to trial sometime in mid-2014.

- ▶ The NHL's Philadelphia Flyers owner, Comcast-Spectacor Inc., announced that the team had reached a settlement on December 31, 2013 with plaintiff season ticket holders in a class action suit in which the season ticketholders had claimed the team had misled them into buying the 2011-2012 season ticket package by leading them erroneously to believe that the package included all home games, including the 2012 Winter Classic on January 2, 2012, an alumni game, and a game against an AHL team. Roughly 15,000 fans will be eligible to receive either a \$45 arena concession voucher or an entertainment package worth \$75, which could cost the team over \$1.25 million plus legal fees of about \$500,000. The Flyers continued to assert that it had not misled the plaintiffs but that it decided that it was better to settle the case than get into a bitter and protracted fight with its loyal season ticket holders.
- ▶ A California superior court judge on September 8, 2013 denied a motion filed by Jamie McCourt, the former Los Angeles Dodgers CEO and wife of former Dodgers owner Frank McCourt, to reopen their divorce settlement on the grounds that the settlement under which she received \$131 million and several luxurious homes was grossly unfair because she was misled by Frank as to the actual value of the Dodgers that sold after the divorce was finalized for \$2 billion. Superior court judge Scott Gordon in Los Angeles denied her motion on the ground that Jamie had sufficient information at the time of the settlement to make reasonable estimates of the true value of the Dodgers and that there was "no credible evidence that [Frank McCourt] misrepresented the valuation to her."
- ▶ It was publicly revealed in fall 2013 that the NFL had filed an arbitration claim against 38-year old Sri Lankan rap singer M.I.A. (whose real name is Mathangi "Maya" Arulpragasam) seeking \$1.5 million in damages and a public apology for breach of contract that it claims occurred as a result of the singer's extending her middle finger toward the audience and mouthing the words "I don't give a shit" while performing with Madonna during the halftime of Super Bowl XLVI on February 5, 2012 in Indianapolis. After the incident, which spread quickly on social media, the NFL on

March 13, 2012 filed a demand for arbitration with the American Arbitration Association, which M.I.A. ignored. In October 2013 the NFL obtained a summary award from the arbitrator and filed suit to enforce the award. The incident in question occurred while M.I.A. was performing the song “Give Me All Your Luvin” when she gave the audience and the camera the finger, which evaded the NBC censors’ observation. M.I.A. at first wanted to keep the legal dispute quiet, but when the NFL filed a motion for summary judgment with the arbitrator, she decided to go public in an effort to ridicule the NFL’s position that her conduct had damaged its brand.

- ▶ Formula 1 CEO Bernie Eccelstone, age 83, went on trial in Munich, Germany, on April 24, 2014, after being indicted in October 2013 by Munich prosecutors for making a \$44 million payment to Gerhard Gribkowsky, a German banker, in connection with the \$1.6 billion sale of the F1 motor racing series to private equity firm CVC in 2006, a payment that the prosecutors characterize as an illegal bribe and an inducement to get Gribkowsky to breach a trust by steering the sale of Munich-based bank BayernLB’s 47% stake in Formula 1 to a buyer of Eccelstone’s preference. Eccelstone admits to making the payment but claims it was because he was being blackmailed by the banker, Gribkowsky, who was threatening to tell UK tax officials about some of Eccelstone’s business activities, and not to influence the choice of buyers of the 47% interest. Eccelstone argues that paying a blackmailer is not illegal. The investigation leading up to the indictment caused Formula 1 to lose several key sponsors and renegotiate other sponsorship deals. Somewhat surprisingly, Eccelstone has not been removed from leading F1, the multi-billion dollar sport in which he has long been regarded as the “Supremo,” but he did “temporarily” resign from the governing board of directors of FI’s holding company, CVC, claiming he will return to the board after he is exonerated. His trial is being held before Judge Peter Noll, the same judge who presided over the 2011 trial of Gribkowsky who was sentenced in 2012 to 8.5 years in prison for corruption for receiving the payment from Eccelstone. _____
- ▶ Formula 1 CEO Bernie Eccelstone was indicted in October 2013 by Munich, Germany, prosecutors for making a \$44 million payment to Gerhard Gribkowsky, a German banker who was brokering the deal, in connection with the \$1.6 billion sale of the F1 motor racing series to private equity firm CVC in 2006, a payment that the prosecutors characterize as an illegal bribe. Eccelstone admits to making the payment but claims it was because he was being blackmailed by the banker, Gribkowsky, who was threatening to tell UK tax officials about some of Eccelstone’s business activities. Eccelstone argues that paying a blackmailer is not illegal. The investigation leading up to the indictment caused Formula 1 to lose several key sponsors and renegotiate other sponsorship deals. Somewhat surprisingly, Eccelstone has not been removed from leading F1, the multi-billion dollar sport in which he has long been regarded as the “Supremo,” but he did “temporarily” resign from the governing board of directors of FI’s holding company, CVC, claiming he will return to the board after he is exonerated. His trial began in Bavarian district Court in late April 2014 before Judge Peter Noll, the same judge who presided over the trial of Gribkowsky who was sentenced in 2012 to 8.5 years in prison for corruption for receiving the payment from

Eccelstone. (*This is also relevant in the International Sports section.*) Almost the same as the preceding passage, but not verbatim.

- ▶ **Bluewaters v. Eccelstone** -- New York Supreme Court judge Eileen Bransten on January 22, 2014 dismissed a \$650 million lawsuit brought by American investment firm Bluewaters against Bernie Eccelstone. The court found that it lacked subject matter jurisdiction over the case which involved a claim by Bluewaters that Eccelstone and his Bambino family trust paid a \$44 million bribe to German banker Gerhard Gribowsky, who was brokering the sale of the F1 racing circuit, to steer the sale to CVC Investments even though Bluewaters (then a company established and headquartered on the Island of Jersey off the English coast) was the highest bidder. (See the previous entry.) Judge Bransten ruled that the lawsuit was “not about a lost business venture in New York, but rather an allegation that an English citizen bribed a German citizen to compel a German bank to sell its interest in a Jersey company to an English company rather than another Jersey company.” The lack of any connection to New York or the U.S. led the judge to find that the court lacked jurisdiction.

- ▶ The Formula One Teams’ Association was disbanded on February 27, 2014, reportedly because of financial issues. FOTA was established in 2008 to give the teams a collective voice that would help them “safeguard the interests [of the teams] at the onset of the global financial crisis, and ensure that teams were unified in negotiations with [Bernie] Eccelstone and governing body FIA.” In announcing the closing of the FOTA, General Secretary Oliver Weingarten stated that “the changing political and commercial landscape led the teams’ deciding that they no longer required an umbrella organization to negotiate on their behalf.”

- ▶ **Jackson State University v. Grambling University** – Grambling University’s football players refused to board the bus for the five-hour drive to Jackson, Mississippi, on October 18, 2013 for a scheduled game with Jackson State University on October 19th that was to be Jackson State’s homecoming game. The Grambling players were protesting the recent firing of head coach Doug Williams, the recent cuts in the football budget, and the horrible conditions they said they had to endure (including riding a dilapidated bus to every away game). As a result, Grambling forfeited the game that was expected to draw at least 20,000 paying spectators, and Jackson State was forced to cancel a number of homecoming activities. Those who had already bought game or other event tickets had their money refunded. The event cancellations also purportedly cost the City of Jackson a lot of money that had been committed for those events. In the aftermath, Jackson State filed a breach of contract lawsuit against Grambling seeking to recover all of the lost revenue and costs that it suffered as a result of the cancellation. Subsequently, the Southwestern Athletic Conference announced that it had resolved the dispute by requiring Grambling to pay \$20,000 to Jackson State to cover its expenses and losses and that Grambling would play road games at Jackson State for the next three years. Grambling has also agreed to pay Jackson State an undisclosed amount from its “future distribution amounts” from the SWAC.

► **Frazier v. North Carolina Central University** -- North Carolina Central University's athletic director Ingrid Wicker-McCree fired head football coach Henry Frazier shortly after Frazier was arrested on August 19, 2013 for violating a domestic violence-based protective order given to his ex-wife Lanier Turner-Frazier. After NCCU chancellor Debra Saunders-White on August 29 rejected Frazier's request to be reinstated, Frazier filed a wrongful termination suit against NCCU in state court in Wake County. On October 1, 2013, Frazier's case received a boost when Know County judge Jennifer Knox found Frazier not guilty of violating the protective order. Apparently, Frazier had written a handwritten letter to his ex-wife asking to be reimbursed for a \$205 parking ticket that he had paid but that had been caused by the ex-wife or her daughter parking illegally while driving a car registered to Frazier. The letter indicated that he would deduct the \$205 from the next month's alimony check. The ex-wife then took the letter to a Cary Police Department officer who obtained the warrant that led to Frazier's arrest. Judge Knox ultimately found that the arrest warrant had cited to an expired protective order, not the one in effect at the time, which made Frazier's arrest invalid, which in turn makes Frazier's firing based solely on an unjustified arrest suspect. A settlement now seems quite likely.

- Former Minnesota State University at Mankato football coach Todd Hoffner was reinstated as the school's football coach after he won an arbitration decision on April 10, 2014 from arbitrator Gerald Wallin who ruled that the University had no valid grounds for terminating his contract. The University had fired Hoffner after he was arrested in 2012 and charged with two counts of possessing child pornography after university staff found images of naked children on his work-issued cell phone. Coming just months after Jerry Sandusky was convicted of child sex abuse, Hoffner's case made national news, but the charges against him were dismissed three months after his arrest after the judge found that the pictures on his phone depicted innocent images of his own children playing after a bath. Since Hoffner was guilty of no criminal nor wrongful act, the arbitrator found that his termination was wrongful and ordered his reinstatement. Hoffner had already taken the head coaching position at Minot State in North Dakota, but he resigned from that position and reassumed his position at Uof M Mankato shortly after the arbitrator's decision was announced.
- Moody's issued a report in early October 2013 warning universities that they were at risk of having their credit ratings downgraded due to the escalating risks associated with conducting Division I athletic programs. The report noted that although bid-time athletics can boost an institution's brand recognition, donor support, and student applications, those benefits are offset by growing "financial and reputational risks that require careful oversight." Moody's noted that nine out of ten D-I programs are not self-sustaining and require growing subsidies diverted from other university operations. It also cited public scrutiny from numerous scandals, depleted debt capacity caused by capital investment in athletic facilities, and uncertain future costs from potential liability in high profile litigation, as well as the possible change in the amateur model.

Earlier, in June 2013, Moody's had downgraded the NCAA's credit outlook to negative, citing the O'Bannon litigation risks that could "destabilize the current intercollegiate athletic system and negatively impact the NCAA and its member institutions.

- ▶ Minnesota governor Mark Dayton in late May 2013 signed into law a bill passed overwhelmingly by both houses of the Minnesota state legislature that added a provision to the 2013 Omnibus Education Bill stating "The existence of parent complaints must not be the sole reason for a school board to not renew a coaching contract." This legislation was introduced by Reps. Dean Urdahl (R-Grove City) and Paul Marquart (D-Dilworth), former high school cross country and wrestling coaches, respectively, after the nonprofit Minnesota State High School Coaches Association presented them with data showing that of the 110 boys hockey coaches whose contracts had not been renewed during the previous five years, 38 were precipitated by and the non-renewal justified solely by parental complaints. Likewise, several coaches had testified to legislative committees that abuse by parents, often upset because their son or daughter did not receive the playing time the parents thought they should, was a significant aspect of their jobs, and that the phenomenon of parental abuse of coaches had been magnified by the availability of social media. The sports most severely affected by the phenomenon of parental interference were cited as being ice hockey, basketball, soccer, and volley, all sports that boost significant parental involvement at the youth, club, and travel levels. The new legislation is intended by the legislature as a signal to school boards and to parents that parental involvement in high school sports should be diminished.
- ▶ The Pennsylvania legislature in late 2013 passed HB 1502 that allows children 12 and older to be employed as youth sports officials in Pennsylvania. Previously, the state's Child Labor Act prohibited minors younger than 15 from being employed except as golf caddies or newspaper delivery carriers who can be as young as 12. The new legislation allows the same exception to apply to 12-year old and up who officiate youth sports contests.
- ▶ The Brandon Bears youth football teams (two different teams from different age groups) of the Tri-County Youth Football and Cheerleading Conference in Tampa, Florida, have been barred from participating in the conference championship games (for which they had qualified) for participating in too many practices. The extraordinarily technical ruling came after seven of the team's 34 cheerleaders performed some of their routines to music during a barbecue that one of the team's assistant coaches held for the team at his home. Because the small group of cheerleaders performed their routines, the event was deemed by conference officials to be a team practice, putting the teams over the practices limit, even though no football was played or drills performed – it was strictly a social event in street clothes for the players. The Brandon Bears organization was also fined \$2,500. The organization unsuccessfully appealed what conference president Greg Stallings said was a 14-0 decision by the conference board.

- ▶ The FIFA executive committee in early 2014 instructed FIFA chief investigator (i.e., the head of the investigatory chamber of the FIFA ethics committee) Michael Garcia, an American lawyer, to engage in an extensive investigation of possible improper conduct on the part of FIFA members who voted for the controversial bids for the 2018 and 2022 World Cups. Especially in the midst of the fiasco of trying to figure out the timing of the 2022 World Cup in Qatar, where the summers are extremely hot and the rest of the year disruptive of football operations for almost every league and competition around the world, allegations have been made that the Qataris may have bribed voters into giving the 2022 Cup to Qatar. Specifically, the Daily Telegraph ran an article claiming that former FIFA executive committee member Jack Warner “requested payments” of more than \$2 million from since expelled Qatari executive committee member Mohamed bin Hamman shortly after the World Cup vote. FIFA’s leadership has ordered the investigation saying that the integrity of the World Cup must be unimpeachable and the process incorruptible. The investigation has triggered speculation in the soccer world that the 2022 World Cup might be taken away from Qatar, speculation on which FIFA president Sepp Blatter has declined to comment.
- ▶ The English Premier League, the French Tennis Federation, and several music publishers in early November 2013 reached an agreement with Google-owned video sharing YouTube to drop their lawsuit against YouTube in the English High Court in which they claimed that allowing third parties to post video clips of the plaintiffs’ matches and events on the YouTube platform violated the UK’s copyright law. All parties agreed to pay their own court and litigation costs. The move allowed the EPL and other plaintiffs to establish their own YouTube channels and use the platform to show delayed highlights of their matches and events and behind-the-scenes videos and interviews, which they had been unable to do while the litigation was pending. Others will still be able to post their video clips of the plaintiffs’ matches. The EPL indicated that it was settling the case in large part to focus its legal attention on preventing Internet service providers from accessing a web site that streamed live EPL matches (see previous entry).
- ▶ The UK Parliament in fall 2013 adopted a bill that now allows the Minister of Culture, Media & Sport to modify regulations that impose a heavy tax on foreign sports stars earnings when they perform in the UK. The current tax has deterred many major stars from competing in events in the UK, and to entice them in the past event promoters had to make a case on an ad hoc basis to the Culture Ministry for a waiver of the tax requirements. Sports Minister Hugh Robertson is also seeking a bill in Parliament that would create a broad framework for granting exemptions and expedited procedures (e.g., tax exemptions, expedited visas, security provisions, ticket-tout bans, etc.) for athletes participating in events in the UK. Apparently international federations are demanding many such waivers and procedures before committing to hold events in the UK, and it would facilitate attracting such events if these waivers and procedures were already in place.
- ▶ Brazilian prosecutor Guilherme Lapenda demanded in December 2013, under threat of criminal prosecution for fraud, that FIFA, the local Brazilian World Cup organizers,

and FIFA's ticket sales agent MATCH Services pay roughly \$2 million in "damages" to fans who bought tickets for matches played at Arena Pernambuco during the Confederations Cup competition in 2013 (which was a dress rehearsal for the World Cup to be played in Brazil in 2014). Many fans who bought tickets for the matches received tickets that were not located where they were told they would be when they purchased them. Some ticket buyers even had their seats on opposite sides of the stadium. Just a couple of weeks earlier, FIFA and MATCH had been fined more than \$200,000 each by consumer rights officials for the problems that occurred in the tickets at Arena Pernambuco.

- ▶ UEFA's Club Financial Control Body was reported in early March 2014 to be investigating as many as 76 Champions League and Europa League football (soccer) clubs for potentially violating the Financial Fair Play rules recently put in place to curb excessive spending (which UEFA characterized as "greed, reckless spending, and financial insanity." (E.g., Clubs in European competition are required to limit any losses in 2011-13 to \$45 million euros.) UEFA planned to publish its first set of sanctions in April 2014 (after this document is submitted), with clubs involved in the most serious violations to be handed more severe discipline in June 2014. Then by May 1, 2014 it was reported that UEFA had determined that just 9 clubs had been found to have violated the rules and that they were privately being offered settlements before any penalties are publically announced. Among the violators reportedly were Manchester City of the English Premier League and Paris St. Germaine of Ligue 1. It is expected that barring settlements with the teams (which reportedly only Man City was refusing to accept), when sanctions are handed down, many clubs will file legal challenges with the Court of Arbitration for Sport, not only to the individual sanctions, but to the entire scope of the Financial Fair Play rules themselves as violating the European Charter. However, UEFA president Michel Platini publically indicated that he did not believe that any club would face the most severe penalty of being excluded from all European competition next season. ?
- ▶ Mercedes was found guilty on June 23, 2013 by a five-judge FIA International Tribunal, headed by Tribunal President Edwin Glasgow, of violating FIA sporting article 22.4 by running a 600-mile test session in May 2013 with a current 2013 car and driver and by doing so gained a "material unfair sporting advantage" in subsequent races. The penalty imposed by the panel was only a reprimand and barring the team from participating in a three-day young driver test scheduled for Silverstone in July 2014, a penalty FIA officials and most other teams regarded as a mere slap on the wrist. The panel issued such a light penalty because it found that FIA had given a "qualified approval" for the illegal test and that Mercedes was not trying intentionally to gain a competitive advantage and was thus not acting in bad faith. This episode has been referred to as the "Tyregate" scandal.
- ▶ A scandal engulfed the sport of Rhythmic Gymnastics when the international federation governing gymnastics (FIG) revealed that it had uncovered a massive amount of cheating by test-takers and proctors during a paper test administration in

late 2012 for persons seeking to qualify as judges for future international rhythmic gymnastics competitions. After a several-month investigation, FIG announced sanctions against several top officials in the sport in several countries as a result of obvious and clumsy cheating that occurred at several testing sites (most notably Bucharest, Rumania, and Moscow, Russia). Among those involved in administering the test who were either expelled or suspended from the sport were Caroline Hunt of the U.S., Maria Szyskowska of Poland who was once the president of FIG's Rhythmic Gymnastics Technical Committee, and senior federation officials in Egypt, Russia, and Japan. Dozens of individuals who took the exam were also implicated and will be barred from judging any FIG sponsored competitions in the future. Clear evidence of test takers copying the answers from others' papers, crude markups, unexplained bonus points being given, interference with the computer program that scores the exams, answers changed in handwriting other than the test-taker's, and other blatant irregularities were found at several testing sites. This was a major setback for the credibility of a sport that is widely perceived to be rife with cronyism, biased judging, and corruption.