Sports Law
Cases and Materials
Teacher’s Manual
1999

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CHAPTER 1
INTRODUCTION

The initial chapter is meant to serve as an overview of the entire text. It speaks for itself in terms of what is included and omitted from the book as well as how the text is organized. It also includes a disclaimer about our decisions to apply a light editing touch to many of the cases and to omit completely some areas from coverage. The Introduction does not offer suggestions regarding how to accommodate an 1100 page book to a two or three credit course. We will expand briefly upon each of these areas, below.

First, the topics selected and the organization of the text were products of years of teaching Sports Law from our materials as well as from texts by other authors. We chose to organize the book along subject matter lines rather than "situational" or "conduct" lines because we believe that it is more pedagogically sound and easier for the students to absorb and catalog. At times, we contemplated adopting different approaches -- for example, identifying an activity or course of conduct as a heading, and treating the various legal ramifications arising therefrom -- but quickly abandoned those ideas and returned to the current format. Therefore, you may find conduct that is arguably a violation of the antitrust, labor, and copyright laws treated in three separate places under the appropriate "legal" heading. Hopefully, you will agree that our approach presents a more orderly, user-friendly approach. The only deviations from this regimen are Chapters 2 and 3 and, to a degree, Chapters 17 and 20 which, we felt, needed a discrete treatment in order to provide students with the proper background prior to addressing the more complex substantive legal issues in Chapters 4 through 20.

We consciously omitted treatment of amateur sports as a separate topic. Our rationale very simply was that we did not want to sacrifice the depth of coverage in the selected subject areas and there was no way to expand the text beyond its already expansive length. While we alluded to amateur sports issues tangentially (see, e.g., Chapter 17), we felt that any attempt to do more would disserve both the existing topics and the various amateur sports issues.

With respect to the cases, you may find many of them to be longer than the typical edited casebook opinions. We ask your indulgence and offer the following reasons for our decision. First, many of the cases are extremely complex, fact-peculiar, and quite lengthy in their unabridged state. To edit the case to a cosmetically acceptable size would be to gut pivotal portions of the opinion. Sports law is an emerging area, with a legacy that is being made and revised daily. Often, the cases in this book were chosen as much for their rich history and salient factual backgrounds as for the guiding legal principles. Second, our experience with many traditional casebooks is that they, at times, cut muscle out of an opinion to such an extent that students are left with hornbook tenets and no factual reference point. Thus, the students' ability to extrapolate from that opinion and apply the law to a new set of facts is severely compromised. We do not suggest that the cases are unedited; we simply want to emphasize that we attempted to exalt substance over both form and appearance in the editing process.

Presumably, the foregoing paragraphs still leave you with a compelling question, "I know what you left out and I know what you left in (and 'why' on both counts), but how do I decide what to cover out of the 1100 pages that remain?" The following suggested syllabi may be helpful. It will be assumed that each credit hour is a 60 minute class. Thus, a three credit course will have 28 one and one-half-hour or 42 one-hour meetings for 14 weeks. A two credit course will have one two-hour meeting or two one-hour meetings per week for 14 weeks. We have not assigned page numbers because each professor places his or her own demands upon students and may desire to extract certain things from the chapters. However, if you would find recommended syllabi --
with specific weekly assignments -- helpful, please contact us and we can provide you with suggestions immediately.

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Chapter 6 - 2 hours
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Chapter 8 - 2 hours
Chapter 9 - 3 hours
Chapter 10 - 2 hours
Chapter 11 - 3 hours
Chapter 12 - 4 hours
Chapter 13 - 2 hours
Chapter 19 - 1 hour
Chapter 20 - 1 hour

Two credit course -- Labor emphasis

Chapter 2 - 2 hours
Chapter 3 - 3 hours
Chapter 5 - 2 hours
Chapter 6 - 2 hours
Chapter 9 - 3 hours
Chapter 14 - 2 hours
Chapter 15 - 3 hours
Chapter 16 - 3 hours
Chapter 17 - 4 hours
Chapter 18 - 2 hours
Chapter 20 - 2 hours

These precatory syllabi will provide a broad perspective on the way in which you could tailor your course and our casebook to your particular credit hour constraints and subject interests. Again, if you desire more specific advice on ways to accommodate our text to your needs, please call at your convenience.

Finally, to facilitate your adoption of this text we have included numerous examination questions in the Appendix. These sample examinations are not abstract, but rather have been employed to test students on the material covered in our casebook. Student performances on these examinations persuade us that they are valid evaluative tools. Again, we are available to discuss ways in which to modify these questions to accommodate the needs of your particular course.
CHAPTER 2
THE BUSINESS OF SPORTS

As the Introduction to this chapter explains, this book and the subject that it explores - Sports Law - is about the application of a wide variety of legal principles to the sports industry. The goal of this chapter is obviously not to explain all of the business relationships and business issues that define the multi-billion dollar sports industry. Instead, we have focused on a few of the more fundamental relationships and structural issues in sports: (1) the relationships between and among the teams in a league and the relationship between each team and the league; (2) the legal and business consequences of the traditional model of league sports, in which the league is initially conceived of as merely an association owned and controlled by the owners of each of the teams; (3) the recent changes in league structure that have been considered, and in some cases adopted, as a result of business and legal concerns presented by the traditional league sports model -- yielding the so-called "single entity" or "hybrid single entity" league; (4) the differences and similarities between individual and team or league sports; and (5) relationships among those involved in the production and marketing of individual sports events and circuits. This chapter sets the stage for discussions in later chapters about the economic, contractual, and competitive relationships in the sports business.

The chapter is divided into four textual sections with associated questions, with a Notes and Questions section at the end of the chapter that goes beyond issues raised in the preceding textual sections:

I. Introduction

II. Some General Observations in the Nature of Leagues, Circuits, Tours, and Collective Behavior

III. The League: An Excursus on the "Traditional" and "Single Entity" Models

IV. Team and Individual Sports: A Comparison

V. Notes and Questions at the End of the Chapter that Focus and Expand Upon Issues Raised throughout the Chapter

From a pedagogical perspective, we believe this chapter has a number of benefits.

1. You can assign this chapter for background reading before the first class. It should get students thinking about the business issues, thereby preparing them for the class.

2. If you decide to "teach" this chapter, it should be relatively easy to start the class with a socratic dialogue or at least an open discussion, focusing on either the subjects addressed in the text or the many questions posed in the chapter, or a combination thereof. For professors seeking to encourage class participation throughout the course, it is our experience that it is important to have participation in the first class, to set the stage and expectations of the students for future classes. It should be possible to conduct a relatively lively discussion, with broad participation, focused on a selection of a few or many of the questions on page 10 of the text, especially if the syllabus or the posted assignment for the class directs the students to be prepared to discuss those questions. No specialized knowledge or background is necessary to contribute to a discussion of questions like the following.
1. How many different sports can you list?

2. What makes them a sport and not a game? (e.g., bridge, chess, horse racing, car racing, poker, cricket, rugby, sky diving, cheerleading, baton twirling, aerobics, obstacle course competitions, American Gladiators, the decathlon, steeplechase, video games, badminton, croquet, darts, pool/billiards, arm wrestling, martial arts, (kayak, kung-fu, tae-kwon-do, judo); fencing, boxing, etc.)

3. Which are professional sports and why?

4. How significant are sports in the United States?

5. What facts would you point to in support of the significance of sports? (e.g., sections of some newspapers divide into the following categories: US News, World News, Local News, Sports, Entertainment, Business, Classified Ads; one sixth of many television news broadcasts, most watched televised events = Super Bowls, etc.)

6. Why are sports important?

7. Why do people care about some sports and not about others?

8. Why do you care about certain sports and not others?

9. Why are some sports very popular on television or as events to attend (i.e., live gate attendance) while others are not?

10. Why are some sports very popular as participation sports in the United States, but not as spectator sports, either with respect to live gate attendance or television?

11. Why does the popularity of specific sports vary widely from country to country?

12. Why must an eighteen year old freshman shoot a critical free throw facing a screaming, towel-waving throng, while a veteran golfer or tennis player is unable to putt or serve without total silence?

13. Are athletes more disposed to domestic violence than non-athletes?

If you do not cover all the questions that you want to address in the first class, you can start each subsequent class with a discussion about one or two of the remaining (or similar) questions. You can also return to questions that you have discussed, for a follow-up discussion, later in the semester. Everyone should be able to contribute to the discussion of these questions, even if they have not prepared for class.

Another question/problem that can provoke a discussion filling an entire two or even three hour class:

You are part of a group that has convened to discuss the formation of a new professional sports league (you can pick a sport - e.g., Volleyball (men’s or women’s, 6-person or 4-person or 2-person Teams)). What business and legal issues have to be
resolved? Describe everything that has to be or should be done before the league starts its first season.

The discussion can focus on, among other things:

1. Structure of the league (see further, questions on page 18 of the text);

2. Rights of individual team owners or operators;

3. Number of teams and location of teams—strategic business considerations, including will league be national or regional or international, how to decide how many teams, where to place teams, expansion plans, and timetable;

4. Stadium/arena/facility selection -- what criteria in selecting facilities? Who decides -- individual teams or league?

5. Length of season (number of games - what time of year);

6. Player selection, dealing with players, cost of players, likelihood of a players association, strategy for dealing with players, possible players association;

7. Dealings with national governing bodies, international federations;

8. Possible changes in the rules of the sport to improve the product - for spectators, television, etc.;

9. Likely demographics, target audience - spectators and television viewers - for the sport;

10. Product design and marketing - ticket prices, site of arena, "halftime" entertainment, associated activities at games;

11. All-Star game(s), play-offs, championship games, format, etc.;

12. Possible sponsors, types of sponsorships deals for teams and league;

13. Name of the league, names of the teams, development of league and team marks and logos;

14. The competitive concerns about competing with existing leagues, possible future leagues? (e.g., NFL v. AFL, WFL, USFL, CFL, Arena Football League; NBA v. ABA, CBA; NHL v. WHA);

15. The need to develop a minor league system?

16. Is there potential for marketing and promoting the league outside the United States? (e.g., NFL's World League of American Football; Major League Baseball, NBA, NHL and NFL playing exhibition games outside the United States; Olympic dream teams of league all-stars to promote international interest, etc.)

17. Consideration of a co-ed league or a women's league associated with a men's league (e.g., NBA and WNBA)?
18. The likely relationship between the professional league and colleges, universities and the NCAA if the sport is also an NCAA sport? What rules should the league have about players leaving high school or college or the pros? Why?

19. The need for league rules about the equipment to be used by the players and the teams?

20. League positions, employers -- should the league have a commissioner, with what responsibilities, functions, purposes, and authority?

These discussions obviously deal with issues that will be central focuses of subsequent chapters. The last question is an excellent discussion topic to end the class that precedes discussion of Chapter 3 (The Commissioner).

There are obviously too many questions for a single class discussion. One possibility is to discuss the idea of forming a new league and then return to the discussion throughout the semester as you focus on specific business questions that relate to the legal subject being addressed. For example, Note 19 before Chapter 3 (Commissioner), Note 14 before the contracts chapters that deal with competing leagues (Chapters 5 and 6) or before Chapter 11 (antitrust - inter-league competition), questions about league versus team rights and autonomy before Chapter 12 (antitrust - intra-league competition), Note 19 before Chapter 13 (antitrust equipment issues), Note 6 before the antitrust labor exemption (Chapter 9) or antitrust analysis of player restraints (Chapter 10), or labor law issues (Chapter 14-16), Notes 12 and 13 before Chapter 19 (intellectual property).

It is our view that there is no need to attempt to summarize the textual portions of Chapter 2 in this Teachers Manual. The first three text sections (including the Introduction) are generally self-explanatory. You should suggest that your students return to the discussion of traditional model and single entity leagues prior to Chapter 12, the antitrust chapter that includes substantial emphasis on "single entity" arguments made by traditional model leagues in defense of antitrust challenges. The final text section - the comparison between "individual" and league sports - was included in part in an effort to get the students thinking creatively about sports. It also serves as an introduction to the business of individual sports, and the world of title, presenting and official product sponsors. This portion of Chapter 2 may be useful for student to review when they confront issues related to individual sports in a number of subsequent chapters, including for example, Chapter 5 (Shavers case), Chapter 10 (Volvo case), Chapter 13 (antitrust equipment cases), and Chapter 19 (various intellectual property cases).

At the end of Chapter 2 we included the 1997 Sporting News list of the 100 Most Powerful People in Sports. In subsequent years, you might want to consult the most recent such list. The list is, in large part, meaningless. There is no real independent significance to a comparison of the "power" of a professional athlete, a sports agent, a league commissioner, and a television executive. Nevertheless, the list serves to remind students of the broad scope of the business of sports and introduces them to some of the people whose names are likely to surface in discussions of current sports issues. In addition, among the other points that we believe are illustrated by the list are the following:

1. Television companies and the commissioners of the major sports leagues are generally considered the most important decisionmakers in the sports in which they are involved;
2. Because of the legal implications of so many sports business decisions, the recent historical trend has been toward lawyers serving as commissioners of the major league sports;

3. While players are the most important part of the sports product, and can often negotiate lucrative contracts, as well as endorsement contracts, players are not making the decisions - their period of importance is generally relatively short and they do not have the "power" that owners and commissioners have;

4. The importance of sponsors is often not appreciated, but the presence of people who work for Nike, General Motors, Anheuser-Busch, Coca-Cola, McDonald's, Miller Brewing, John Hancock, Sprint, Adidas, Pepsi Co. and Reebok in the top 100 list is the result of the tremendous influence that the sponsorship dollars of sponsors in general and the top sports sponsors in particular have over sports - what sports are televised, what small sport leagues are launched, what individual sports events survive, and so on.
CHAPTER 3
THE COMMISSIONER

I. Introduction

This chapter presents an overview of the background, development, and legal parameters of commissioner authority in the major professional sports. In addition to considering several cases in which the commissioner's exercise of power has been challenged, the chapter explores the rich history of the commissioner's office in the various sports, especially Major League Baseball, and the types of arguments that have been advanced in both attacking and defending the commissioner's exercise of authority. Please note that, on page 62, Judge Landis' term was from 1920 (not 1926) to 1944 and that Commissioner Peter Ueberroth (1984-1988) was inadvertently omitted from the list.

Prior to the discussion of any cases, this chapter introduces the students to a brief background of the establishment of the commissioner's office in Major League Baseball and alludes to other commissioners as well. It makes clear at the outset that the selection of a league commissioner is a complex process and one rife with its share of intrigue. These issues are also explored in further detail later in the chapter. Suffice it to say at this point that baseball's inability to elect a commissioner and settling upon an owner as an interim head has presented more than its share of problems -- problems that may persist until a non-interim commissioner is chosen. Because one of the themes throughout this chapter will be the degree of deference that courts and other adjudicatory forums provide commissioners, it is advisable to discuss the origins of the commissioner's power, and how the absence of a strong, ostensibly neutral party would result in the erosion of that power, particularly insofar as deferral by outside parties is concerned.

The motivation to delegate such a large amount of authority stems from several factors including the logistical problems created by the size of most leagues and the magnitude of their enterprise. However, the principal impetus for a strong league commissioner actually had nothing to do with the operational difficulties of running a large-scale sports league, but rather, was prompted by the Black Sox scandal in Major League Baseball in 1919. There, baseball recognized the need for some type of strong governance and provided such authority to U.S. District Court Judge Kenesaw "Mountain" Landis. In fact, the tremendous amount of authority vested in the league commissioner was as much a product of Landis' individual demands prior to taking the job as it was a need for some type of centralized, delegated power.

II. Parameters of the Commissioner's Authority

Case: Charles O. Finley & Co. v. Kuhn

Primary reason for inclusion: To establish the notion that commissioners in major sports leagues command considerable deference, or, at least, have received considerable deference from courts and other adjudicatory forums.

Points to emphasize:

1) The history and evolution of the commissioner's office in Major League Baseball, including the amendments to league rules expanding and contracting the commissioner's power, have had a profound impact on the jurisprudence surrounding challenges to decisions made by baseball's commissioners. The terms "imposed" by Judge Landis as
conditions for his assuming the position of commissioner cannot be overstated as critical features of the commissioner's office for decades to come.

2) The range of activities or conduct that rests under the umbrella of the "best interests of baseball" or the integrity of the game may be quite broad. To date, we have not seen a litmus test definition; but there is no indication that it will be narrowly circumscribed.

3) The commissioner's resolution of intra-league, inter-club disputes, including the appropriateness of enmeshing himself in player trades, is a valid exercise of his authority. Yet, students should be aware of the fact that commissioners have rarely disturbed a club's personnel decision, particularly a trade.

4) The significance of the waiver of recourse clause is worthy of some discussion. Given the broad authority vested in the commissioner as a general matter, it is conceivable that this clause is somewhat derivative and, in a sense, "cumulative." Nonetheless, its impact should be considered along with the manner in which state courts may differ on such a clause's efficacy.

5) There are limitations on his early plenary authority. As much as this case stands for the wide latitude that a commissioner possesses, circumstances may justify reversal of his decision. This issue assumes added importance given the result in the Rose case.

Notes and Questions:

The fact that trades (assignments) have always been a part of baseball and that commissioner's typically stay away presents an interesting backdrop to this case. A commissioner's approval of even the most outlandish deals had been commonplace in professional sports.

The answer to N&Q 3 is anyone's guess, but a likely response is that the commissioner probably would have backed off if Walter O'Malley or other high roller in the baseball hierarchy were involved.

The remaining notes speak for themselves as they provide a more detailed assessment of various commissioners. N&Q 6 rhetorically sets the stage for the discussion of the Rose materials by asking whether there are limits to the commissioner's power. Clearly there are, particularly where the commissioner violates principles of due process or acts in violation of law.

Case: Rose v. Giamatti (and supplemental materials)

Primary reason for inclusion: To demonstrate that, notwithstanding the commissioner's power, a court may nullify a decision by that office.

Points to emphasize:

1) The Major League rules governing the commissioner's prosecutorial and adjudicatory functions, specifically the rules dealing with hearings establish clear procedural parameters. These procedures generally call for a trial-type hearing.
2) The nature of the commissioner's actions and the degree to which Bart Giamatti had compromised Pete Rose's right to a fair hearing should be addressed in some detail. The cornerstone of due process is a neutral decisionmaker.

3) The need for Rose or similarly situated person to exhaust "administrative remedies" prior to seeking redress in court is a critical aspect of this case. The notion of availing oneself of contractual or administrative avenues of recourse resurrects itself in other contexts (see Chapter 16 re arbitration procedures). The viability of arguments that pursuing or defending the matter before commissioner Giamatti would have been "futile," thus justifying immediate resort to the judicial process, was crucial to Rose's case. By emphasizing that Giamatti was biased, the futility argument became inevitable. Logically, any plaintiff should ask, "why should I be required to exhaust remedies before a tribunal that, I contend, is biased?"

4) Judge Norbert Nadel's status as an elected state court judge who potentially could be influenced by political concerns (given Pete Rose's enormous popularity in Ohio) was a subject of considerable attention. However, it is likely that this point received more "press" than it deserved in light of the relatively clear error in judgment by Commissioner Giamatti.

Notes and Questions:

N&Qs 1 through 4 simply provide a brief excursus on the basic principles of administrative law. A review of these notes is worthwhile at this point both because the administrative law issues have universal application and many students may not have taken this course.

N&Q 4 regarding the comparison of the commissioner to an agency head could certainly be answered in the affirmative, especially given the fact that he or she is appointed directly and derivatively by the persons that he or she may be ruling on in the future. Again, the administrative law analogy is obvious and could provide a useful background for understanding other sports disciplinary issues. In this regard, N&Q 5 poses an interesting question in terms of the impact of Rose in other contexts. Irresistibly, the discussion here turns to the Nancy Kerrigan/Tonya Harding incident and the governing body's authority and responsibilities in a process involving the suspension of Ms. Harding. Other questions are inevitably joined in terms of the various governing bodies' power in international competition, Olympic events, etc.

N&Q 6 is worthy of some discussion -- but there is no definitive answer. As the note indicates, there are valid arguments on both sides. N&Q 7 frankly has been included for fun. There are legal issues that could be joined (the viability of an antitrust claim, the availability of the baseball exemption, business tort, etc.). However, this question is provided mostly to generate a dialogue that provides a welcome respite from more heavy-duty legal discussions.

Case: Chicago National League Ball Club, Inc. v. Vincent

Primary reason for inclusion: To illustrate that the most significant limitation on the commissioner's authority is the league ownership itself and the universal truth that the commissioner operates at the disposal of his "bosses."

Points to emphasize:
1) The tension between individual league (National and American) rules and the broad "best interests of the game" prerogative vested in the commissioner presents a conundrum. There is no clear mandate dictating which provisions will prevail in the event of a conflict.

2) The standards governing questions of interpretation where ostensibly relevant contract principles are in conflict are employed to reconcile the conflict between Major League Baseball's Agreement and the rules of the National League. Of course, these interpretation guidelines are not dispositive and a considerable amount of discretion rests in the trial court or other fact-finder.

3) The comparison (or contract) between Finley v. Kuhn and Atlanta Braves v. Kuhn in Paragraphs 14 and 15 of the opinion reinforces the idea that the commissioner's power is not absolute. In appropriate circumstances, the commissioner's decisions will be repudiated by the owners with the blessings of a reviewing court. To be sure, the court's unequivocal conclusion makes it clear that the commissioner's power is not totally unfettered, especially where he or she plays havoc with the desires of the league's more powerful owners.

4) Students should familiarize themselves with the standards governing the issuance of an injunction. This issue that will be addressed in considerable detail in Chapter 6.

Notes and Questions:

N&Qs 1 and 2 revisit the performance of baseball's earlier commissioners. The references to the various commentators' assessments are intended to provide some non-legalistic color to the treatment of commissioners and their exercise of authority. It bears emphasis that commissioners should not be deluded into assuming that they are beyond sanction. It is also worthwhile to illustrate that where a commissioner has asked for a vote of confidence (or owners have ordered a "no confidence" vote) the commissioners have ended up jobless. An interesting class discussion could focus upon what legal recourse exists for a commissioner who has been discharged.

N&Qs 3 through 9 focus upon the relationship between the commissioner and the players, particularly in the areas of labor relations and discipline. In this regard, considerable attention should be directed toward the commissioner's placement in the overall labor-management scheme. His role as "neutral arbitrator" has been narrowly circumscribed with the evolution of players associations. As the text indicates, there are circumstances where the Commissioner retains the power to impose discipline unilaterally, without any arbitral review. [Please be aware that, in N&Q 4, the correct reference for the cited grievance/arbitration clause is Art. XI A (1)(b) and, in N&Q 5, the NBA collective bargaining agreement cited is the agreement that expired in 1995.] There are occasions where, pursuant to such authority, commissioners have sought to preclude review through a CBA's grievance mechanism and have been successful in their efforts. The current provision governing this issue is found in Article XXXI, Section 8. Even when he exercises his seemingly plenary power in the area of the game's "best interests," he may cede ultimate decisionmaking in a discipline case to a neutral arbitrator on review. For example, in most, if not all, discipline cases, the baseball commissioner has permitted the affected player to seek review before a neutral arbitrator. The Commissioner's willingness to all resolutions by a neutral arbitrator may be a product of the Commissioner's desire to provide a neutral forum for any number of reasons. For example, the Commissioner may feel that the conduct provoking the imposition of discipline by the league does not actually compromise the integrity of the game. Also, the Commissioner's power may be circumscribed by the very collective bargaining agreement language that gave him extended arbitral authority (e.g., Article XXXI, Section 8 of...
the current NBA agreement limits the Commissioner's power to withdraw a case from the grievance/arbitration procedure where the financial impact on the player exceeds $25,000.)

Moreover, the "elevation" of the commissioner to head of the PRC is not insignificant. It is relevant in more than one respect. First, in certain matters, he does not ever have the appearance of a neutral party, and he is clearly an agent of the employers, carrying attendant consequences in potential liability under the labor laws. Second, he will not have authority to tell the owners what to do or how to resolve any labor dispute that may occur. The question that persists is whether the commissioner retains any status of neutrality vis-a-vis the players and their collective bargaining representative. The NFLPA case that closes the chapter highlights the commissioner's unsettled status in this regard. The issue appears again in the first Silverman case in Chapter 15.

The issues presented in N&Qs 6 through 8 are by no means conducive to simple resolution. The hypothetical presented in N&Q 6 has been used in class discussion for the past twelve years, and it consistently provokes vigorous debate. It has a certain interdisciplinary character because it forces students to consider the notions of bail, "innocent until proven guilty," etc. It also makes them consider these questions beyond mere abstract contexts. When directly confronted with the question of whether to suspend the player in question or how, as general counsel, they would advise the commissioner, students realize that the task is extremely difficult. There is no precise answer to these hypotheticals and any advice should turn on the facts of each case.

III. Status of Commissioner

Case: National Football League Players Ass'n v. NLRB, 503 F.2d 12 (8th Cir. 1974)

Primary reason for inclusion: To assess the status of a league commissioner and to explore those circumstances in which the acts of a commissioner would be imputed to the owners and vice versa.

Points to emphasize:

1) The commissioner is not explicitly identified as employer. As discussed at various points throughout the text, this issue has never been fully resolved. Yet, however, the clear implication from the opinion in this case is that the commissioner's actions in various situations, may very well be imputed to the ownership.

2) The court of appeals will not simply rubberstamp a decision of the NLRB or defer to the agency's expertise. Although many circuits will show considerable respect for an agency's decisions, particularly in the context of legislative-type actions such as rulemaking, they have the ability and, in some circuits, propensity to make independent judgments especially when it comes to questions of law.

3) Arcane attempts to create a subterfuge by characterizing the fines as a commissioner's decision covered by the collective bargaining agreement (which, in itself, was subject to some doubt) were rejected by the court. The fines had a significant affect on wages, hours, and working conditions, and the employer/owners' failure to bargain about such matters constituted a refusal to bargain in good faith in violation of the NLRA. This point serves as a precursor to discussion of mandatory bargaining subjects and the
club's legal obligation to negotiate in good faith about such matters with the players' collective bargaining representative.

Notes and Questions:

As the notes reflect, we still have no definitive statement on the commissioner's status as employer. Yet, the tenor of the court's opinion seems to suggest that he is much more an agent of the owners than a representative of the game and all of its participants.

With regard to the questions posed in N&Q 2, the league seems to have traded its ability to distance itself from certain labor-related conduct of the commissioner for the power to make the commissioner toe the company line. In part, this motivation may stem from the owners' discomfort with having former commissioners Bowie Kuhn and Fay Vincent tell them to abandon their lockouts in 1976 and 1990, as well as from their comfort with having interim commissioner and Milwaukee Brewer owner Bud Selig 100% "in line."

With regard to game officials, the notes speak for themselves. A worthwhile sideline discussion would center on a comparison of the deference that a court shows an agency, an agency head shows their bureaucratic underlings, and the commissioners show umpires and referees. The brief discussion of the emergence of game officials is a "teaser" for further discussion later in the book (e.g., Chapters 14 and 17).
CHAPTER 4
CONTRACT LAW AND SPORTS: A PRIMER

In all likelihood, many law school professors will choose to bypass this chapter as an assigned reading for two reasons. First, all sports law students will have taken contracts during their first year of law school. Thus, it is a safe assumption that the rudiments covered in this chapter have already been mastered or, at least, considered. Second, because there is such a substantial amount of important material to be covered, even in a three credit course, time may not permit the luxury of assigning this chapter.

Given the legitimacy of these points, the irresistible question must be, why place this chapter in the text? Several reasons provided the impetus for this decision. First, the chapter can be assigned as optional reading and, in light of the students’ general familiarity with the topics covered, it would not be an onerous "read." Second, our sports law students who have been given an earlier version of this chapter have almost uniformly responded in a positive way, and they have strongly suggested that the material be included in the final version of the casebook. They felt that it was a useful review and a worthwhile building block for Chapters 5 and 6. Third, there may be professors who are intimately familiar with sports, labor, and/or antitrust (or any combination thereof) but may relish a refresher in contract law, particularly as it relates to the world of sports. This primer may provide enough background to enable a more sophisticated analysis of the issues raised in Chapters 5 and 6 and, to some degree, Chapters 15, 16, and 20. In this regard, while many of the cases included in these chapters can certainly be taught and grasped without a comprehensive review of this chapter, the more subtle aspects of these cases cannot be fully appreciated without a thorough understanding of contract law. Finally, the chapter can serve as a resource without any assignment whatsoever simply by referencing the relevant portions as they relate to the cases covered.

This chapter does not presume to be a mini-contracts course. Matters such as third party beneficiary, illegality, parol evidence, and other portions of the contracts subtext have been bypassed. In most instances, the decision was predicated upon the relative infrequency of such issues arising in a sports context, the probability that the issue is covered in other legal disciplines, and/or a desire to spare the reader the pain and tedium of dealing with virtually incomprehensible and totally unrewarding topics such as parol evidence when there was no real immediacy. This point does not suggest, for example, that the parol evidence rule never arises in a sports context. Rather, such topics have not been addressed in the primer simply because the return on investment is negligible.

The matters that have been addressed follow a fairly straightforward format. Most contract courses, in one form or another, focus upon three principal stages: formation, validation (consideration), and performance. The first stage treats the matters that lead to the closing of the circle of assent or the formation of the shell of an agreement. At this stage, questions surrounding offer and acceptance, duration, indefiniteness, etc. arise. A peek at Chapter 5 makes it clear that considerable sports litigation has developed in this area (Billy Cannon case is a glowing example). The second stage involves the validation of, or consideration for, the contract. This chapter attempts to provide some basic explanations of consideration doctrine and its frequent kin, promissory estoppel. While challenges to the validity of sports contracts on consideration grounds were much more prevalent at the turn of the century, issues still arise in this area centering upon questions of mutuality, illusory promise, etc. Pertinent illustrations of such questions arising in the sports context are included in this chapter. The third stage in the contracting process involves the actual performance of the parties' duties. In order to appreciate fully the issues that have arisen in this area, students must comprehend the differentiation of
promises and conditions, the determination of the factors relevant to ascertain whether a material breach justifying rescission of a contract has occurred, and the various circumstances that will excuse a party from failing to satisfy a particular condition (e.g., waiver). Questions surrounding these topics will surface frequently in Chapter 5, particularly in the Kenny Stabler and Catfish Hunter decisions, as well as in numerous arbitration decisions appearing as both lead and note cases.

In addition to the treatment of the basic contracting stages, Chapter 4 considers overarching issues such as the need for a writing, various concepts that will affect one’s duty to perform (typical avoidance issues such as duress, undue influence, incapacity, mistake, fraud, etc.), and assignments (commonly referred to as "trades" in the sports profession). All of these concepts have arisen in sports contract enforcement litigation and likely will surface in the future. They have collateral relevance to many of the cases considered in Chapters 5 and 6, particularly the Notes and Questions that follow the lead cases.

The ultimate question in any contract analysis centers upon what remedies are available to the party who has alleged a breach. This section is very important in the sports context due to the fact that the nature of the breach may severely circumscribe the available relief. That is, when an athlete "jumps" a contract, enforcement of the negative covenant is frequently the only viable remedy because damages are too speculative and an affirmative injunction is inappropriate on both "involuntary servitude" and administrability grounds. Thus, an understanding of the basic principles of remedies, including mitigation of damages, unclean hands (when equitable relief is sought), etc. will facilitate students' appreciation of several of the cases contained in Chapter 6.

In terms of a suggested approach to utilize Chapter 4, we have three recommendations. It could be assigned as a one-hour required reading that is discussed in class as a review of contract law. Second, it could be "assigned" as a recommended, but not required, reading that is referred to at periodic points throughout the course specifically dealing with cases in Chapters 5, 6, 16, and 20. Third, it could be dispensed with as an assignment altogether in favor of an in-class synopsis by the professor. Regardless of the approach taken, it is strongly recommended that the relevant portions of this chapter be highlighted at various points throughout the text, whenever courts or arbitrators are calling upon traditional principles of contract law. We have made an effort to cross-reference any points that are covered in both this primer chapter and subsequent chapters.
CHAPTER 5
CONTRACTS AND SPORTS: NEGOTIATION, FORMATION AND INTERPRETATION

I. Introduction

Parts I (Introduction) and II (Negotiating Strategy) of this chapter are intended to provide students with a brief overview of negotiating strategy and to present an example of the boilerplate uniform player contract that applies in most professional sports. The portion devoted to negotiating strategy is largely anecdotal, calling upon personal experiences at the bargaining table. Certainly, this section can be amplified by the professor’s own experiences and available literature in the area. This section may also provide a useful launch point to discuss the ethical considerations that must be a part of all contract negotiations -- particularly in the context of an agent representing more than one athlete on the same club and athletes who are part of a collective bargaining unit.

It is not necessary to address each provision of the sample contract that has been included; however, students should be encouraged to read the language carefully. At various points throughout the remainder of the text, provisions of these contracts will be featured. For example, in the first case of the next section (Billy Cannon), the commissioner approval language is the gravamen of the case. Other paragraphs dealing with injuries, workers' compensation, special covenants, etc., will occupy center stage in subsequent cases and chapters.

Part III of this chapter returns to the traditional analysis of several cases. They are treated immediately below.

III. Specific Problems in Contract Formation

(A) Offer and Acceptance: Identifying the Offeror

Case: Los Angeles Rams Football Club v. Cannon

Primary reason for inclusion: To illustrate the difficulty in determining the identity of the offeror and offeree in certain contract settings and to present an example of standard player language that may be subject to more than one interpretation.

Points to emphasize:

1) At the time of this litigation, the AFL and NFL were engaged in a bitter bidding war for player services. Often the victims of the stratagems and silly games played by the clubs in each league were young and unsophisticated college athletes. Whether Billy Cannon was one of the naive victims remains unsettled, as discussed in N&Q 8.

2) The commissioner approval language that caused the lion’s share of the confusion in this case has been amended to eliminate the possibility of revocation prior to commissioner approval (see ¶ 18, entitled Filing). Thus, even if the player were deemed to be the offeror, he or she would not be able to revoke once the club has executed the agreement.
3) The option contract argument raised by the club/league was very creative. Students should be referred to the section of Chapter 4 dealing with options. Ultimately, the argument failed because the money involved was not "sufficient" consideration because it was refundable and had not been "converted" in any way by Cannon.

4) The characterization of the commissioner's language as a condition upon acceptance versus a condition on performance is critical. As the Notes and Questions indicate, the former would suggest that the contract is not formed until the commissioner approves. The latter construction would mean that a contract had been formed (thus barring revocation), but that no duties would arise thereunder until the condition had been satisfied. This case is a pertinent launch point for return to the primer chapter to review the basic concepts of formation, validation, and performance. The facts of Cannon, with some embellishment, are fodder for a comprehensive examination question, examples of which are included in the appendix.

Notes and Questions:

N&Qs 1 through 3 address the points raised immediately above. It is worthwhile to discuss the circumstances surrounding the Cannon case. There is little doubt that the judge was influenced by the fact that Cannon had become a pawn (or even a more valuable piece) in the league's chess match; he tailored the opinion accordingly.

The answer to N&Q 4 is simply that the option would have rendered the contract irrevocable for an agreed-upon or "reasonable" period of time. Thus, Cannon would have been precluded from withdrawing his offer -- assuming that he was the offeror.

N&Q 5 asks the students to compare the Cannon facts to the current commissioner approval language. The current language (¶ 18, not 19 as listed) would have made it much easier for the club to convince the court that a contract had been fully formed independent of, and without need for, the commissioner's approval.

N&Q 6 requires the students to revisit the avoidance section of the primer chapter. Conceivably, the way in which Cannon was treated could be the predicate for an argument that the contract was voidable on grounds of undue influence, fraud, or other similar avoidance devices.

N&Q 7 asks whether the entire contract (to the extent that one has been formed) is void on consideration grounds. A useful analogy in this regard is the National College Letter of Intent, which contains similar language conditioning the scholarship arrangement upon university approval. (See Chapter 4). It is noteworthy that, although this case centers on contract formation principles, several affirmative defenses were raised. As recommended in N&Q 5, it might be useful to address the fraud, unclean hands, mutuality, and mistake issues raised in the early part of the opinion by relating them to the pertinent parts of the primer. Also, students should be asked to explain the consequences of a finding that there is no consideration (void) versus a finding that the contract is avoidable due to mistake or misrepresentation (voidable).

N&Q 8 provides an interesting postscript to the Cannon affair. It may be worthy of some discussion to consider whether there is a rising incidence of athletes' inability to observe societal norms. One question is whether a disproportionate number of athletes have "legal" problems or whether athletes' problems are simply given greater play by an increasingly intrusive media. Issues such as spousal abuse and drug usage are compelling examples. See further Chapter 3 and Chapter 18.
(B) Contract Duration

Case: Sample v. Gotham Football Club

Primary reason for inclusion: To alert students to the fact that salary guarantee clauses must be drafted scrupulously and to explain that long term (multi-year) contracts can be viewed as either one contract with a number of performances or as a series of one year contracts. As the Sample case demonstrates, this latter distinction can be quite significant.

Point to emphasize:

1) The nature of the documents reflected that there were three separately executed agreements. Many contracts commentators and several courts decry the need for laborious examination of extrinsic factors, favoring an approach that scrutinizes the "four corners" of the relevant documents to derive a plausible interpretation.

2) Often, courts will do somersaults to avoid considering extraneous information in interpreting a contract. Here, Judge Edelstein goes directly to the documents themselves. Thus, while there seems to be ample evidence supporting the idea that Sample had a long term deal, the court construes the arrangement as a set of one year contracts.

3) The court's reliance on the Hennigan decision was handwriting on the wall. The relevance of Hennigan to Sample should be entertained, and students should be asked to assess the prudence of the courts' approaches in these cases.

Notes and Questions:

Again, we are presumably presented with a naive athlete who has negotiated an arrangement that, he assumed, "protected" him for several years. However, it does not appear as though the court was sympathetic to the athlete's plight. The Notes and Questions illustrate that differentiating one contract from a series of contracts can be difficult. In this case, and certainly in the Hennigan case referenced therein, it seems that the court missed the boat. At the very least, it seems as though the contract(s) are beset with ambiguity warranting an interpretation against the contract drafter, in this instance a professional sports team, vis-a-vis an unsophisticated athlete.

(C) Indefiniteness

Case: Eckles v. Sharman

Primary reason for inclusion: To illustrate that vague or ambiguous contract language can doom an agreement even when a severance (or severability) clause is present.

Points to emphasize:

1) The facts may give the impression that Bill Sharman is the type of coach that "goes for the gold" (a la Larry Brown of the Philadelphia 76ers, et al.) -- a person who may not be worthy of sympathy in a close case. This factor could have influenced the district court on the question of liability and the jury on the question of damages.
2) The district court was persuaded that the severance clause would serve to excise the troublesome language and permit the untainted portions of the contract to survive as part of an enforceable agreement. The lower court also found it relevant that the parties had made an earnest effort to clarify the option and pension clauses.

3) The Tenth Circuit found fault with the lower court's conclusions on several grounds, particularly the finding regarding the parties' good faith efforts to reconcile the indefinite terms and the presumed efficacy of the severance clause. The good faith attempt does not give the agreement any more precision or any greater basis to ascertain the meaning and scope of the language. Moreover, the severance clause in itself does not operate to make the contract divisible and cannot permit a contract to survive if the clauses sought to be severed are "essential."

4) The issues for consideration by the Tenth Circuit involved questions of both law and fact -- or at least mixed questions of law and fact. Thus, the reviewing court had no misgivings about reversing. The court effectively ruled that the language in question was ambiguous, and that it could not be severed unless and until a determination had been made about the materiality of the clauses. Because there had been no clear manifestation of intent in this respect, the court of appeals reversed the directed verdict and remanded the case for a new trial.

Notes and Questions:

N&Q 1 focuses on the nature of the indefiniteness problem presented by this case. The terms in doubt do not simply represent vague language that was the product of the parties' inadvertent or careless omission. Such an oversight may have been viewed as harmless error, correctable by judicial gap-filling. However, the indefiniteness in Eckles reflected an agreement to agree -- often a flaw that is fatal to the contract. The particular problem with the agreement to agree is that it represents an overt manifestation of the parties' intent to agree at a later time -- ergo, the parties have reached no agreement and there is no basis upon which a court can find an enforceable contract.

The severance clause and other language will not ipso facto make a contract divisible or operate to sever offensive language absent a clear manifestation of intent. In other contexts, courts have made it abundantly clear that contracts are presumed to be "entire" and non-divisible. It could be argued that the severance clause in Eckles was intended to salvage the remainder of the contract after the ambiguous terms had been excised. The court presumably believed that the severance clause should not be given such significance where the result would be a "contract" bereft of several material terms. Accordingly, it remanded the case for further inquiry into whether the questionable clauses were essential.

N&Q's 2, 3, and 4 consider modern approaches to indefiniteness issues with emphasis upon a legislative and judicial predilection for the preservation rather than destruction of the contract. Students should be asked whether the Tenth Circuit's decision is reflective of a dated approach to contract indefiniteness or whether the plaintiff's action would be infirm under any regime.

N&Q 5 becomes relevant due to the evolving prominence of revenue sharing in most league sports. Baseball is the latest professional sport to adopt a revenue sharing plan. This question has no definitive answer, but it could raise some interesting issues about damage recovery and source of liability.
N&Q 6 provides an introduction to the material that will be covered in greater detail in Chapter 6. For purposes of this question, we would ask the students to consider the basic elements of a claim for equitable relief, the prerequisites for injunctive relief, and the possible available defenses (including "unclean hands").

**(D) Salary Guarantees and the Duty to Mitigate Damages**

**Case:** *NFL Players Ass'n v. NFL Management Council*

**Primary reason for inclusion:** To introduce students to the notions of guaranteed contracts, waiver provisions, and mitigation of damages.

**Points to emphasize:**

1) The court has jurisdiction over the matter by virtue of Section 301 of the NLRA.

2) The court was called upon to review a decision of a reputable arbitrator. As will be discussed in Chapters 14 and 15, it is rare for a court to disturb a well-reasoned arbitration decision -- this case provides no exception to that general assumption.

3) The language of Pastorini's contract contained a salary guarantee, but no offset language. In and of itself, this factor might not have sounded the death knell for the league's offset language. However, as discussed below, the contract's silence on this issue together with other indicators discounted the validity of the league's contentions.

4) Pastorini was placed on waivers and no club claimed him. Accordingly, Pastorini's contract was not assumed by any other club. When Pastorini was released, he became a free agent, in effect, and any deal that he negotiated was independent of the guarantees provided under his prior contract.

5) The club attempted to demonstrate that league policy called for an offset whenever a player under a guaranteed contract was signed by a new club after his unconditional release. The part of this case that the students seem to enjoy is the NFL's straight-faced argument to this effect despite the personnel director's acknowledgement that the alleged policy was not in writing, had not been communicated to the NFLPA, and was not part of the union contract!

6) Existing precedent in the *Smith* and *Davis* cases reinforced the idea that a team wishing to impose "offset obligations" upon a player who negotiates a new deal after a release should make this obligation known to the player. Arbitrator Kagel explained that the league even provided such offset language to the clubs in the wake of the *Smith* decision.

7) The basic explanation of mitigation of damages is accurate, but somewhat misleading. [See discussion in *Notes and Questions*, below.]

**Notes and Questions:**

N&Qs 1 and 2 revisit the decision itself and address some of the **Points to emphasize** covered above. N&Qs 3 through 6 attempt to clarify the mitigation of damages issue. Simply stated, there is no mitigation issue in this case. In the abstract, given the exclusive nature of the
standard player contract, mitigation would apply in the event of a breach -- absent any guarantee. In this case, the salary was absolutely guaranteed -- in contemplation of events such as the ones that transpired. Thus, mitigation has no relevance to this case whether Pastorini's termination resulted either from a legitimate management decision based upon insufficient skills or from a blatant, heinous breach of contract.

N&Qs 6 and 7 point out the perils of a "guarantee" or "no-cut" clause that is not explicit. Often, adjudicators will attempt to interpret what the parties meant and what would be a fair result in a given situation. But careful drafting avoids placing one at the mercy of a potentially inhospitable decisionmaker. The Billy Martin question at the end of the Notes and Questions raises an interesting issue in terms of the connotation attached to a guarantee and the degree to which a club can satisfy its obligation simply by following the letter of the agreement. We would argue that there is an implied promise of good faith that attends the guarantee clause and that Holtzman's exile is tantamount to a breach. We would probably lose!

(E) Salary, Bonuses, and Incentive Awards -- The Club's Failure to Pay as a Material Breach

Case: Alabama Football, Inc. v. Stabler

Primary reason for inclusion: To illustrate the variety of bonus provisions and the possible impact of a clause characterized as a signing bonus as opposed to merely a salary advance.

Points to emphasize:

1) Kenny Stabler signed a contract with a team in a fledgling rival football league. The league had no history to "trade on" and, to some extent, hoped that the name recognition of "renegade" players from the established league would "sell" the product.

2) Stabler attempted to rescind the contract based on the material breach of the Alabama Football Club -- its failure to pay monies due. There was some discussion in the case regarding Stabler's alleged failure to give the club a chance to perform. It might be useful here to refresh the students' memory -- or make them aware -- of the section in the primer chapter dealing with material breach, particularly the fact that a late payment alone may not constitute a material breach justifying rescission.

3) The court correctly stated the law that the inability to perform may constitute a material breach justifying the other party's repudiation of the contract. However, the court at no point explained its decision to leave the parties exactly where it found them -- with no adjustment in the status quo in terms of return of money expended, good will lost, etc.

Notes and Questions:

N&Qs 1 through 3 raise the threshold issues that must be addressed in cases like this one. Is the bonus truly a bonus -- compensation above and beyond straight salary? If so, what is the recipient obligated to do to "earn" the bonus? Is his signature and the attendant publicity value enough? If not, is Stabler in this case entitled to the money that he retained without playing a game? Is he entitled to any more compensation? The facts of this case simply do not provide enough information to answer these questions, and the court's cavalier handling of the money issue does little to enlighten us. The language from the Greenwood case at least gives us some idea
of the differentiation between a signing bonus and an advance on salary, and the consequences of such differentiation.

N&Q 4 sets the stage for the Catfish Hunter case and clarifies the free agency terminology in the context of a breach of contract case. Simply put, the victim of a material breach is the same in any situation -- he or she is a free agent, so to speak, liberated from all contractual duties to the breaching party.

**Case:** American and National Leagues of Professional Baseball Clubs v. MLB Players Ass'n (Catfish Hunter)

**Primary reason for inclusion:** To demonstrate that in the context of a standard player contract, the typical material breach by the club is the failure to pay and by the player is the failure to perform on the field.

**Points to emphasize:**

1) Catfish Hunter gave owner Charlie Finley ample opportunity to provide the promised annuity payments (loosely characterized in N&Q 4 as insurance coverage). Correspondence from Hunter's representative made it clear to Finley that a failure to make the payments to the life insurance carrier would result in termination of the agreement.

2) The deferred compensation that Finley was supposed to pay to the insurance carrier for Hunter's annuity comprised half (50%) of Hunter's salary -- and there was no denial that the funds had not been paid. Thus, there is little doubt that the breach was material.

3) Typically, the party obligated to pay money is given a limited grace period to perform. Courts are reluctant to forfeit an agreement based on a *de minimis* delay in payment. See E. ALLAN FARNSWORTH at 8.14. Yet, in this case, Finley could find no safe harbor here, because numerous opportunities have been given to comply.

**Notes and Questions:**

N&Q 1 reinforces the idea that an owner's material breach could provide the player an escape hatch from his contractual obligations. The question arising is whether enough time was given for Finley to comply with his promise to funnel the deferred compensation to the insurance company.

N&Q 2 again illustrates the potential problems that can arise when bonus provisions and regular salary are not clearly demarcated. In this situation, the parties are at the mercy of an arbitrator or other adjudicator to ascertain how the various types of compensation should be allocated. The right result probably obtained in the *Horner* case, but a contrary result easily could have occurred.

N&Q 3 is a glowing example of how the bonus/compensation dichotomy rears its head in the context of salary caps and other mechanisms that circumscribe a player's right to negotiate a higher compensation package.

N&Q 4 points out the various approaches to incentive payments, with baseball providing the most circumscribed approach. The hypotheticals posed in N&Q 5 raise questions about the enforceability of incentive provisions tied to performances that are purely within the discretion
of management (e.g., number of appearances by a pitcher). The analysis of these hypotheticals entails a consideration of promises versus conditions and the theories of "excuse" that may serve to dispense with one party's need to satisfy the condition. For example, in N&Q 5(A) the number of appearances is arguably an express condition precedent to the club's duty to pay. Thus, the club would argue that the player is not entitled to any extra remuneration because he has failed to comply strictly with the condition. The player could respond in several ways. First, the bonus clause is not an expressed condition but a promise. It only requires substantial performance to trigger the club's duty to pay. Alternatively, and perhaps more persuasively, the player could argue that the club has a duty to exercise good faith and the failure to assign the player to any pitching duties during the month of September constituted interference or non-cooperation with the condition, excusing the other side from compliance. In all likelihood, the player will lose given the prevailing assumptions regarding the need to give manager's virtual carte blanche in the area of on-the-field decisions. [Contemplate the slippery slope if courts and arbitrators had the hubris to question a manager's strategic decisions]. The solution probably lies in the negotiation of a clause that, if possible, anticipates the hypothetical eventuality and addresses it in the contract.
I. Introduction

Chapter 6 introduces the students to various aspects of sports contract enforcement. Included among the messages that this chapter hopes to send are the following:

1) Affirmative injunctions are unavailable in a personal services contract, due to problems of involuntary servitude and difficulty of administration. Students should be reminded that if an athlete were compelled to play for a particular team it would be impossible to assert whether subsequent poor performance is due to insufficient skill or contempt for the court's order;

2) Due to the difficulty of determining damages with any reasonable certainty there is seldom an adequate remedy at law when a player jumps a contract to sign a contract to play for another team. For this reason, and the rationale explained above, the jilted team's choice of remedy against the player is limited to an injunction enforcing the negative covenant. In seeking such relief, the plaintiff will have to establish the existence of a valid contract and satisfy the traditional standards of equity. See N&Q 3 on page 209. The critical overarching inquiries in these cases center on the reasonableness of the negative covenant and the uniqueness of the athlete;

3) Because the relief sought is equitable in nature, plaintiffs must come to court with clean hands. Given the fierce bidding wars for players' services and the tenuous nature of early player contracts, player raiding was not uncommon, and clubs who were "raider-turned-victim" often found themselves charged with being in pari delicto when they sought to enforce their negative covenants.

II. The Negative Injunction

Case: Central New York Basketball, Inc. v. Barnett

Primary reason for inclusion: To present interpretations of the term "unique" as applied to a professional athlete and to provide an overview of the prerequisites to injunctive relief in the typical contract-jumping scenario.

Points to emphasize:

1) Defendant Dick Barnett's standard player contract explicitly identified him as a unique player. Query: Should that boilerplate language end the inquiry into the player's uniqueness and virtually preempt any discussion of the irreparable injury issues?

2) The portions of the transcript where the parties were falling over themselves trying to show (from the plaintiff's standpoint) that the player is irreplaceable and (from the defendant's standpoint) that the player is possessing of only the most ordinary skills are both humorous and sad. In all likelihood, the transparency of such remonstrations should be obvious to any fact finder.

3) The modern definition of uniqueness seems to be based upon considerations of how difficult it is to replace the defendant player. Yet, there is language suggesting that all professional basketball players are unique. Again, if this definition of uniqueness were to
be employed, then the irreparable injury component of the equitable equation would seem to be eviscerated in professional sports contract-jumping cases.

Notes and Questions:

N&Qs 1 through 4 summarize the variables to be considered in injunction cases such as *Barnett*. They also make clear that arguments attacking the standard player contracts on grounds of lack of mutuality are dated and ineffectual. Again, these notes will have more meaning if discussed with reference to the appropriate portions of Chapter 4. Also, the standard player contract should be addressed, particularly the uniqueness language in Paragraph 9.

N&Q 5 requires students to visit other portions of the standard player contract and familiarize themselves with option and renewal clauses, as well as the circumstances surrounding a club’s exercise of an option. Recent collective bargaining agreements have called for the removal of option clauses as part of the standard player contract language.

N&Q 6 explores the balancing of equities and asks whether the result may have been different if *Barnett* were a player of considerably fewer talents. The answer is perhaps yes for a few reasons. First, the uniqueness component, barring an automatic finding of uniqueness predicated on Paragraph 9, may not have been satisfied. Second, balancing the respective hardships, a court may have indulged the player’s attempt to better himself, especially because the plaintiff-club’s competitive advantage would not have been severely compromised.

N&Q 7 considers alternative remedies that the plaintiff could have pursued. It bears mention here that in cases such as *Barnett* the plaintiff may have causes of action grounded in both tort and contract law. This point could be relevant for several reasons, including the preservation of a delayed lawsuit where there may be different statute of limitations periods. At this stage, it is recommended that a brief discussion of tortious interference with contractual relationships be entertained; however, full-blown examination of this topic should probably be left for subsequent classes.

N&Qs 8 through 11 focus upon the competitors’ injury and the balancing of hardships as parts of the injunction calculus. This topic can provoke a lively classroom debate in the sense that one side may argue forcefully that enforcement of the negative covenant by injunction is the only relief available against a player who repudiates his or her contract with impunity. They would contend that the degree of competitive injury or the weighing of respective adverse consequences should be irrelevant to the appropriateness of injunctive relief. The other side will argue that in some circumstances there is not a "no harm-no foul" situation. Thus, no injunction is needed if the individual player and/or the new club/league are well-served by the contract abandonment and the jilted club is really none the worse for wear.

N&Q 12 presents the general view that there is no adequate remedy at law in these types of cases; yet, the possibility of a damage award cannot be discounted. The students should be asked to develop their own theories of monetary recovery and to assess the viability of the theories posited in N&Q 12, itself.

Cases: *Madison Square Garden Boxing, Inc. v. Shavers*

Primary reason for inclusion: To present an injunction case in a non-team sport context as well as to consider the reasonableness of the negative covenant and its impact upon the uniqueness question.
Points to emphasize:

1) The court was unwilling to disturb the finding of the boxing commission -- although it acknowledged that it had the authority to do so. This deference to the expertise of a lower, non-judicial authority is a recurrent theme in the text and sports jurisprudence generally. See Chapters 3, 13, 14, 15, and 16.

2) The parties' credibility had a great deal to do with the court's ultimate conclusions. Here, students should be reminded of the idiosyncracies of the industry involved and how they may form the predilections and inform the judgment of adjudicating bodies. The public's perception is that the boxing business has not been peopled by persons of unimpeachable character and integrity. Doubtless, as reputations are formed, and reinforced by the decisionmakers' observations of testimony, the outcome of a case can be dramatically affected.

3) Footnote 11, referred to in N&Q 5, seems to have far-ranging consequences, suggesting not only that negative covenants can be implied and inferred from the fact of an athlete's unique talents, but also that professional athletes are unique per se. In N&Q 5, we consider just how significant such an implication or inference can be.

4) The injunction in this case precluded Shavers from fighting until "October 11 or such earlier time as he fulfills his contractual obligations to the plaintiff." Students should be asked whether this relief was consistent with the relief requested by the plaintiff. If not, what did the court do in fashioning its remedy? See discussion of N&Q 2, below.

Notes and Questions:

N&Q 1 necessitates a review of problems presented by oral agreements that are not intended to be effective until memorialized in a subsequent writing. Here, the right of first refusal language had not been properly memorialized and any mention of those terms in the telegram was omitted in the "final" written correspondence.

N&Qs 2 and 3 deals with overly broad negative covenants. Courts often will correct the evil of an unreasonable covenant by interpreting it in a purposeful way or narrowing its unconscionable scope by construction. Students should be advised that this approach has a certain curb appeal and seems to place everything in equipoise. However, from a long range perspective it may be harmful to the general contracting process because it does little to discourage the insistence upon adhesive provisions by the party in the stronger negotiating position. This type of analysis can present difficulties for students who feel that they are being trained to negotiate the best deal for their clients only to be told now to "soft-peddle" the killer bargaining and reach accord on a reasonable negative covenant. The message is that sometimes "less is more."

N&Q 4 asks a somewhat rhetorical question. The statute doesn't apply because the contract is certainly capable of performance within a year and no other provisions of the statute are implicated. The limited purpose of the question is to differentiate the need for a writing "by law" from the need for such a writing by stipulation of the parties or on a showing of the requisite intent to be bound.

N&Q 5 raises the issue considered above in the Points to emphasize section. The court comes close to suggesting that a breach of contract between an athlete and club or promoter will
inevitably trigger issuance of injunctive relief. If a boxer's talents are presumptively unique (as declared by the court in Footnote 11), and if such status *de facto* justifies the implication of a negative covenant, then the finding of a valid contract will necessarily pave the way for injunctive relief with little opportunity for resistance.

N&Q 6 describes the nature of fight promotion and current trends in that area. A worthwhile discussion of a promoter's duties and responsibilities is found in the *Foreman* case considered in Chapter 20. Also, here a review of Chapter 2's discussion of the business of individual sports may be appropriate.

**Case: Boston Celtics Limited Partnership v. Shaw**

**Primary reason for inclusion:** To underscore the relationship between the arbitration and judicial forums and to set the stage for later discussion of unclean hands.

**Points to emphasize:**

1) Brian Shaw presented himself as a player who was more urbane than he would have the court believe, and as a player who sold himself to the highest bidder with little regard for his contractual obligations. Yet, given the deal that he negotiated regarding his delay of free agency, he was not as sophisticated or well-advised as one might assume. As will be discussed later in the chapter, the court's impression of the defendant player's level of sophistication or avarice may be critical when the amorphous balancing of equities comes into play.

2) The collective bargaining agreement entitled the club to activate an expedited arbitration procedure, which the club invoked. The arbitrator ruled in favor of the club, again casting the die in a way that virtually assured Shaw's defeat on appeal. The court acknowledged the persuasive aspects of Shaw's arguments, but, relying upon the overriding importance of arbitration and judicial deference to that dispute resolution mechanism, affirmed the arbitrator's award.

3) The court's discussion of the criteria to be employed in ascertaining the appropriateness of injunctive relief is worthwhile. While courts articulate the standards in countless ways, the major points remain consistent and the court carefully explained how the facts of this case justified the lower court's issuance of an injunction.

4) The First Circuit responded to the defendant's protests about the simultaneous injunction and enforcement of the arbitration award -- Shaw claimed that the enforcement of the order deprived him of due process and, in effect, constituted a premature grant of summary judgment in contravention of the Federal Rules of Civil Procedure. The court's response at pages 220-21 is a good example of exalting substance over form. The students should be alerted to the functional fungibility of the injunction order and enforcement of the arbitration award -- and, likewise, they should be aware that Shaw's arguments were paper tigers whose transparency was not lost on a savvy Judge Breyer.

**Notes and Questions:**

N&Q 1 explains that the plaintiff club in this case chose to litigate this matter through the arbitration process. In the past, clubs have left the door ajar to seek reprisals in court without
the need to proceed first through the grievance machinery. Students should be asked generally whether, as counsel for the team owners, they would want clubs to have, and be bound by, the same grievance mechanism as the players. This question will set the stage for future discussion regarding arbitration as a benefit to employees (counterbalanced by the union's agreement to waive the employees' right to strike) and whether employers would be better served by seeking redress in a forum other than the arbitration route. Some employers, particularly in the context of a collective bargaining agreement with a standing arbitrator (who may be prone to compromise), feel that they have a greater chance of securing the full range of available relief in a judicial forum.

N&Qs 2 and 3 speak for themselves and have been addressed in the Points to emphasize above. It is worthwhile to stress the significance of judicial deference to arbitration and the perceived sophistication of the defendant as critical overarching variables in consideration of the issues raised in these notes. N&Q 4 hopes to trigger the students' recollection of the interplay between an unconscionable negative covenant (possibly warranting avoidance of the contract) and unclean hands (which will serve as a defense to the plaintiff's request for injunctive relief). These two potential responses to the plaintiff-club's legal action are opposite sides of the same coin.

N&Qs 5 and 6 simply serve to introduce material that will be covered in subsequent parts of the text, both following immediately below as well as in Chapter 16.

III. Unclean Hands Doctrine -- A Defense to Plaintiff's Request for Injunction Relief

Case: Weegham v. Killefer

Primary reason for inclusion: To discuss the notion of in pari delicto ("unclean hands") in greater detail and to explain how it could affect a plaintiff-club's request for injunctive relief in a professional sports context.

Points to emphasize:

1) Judge Sessions adopted an almost puritanical approach in the way that he assessed the worthiness of the plaintiff's request for equitable relief. He did not limit the unclean hands defense to questions of illegality, choosing rather to hold putative plaintiffs to a higher standard of accountability. His controlled vitriol is evident in the first and last paragraphs of the opinion.

2) The original contract that defendant Killefer repudiated was of dubious validity and may very well have "failed" in an action for declaratory judgment. This fact becomes very relevant when discussing how an attorney viewing the original agreement would counsel a player who seeks to escape from the contract.

3) Judge Sessions made it abundantly clear that he has no use for either party to this litigation, but he makes a telling point that will have relevance to other cases of this sort. Killefer did not ask the court for anything. Therefore, his somewhat questionable character is of no real legal moment -- except to the extent that it is cranked into the balancing of harms. Thus, he may be "blessed" in much the same way as the illegal gambler who has been sued on a gambling debt. When the court leaves the parties where it finds them, one of the evil-doers generally is the beneficiary of the court's "indifference."

Notes and Questions:
The Notes and Questions following this case need little elaboration. A worthwhile exercise would test the students' creativity and sensitivity to ethical concerns by pushing the questions posed in N&Q 2. The ultimate solution to the Catch-22 probably rests in an action to declare the original contract void, thus paving the way for the negotiation of a new deal and avoiding the problem of coming to court with sullied hands.

Case: *Munchak Corp. v. Cunningham*

**Primary reason for inclusion:** To juxtapose the Fourth Circuit's indulgent approach with Judge Sessions' pristine view of the standards applicable to injunction-seeking plaintiffs.

**Points to emphasize:**

1) The Fourth Circuit, while apparently not disputing the lower court's legal assessment of the unclean hands standard, simply disagreed with that court's conclusions regarding the applicability of the defense to the subject case. This point underscores the "iffy" nature of an equitable action and the varying judicial predilections as to what constitutes a "fair" result in a given case. In these types of actions, courts have wide latitude to fashion an equitable disposition, and, as is evident, they frequently use every inch of it.

2) The district court frowned upon the solicitation of employees (under a contract) by a rival employer. The Fourth Circuit is not nearly so troubled by this conduct, apparently reasoning that there can be no meaningful player mobility unless some type of pre-contract expiration contact is permitted.

3) The plaintiff club failed to meet its obligations on the promissory note referenced in the opinion. This factor further influenced the district court's decision to deny the injunctive relief. For several reasons, however, the court of appeals refused to condemn the Cougars for declining to pay the note. Most importantly, the court found that the failure to pay the amount, while possibly a breach, did not warrant Cunningham's rescission of his contractual obligations. Further, the court noted that, given the scenario that had unfolded, Cunningham should have refunded the payment in any event. Here students' attention should be drawn to two items. First, there should be some discussion as to why the withholding of payment would not justify Cunningham's repudiation of the contract. The court concluded that the failure to pay, at that stage, did not constitute a material breach. Again, a revisitation of the factors relevant to a finding of material breach may be worthwhile. *See Restatement (Second) of Contracts § 241.* Second, the court's assumption that equity does not require the performance of a futile act should be addressed. Was Carolina certain that the payment would be futile and would simply result in the return of the amount paid? Even if so, should not the club be required to demonstrate that it at least was in a position to tender the promised amount?

4) Cunningham's claims that his no-trade clause freed him from contractual obligations because of the change in team ownership. The court rejects out of hand the argument that a change in ownership is the rough equivalent of a trade to a new club. Students should focus on the underpinnings of the assumption that assignments of rights in a personal services contract are generally taboo. However, as addressed further in the Notes and Questions following the Barry case, standard player contracts generally contain a waiver that permits an assignment -- unless the player has negotiated a no-trade or no-assignment clause.
Notes and Questions:

The Notes and Questions following this case focus on the comparison between the *Weegham* and *Munchak* approaches. Certainly, the district court adopted a view more along the lines of *Weegham* -- but the court of appeals saw things differently. N&Qs 2 through 4 address issues raised in the Points to emphasize, above. A lively discussion should be provoked by the questions posed in N&Qs 2 and 3. There, of course, is no definitive answer, but the questions will force the students to think creatively. The promissory note arrangement on page 228 has generated more speculation and outright "guesswork" as to what prompted the court's observation that the "new" club had actually provided Billy Cunningham an incentive to play. Have the students read this section carefully to divine how the deal actually provides Cunningham with an incentive to play out the final year with the new club. Like Herman Melville's Captain Ahab seeking the great white whale Moby Dick, one of us has posted a reward on the yardarm for any student leading to a plausible explanation for the court's arcane conclusions in this regard.

An additional question that will provoke some debate is whether a potential new employer should be able to communicate with, or solicit the services of, a player who is under contract to another employer. There is ample reason to permit such benign discussion -- an outright prohibition would functionally eliminate all job mobility, because employees would be functionally precluded from encouraging or entertaining overtures regarding another position until their current contract had expired. N&Q 4 reviews the basic rules governing assignments in a personal services contract and sets the stage for the *Barry* case, which explores the change in ownership factor in a different context.

Case: *Washington Capitals Basketball Club, Inc. v. Barry*

Primary reason for inclusion: To provide a perspective on the negative injunction where the club seeking the injunction is a successor to a club that may have had unclean hands.

Points to emphasize:

1) Barry had already been enjoined from jumping clubs in an earlier case. As a result of that injunction the player had been forced to "sit out" an entire season (see page 236).

2) Washington purchased the club from the Oakland Oaks and does not stand in the shoes of the Oaks for purposes of seeking equity. It is noteworthy here that there was no meaningful discussion of Washington's knowledge of the Oaks in this regard.

3) The court denied applicability of the unclean hands defense not only because the plaintiff was an innocent purchaser untainted by acts of the predecessor, but also because the alleged misconduct was supposedly unrelated to the transaction subject to the instant litigation. These points should be stressed to the students, and the court's conclusions should be questioned in terms of their long-range implications. See discussion of N&Qs 1 through 4.

4) Again, Rick Barry is a player who was extremely savvy and capable of cutting great deals for himself. The court doubtless recognized that Barry was no babe in the woods, and it had no compunction about holding him to his commitments pending a trial on the merits.

Notes and Questions:
N&Qs 1 through 4 require a close look at the two principal bases for the court's refusal to apply the unclean hands doctrine to the facts of this case. The rationale that the Capitols were *bona fide* purchasers distanced from the Oaks' untoward conduct is plausible. However, further discussion is warranted in terms of the court's failure to delve further into the Capitols' knowledge of such conduct and the possibility that the purchase price of the club may have taken into account the risks presented by the Oaks' activity. With regard to the remoteness of the transaction, serious questions arise as to whether the remoteness should play a part. Students should be asked whether this rationale should be extended to preclude all unclean hands defenses where the taint was attributable to an earlier transgression. It is certainly arguable that the court has stretched the notion of remoteness to insulate the plaintiff from the reach of the unclean hands defense and to ensure that Barry would receive his comeuppance. In N&Q 1, please note that the second sentence should read:

"First, the transaction that was the subject matter of the suit (the Warriors' offer to Barry while he was still under contract to play basketball for the Oakland Oaks) is unrelated to the Oaks' tampering with Barry's Warrior contract originally, misconduct which is 'remote or misconduct which affects the instant case only indirectly.'"

N&Q 5 makes it clear that league rivalries presented a fertile ground for tactics that could form the predicate for an unclean hands defense. In numerous cases, the original contract sought to be enforced in equity was secured by duplicitous actions in which the player was deceived into signing or in which the circumstances surrounding the signing offended normal standards of decency and fair play. As the following two cases illustrate, the perceived naivete of the athlete cannot be overstated as a relevant factor.

**Cases** (considered in tandem): *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.; Houston Oilers, Inc. v. Neely*

**Primary reason for inclusion:** To compare and contrast the judicial treatment of two cases involving the premature signing of college players who subsequently chose to abandon their contracts and sign with another team.

**Points to emphasize:**

1) Charlie Flowers in the *Giants* case and Ralph Neely in the *Oilers* case were presented as two dramatically different athletes in terms of their intellectual sophistication. When combined with the court's pointed criticism of the professional league's tactics (*see page 240, where words like "sordid" and "disgust" are graphic illustrations of the court's dismay in the *New York Giants* case*), the handwriting was on the wall.

2) In both cases, the players were led to believe that their eligibility for "post season" play in bowl games would be preserved by maintaining the confidentiality of the agreement. Thus, these factual scenarios are quite different than a battle solely between two professional teams vying for a player's service. Here, the actions of the clubs were not limited to the professional ranks, but rather played fast and loose with amateur sports. Doubtless the deception that was practiced was presumed to be all the more heinous because it implicated college football, bowl eligibility, and the principles of amateurism that have been sacred conceptions.
3) Both transactions arose out of the tumult created by the rivalry between the American and National Football Leagues. As numerous outside sources and personal recollections will attest, the incidence of unsavory backroom deals was by no means limited to these two cases. Moreover, the results of these intriguing activities dictated the eventual merger of the two leagues. Many commentators have speculated that the New York Jets' signing of Joe Namath after a vigorous bidding war with the St. Louis Cardinals and the Jets' Super Bowl victory over the NFL's Baltimore Colts in 1969 forecasted the inevitable joining of the NFL and AFL.

4) While there was a difference of opinion between the courts of appeals in these cases, both district courts had concluded that the injunction requests should be denied. Again, some discussion should be entertained regarding lower courts' opportunities to observe the demeanor of the witnesses and possibly derive adverse inferences from the comparisons of young, impressionable, and unwary athletes to urbane team owners who had attempted to subvert the rules governing college football eligibility and to enforce the contracts that were part of such subterfuge.

5) In the New York Giants case, the court of appeals' unclean hands conclusions dispensed with the need to consider the lower court's finding regarding the invalidity of the contract. If these issues had been considered, the issues addressed in Los Angeles Rams v. Cannon would have been resurrected. Students should consider these arguments and tie them in to the "avoidance" question posed in N&Q 4.

Notes and Questions:

N&Qs 1 and 2 speak for themselves and revisit earlier questions surrounding the influence of idiosyncratic aspects of the case such as athlete's gullibility, the institutional background of the individual negotiations, etc. N&Q 3 simply illustrates that the Statute of Frauds and similar concepts treated in the primer chapter hold more than academic curiosity. The one-year provision of the pertinent Statutes of Frauds would presumably require a writing in these types of arrangements, thus necessitating an examination of the sufficiency of the writings in those situations.

N&Q 4 requires a further review of avoidance principles and the ways in which the subject athletes in the foregoing cases could have escaped from their contractual obligations. It is reasonable to assume that fraud, undue influence, and perhaps even duress or illegality may have formed bases for the players to avoid the contracts. Again, it is also arguable, a la Cannon, that a contract was never formed, thus obviating the need to employ those avoidance devices.

N&Q 5 presents a classic problem/examination question. It simply entails a review of the requirements for an injunction including contract validity, reasonable negative covenants, irreparable injury, etc. Similar questions are presented in the Appendix.
CHAPTER 7
ANTITRUST LAW AND SPORTS: A PRIMER

This is the second of the three primer chapters (contracts, antitrust, and labor). This Chapter should be assigned reading if the professor intends to discuss antitrust issues. As with Chapter 4 (contracts primer), the question is whether there should be classroom discussion of this 45-page Chapter, or whether the students should read it and it will only be discussed as students and the professor draw on its content to inform the discussion of subsequent cases. The authors have both spent some time "teaching" this Chapter in their courses. The easiest way to "teach" this material is a one-hour or two-hour lecture, but the information can be extracted through a classroom discussion in a relatively less efficient, but perhaps more absorbent method. As a practical matter, only the first thirty pages of the Chapter address substantive antitrust law. The last fifteen pages of the Chapter are simply a chronicle of sports antitrust jurisprudence, on a sport-by-sport basis, for three of the major United States team sports, and is more conducive to student review on their own or in a class conducted with a discussion format.

The goal of this Chapter is to provide the substantive legal framework for Chapters 8-13. This Chapter does not address the two primary sports antitrust exemptions (baseball and labor), because an entire Chapter is spent addressing each of those topics (baseball exemption -- Chapter 8, labor exemption -- Chapter 9). Rather, this Chapter primarily focuses on the following topics:

1. An Overview of the Antitrust Laws that Apply to Sports pages 253-255

This section is intended to introduce the students to a number of the federal and state antitrust provisions: The Sherman Act, the Clayton Act, the Federal Trade Commission Act, the Robinson-Patman Act, State Antitrust Laws, and State "Baby FTC" Acts. There are obviously a number of other federal antitrust provisions (e.g., the McCarran-Ferguson Act, the Hart-Scott-Rodino Antitrust Improvements Act, the Soft Drink Interbrand Competition Act, etc.), but they are not generally even mentioned in introductory antitrust courses, much less in a sports law course.

After these pages, other than passing references and a brief focus on state antitrust law in general, in the discussion of whether the baseball and labor exemptions also block the application of state antitrust law, the antitrust analysis of the book is limited to Sections 1 and 2

2. An Overview of Sections 1 and 2 of the Sherman Act pages 255-256

This section is intended to introduce the students to the difference in coverage between Section 1 of the Sherman Act, which focuses on agreements (contract[s], combination[s] . . . , or conspirac[ies]) that restrain trade, and Section 2 of the Sherman Act, which prohibits monopolization, attempts to monopolize, and conspiracies to monopolize. Section 1 requires an "agreement" - - there must be two separate persons or entities engaged in joint conduct for a
violation of Section 1 to occur. On the other hand, with respect to the primary focus of Section 2, monopolization and attempts to monopolize, single firm behavior may violate the statute. However, there is a much greater scope of conduct that can violate Section 1 than the scope of conduct that can violate Section 2. As a result, the initial focus on the existence or non-existence of two or more separate actors and the presence or absence of an agreement between or among them is paramount to antitrust analysis. This is an extremely important, very basic point that the students must grasp to understand the analysis of Chapters 10-13.

3. Analysis of Section 1 of the Sherman Act pages 257-269

These are probably the most important pages of Chapter 7. They introduce the students to the elements of a Section 1 Sherman Act claim, then address each of the elements, including the agreement requirement and the mode of analysis (per se and Rule of Reason) for determining if an agreement unreasonably restrains trade. The various per se violations are discussed, and the analysis of whether an agreement constitutes "price fixing," "horizontal market division," or a "group boycott" will be a central focus of discussion when the students turn to specific challenged conduct in Chapters 10-13. In particular, the complicated evolution of the per se analysis of group boycotts and the Supreme Court's decision in the Northwest Wholesale Stationers case is very useful to the students in understanding reported decisions in subsequent Chapters.

NOTE: There is a substantive typographical error in the first printing of the casebook on page 267. The first paragraph of section E(1) should be changed as follows:

All conduct challenged under Section 1 of the Sherman Act that is not analyzed under a per se rule will be analyzed under the Rule of Reason. To prove a claim under the Rule of Reason, a plaintiff must establish that: (1) there was an agreement between or among two or more persons or distinct business entities, as explained above; (2) the agreement or the conduct pursuant to the agreement adversely affected competition in a relevant market; and (3) the anticompetitive effects of the agreement exceeded the procompetitive benefits, and or there were no less restrictive alternatives by which the same procompetitive benefits could have been achieved.
4. Analysis of Section 2 of the Sherman Act  

The primary importance of this section is to provide the students the basic mode of analysis under Section 2 of the Sherman Act and to introduce them to the concept and analysis of "relevant markets." As explained in the text, the scope of the relevant market -- both the relevant product market and the relevant geographic market -- is also very important when one is assessing an agreement alleged to restrain trade unreasonably under Section 1 of the Sherman Act. In that context, the scope of the relevant market is a prerequisite to determining whether the challenged agreement adversely affected an overall antitrust market or whether the defendants alleged to have entered into the agreement have "market power," that is power to affect an entire antitrust market as opposed to the power to affect a small portion of the competitors or purchasers in that overall market.

Issues of monopolization in violation of Section 2 of the Sherman Act will be addressed in Chapter 11, and in the discussion of the concept of a single entity league that was started in Chapter 2 and that continues in Chapter 12. Monopolization issues are also presented in Chapter 13 (antitrust analysis of equipment restrictions). You may suggest that the students look back to these pages before the class discussion of Chapter 11.

5. Antitrust Exemptions  

As explained above, the baseball and labor exemptions are left for the next two Chapters. The state action and Noerr-Pennington exemptions or "doctrines" are discussed briefly, but the primary discussion concerns the Sports Broadcasting Act of 1961 and 1966.


These last fifteen (15) pages were included for several reasons. First, they give the students some appreciation of the extent to which antitrust litigation is an ever-present specter hanging over those who operate professional sports teams, leagues, and circuits. Second, they provide a fairly comprehensive reference tool for students and practitioners seeking antitrust decisions related to hockey, basketball, or football (virtually all of the antitrust decisions related to baseball can be found in Chapter 8). Third, they provide some historical background information about those three professional sports. (Historical information about professional tennis can be found in Chapter 10). That background information can be useful to the students in subsequent chapters, when they are discussing
reported decisions about those sports. Finally, it is our view that a casebook about 
sports law should include information about sports, and a course about sports law 
should include discussion of sports. These pages should be interesting and 
informative to all but the most knowledgeable sports fans and can serve as a 
useful launching point for a wide variety of discussions about such business topics 
as:

a. Differences and similarities between and among the various 
professional sports leagues

Do they have teams both inside and outside the United States?

Have they faced competing leagues? With what results? Why?

What are the season differences among the leagues -- how many 
games do they play each season? What does it take to qualify for 
post-regular season play?

In what arenas/stadia do they play? Are their stadia/arenas used by 
other sports or other events? What might the antitrust significance 
be of alternative use for their facilities -- for example, the fact that 
the same arenas house NBA and NHL teams (see, e.g., the 
discussion of the relevant product market in the Los Angeles 
Memorial Coliseum Commission's case against the NFL in 
Chapter Twelve)?

b. Why did the NFL and AFL combine their teams through a merger, 
while the NBA expanded its league to add four former ABA teams 
and the NHL expanded to add former WHA teams? Answer: 
because the Sports Broadcasting Act of 1961 and 1966 gave 
football an antitrust exemption and merging the only two top 
basketball or hockey leagues would likely have been attached as 
violative of the antitrust laws.

c. Why has there been more antitrust litigation involving professional 
team sports, as opposed to individual sports? (In part because (i) it 
is easier to launch a competing individual sports event rather than 
an entire competing league, (2) the monopoly position of sports 
leagues has been easier to establish -- often because individual 
sports (e.g., golf, tennis, and boxing) tend to be more international
in character, the appropriate forum to remedy anticompetitive conduct was often less apparent or non-existent, and world domination and control of the sport was less frequent, (3) the professional character of the sport may be of more recent vintage (e.g., see the discussion of the history of professional tennis in Chapter 10), and (4) there were fewer situations where people who had invested great amounts of money in the sport found themselves in positions where it was worthwhile to incur the substantial costs of antitrust litigation in order to try to remedy alleged anticompetitive conduct.

d. What steps have the various sports taken over the years to improve their product, to increase fan interest in their product, and to increase the attendance at their games and the size of the audience for their television and radio broadcasts? Have any of those efforts led to antitrust litigation? (E.g., keeping teams from relocating, restricting team broadcasts that compete with league broadcasts, restricting movement of players from team to team, forcing season ticket holders to also purchase tickets to preseason games, blocking the creation of competing leagues, etc.)

These questions can be asked as part of a discussion of Chapter 7, or they can be asked at various points during the discussions of the cases in Chapters 10-13.
CHAPTER EIGHT

ANTITRUST AND SPORTS:
THE BASEBALL EXEMPTION

This is the first antitrust Chapter following the antitrust primer, and it starts with the earliest cases involving both sports and antitrust. The introductory discussion between Casey Stengel and various United States Senators in 1958 is intended for the amusement of the reader. In addition, it should take the reader back to what it was like to be involved with professional baseball and the major and minor leagues in the first half of the twentieth century.

The first four cases -- Federal Baseball, Toolson, Salerno, and Flood -- chronicle the history and development of the baseball exemption. The final three cases all post-date the Supreme Court's decision in Flood, and concern the scope of the exemption.

The following text addresses Chapter 8 and the Baseball Exemption in two ways. The first part of the text is a hornbook description of the historical development of the baseball exemption, which discusses the cases in the Chapter as part of that development. The second part of the text goes case-by-case through the Chapter, discussing the significance of each case and the notes and questions that follow those cases.

I. THE HISTORICAL DEVELOPMENT OF THE BASEBALL EXEMPTION

The following is a hornbook description/analysis of the baseball exemption:

In a series of cases, the Supreme Court has considered the application of the antitrust laws to professional sports. In Federal Base Ball Club of Baltimore, Inc. v. National League of Professional Base Ball Clubs, the Supreme Court first considered the issue and held that the "business [of] giving exhibitions of base ball" did not constitute interstate commerce, even though the competitions were "arranged between clubs from different cities and States" and the League had to induce and pay for players and other personnel to cross state lines.\(^1\) Accordingly, the Court did not reach the merits of the case, but affirmed the lower court's dismissal of the case.\(^2\) The Court expressed the view that "personal effort, not related to production, is not a subject of commerce," and the exhibitions were not interstate, so neither commerce nor interstate commerce were at issue.\(^3\)

\(^{1}\) 259 U.S. 200, 208-09 (1922).

\(^{2}\) The plaintiff, the only remaining team in baseball's Federal League, had secured an $240,000 verdict after trebling against the National and American Leagues for buying up Federal League teams and inducing teams to leave the Federal League in other ways. On appeal, the Court of Appeals in the District of Columbia had held the antitrust laws inapplicable and entered judgment for the defendants. See 259 U.S. at 208; National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 Fed. 681, 688, 50 App. D.C. 165 (D.C. Cir. 1921).

\(^{3}\) 259 U.S. at 208-09.
Over the next thirty years, the analysis of the *Federal Base Ball* decision was undermined by holdings that the provision of personal services constituted commerce and that the required interstate nexus was much less than was present in baseball's professional leagues. The Supreme Court next considered the application of the antitrust laws to baseball in *Toolson v. New York Yankees, Inc.* 4 and dismissed several appeals that involved challenges by players against baseball's reserve system. Despite the express holding of *Federal Base Ball* having been that baseball exhibitions did not involve interstate commerce, the *Toolson* majority held that it was affirming based on the authority of the *Federal Base Ball* decision, "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 5 The *Toolson* majority also stated that Congress had been aware that the *Federal Base Ball* decision by the Supreme Court had left professional baseball to develop "on the understanding that it was not subject to existing antitrust legislation," and Congress had considered possible responses to that decision; therefore, "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." 6

The Supreme Court followed the *Toolson* decision with a series of rulings that the antitrust laws did apply to the production of theatrical attractions, 7 championship boxing exhibitions, 8 professional football, 9 and professional basketball. 10 The lower federal courts held that other professional sports were not exempt. 11 Questions were raised about the continued vitality of baseball's exemption and the *Federal Base Ball* and *Toolson* decisions in light of the

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5 346 U.S. at 357.
6 *Id.*
decisions consistently holding that other sports and exhibition businesses were not exempt from antitrust scrutiny. 12

The Supreme Court considered the baseball exemption for the third time in 1972, when a major league player, Curt Flood, challenged baseball's reserve system, in particular the requirement that he move from the St. Louis Cardinals to play for the Philadelphia Phillies as a result of an inter-team trade, without any opportunity to review or approve the transfer and assignment of his contract. In Flood v. Kuhn, Justice Blackmun authored the majority opinion, which held that the two lower courts that had considered Flood's case had correctly determined that the baseball exemption precluded judicial application of the antitrust laws, both state and federal, to assess the merits of Flood's claims. 13

The Flood decision made it clear that "professional baseball is a business and it is engaged in interstate commerce" and acknowledged that the affording of an antitrust exemption only to baseball and not to other professional sports is "an anomaly." 14 Nevertheless, the Court held that the exemption remains confined to baseball. 15

The Flood majority held that even though baseball's exemption from the antitrust laws might be regarded by some as an aberration, "[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs." 16

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12 See, e.g., Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971) (Friendly, J.) ("We freely acknowledge our belief that Federal Baseball was not one of Justice Holmes' happiest days, that the rationale of Toolson is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' . . . While we should not fall out of our chairs with surprise at the news that Federal Baseball and Toolson had been overruled, we are not at all certain the Court is ready to give them a happy d[il]spatch.")


14 407 U.S. at 282.

15 Id.

16 Id.
The Court held that the baseball exemption remains viable for several reasons. First, for fifty years Congress has allowed professional baseball to develop and expand, and although "'[r]emedial legislation has been introduced repeatedly in Congress, . . . none has ever been enacted," thereby evidencing, by "positive inaction," a Congressional intent that the exemption should continue.\(^{17}\) Second, the majority expressed concern that a "judicial overturning of \textit{Federal Baseball}" could cause confusion and retroactivity problems.\(^{18}\) The Court stated that if the exemption is to be changed, it should be by legislative action that "by its nature, is only prospective in operation."\(^{19}\)

The lower courts in \textit{Flood} had held that Flood's state antitrust laws were preempted by the federal policy embodied in the baseball exemption and were barred by the dormant Commerce Clause as an undue interference with interstate commerce.\(^{20}\) The majority cited those portions of the lower court opinions and, on the basis of those statements, affirmed the dismissal of the state antitrust claims.\(^{21}\)

Since \textit{Flood}, the reported decisions focusing on the baseball exemption have all confirmed the existence of an exemption, but have focused on defining its scope. In \textit{Charles O. Finley & Co., Inc. v. Kuhn},\(^{22}\) the court interpreted the Supreme Court trilogy (\textit{Federal Base Ball},

\(^{17}\) \textit{Id.} at 283. The Court distinguished its decision issued one year earlier in \textit{Boys Markets, Inc. v. Retail Clerks Union}, 398 U.S. 235, 241-42 (1970), which had held that when Congress was urged to modify a Supreme Court decision and responded with congressional silence and inactivity, that was an insufficient reason for the Supreme Court to refuse subsequently to reconsider the decision.

\(^{18}\) 407 U.S. at 283.

\(^{19}\) \textit{Id.} ("If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court"). The concurring opinion of Chief Justice Burger acknowledged the dissent's criticism of reliance upon congressional inaction as a basis for deferring to Congress, but opined that "the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem." \textit{Id.} at 286 (Burger, C.J., concurring).

\(^{20}\) See 407 U.S. at 284; 443 F.2d at 268; 316 F. Supp. at 280.

\(^{21}\) 407 U.S. at 284-85.

\(^{22}\) 569 F.2d 527, 541 (7th Cir. 1978).
Toolson, and Flood) as three holdings "that 'the business of baseball' is exempt from the federal antitrust laws." The dispute at issue in the case concerned the Commissioner's disapproval of the assignment of three player contracts, and the Finley court held that the Commissioner's conduct was part of the business of baseball and exempt.²³ Other courts held that the scope of the exemption was "the business of baseball"²⁴ or applied a similar broad formulation in dismissing an antitrust challenge.²⁵

In Henderson Broadcasting Corp. v. Houston Sports Ass'n, Inc.,²⁶ Judge McDonald stated that the baseball exemption has a "narrow scope," does not apply to radio broadcasting of baseball, and does not apply to agreements between baseball teams and non-baseball business enterprises. Judge McDonald's opinion suggests the exemption is limited to conduct or agreements that are "central enough to the 'unique characteristics and needs' of baseball," or are a "part of the sport in the way in which players, umpires, the league structure and the reserve system are."²⁷

²³ The only other guidance from the Finley court was that "the business of baseball, not any particular facet of that business," is exempt, but the "exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball." 569 F.2d at 541 & n.51.

²⁴ In Professional Baseball Schools and Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1086 (11th Cir. 1982) (per curiam), the United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of an antitrust challenge to the minor league player assignment and franchise location systems and other minor league rules, on the basis that "the exclusion of the business of baseball from the antitrust laws is well established." Similarly, two years before the Supreme Court's decision in Flood, Judge Friendly stated that Federal Baseball and Toolson hold that "professional baseball is not subject to the antitrust laws." Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970), cert. denied, 400 U.S. 1001 (1971) (Friendly, J.). On that basis, the Second Circuit affirmed the dismissal of antitrust claims filed by two discharged major league umpires. Id.

²⁵ In Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004, 1007 (D.Or. 1971), aff'd per curiam, 491 F.2d 1101, 1103 (9th Cir. 1974), the district judge and the Ninth Circuit both held that major league baseball's agreement with the minor leagues and the rules about territorial allocation and compensation for territorial infringement were protected by the baseball exemption from federal antitrust challenge.


²⁷ 541 F. Supp. at 268-69. In Wisconsin v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1, 15 (1966), a decision issued prior to the Supreme Court's opinion in Flood, the
The scope of the exemption was also at issue in *Postema v. National League of Professional Baseball Clubs*, in which the court held that the baseball exemption did not apply to antitrust claims about baseball's employment relations with its umpires. The court followed the *Henderson* court's analysis, seeking to assess whether the challenged conduct was "central enough to baseball to be encompassed in the baseball exemption." The *Postema* opinion treated *Flood* as an opinion limiting the scope of the exemption to baseball's "unique characteristics and needs" and applied that narrow scope to *Postema's* claims:

Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game. Anti-competitive conduct toward umpires is not an essential part of baseball and in no way enhances its vitality or viability.

799 F. Supp. at 1489.  

More recently, the baseball exemption battleground has concerned whether the scope of the exemption is limited to antitrust claims concerning baseball's reserve clause and other issues concerning professional baseball's agreements restricting players' compensation and ability to negotiate freely with a number of professional baseball teams. The conventional wisdom about the scope of the exemption was rejected by Judge Padova in *Piazza v. Major League Baseball*. In *Piazza*, Judge Padova first acknowledged that prior to the Supreme Court's opinion in *Flood*, the scope of the exemption may have been expansive, applying "to the Supreme Court of Wisconsin held that "the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it." The Court held that league and team decisions about relocation of teams and league expansion are exempt. 144 N.W. 2d at 18.


30 *See also Amateur Softball Ass'n of Am. v. United States*, 467 F.2d 312, 314 (10th Cir. 1972) ("amateur softball is not entitled to rely on the same unique exemption that organized professional baseball has claimed and achieved for so many years").

'business of baseball' generally, not to one particular facet of the game." However, Judge Padova concluded that the Supreme Court's opinion in *Flood* stripped all prior cases of any precedential value except with respect to the reserve clause -- the conduct at issue in *Flood*. Judge Padova's opinion did not stop there -- he went on to assess the scope of the exemption if he were wrong and the exemption were not limited to the reserve clause. In making the latter alternative assessment, he reviewed the prior precedents concerning the exemption and generated a list of activities within the exemption if it were more broadly construed:

1. the reserve system, and
2. matters of league structure and a list of non-exempt activities:
3. the movement of players and their equipment from game to game,
4. the broadcast of baseball games, and
5. perhaps, employment relations between organized professional baseball and non-players.

831 F. Supp. at 440. Judge Padova then stated that determining which aspects of league structure are "central. . . to the unique characteristics of baseball exhibitions" or which types of league and team decisions or agreements are part of baseball's league structure are factual questions that could only be decided on the basis of a factual record.

Since *Piazza*, some courts have come to contrary interpretations of the scope of the exemption. For example, in *New Orleans Pelicans Baseball, Inc. v. National Ass'n of Professional Baseball Leagues, Inc.*, the United States District Court for the Eastern District of Louisiana agreed with the Seventh Circuit's interpretation of the scope of the exemption in the

32  *Id.* at 435.

33  831 F. Supp. at 435-36.

34  831 F. Supp. at 441. Judge Padova reiterated these latter points in his opinion denying the defendants' request that he certify his decision about the baseball exemption for immediate appeal. *See Piazza v. Major League Baseball*, 836 F. Supp. 269, 271-73 (E.D.Pa. 1993). In his opinion denying certification, Judge Padova conceded that "there is substantial ground for difference of opinion" about the scope of the baseball exemption and whether it is limited to baseball's reserve system. 836 F. Supp. at 271.
The Finley case, concluding that the exemption applied generally to the business of baseball, and thereby granted summary judgment dismissing antitrust challenges to territorial allocation rules of the minor leagues.\footnote{35}{Civil Action No. 93-253, 1994 WL 631144 at *9 (E.D.La. 1994). The court expressly rejected the "cramped view" of \textit{Piazza}, but described Judge Padova's reasoning as "impressive," \textit{Id. See also McCoy v. Major League Baseball}, 911 F. Supp. 454, 456-57 (W.D. Wash. 1995) ("This Court rejects the reasoning and results of \textit{Piazza} and \textit{Butterworth}. As \textit{Butterworth} recognized, the great weight of authority recognizes that the scope of the antitrust exemption covers the business of baseball")(citations omitted).}

One year after \textit{Piazza}, in \textit{Butterworth v. National League of Professional Baseball Clubs},\footnote{36}{644 So.2d 1021, 1022, 1025 (Fla. 1994).} the Supreme Court of Florida reversed a lower court and came to the same narrow view of the exemption as Judge Padova did in \textit{Piazza},\footnote{37}{See also Morsani v. Major League Baseball, 663 So.2d 653, 655 (Fla.App. 2 Dist. 1995) ("the antitrust exemption for baseball is limited to the reserve clause").} with only a single judge dissenting. The state trial court had stated, among other things, that "[o]ne area of business activity which has clearly and consistently been considered exempt is the matter of the structure of the league. . . . Decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption.}\footnote{38}{Butterworth, 644 So.2d at 1026 (McDonald, S.J., dissenting), quoting trial judge's order.} The Florida Supreme Court rejected the trial judge's analysis. The Florida Supreme Court acknowledged that "[t]here is no question that \textit{Piazza is against the great weight of federal cases regarding the scope of the exemption}" and even noted the very recent \textit{New Orleans Pelicans} opinion\footnote{39}{Civil Action No. 93-253, 1994 WL 631144 at *9 (E.D.La. 1994).} rejecting \textit{Piazza}.\footnote{40}{644 So.2d at 1025.} However, the \textit{Butterworth} court concluded that no other case has engaged in the comprehensive analysis of \textit{Flood} set out in \textit{Piazza}.\footnote{41}{Id.} \textit{Butterworth} "come[s] to the same conclusion as the \textit{Piazza} court: baseball's antitrust exemption extends only to the reserve system.\footnote{42}{Id.}"
II. CASE-BY-CASE ANALYSIS OF CHAPTER EIGHT

We now turn to an abbreviated case-by-case analysis of the seven main cases and the notes and questions that follow them.

FEDERAL BASE BALL CLUB OF BALTIMORE, INC. V. NATIONAL LEAGUE OF PROFESSIONAL BASE BALL CLUBS (pages 300-303)

Primary Reason for Inclusion: This is the first Supreme Court decision that dismissed an antitrust challenge directed at professional baseball.

Points to Emphasize:

The opinion is very short. It is of historical interest only, except to the extent that it may inform the subsequent discussion of whether Judge Padova is correct in \textit{Piazza}.

To start the students thinking about the underlying antitrust claims (not just the exemption issues), N&Q 1 focuses on the theory of the case, which is that the National League and the American League purchased teams in the Federal League and induced other Federal League teams to jump to the American and National Leagues. As a result, the complaint alleged, the Baltimore Team was left without opponents or a league. You might conduct a discussion about what claims the plaintiff could bring -- Section 1 claims, both \textit{per se} (\textit{e.g.}, group boycott, perhaps horizontal market division) and Rule of Reason (\textit{e.g.}, exclusive dealing), to get the students thinking about and applying what they learned in Chapter 7. In addition, when Judge Padova in \textit{Piazza} says the Supreme Court in its trilogy of baseball exemption cases was always focusing on the reserve clause, was that true? The reserve clause would have been at issue in \textit{Federal Base Ball}, but was it the central focus?

Notes and Questions:

The key to the analysis of the Court is also sought in N&Q 1 -- what was the basis of the holding? If the students read carefully, it becomes clear that the Court considered arguments that the plaintiff could not satisfy the interstate commerce requirement of the federal antitrust laws, both because the plaintiff had not challenged activity that was sufficiently interstate in character and because the activity was not commerce, being personal effort. The Court seemed to accept both of these arguments, but certainly accepted at least one of them, holding that the activity was not interstate commerce. N&Q 5 asks whether there is a significant difference between the two theories about why baseball did not constitute interstate commerce.
N&Q 4 focuses on something that is often said, in error, about the Supreme Court's decision in *Federal Base Ball* -- that the Court held that baseball was a sport, not a business. In fact, the Court of Appeals in *Federal Base Ball* said something very similar -- that baseball games "are still sport, not trade." The Supreme Court does speak positively about specific parts of the decision of the Court of Appeals ("we are of the opinion that the Court of Appeals was right"), and does note the defendants' argument that "personal effort, not related to production, is not a subject of commerce." However, its holding technically concerns the interstate commerce requirement and does not include the statement oftentimes attributed to it.

N&Q 3 quotes from the plaintiff’s brief, which makes a point that is even more true today -- major professional sports leagues are more fundamentally interstate businesses than just about any other business. It is perhaps ironic that baseball’s antitrust exemption originated with the idea that baseball did not involve interstate commerce.

N&Q 6 foreshadows the subsequent decisions, all of which held other sports subject to the antitrust laws, asking whether there is any basis for reaching a different result in those cases.

**TOOLSON V. NEW YORK YANKEES, INC.,** (pages 303-306)

**Primary Reason for Inclusion:** This is the Second Supreme Court decision considering whether the federal antitrust laws apply to professional baseball and it reaches the same outcome as *Federal Base Ball*, but with different reasoning.

**Points to Emphasize:**

The Court's opinion is extremely short -- six sentences in a single paragraph. The key discussion point is raised in N&Q 1 -- the per curiam majority affirmed *Federal Base Ball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws," but of course the *Federal Base Ball* opinion said no such thing. You could discuss with your students the meaning of a per curiam decision (per curiam means "by the court," and is used to distinguish an opinion issued by the whole court or all of the judges who join in the opinion, rather than by a specific judge), which are used in a variety of circumstances, and some say are used when no judge wants his or her name associated with the decision.

If one wants to work hard to say the majority is correct, one could say that Holmes in *Federal Base Ball*, when he said that baseball was not interstate commerce, was saying that under the terms of the federal antitrust statutes issued by Congress, they did not mean
to address anticompetitive practices in baseball, because they did not consider baseball to be commerce or to be interstate in nature. In that way, you could say that Federal Base Ball was about congressional intent, and could thereby defend what the majority said in Toolson. However, when Congress passed the Sherman Act in 1890 and the Clayton Act in 1914, they did not consider the question of whether baseball exhibitions might become interstate commerce, they could not anticipate the development of a great many products and services, and courts have generally not hesitated to conclude that competitive activity concerning new products and services is subject to antitrust review. Basically, the Supreme Court majority knew that it could no longer say, consistent with its other decisions, that professional baseball was not interstate commerce, and for that reason, when it decided to hold baseball exempt, it "re-construed" the Court's previous decision in Federal Base Ball.

Notes and Questions:

N&Q 1 considers the significance of congressional inaction and whether that is a basis for attributing to Congress and intent to continue the exemption acted in Federal Base Ball and Toolson.

N&Q 2 is intended to draw attention to the fact that the dissent does not really attack the majority opinion, but restates the majority opinion to say what it does not say (that baseball is still not interstate commerce) and then knocks that straw man down. We have included portions of the dissent to give the students some understanding of the state of the business of baseball as of 1953.

N&Q 3 asks students to consider how Salerno, the case that follows Toolson, can be reconciled with the prior Supreme Court decisions. This lead-in may cause students to consider the role of lower federal courts. Should a lower court rule contrary to Supreme Court precedent in anticipation of a change in the Supreme Court’s views, or follow prior precedent and wait patiently for Supreme Court direction?

SALERNO v. AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS
(pages 306-307)

Primary Reason for Inclusion: This case is also quite short, and is included to set the stage for Flood -- to give the students the idea that a very learned judge, Judge Henry Friendly of the Second Circuit, had considered the issue and said both (1) that the creation of the baseball exemption was not a great moment in Supreme Court history and (2) that he was not certain the Supreme Court was ready to terminate the exemption.
Points to Emphasize:

It is an opinion that expresses the view that lower courts should wait for the Supreme Court to overrule its decisions except in exceptional cases. That portion of the opinion can be the basis for a discussion about the question of whether lower courts should follow the Supreme Court, try to anticipate what the Supreme Court is likely to do, or lead the way for the Supreme Court to review later. That topic can be revisited, as you discuss whether Judge McDonald (Henderson Broadcasting) and Judge Padova (Piazza) did what Judge Friendly says they should do.

Notes and Questions:

The notes and questions that follow Salerno start to cultivate parallels and cross-references between ideas from antitrust law and ideas from labor law. N&Q 2 explores the decision by the NLRB to refuse to exercise jurisdiction over employees in the horse racing industry, for a number of policy reasons that are alluded to in the note.

N&Q 3 is intended to foreshadow the analysis of Flood v. Kuhn. Was Justice Blackmun writing a scholarly legal precedent or an ode to baseball?

FLOOD V. KUHN (pages 307-326)

Primary Reason for Inclusion: This is the most recent pronouncement of the Supreme Court concerning the existence and scope of the baseball antitrust exemption.

Points to Emphasize:

The text above explains the analysis and holding of Flood v. Kuhn. Some of the primary issues in the decision are:

A. The decision clears up the issue of what the Court says are and are not the current theoretical underpinnings of the exemption.

1. The interstate commerce requirement is no longer a basis for the baseball exemption. The majority makes it clear that "professional baseball is a business and it is engaged in interstate commerce."

2. The exemption for baseball alone is difficult to defend. The majority opinion acknowledges that the affording of an antitrust exemption only to baseball and not to other professional sports is "an anomaly."
Nevertheless, the Court held that the exemption remains confined to baseball because even though baseball's exemption from the antitrust laws might be regarded by some as an aberration, "[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs." The Court's analysis of stare decisis is arguably directly contrary to its 1970 decision in Boys Market, which is discussed in N&Q 2. How does this concept of stare decisis relate to the concept in Salerno about lower courts waiting for the Supreme Court to correct its own erroneous prior decisions?

The decision states that the baseball exemption remains viable for several reasons.

a. For fifty years Congress has allowed professional baseball to develop and expand, and although "[r]emedial legislation has been introduced repeatedly in Congress, . . . none has ever been enacted," thereby evidencing, by "positive inaction," a Congressional intent that the exemption should continue. This issue is explored in N&Q 1.

b. The majority expressed concern that a "judicial overturning of Federal Baseball" could cause confusion and retroactivity problems.

c. The Court stated that if the exemption is to be changed, it should be by legislative action that "by its nature, is only prospective in operation."

B. The Court holds that the baseball exemption bars state antitrust claims, as well as federal antitrust claims. The lower courts in Flood had held that Flood's state antitrust laws were preempted by the federal policy embodied in the baseball exemption and were barred by the dormant Commerce Clause as an undue interference with interstate commerce. The majority cited those portions of the lower court opinions and, on the basis of those statements, affirmed the dismissal of the state antitrust claims. This issue is explored in N&Q 3.

Notes and Questions:

N&Q 1 alludes to one reason the anomalous baseball exemption has survived over more than sixty years. Major League Baseball players (not much of a lobbying force) are about the only ones likely to benefit from elimination of the exemption. Therefore, this is a particularly inappropriate circumstance to infer much of anything from congressional inaction.
N&Q 2 simply provides information about the *Boys Market* case, discussed in *Flood*, which was decided only two years before *Flood*.

N&Q 3 is intended to highlight the bizarre holding in *Flood* concerning state antitrust law. Contrary to ordinary antitrust law, congressional inaction is interpreted as preempting state antitrust law! Usually preemption requires a congressional legislative scheme that “occupies the field” and leave no room for state involvement. Can that be said about Congress’s failure to take any action concerning baseball?

The introductory portions of the opinion, which discuss the history of baseball and list famous former players, raise questions about the attitude or preconceptions that the justices brought to the case, and the way the case was handled by the justices. Those questions have been fueled by the description of the deliberative process of the Supreme Court in the case, which appears in *The Brethren* by Bob Woodward & Scott Armstrong and is excerpted in N&Q 4.

N&Q 3 that follows the *Salerno* case and N&Q 4 after *Flood* can be the basis for a discussion about the influence of jurists' views about sports on litigation involving those sports. This issue is similar to the concern that jurists will be unable to perceive how to apply antitrust analysis that is usually applied to more traditional businesses to the business of a professional sport. The latter issue is the subject of N&Q 1 on page 467 that follows the *Volvo* case in Chapter 10. The class discussion of this issue that follows *Flood* can be revisited when you reach page 467.

**HENDONER BROADCASTING CORP. v. HOUSTON SPORTS ASS'N, INC.**
(pages 326-333)

**Primary Reason for Inclusion:** Post-*Flood* case that addresses the scope of the baseball exemption.

**Points to Emphasize:**

*Henderson* was decided ten years after the Supreme Court's decision in *Flood*. The district judge in *Henderson* was faced with the task of deciding not whether there is a baseball exemption, but the scope of the baseball exemption.

One issue to discuss about the case is the underlying allegation of an antitrust violation. The team decided to cancel its radio station contract and to only contract with station KENR, not the plaintiff, to broadcast Houston Astros games on the radio. How would you argue
that the defendants' conduct violates the antitrust laws if it is not exempt? HINT: The plaintiff alleged the conduct constituted horizontal market division, but it appears to be exclusive dealing. What is the relevant market? What are the anticompetitive effects on a relevant market of the challenged conduct? It is difficult to see any likely substantial anticompetitive effects in any relevant market of having one, instead of two, stations broadcast Astro games on the radio.

Some of the primary points to focus upon are the three-pronged basis for the court's holding: (1) broadcasting is not a central aspect of the business of baseball, and is therefore not exempt, (2) to the extent that the exemption is based on congressional inaction, there has been congressional action with respect to sports broadcasting -- the Sports Broadcasting Act of 1961 and 1966 discussed in Chapter 7, and that statute fails to exempt the conduct at issue in Henderson, and (3) the baseball exemption has not been applied by lower federal courts in cases involving contracts with non-exempt entities, such as a radio station. With respect to the last prong, footnote 8 of the opinion, found on page 332 of the text, states that the Court accepted the plaintiff's argument that exempt baseball businesses lose the exemption when they combine with entities that are not exempt.

In Henderson, Judge McDonald, foreshadowing the Piazza decision, stated that "[t]he baseball exemption arose and has been applied by the courts solely in disputes between players and team owners or a league." N&Q 1 asks whether that is true. Consider Federal Baseball -- wasn't that a claim by a team against other teams and leagues? In addition, Toolson was an affirmance of several decisions, and the substance of some of those cases is referenced in the opinion. Toolson includes the following statement:

"Similarly, in No. 25, the plaintiffs allege that because of illegal and inequitable agreements of interstate scope between organized baseball and the Mexican League binding each to respect the other's 'reserve clauses' they have lost the services of and contract rights to certain baseball players."

That certainly sounds by a claim by competing teams. "[T]he plaintiffs . . . have lost the services of . . . certain baseball players." The plaintiffs must be employers of players and the defendants are not the players, but rather are teams and leagues.

Judge McDonald in seems to consider it important that in response to an antitrust counterclaim by a baseball team against its concessionaire, the defendant concessionaire did not raise the baseball exemption as a defense. Similarly, in an antitrust case involving the Major League Baseball Players Association ("MLBPA") and baseball cards, the defendant MLBPA did not raise the baseball exemption as a defense. N&Q 2 asks about the limited precedential significance of the failure by a party to raise a defense that might have been available. In
particular, how likely would it be that the MLBPA would support an affirmance and possible extension of the baseball exemption?

N&Q 3 and 4 ask about the implications of the analysis as applied to other aspects of the businesses of baseball, broadcasting, and softball. N&Q 5 asks whether is consistent with or is a district judge working hard to undermine or limit the Supreme Court's decision. 

**PIAZZA v. MAJOR LEAGUE BASEBALL** (pages 333-344)

**Primary reason for Inclusion:** Most important post- baseball exemption decision; major effort to limit scope of the exemption.

**Points to Emphasize:**

The analysis of *Piazza* is described in detail above.

*Piazza* is a very important decision. The primary antitrust concerns of baseball are, not necessarily in this order, (1) player issues (restrictions on free agency, amateur player draft, etc.), (2) minor league-major league agreement and overall minor league system, (3) league restrictions on franchise relocation, and (4) other intra-league rules, such as restrictions on ownership, revenue sharing, exclusive local television territories, etc. If the primary holding of *Piazza* is correct, all except player issues will be subject to antitrust challenge. As Chapter 9 explains, given the Supreme Court's decision in *Brown v. Pro-Football, Inc.*, as long as the MLBPA remains the collective bargaining representative of major league players and does not de-certify as a labor union, legal challenges involving player issues will be resolved under the labor laws, not the antitrust laws. See, e.g., N&Q 5 following the *Butterworth* case (page 347) and N&Q 7 following the D.C. Circuit's decision in *Brown* (page 399). Therefore, the continuing significance of the baseball exemption would be extremely limited.

If *Piazza*’s primary holding is rejected, its secondary holding would require a case-by-case assessment, after factual development, of whether the minor leagues, franchise relocation, revenue sharing, and restrictions on ownership are matters of "league structure" or whether the markets they affect are "central to the unique characteristics and needs of baseball exhibitions." The alternative would be for judges to decide whether challenged conduct is part of the "business of baseball" to a sufficiently significant extent to be exempt from antitrust scrutiny.

**Notes and Questions:**
N&Q 1 asks whether Judge Padova was trying to apply the letter and the spirit of *Flood* or whether he was working very hard to construe the exemption as narrowly as possible. N&Q 2 asks whether *Piazza* and its analysis of *stare decisis* is correct.

The strangest portion of the *Piazza* analysis is the attempt to tie the scope of the exemption to analysis of relevant markets. It is very unusual for an antitrust exemption to be defined with reference to the market that would be at issue if there were no exemption. The idea of an exemption generally is that the industry or activity is exempt, and for that reason there is no need to focus on the market at issue. This issue is explored in N&Q 3 and 4.

In the minds of some, the baseball exemption is linked to the idea that Major League Baseball has an independent Commissioner who will safeguard the sport. In all fairness, the idea that an independent Commissioner, if there ever was one, would be a substitute for application of the antitrust laws, is a very strange concept. Similarly, the idea that a sport should lose its antitrust exemption if it fails to appoint an independent Commissioner is, at best, unusual. What does it mean that the Commissioner is independent? Nevertheless, those views have been expressed by members of Congress and they are the focus of N&Q 7. The exploration of the issues related to the independence of the Commissioner can be revisited at this point.

**BUTTERWORTH v. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS**
(pages 344-348)

**Primary Reason for Inclusion:** This case and the notes and questions explore the world of the baseball exemption post-*Flood*. Points to Emphasize: The majority, concurrence, and dissent all explore the questions of whether *Piazza* is correct, and if so, what remains exempt after *Piazza*. The notes and questions also identify some of the other post-*Flood* decisions that applied or refused to apply the baseball exemption to various aspects of baseball or related sports.

**Notes and Questions:**

Some students may wonder how MLB's liability for "collusion" relates to the antitrust laws. The answer is that it does not, except to the extent that the players, unable to pursue antitrust claims, negotiated for antitrust-like remedies in their collective bargaining agreement with the teams. N&Q 4 explains that there is no cause of action for "collusion," but that the players had a right to pursue a claim, in arbitration, based on their allegation that the owners had violated the anti-collusion provisions in the collective bargaining agreement ("CBA") that were negotiated by the MLBPA and Major League Baseball. The CBA provided for treble damages (modeled after the antitrust laws) to the players if they could prove that the owners had colluded to keep salaries low or to restrict movement.
N&Q 7 asks the students to apply what they know about the baseball exemption to the lawsuit filed by George Steinbrenner and the New York Yankees against Major League Baseball. The Yankees lawsuit certainly does not concern player restraints, and if the primary holding of Piazza is accepted, the baseball exemption would not be a hurdle. If either the alternative Piazza holding or the "business of baseball" standard is applied, the analysis must focus on whether sponsorship agreements are sufficiently central to the business of baseball to render them exempt. Is sponsorship similar to broadcasting or concessions, as peripheral economic activities that are associated with baseball but are not central to league structure or baseball operations? In addition, under Henderson, does the agreement between MLB and non-exempt sponsors eliminate any claim to an exemption?
CHAPTER 9
ANTITRUST AND SPORTS: THE LABOR EXEMPTION

I. Introduction
II. Origins of the Non-Statutory Labor Exemption

Parts I and II of Chapter 9 are intended to familiarize students with the underpinnings of the statutory and non-statutory exemptions to the antitrust laws. This area of study is perhaps the most complex and difficult to grasp in the entire sports law subtext. It has been our experience that antitrust professors rely upon labor law professors to address this topic and labor law professors, in kind, in turn, rely upon antitrust professors to do the same. An informal poll yields evidence that though both labor law and antitrust textbooks contain sections devoted to the labor exemptions, professors in these areas have chosen to reserve discussion of the issues arising thereunder for "another day." Fortunately or unfortunately, due to the tremendous amount of litigation in this area in sports law, professors teaching this course have no recourse but to address this topic in some detail.

We tell our students that they should not shrink from the challenge but, rather, should welcome the opportunity to consider an area that is elusive and certainly mysterious to most commentators and jurists. Students should be made aware, however, that the labor exemption presents somewhat of a conundrum and that no amount of industry on their part or explanation on the part of their professors will yield the types of definitive results that tend to make students happy. Unfortunately, the nature of the non-statutory exemption in particular makes it almost impossible to provide any precise resolution. That is, the antitrust laws are designed to promote competition and the labor laws; at some level, are designed to suppress competition. Consequently, particularly when confronted with a restraint in the labor market area, the two pieces of legislation are at cross-purposes and an attempt to devise a workable theory in which to pigeon-hole the types of conduct that should be exempt from antitrust scrutiny is extremely difficult.

Perhaps the most difficult hurdle for courts to overcome, and for students to appreciate in terms of their analyses, is the avoidance of considering the merits of the antitrust controversy as part of the exemption analysis. With the exception of Justice Goldberg’s concurring opinion approach in the *Jewel Tea* case (and perhaps the Supreme Court’s most recent pronouncement in the *Brown* case, covered at the end of this chapter), almost every labor exemption analysis, to some degree, has entertained consideration of the potential impact of the restraint upon competition -- thus pursuing in one sense an evaluation of the merits of the antitrust claim. While this approach is almost irresistible, it is intellectually infirm in the sense that the merits of the controversy really should not be a subject of inquiry until the labor exemption issue has been resolved. If the conduct is exempt, then the degree to which it implicates competition or runs afoul of the purposes underlying the antitrust laws really should be no more relevant than the economic hardship visited upon an exempt employee who seeks recovery under the wage/hour laws.

Parts I and II attempt to provide an overview of both the statutory and non-statutory exemptions independent of any specific sports law application. The excerpt from the Duke Law Journal article is extremely complex and perhaps somewhat inaccessible without an actual reading of the cases discussed therein. Space limitations effectively precluded inclusion of many of these cases, and, because they really did not involve fact patterns emanating in a sports context, we chose not to include them. However, students should be encouraged to refer to the text of these opinions, or edited versions of these cases perhaps could be distributed, to enhance students' understanding of the non-statutory labor exemption issue. We do not suggest that this is
necessary to a full understanding; a detailed lecture accompanying this section will probably suffice. However, to the extent that the cursory discussion of these cases leaves the students wanting or needing more information, the simplest advice would be to recommend that students read those opinions in their entirety.

One of us has employed the following approach to set up the labor exemption chapter and to provide a working outline. The analysis takes several stages, each introduced by a question:

1) What is the statutory exemption?
2) What is the non-statutory exemption?
3) How has the non-statutory exemption generally been applied in a sports law context -- particularly with regard to labor market restraints?
4) Does the non-statutory labor exemption apply after a collective bargaining agreement has expired?
5) Does the non-statutory labor exemption apply to a course of conduct in which there has never been any agreement between the labor and non-labor group?

Through this approach, the students may then walk through the various stages of the non-statutory labor exemption as it has been applied in professional sports. Clearly the answer to the first question is found in the Introduction and the Duke Law Journal excerpt. The answer to question three involves an overview of the Mackey case and the three-pronged test employed therein. The fourth question necessitates an examination of Powell and other cases decided at the same time, with particular emphasis upon the fact that even after a collective bargaining agreement has expired the labor exemption will continue so long as a collective bargaining relationship persists. The final question involves a consideration of the Brown cases. We have intentionally included both the court of appeals decision in Brown as well as the Supreme Court decision and we have, despite considerable editing, left large portions of these cases intact. We have applied a relatively light editing touch because of the significance of Brown and the relevance of the dissenting opinions, particularly with respect to applications that may arise in the future.

As suggested above, Parts I and II speak for themselves and may be assigned and synopsized briefly before the initial discussion of Mackey or, in the alternative, an entire lecture could be devoted to the non-statutory exemption prior to any consideration of Mackey. One of us devotes an entire class to providing some history of the evolution of labor law legislation, protection of employee rights, and the development of collective bargaining, along with a brief synopsis of the Sherman Act. This introductory discussion facilitates students' understanding of the tension existing between labor legislation and the antitrust laws. It also provides insights into the inevitability of the need for some type of non-statutory exemption if the courts, in any way, are to accommodate the apparent conflict between labor and antitrust. Following this introductory discussion (however detailed the professor chooses to make it), it is then recommended that a traditional case analysis be employed to address Mackey, Powell, and Brown.

III. Application of the Labor Exemption to Professional Sports

Case: Mackey v. NFL
Primary reason for inclusion: To consider the seminal sports law case dealing with the non-statutory labor exemption and to make students aware of the three-pronged test utilized by the Eighth Circuit in Mackey -- a test that, to some degree, still exists today, even in the wake of the Brown case.

Points to emphasize:

1) This case involved a restraint in a labor market rather than the more typical product market. Thus, it rests outside of the traditional labor exemption-type issue in the sense that the "agreement" or conduct in question exclusively benefits the multi-employer group, and constitutes a provision (eventually included in the collective bargaining agreement) that the players vigorously opposed.

2) The three-prong test is crucial to the students' understanding of the Eighth Circuit's attempt to develop a workable approach using the non-statutory exemption in a sports/labor market context.

3) The third prong of Mackey, the bona fide, arms-length bargaining prong, has been subject to considerable controversy, with the most prevalent criticism leveled at the fact that it pursues a level of inquiry that should be irrelevant to a determination as to whether or not the subject conduct should be exempt from the antitrust laws. That is, some commentators suggest that the third prong really is an attempt to level the playing field where the respective economic strengths of the parties should control the outcome (i.e., the labor laws presuppose that one party may have more strength at the bargaining table than the other party and, therefore, that inquiry should not be part of any labor exemption analysis.

Notes and Questions:

The answer to N&Q 1 is that, although most of the sports law labor exemption cases have involved labor market restraints, Mackey is certainly not limited to restraints implicating the labor market. There may be other situations in which the restraint involved may be part of a collective bargaining agreement even though it constitutes a restraint on a related product market.

N&Qs 2 through 5 are devoted primarily to the continuing validity or applicability of the "third prong." Students should be asked to consider whether the respective strengths of the negotiating parties and the development or maturity of the labor organization should have an impact on the applicability of the labor exemption. On the one hand, there is considerable support for the proposition that the utilization of the third prong may involve an analysis of issues beyond pure labor law inquiry and matters that delve into the substantive merits of the antitrust claims. On the other hand, others adopt the view that this prong is necessary to insure that the non-statutory exemption is not employed to shove a restraint down a union's throat with no recourse available under the antitrust laws. The quote from the McCort decision in N&Q 2, together with Judge Edwards' dissent addressed in N&Qs 4 and 5, join the question and should provoke some student dialogue on this question.

N&Q 6 raises an interesting question regarding the first prong of the Mackey test and the individuals who may be affected. This issue takes on considerable significance in the context of draft choices and other collegians who may be adversely affected by provisions in a collective bargaining agreement that could compromise their eligibility to play professional sports. Some commentators have argued that any provision that adversely affects potential draftees who are not
yet part of the collective bargaining agreement, fail to satisfy *Mackey* and thereby should not be labor exempt.

N&Q 7 introduces the next question in our multi-stage approach addressed above: the availability and scope of the labor exemption after the collective bargaining agreement has expired.

IV. Availability and Scope of the Exemption When the Collective Bargaining Agreement Expires

**Case:** *Powell v. NFL*

**Primary reason for inclusion:** To consider whether or not the labor exemption would be deemed to apply after a collective bargaining agreement containing the particular restraint has expired and what point in time would mark the expiration of the exemption in that eventuality.

**Points to emphasize:**

1) The *Powell* case addressed an issue that was specifically left open in footnote 18 of *Mackey*, to wit: "In view of our holding we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption." Though the Eighth Circuit eschewed any type of consideration of this question, its eventual relevance was inevitable.

2) Because of the considerable unrest surrounding the 1982 strike, and the trauma associated with player activity that threatened the playing of games, the achievement of some type of "industrial harmony" and a preoccupation with the desire to return the parties to the table is an important backdrop to this case.

3) In view of the court's eventual decision that the labor exemption would continue to exist so long as a collective bargaining relationship existed, and its absolute unwillingness to set any finite period of time for the expiration of the exemption, the foregoing point regarding the obsessive preoccupation with returning the parties to the bargaining table cannot be overstated. In evaluating the prudence of the court's approach, students should be encouraged to give considerable attention to the other potential theories, including the union consent theory (discussed in the notes that follow) and the impasse theory, which Judge Doty at the district court level adopted. It is a worthwhile exercise to have students consider the advantages and disadvantages of each of the three approaches (the union consent theory, the impasse theory, and the approach eventually adopted by the court).

4) Students should be made aware of the fact that footnote 12 on page 370 reaffirms the applicability of *Mackey*, particularly prongs 1 and 2. It also interestingly notes that the Sherman Act could be found applicable if the restraint had been proposed in a manner not consistent with good faith bargaining. There would be some who would argue that the question of whether or not the restraint involved good faith bargaining should be reserved for the labor laws and subject to sanctions under the National Labor Relations Act, rather than subjecting such conduct to scrutiny under the antitrust law notwithstanding the bad faith bargaining aspects.
5) The dissenting opinion contained in pages 372-373 should be considered in some detail because it, in some form, is revisited by dissenting opinions in the Brown case. Students should be asked to explore whether or not the non-statutory labor exemption was ever intended to apply to a restraint that the union had no desire to include in the collective bargaining agreement. In this regard, we would highly recommend consideration of a recent article by Professor Michael C. Harper of Boston University, entitled Essay: Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption, 38 Wm. and Mary L. Rev. 1663 (1997).

Notes and Questions:

In N&Q 1, we call your attention to a slight typographical error in the fourth sentence, which now reads, "Any suspension prior to the exemption could frustrate . . . " and should read, "Any suspension of the exemption prior to impasse could frustrate . . . ." N&Q 1 explains to students the rationale underlying the impasse theory and the union consent theory. Again, these approaches should be compared and contrasted with the approach employed by the court in Powell. As an aside, it is worthwhile to mention to students that student law review notes, which they may believe to be nothing more than an obligatory law review writing requirement, may sometimes have a profound influence upon a court or a developing body of law. Student Michael Hobel's Note in the NYU Law Review formed the predicate for Judge Doty's decision which, although not adopted by the Eighth Circuit, presents an interesting compromise approach to the exemption question in the Powell context.

N&Q 2 requires students to consider an approach adopted by Judge Debevoise in the Bridgeman case. One criticism of the test is that it really does not provide any finite period for the end of the labor exemption and, in fact, may encourage unions to emphatically refuse to consider an employer proposal so as to resolve any doubts as to whether or not the matter is a subject for further negotiations. Again, students should be asked to argue in support of this approach (for example, by emphasizing that the criticism of the approach -- i.e., it could encourage a union's outright refusal to consider a certain proposal -- is countered by the fact that the labor laws (Section 8(b)(3)) could be invoked to preclude a union's bad faith bargaining in this regard. Students should also be asked to consider whether something as subjective as expression that a particular provision would not be accepted is a valid determinate given the fact that a great amount of puffing and outright denials are part of the posturing process attend all collective bargaining.

N&Qs 3 and 4 speak for themselves. They involve a revisitation of the Mackey three-prong test and provide an elaborate factual synopsis of the circumstances leading to and stemming from the Powell decision. Because the authors of this casebook were intimately involved in the filing of unfair labor practice charges on behalf of the Philadelphia Eagles subsequent to the negotiation of the current collective bargaining agreement, anyone reviewing this manual is invited to contact us for further "fly on the wall" discussion of these events.

N&Q 5 asks students to consider whether or not the Powell decision resulted in the adoption of the most prudent approach. While the end result may have been precisely what the Eighth Circuit desired, again students should be asked to consider whether the court could have predicted the path leading to the eventual result.

N&Q 6 simply sets the stage for consideration of the Brown case both at the court of appeals and Supreme Court level.

V. The Non-Statutory Labor Exemption and Its Outer Limits
Case: Brown v. Pro-Football, Inc. (D.C. Circuit)

**Primary reason for inclusion:** To familiarize students with the D.C. Circuit's emphasis upon the significance of multi-employer bargaining in the professional sports context and to make students aware of Judge Edwards' cavalier assessment that players seeking the benefits of collective bargaining recognize the Hobson's choice of availing themselves of the labor laws to the possible exclusion of an antitrust remedy.

**Points to emphasize:**

1) The dispute arising in this case involved a decision by the league that had never before been incorporated into any collective bargaining agreement and had never been subject to any type of mutual understanding between the clubs and the players' collective bargaining representative. In this sense, it represented a unique and potentially protracted application of the labor exemption.

2) The court made great weight of the importance of multi-employer bargaining in the overall collective bargaining scheme and stresses its significance in terms of the maintenance of industrial peace and stability.

3) On page 385, Judge Edwards' pivotal statement made it clear that players in a labor market restraint context will find little solace in the antitrust laws: "In our view, the non-statutory labor exemption requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act." This sentiment echoed the thoughts articulated earlier by Judge Winter in the Wood case. At the time, Judge Winter's comments were not surprising given the fact that he had co-authored an extensive law review article expressing a preference for the labor laws over the antitrust laws and also espousing a view that showed no reluctance to visit this Hobson's choice upon the players. Coming from Judge Edwards, this further enunciation of a principle that essentially forces professional athletes to choose between labor and antitrust as a means of recourse is extremely significant.

4) Judge Wald's vigorous dissent framed the issue that would eventually be heard by the Supreme Court. Judge Wald suggested that Judge Edwards' opinion virtually precludes application of the antitrust laws to labor market restraints. Judge Wald, at page 391, emphasizes that nothing in prevailing precedent governing the non-statutory exemption would support the notion that labor market restraints are beyond the reach of the antitrust laws -- certainly not to the degree that the majority would insulate such conduct. The penultimate paragraph on page 391 amply articulates Judge Wald's concerns regarding the breadth of the majority's opinion. Further, in Judge Wald's dissent, her differentiation of terms versus tactics is crucial because it undercuts the majority's assumption that elimination of the labor exemption in the context of the subject case would virtually preclude any multi-employer bargaining strategy that even potentially implicates the antitrust laws. Judge Wald correctly pointed out that there is a chasm of difference between the tactics employed in collective bargaining (and the strategies that are discussed as part of a multi-employer bargaining scheme) and the unilateral implementation of terms against a union's will -- which, had they been imposed in the absence of any collective bargaining representative, would clearly have run afoul of the antitrust laws.
5) Judge Wald clearly concluded that the critical issue still may be when the labor exemption ends in the face of a provision that had previously been incorporated into a collective bargaining agreement. She plainly would not apply the labor exemption in a situation where the parties had never agreed to such terms.

Notes and Questions:

N&Q 1 forces students to consider the origins of the non-statutory exemption a device that emanated from the statutory exemption which insulated exclusively union conduct. Students should be encouraged to consider whether or not independent multi-employer conduct that is imposed upon the union due to the largesse of the labor laws in terms of post-impasse implementation should rest under the protective umbrella of the exemption -- even assuming that good faith, albeit tough, bargaining, is utilized.

N&Q 2 asks whether employees should be presented with the choice of having a collective bargaining representative or individually availing themselves of the antitrust laws. Certainly, it is arguable that this choice will effectively encourage employees to seek decertification rather than induce more meaningful collective bargaining as Judge Edwards and others would hope. This factor is especially compelling given the fact that availing oneself of the labor laws, which employees will have little choice about if they have chosen a collective bargaining representative, will afford a relief that pales in comparison to treble damages afforded under the antitrust laws. That is, alleging bad faith collective bargaining, in most instances, will result in a bargaining order requiring the offending employer to return to the table to bargain in good faith. It may become readily apparent to players who have been victimized by labor market restraints in the past that the benefits of unionization are outweighed by the ability to secure more meaningful relief through the auspices of the antitrust courts.

N&Q 3 poses the question as to whether or not Judge Edwards' opinion, while certainly stricter and more limiting in terms of availing players of antitrust relief, is purer and more intellectually honest in terms of a traditional exemption approach. That is, while Judge Edwards' harsh, cut and dried analysis may, in certain circumstances, deprive worthy plaintiffs of forum under the antitrust laws, it eliminates the thorny problem confronting many jurists in the past regarding the inevitable entwining of labor and antitrust issues at the exemption stage where consideration of the antitrust merits theoretically would be inappropriate.

N&Qs 4 and 5 require students to revisit the question of multi-employer bargaining and its hallowed place in labor relations. At the conclusion of N&Q 5, students are asked to assess whether the fear articulated by Judge Winter is real. If so, students should be asked to contemplate whether there are alternatives that would preserve multi-employer bargaining while at the same time open the door for recourse to the antitrust laws where appropriate. A useful starting point to stimulate this discussion may be found in Michael Harper's law review article Essay: Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption, 38 Wm. and Mary L. Rev. 1663 (1997), alluded to earlier.

The question posed at the conclusion of N&Q 6 reiterates the very same question posed with regard to the developments that ensued following the Powell decision in which the Eighth Circuit stated that the labor exemption would continue so long as the collective bargaining relationship existed. Again, the result was several years of labor peace through a multi-year collective bargaining agreement. However, it is unlikely that the court in either event would have contemplated that the path would be so tortious.
N&Q 7 speaks for itself, and provides the entry into consideration of the Supreme Court's decision in Brown v. Pro-Football, Inc.

Case: Brown v. Pro-Football, Inc. (Supreme Court)

Primary reason for inclusion: To provide some finality to the labor exemption issue, particularly judicial precedent that seems to have expanded the non-statutory exemption far beyond any confines that may have been anticipated in its earliest stages.

Points to emphasize:

1) Justice Breyer's majority opinion echoed Justice Edwards' theme regarding the importance of multi-employer negotiations in the overall scheme of collective bargaining. Of particular significance is the court's acknowledgment on page 401 that the NLRB and judicial decisions reinforce the notion that a multi-employer bargaining group may unilaterally implement mandatory subjects of bargaining terms subsequent to an impasse.

2) On page 402, Justice Breyer asked rhetorically what multi-employers are to do once impasse is reached if the antitrust laws were to be applicable to conduct that arguably involves mandatory subjects of bargaining. It apparently never occurred to the court (and indeed it is a somewhat radical notion) that although an employer in a labor context may unilaterally implement terms subsequent to impasse and the unilateral implementation of such terms in a multi-employer bargaining sense may survive scrutiny under the labor laws, such conduct, however, absent agreement by the union, may potentially implicate Sherman I because it does involve a combination that may unreasonably restrain trade.

3) The court was unclear as to whether or not a pre-impasse unilateral change, which clearly would involve a violation of Section 8(a)(5) of the NLRA, is de facto beyond the scope of the labor exemption. While the court did speak consistently in terms of post-impasse changes, its slavish deference to labor law as the problem-solver in matters involving mandatory subjects of bargaining may suggest that the only remedy in an 8(a)(5) context for activities engaged in by a multi-employer bargaining group may be the relief provided by the labor laws. The court apparently contemplated this possibility by suggesting that its holding was not intended to insulate every joint employer's imposition of terms. Yet, pre-impasse changes were not specifically itemized in the exemplars of conduct that may be beyond the exemption's reach.

4) Justice Stevens' dissent is noteworthy in several respects. First, both Judge Edwards and Justice Breyer found it useful to rely upon Justice Goldberg's concurring opinion in Jewel Tea, particularly with respect to Justice Goldberg's focus upon the nature of the restraint in question (i.e., whether it was a mandatory subject of bargaining) and his disregard for the potential antitrust consequences in developing his exemption analysis. Justice Stevens, in dissent, made it very clear that the facts presented in Jewel Tea, as well as Pennington, did not parallel the Brown facts in any fashion. Justice Goldberg at various points, both as a litigant and as a jurist, made it clear that he did not intend by his Jewel Tea concurrence, to insulate "hard core, anti-competitive activity by employers acting alone." In this regard, Justice Stevens analogized a post-impasse unilateral implementation by a league of mandatory bargaining terms to be functionally tantamount to a group of employers acting alone.
5) Further, Justice Stevens categorically rejecting the notion that employees seeking the representation of a collective bargaining agent surrender recourse to the antitrust laws to remedy various labor market restraints. He made it clear that prior precedents "do not justify the conclusion that employees have no recourse other than the Labor Board when employers collectively undertake anti-competitive action. In fact, they contradict it."

6) Without explicitly saying so, Stevens has embraced, to some small degree, portions of the union consent theory because he emphasized the significance of the "agreement" component of the labor exemption. It does not appear further that there is any doubt in his mind that the Mackey test, at least in some form, survives, even in the face of the majority's broad expansion of the exemption.

Notes and Questions:

N&Qs 1 and 2 visit Justice Breyer's majority and pose the question as to whether the prospect of the labor exemption not applying to the instant case could compromise multi-employer bargaining and the industrial stability that it has engendered. Certainly, the amount of antitrust litigation could increase to some degree if the exemption were not applied in this situation. However, because the task of establishing either a per se violation or a violation under the Rule of Reason is so onerous, it is unlikely that the removal of the exemption in contexts such as Brown would visit a spate of antitrust litigation upon the courts. Moreover, whether or not this type of "slippery slope" could eventuate is irrelevant to a determination as to how the non-statutory exemption should be applied. Perhaps, the question is deserving of further congressional action in terms of clarification of what is now called the "non-statutory" exemption. In any event, it seems as though the omnipresent love affair with multi-employer bargaining is working to close the door to the antitrust courts to many types of restraints that arguably would violate the antitrust laws were it not for the coincidental benefit of a collective bargaining relationship.

In N&Q 3, students are simply asked to assess the merits of Justice Stevens' dissenting opinion regarding the narrowly circumscribed scope he gave Justice Goldberg's concurrence in Jewel Tea. As students contemplate this question, they should be reminded that Justice Goldberg had for years been viewed as an ally of organized labor, and was, in fact, Secretary of Labor in the Kennedy administration. His judicial predilections certainly were not those that, one would expect, would support the league's virtually unilateral imposition of terms that has characterized the reserve systems and similar anticompetitive mechanisms in professional sports.

N&Qs 4, 5 and 6 ask students to consider what the practical consequences of the Brown decision will be. Although no one can definitively predict the results, it certainly is possible that the Brown court will have its wish in that players will seek the bargaining table with greater zeal and both parties will make greater attempts to resolve issues through labor law mechanisms. However, it is also possible, particularly as players become more secure in terms of their ability to negotiate their own contracts, that professional athletes will seek decertification so as to open the door for their own individual litigation and the eventual demise of all reserve systems in sports. This prospect is extremely troubling for sports leagues because most litigation surrounding reserve systems and similar restrictions have resulted in findings that such restraints are unreasonable and not justified by league protestations that free agency and the like will compromise league competitiveness and viability. The extremely disconcerting aspect of Brown, however, involves situations where decertification certainly would not result, and, likewise, where the antitrust laws would be precluded. That is, in many instances, the particular restraint may only affect a small number of bargaining unit personnel; yet, they may involve a number large enough to make a justiciable claim under the antitrust laws. In these situations, the views of this small group will be subsumed by the larger group in a way certainly beyond contemplation of typical "one for all,
all for one" raison d'etre that characterizes collective bargaining. Does Brown virtually preclude any relief for those disaffected employees? Students should be asked to contrast this potential hardship with the adverse affects that a contrary decision in Brown could have had upon multi-employer bargaining.

N&Q 7 is really provided as a small mini-examination question that will force students to consider the Brown case's impact on the labor exemption question and the continuing viability of Mackey. As you walk students through potential answers (and there are no definitive resolutions of these questions), students should be apprised of the fact that some commentators think Mackey has limited viability in the face of the Brown decision. However, we believe that such a contention is somewhat cavalier, particularly given specific language in the Brown case that would suggest that many of the Mackey factors, if not all, still exist in some form. In this regard, students should have their attention drawn to page 406, where the majority opinion finds relevant that conduct as part of collective bargaining negotiations was related to the lawful operation of the bargaining process, involved a mandatory subject of bargaining, and only concerned the parties to the collective bargaining relationship. Certainly two of the three Mackey criteria are embraced by the court's general language and, depending upon how one would construe the terms "lawful operation of the bargaining process," could effectively include all three phases of Mackey. In this sense, the critical impact of Brown would not be to dilute the three-prong test but, rather, would be to apply it in the context of situations where there had been no agreement and there was no agreement in effect.

In N&Q 8, the students are asked to revisit the question as to whether or not the labor law legitimacy of a post-impasse unilateral implementation by a multi-employer bargaining group a fortiori suggests that such conduct should be exempt from antitrust scrutiny. To suggest that all such activity is exempt perhaps may raise the bar in terms of antitrust availability far beyond anything the Sherman Act contemplated. Again, for a useful and extremely thoughtful approach to this question, see Michael C. Harper, Essay: Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption, 38 Wm. & MARY L. REV. 1663 (1997).

N&Q 9 poses the question raised in the Points to emphasize regarding the absolute scope of the majority's opinion. Certainly if an impasse is not found, then the multi-employer group will be in violation of 8(a)(5) of the NLRA. Under those circumstances, what would be the continuing viability of the exemption? The court simply does not resolve this question to full satisfaction, and leaves the impression that perhaps the labor laws may be the only effective redress. If so, it would invite all multi-employer groups, in the context of labor market restraints embracing mandatory subjects of bargaining, to adopt the most hard-nosed bargaining tactics recognizing full well that the most serious impact will be a cease and desist order for violating Section 8(a)(5) of the Act. Of course, other circumstances could result, such as a finding of an unfair labor practice strike if employees engaged in a work stoppage in protest of the bargaining tactics. Yet, again, these consequences are attenuated and by no means provide the employees with the immediate type of satisfaction and relief that would be available under the antitrust laws.
CHAPTER 10
ANTITRUST AND SPORTS: PLAYER RESTRAINTS

This is the first non-primer chapter that deals with substantive antitrust law, as opposed to antitrust exemptions (Chapter 7 is the antitrust primer, Chapter 8 covers the baseball exemption, and Chapter 9 addresses the labor exemption). Therefore, a law professor may want to remind students that, as they consider the sports antitrust cases in Chapters 10 through 13, they may want to refer back to Chapter 7 to refresh their understanding about the elements of the claims that are being asserted in the cases in these substantive antitrust chapters.

I. AN OVERVIEW OF CHAPTER 10

We start the substantive antitrust chapters with an examination of player restraints, because the issues are somewhat more narrow and the fact patterns somewhat less complicated than the issues in the following chapters. Although there may be passing reference to Section 2 of the Sherman Act in the player restraint cases, these are primarily cases brought under Section 1 of the Sherman Act -- challenges to agreements that are alleged to restrain trade unreasonably. There is seldom any question about the satisfaction of the agreement requirement, except for leagues' argument that they constitute a single entity -- which is addressed in detail in Chapter 12, and the issue in the Volvo case about members of an association conspiring with each other. The teams in a league or the events in a circuit have all agreed to certain restrictions on their dealings with players. The agreements among the teams or the agreements by the players and the producers of the events to abide by the circuit's rules and regulations satisfy the Section 1 requirement of a "contract, combination . . . , or conspiracy."

The Kapp and Mackey cases are traditional cases involving disputes between players and their league. Kapp challenged the collection of NFL player restraints that were then in effect -- the draft, anti-tampering provisions, compensation for free agents lost (the Rozelle rule), and so on. Mackey challenged the Rozelle rule. The rules at issue in Kapp and Mackey were of general applicability and restrained player compensation and mobility in the entire NFL. The restraints at issue in Kapp and Mackey were alleged to be means by which all of the NFL owners were able to keep their team costs for player services from rising.

The Boris case is different - it challenges a rule of the United States Football League that prevented players from skipping college and going straight to professional football. The restraint in Boris does not clearly harm or benefit the teams -- it simply prevents younger players who do not finish college from competing for positions on teams that will otherwise be filled by older players. The motivation for the rule at issue in Boris concerned the relationship between the new league (the USFL) and the colleges that were the primary source for the new league's players.
Then, the Chapter considers restraints imposed on players for disciplinary reasons -- in *Molinas* a basketball player who was involved in a gambling scandal was banned from the NBA for life, while in *Blalock*, a woman golfer was suspended from the major professional women's tour for a year because she was accused of cheating -- she allegedly moved her ball during a round of play. The restraint in *Molinas* was not about preventing player mobility or restricting player salaries, and it only affected players who were accused of gambling. The Commissioner of the NBA suspended Molinas and all teams were forced to boycott Molinas. Some of those teams might have preferred to "forgive and forget" to have the opportunity to compete for Molinas's services, but they were not permitted to do so because of the Commissioner's ruling and enforcement power. The rule in *Blalock* applied to all players, but only those who were accused of cheating in events were at risk of being penalized under the rules.

Finally, the *Volvo* case considers player restraints in the world of individual sports. Some of these restraints, such as the agreements dividing up the weeks of the year, are similar to the league restraints on players in purpose and effect – reduce competition for players and thereby reduce player compensation. Others, such as the commitment agreements, ranking systems, and bonus pool, are about forcing players to play to the exclusion of all other events, thereby helping the circuit eliminate existing competing events and prevent new competing events from ever coming into existence. The *Volvo* case is a transition from player restraints (Chapter 10) to restraints and conduct by one league or circuit directed at competing events (the subject of Chapter 11).

II. AN INTRODUCTION TO THE BUSINESS OF "PLAYER RESTRAINTS"

The following discussion is intended to give you, the professor, an overview of some of the business issues related to player restraints. This discussion is not directly tied to any particular case, but is meant to provide some context to the basic concept of player restraints and the fact that they take different forms and may have different purposes, even though they are sometimes discussed as though they are a unitary phenomenon. The cases we have selected discuss a few player restraints, but there are a number that are not addressed in the cases in this chapter. In order to ascertain the likely competitive effects of a player restraint, it is important to understand the purpose of the restraint, not because an unlawful purpose would render a restraint unlawful, but because it may inform the analysis of the restraint's actual competitive effects.

A. PLAYER RESTRAINTS IN TEAM OR LEAGUE SPORTS

Historically, the primary manner in which antitrust law was involved in professional sports was as a weapon used by the players in league sports against the owners of
the teams. As discussed in Chapter 2, the salaries paid to players in sports leagues are a cost of the business of producing the games. Each owner is, therefore, interested in fielding a competitive (hopefully, championship caliber) team at the lowest possible cost, and that includes minimizing the amount the owner has to pay the players on the team. From the earliest days of professional sports, owners of teams became aware that if they did not restrain competition among teams, team owners would compete for the players who were perceived to be the best players or the most marketable players, thereby driving up player salaries and reallocating wealth from owners to players. Therefore, owners and leagues have traditionally used several devices to eliminate competition for players and, thereby, to keep player salaries down.

One obvious way to restrict player salaries would be to permit each player to choose by which team he wants to be employed, but agree upon a wage scale that would be the same for every team in the league, specifying precisely how much each player would be paid, based on objective factors such as years of professional play (seniority), position played, or statistical performance (e.g., batting average, number of games started or played). However, there are obvious ways for one owner to cheat under such a system, attracting the top players by paying additional amounts to the players it wants, either direct "under-the-table" payments or better perquisites and amenities. In addition, if one team were in an undesirable location, or had a reputation as a perennial loser, or was known for unpleasant management personnel, it might be unable to attract quality players without paying them something extra to compensate the players for the undesirable attributes of the team.

Therefore, leagues have historically restricted competition by assigning the right to negotiate with each player to a single team. By some sort of draft or assignment system, players are selected or assigned to a specific team in the league. This process both divided the player talent around the league and restricted or eliminated competition for players' services. Whether the assignment is made by means of a player draft or some other system, leagues traditionally selected a single team that could negotiate with each player, and counted on the player's limited options (sign with that team or do not play in that league) to give the team sufficient leverage in the negotiations to negotiate a low player salary. The team that was given the exclusive right to a player was said to have "reserved" the rights to the player, and the overall system of restraints on players choosing to move to another team was described as a "reserve system."

As time progressed, the absolute, perpetual character of these "reserve systems" was modified, and players began to be free, after a specified period of time, to begin to negotiate with other teams in the league. That freedom was initially a very limited freedom, often so encumbered as to be an illusory freedom for many players. The freedom of a player to leave the team to which he was initially reserved became known as "free agency," as players who were not
forced to remain with the same team became employees or agents who had freedom to search out other employers or principals, although they often remained subject to certain encumbrances. In particular, the encumbrances often proved to be insurmountable for the top players in the league, as the systems tended to give teams the absolute right to retain their top players, so long as they were willing to adjust the compensation they paid those players.

The following list should help you isolate the various "player restraints" being considered in the league sport cases included in this Chapter. The list does not discuss restraints imposed on players as a result of a disciplinary process, such as the restraints considered in the Molinas and Blalock cases. The list identifies and describes the primary player restraints that have been utilized by leagues over the years, including the "reserve systems" and, more recently, in leagues that have free agency to varying extents, restraints during the period when a player is to some extent a free agent, but competition for that player's services remains subject to restrictions:

1. A draft system, by which teams take turns selecting players, and the players who are selected become reserved to the team that selected them for a specified period of time (originally, forever). If there is some limit on the period of time during which a team must sign the players it drafted, the player can threaten to sit out that period as leverage in his negotiations with the team. If, however, there is no time limit (the team that drafts the player maintains the right to that player until they enter into a contract), or the time limit is so long that sitting out that period is not a credible threat, if there is not a competing league to bid for the player, he may find himself forced to participate in a very one-sided negotiation (if, in fact, there is any negotiating at all).

2. Uniform player contracts, which require every team to use the same contract terms, and thereby restrict the players' freedom and eliminate competition among clubs with respect to the non-financial contract terms they offer. There is generally a requirement that all contracts be reviewed and approved by the league Commissioner, to permit the Commissioner to police compliance with the uniform player contract. Historically, under stringent reserve systems, the Commissioners reviewed the individual player contracts to ensure, among other things, that no team allowed its players to become free agents, thereby permitting competition for player services that might lead to higher player salaries and the eventual demise of the reserve system.
3. The requirement that a player released by a team "clear waivers" before becoming a free agent. The idea of these restrictions is that if the team that contracts with a player decides to release him, the player can only become a free agent if all of the other teams in the league decide not to "take him off of waivers" and hold him to the terms of his current contract.

4. Contract provisions that memorialized a team's right to assign a player's contract to another team. These provisions, combined with league rules about when players can be assigned, developed into systems of trading and selling players, their contracts, and the rights of reserve that applied to those players.

5. Anti-tampering rules, which prohibit all teams other than the team that has reserved a player to have any communications with the player about the prospect of the player leaving the employ of the team that has reserved the right to his services. These rules often provide for substantial penalties to be levied by the league Commissioner, in order to deter such "tampering."

6. Contracts that provided that upon the expiration of the term stated in the contract, if the team and the player were unable to come to terms on a new contract, the team was free to renew unilaterally its contract with the player. The team was merely required, by a specified date, to offer the player the same non-salary contract terms as the last contract, with a salary that was, at a minimum, a salary that was a specified percentage (e.g., 75%, 80%, or 90%) of the salary earned by the player for the previous season.

7. Rights of first refusal, which provided that if a player ever became a free agent, he could seek offers of employment from other teams, but if he received such an offer, he had to submit the offer to the team that held his rights. Then, the player's original team could choose to match the financial terms of the offer and retain the player, or it could choose not to match, and thereby allow the player to go to the new team.

8. Compensation provisions to benefit teams that lost free agents (known in football as "the Rozelle rule"). These restrictions provided that if a player became a free agent and left his original team to sign with another, the latter team had to compensate the original team for the loss of the player. If the two teams could not reach agreement about the compensation to be paid, the commissioner of the league was generally charged with deciding
the appropriate measure of compensation. If only nominal compensation is assessed for the loss of a star player, a compensation system does not create a substantial deterrence to free agents seeking more lucrative contract terms from another team. However, if the compensation awarded approximates the value of the player lost, teams will not achieve any net benefit if they sign free agent players, and they will not offer free agents lucrative terms. For example, when Team A with one superstar player signs Team B’s free agent superstar, if the commissioner awards Team B the first superstar on Team A as compensation, Team A may find itself worse off than when it began seeking a free agent. That type of compensation decision will create a tremendous deterrent to teams raiding other teams' rosters to sign their free agents and will, at a minimum, substantially reduce the value of free agency to players. At worst, it will render free agency an illusion.

9. Salary caps are a relatively recent phenomenon, having started with a collective bargaining agreement between the National Basketball Association ("NBA") and the National Basketball Players Association ("NBPA") in the early 1980's, when it appeared that without player consent to a salary cap, the NBA might go out of existence. The basic concept of a salary cap is an overall ceiling on the amount of compensation that each team can pay the players on its roster. The salary cap may also involve a minimum -- a specification that the per team or overall league salaries must exceed a certain specified minimum. If a salary cap system is described as yielding a "hard" salary cap, that is supposed to mean that there are not significant exceptions that permit teams to pay more than the specified maximum team compensation. If a salary cap system is described as having a "soft" cap, that means that there are significant exceptions that permit a team to pay more than the specified maximum team compensation. An example of the latter is the salary cap system in the National Basketball Association, which has traditionally permitted all teams in the league to exceed the specified cap in order to re-sign or extend the contracts of players who have been under contract with that team. An example of a salary cap system that was supposed to yield a "hard" cap is the National Football League, but the NFL cap does permit teams to exceed the cap in total dollars paid in a given year if the team exceeds the cap by paying players signing bonuses, because signing bonuses are pro-rated over the life of the player's contract. Therefore, a team with $1 million left in its cap can pay an additional $5
million signing bonus to a player with a five-year contract, because only 1/5 -- one year's worth -- of the signing bonus, or $1 million, is charged against the salary cap that year.
10. Salary "taxes" involve a modification on the theme of a salary cap. Rather than place any absolute restriction on the total compensation paid by any team in a league, a salary tax involves assessing specified penalties against all teams that exceed specified team-wide salary amounts. The penalty amounts are then distributed among the other, lower-paying teams in the league. For example, a team that exceeds a team salary of $50 million might be assessed a tax of 50% of the excess amount. Therefore, a team that agrees to pay its players $60 million would also have to pay $5 million (50% x ($60 M - $50 M) = $5 M) to the other teams in the league. A 5% tax would only yield a tax of $50,000 per million. Salary taxes have been the subject of discussion in Major League Baseball's collective bargaining negotiations with the Major League Baseball Players Association. The idea is that teams could spend as much as they want, but if they exceed one or more thresholds, they would have to pay specified percentages of the excess to the other teams as a form of revenue sharing or "tax." The lower the tax, the less the restraint.

This list is not exhaustive, but there have been variations of many of these restraints in most of the professional sports leagues. Often a player is drafted and is then completely restricted to play for or be traded by the team that holds the player's rights via the draft. After a specific number of seasons in the major professional league, a player may first become a "restricted free agent," with any free agent offer to him at that point subject to a right of first refusal. Then, a specific number of seasons later, that same player will become an "unrestricted" free agent.

Other terms of the relationship between players and teams in the various sports have been negotiated through the collective bargaining process. Salary arbitration is an example of a process by which a fair determination of player salaries by independent arbitrators was supposed to be substituted for free agency, the player's freedom to seek a fair salary through competition. In the National Football League, teams now designate the one to three players whom they most fear losing to be "franchise" or "transition" players, and those players lose their right to be free agents but must be paid a salary commensurate with the top salaries paid to other players in the league who play their same position.

"Player restraints," as these restrictions on player freedom are referred to generally, are all likely to have some effect on the amount the players will be paid to play. Some of the restrictions also restrict a player's freedom to choose where the player will play -- for
which employer. The freedom to decide where to play or to move from one team to another is generally referred to as player mobility, and rules and contract terms that interfere with that freedom are called "player mobility restrictions" or "restraints on player mobility."

Player restraints can have other purposes beyond dividing talent around the league and restricting competition among the teams in the league to keep player salaries low. For example, player restraints that prohibit participation in competing leagues or off-season events or that disadvantage players who play in a competing league may be the means by which one league creates barriers to entry by competing leagues and events. Similarly, a system of perpetual reserve, enforced with injunctions against "jumping leagues," may be the means by which an established league prevents a newly formed league from ever gaining access to more experienced, or "star" or "marquis" players.

The antitrust analysis of player restraints tracks the competitive effects. Therefore, the most important starting point for discussion of the cases in this Chapter is to consider the purposes and effects of the rules or agreements being challenged in each case.

B. PLAYER RESTRAINTS IN INDIVIDUAL SPORTS

The restraints on players (or athletes) in individual sports are as varied as the sports. In general, athletes in these sports do not have exclusive multi-year contracts to play for one circuit of events, but rather play in different events at different times throughout the year. One exception is auto racing, where a driver and his car may contract to compete exclusively on one circuit. Another exception is boxing, where a championship fighter may sign an exclusive, multi-bout contract with a particular promoter. However, in boxing, the exclusivity may only last as long as the fighter maintains his championship position. After the champion loses his title, control over subsequent bouts may rest with the ex-champion's opponents, and their respective promoters.

In sports with tours of events (such as golf and tennis), the individual events compete to attract the top players, and the tours seek to force the players to expend as much of their competitive time as possible in events that are part of their tour. Some of the devices used by tours to force or encourage players to play more of their events (to the exclusion of all competing events) are considered in the last case in this Chapter, the Volvo case.

III. ANALYSIS OF THE CASES


Primary Reason for Inclusion: This case identifies and discusses a number of the standard
"player restraints" and discusses the question of whether the restraints should be judged under a per se standard or a Rule of Reason standard -- a key issue.

**Points to Emphasize:**

1) As this is the first case in the Chapter, it is important to emphasize that the students need to understand completely each challenged restraint, and how it works, in order to assess its competitive effects. For each restraint, the students should try to identify the ways in which the restraint is anticompetitive (e.g., it limits competition between teams for the player's services -- thereby reducing player salaries and limiting the players' ability to select where they want to work (play)) and the ways the restraint is procompetitive (e.g., it may increase competitive balance in the league, by preventing one team or a few teams from signing all of the best players).

2) Are there player restraints in league sports that should be assessed under a per se rule? If not, why not? Why are sports different? Are only league sports different, or should restraints in individual sports be assessed under a Rule of Reason? Subsequent to the Kapp case, in *NCAA v. Board of Regents*, the Supreme Court held that the agreements among the universities at issue in that case (concerning mandatory pooling of college football television broadcast rights) were to be judged under the Rule of Reason, not under a per se analysis. See N & Q 2. The Supreme Court in *NCAA* reasoned that because some agreements between or among the teams in a league are necessary to produce the product at all (the teams have to agree on schedule, rules, etc.), an antitrust tribunal should not jump to the conclusion that their agreements are anticompetitive or unlawful without a closer examination than the examination required under a per se analysis. The *NCAA* decision went on to hold that because there were obvious anticompetitive effects of the restraints at issue in that case and the defendants had not identified any substantial procompetitive benefits of the restraints, there was no need to proceed further -- the restraints were unlawful under a "quick look" Rule of Reason analysis. See Chapter 7.

3) What per se violation could the restraints be? To the extent they depress player salaries, they could be price fixing agreements by purchasers of player services. To the extent they prohibit other teams from competing for a player's services, they could be group boycotts, but they are not group boycotts designed to hurt a competitor -- should they be afforded per se treatment under *Northwest Wholesale Stationers*? See Chapter 7.

4) Did the district judge consider the possible procompetitive effects of the rules at issue? There is an argument that he did not consider sufficiently the possible benefit of the rules in improving NFL football by creating parity among the teams in the league. Does parity improve the product? While it is of course true that a number of perennially, totally, non-
competitive teams would be bad for the sport, does it hurt the sport to have a few teams that are almost always successful (e.g., the years of the Celtics and Lakers in the NBA, the San Francisco 49ers and Dallas Cowboys in the NFL in recent years, and so on)? Another issue is the extent to which Rule of Reason analysis permits anticompetitive effects in the relevant market at issue in the case (the market for player services) to be outweighed by alleged procompetitive benefits in a separate market (the market for NFL football in which fans pay to watch or the television market for NFL football, in which television companies purchase television broadcast rights). See discussion following Sullivan case in Chapter 12. At a minimum, to the extent the alleged improvement in NFL Football increases the amounts teams will pay for players, it could cause indirect procompetitive benefits in the relevant market.

5) The Kapp case discusses a subsequent collective bargaining agreement, in which the NFLPA agreed to many of the rules challenged in Kapp. Should a union be able to cloak past antitrust violations, retroactively, with the labor exemption?

6) As N & Q 9 explains, despite Kapp's initial legal victory, he was unable to convince a jury that the illegal conduct he challenged had caused his injury (or, perhaps, that he had suffered any injury at all). Having failed to prove injury, also known as "the fact of damage," Kapp had lost, the Court of Appeals did not have any reason to consider the district court's decision, and the Court of Appeals dismissed the NFL's appeal as moot.

Notes and Questions: N&Q 1-3 focuses on the question of whether league player restraints should be subject to per se analysis or the Rule of Reason. The court’s reason for applying the Rule of Reason are set-out on pages 425-26.

N&Q 4 raises an unanswered question. From the point of view of the player, as with any employee, it makes good business sense to negotiate a new contract to follow an expiring contract. Non-athletes will tell anyone considering a new job that it is generally advisable to keep your existing job until you have a new job nailed down. Well, in professional sports it does not generally work that way. Within a league, players are generally not permitted, for understandable reasons, to enter into negotiations with another team while under their existing contract. If a player under contract with the Yankees was playing in a game against the Orioles and negotiating with the Orioles at the same time, might that adversely affect his performance? Would it be bad for the game for questions about that issue to be raised? However, when a player is negotiating with a team in another league, that concern does not exist. Perhaps a player might not play as hard at the end of his current contract, knowing he had already locked-in a lucrative contract with a different team for the next year. However, that remains true whether or not the deal is done – the player may take it easy, to avoid injury. How
could the leagues defend the NFL’s agreement with the Canadian League?

N&Q 5 remains an open and often raised issue in litigation before the NFL Commissioner, but there are no published opinions concerning the issue. A California court recently ruled in favor of the Raiders and against Commissioner Tagliabue in an extreme case that presented this issue; the decision has been appealed and a published decision may be forthcoming.

If the league’s rules are anticompetitive and adversely affect United States athletes, the court has jurisdiction under United States antitrust law. If considerations of comity suggest that the interests of other countries dominate, it is possible for a United States court to refrain from addressing the merits of a case, but that is unlikely to be the case if an international rule has a direct, anticompetitive effect on United States athletes. N&Q 6 raises issues of international application of United States antitrust law in the context of the current litigation in Boston concerning Major League Soccer.

N&Q 7 explores the question of why players associations agree to anticompetitive rules during collective bargaining. The draft is a classic example. The primary victims of a league’s draft are generally players-to-be, college athletes or others who have not yet been subject to the draft. The draft helps teams keep player salaries down, particularly young players – leaving more money for veteran players. Veteran players, not soon-to-be-rookies, make the decisions about what positions a players union will take, and veterans are often more than willing to agree to restraints on players who will become rookies in the future in return for a wide variety of benefits for the veterans.

N&Q 8 explores a statement by Judge Sweigert, which seems to mis the fundamental fact that there is no limit on the antitrust violations that can be agreed to by players, as long as the requirements of the labor exemption (see Chapter Nine) are satisfied.

N&Q 9 discusses what happened in the Kapp saga after Judge Sweigert’s decision was issued.

Case: Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976)

Primary Reason for Inclusion: This is the substantive law portion of the opinion considered in Chapter 9 -- re: the labor exemption. The decision addresses head-on the argument that restraints on player services do not harm consumers or for some other reason are not cognizable under the antitrust laws. It also addresses the per se v. Rule of Reason analysis question, and then conducts a concise application of the Rule of Reason to the Rozelle Rule.
Points to Emphasize:

1) Some commentators have taken the position that because restraints on the amounts paid to players reduce owners' costs, and those costs may be passed on to consumers as lower ticket prices or in other ways, the restraints do not injure consumers and, therefore, do not violate the antitrust laws. See N & Q 4. Some of those commentators have also argued that restraining a labor market (as opposed to a product market) does not violate the antitrust laws. See N & Q 3. Those arguments are rejected by the Eighth Circuit in Mackey and have been rejected by every other court that has decided this issue. The Mandeville Farms decision of the Supreme Court, discussed in footnote 23 of Mackey and in N & Q 4, answers the first argument - price fixing by purchasers is price fixing that violates Section 1 of the Sherman Act.

2) It is important for the students to understand how the Rozelle Rule may render the right to be a free agent illusory. If the "compensation" that must be paid to sign a free agent is sufficiently severe (or is punitive), that may eliminate any incentive to sign free agents. Under all circumstances, the compensation is an additional cost that must be incurred by a team interested in signing a free agent, and is likely to reduce the amount any team is willing to pay to acquire the free agent. Presumably, the amount that a raiding team is willing to pay an incumbent team to sign a free agent player is an amount that the free agent might be able to secure for himself in a negotiation under a system that did not require any payment of compensation.

3) One reason for a plaintiff to assert both per se and Rule of Reason claims is that the discussion about whether the restraint is per se unlawful is an opportunity for the plaintiff to educate the judge that the restraint at issue is, on its face, the same as other restraints that have been held per se unlawful in other contexts and other industries. In other words, if this were not a sports case, the plaintiff will argue, the restraint at issue would be held per se unlawful. Therefore, the plaintiff will argue to the judge, the restraint has obvious anticompetitive effects and could only survive a Rule of Reason analysis if the defendant league could come forward with an incredibly strong showing of procompetitive benefits and a showing that those benefits could not be achieved by less restrictive means.

4) The Mackey court decided it did not have to reach the question of whether a restraint on the movement of top players was necessary to maintain competitive balance because the NFL's restraints applied to all players, and was therefore much more restrictive than possibly necessary. It was for that reason that the NFL unilaterally decided to limit the teams' ability to restrict movement by players to their top 38 players -- that was the concept of "Plan B" and "Plan B" free agency -- the lesser players could become free agents. The NFL also reduced
the number of rounds of the draft -- how could they argue that the player who was the 400th best player out of college in a given year had to be limited to negotiating with a single team to maintain competitive balance? The NFL made those decisions in an effort to improve their chances of prevailing in upcoming antitrust cases. Plan B was at issue in the 1992 *McNeil* case. See Chapter 9 at 375-76. The NFL attorneys knew it would be very difficult to defend restricting 38 players on each team, but the owners did not want unilaterally to give the players any more free agency than necessary -- whatever the league gave up unilaterally would serve as the starting point for collective bargaining negotiations. The more the owners gave up unilaterally, the argument went, the more the players would demand in negotiations. The owners were torn between improving their antitrust chances and leaving themselves with sufficient concessions they were willing to give to the players' union to convince the players to abandon their antitrust litigation in return for a labor exempt collective bargaining agreement.

**Notes and Questions:** N&Q 1-3 focuses on the question of whether league player restraints should be subject to *per se* analysis or the Rule of Reason.

N&Q 3-4 respond to arguments made by league defenders against antitrust claims by players. The player restraints considered thus far in this Chapter are basically price fixing by purchasers of players services, which must be considered under the Rule of Reason, but are generally destined to be held unlawful because their procompetitive benefits are non-existent or minimal, and their likely anticompetitive effects are manifest.

**Case:** *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66.012 (C.D. Cal. 1984)

**Primary Reason for Inclusion:** This case raises the question of can there be a *per se* violation in the context of a team sport. It also raises the question of whether the plaintiff in *Boris* could prove a Rule of Reason violation if a *per se* standard had not been applied -- the same question is raised by the *Blalock* case that follows.

**Points to Emphasize:**

1) The USFL did not particularly want to boycott college players, but did so in order to avoid repercussions from the NCAA and NCAA institutions and their coaches, who oppose sports leagues trying to take their marquis players out of the college ranks and into the pro ranks before the players have finished with their college eligibility. To stay on NCAA coaches' "good sides," did the USFL have to leave the colleges' players alone until they graduated or their class graduated -- thereby creating a substantial disincentive to players leaving school early? Would the USFL have been at a competitive disadvantage vis-a-vis the NFL if it
had not had such a rule?

2) The USFL's rule (see Fact #9) says a player is eligible if "all college football eligibility of such player has expired." I understand that the intent of that rule was that the player had played his four years or he had played and five years had passed, so his eligibility expired (you generally have five years to play four), and that did not happen with Boris. However, the uncontroverted facts establish that "Boris will not be eligible . . . in the Fall of 1984 or any time thereafter . . ." (See Fact #4). Is there an argument that "all college eligibility of [Robert Boris] has expired"?

3) Is it possible that the USFL did not mind the court's decision in Boris? The decision allowed them to sign Boris. Could the USFL simply tell the colleges that they tried to enforce their rule, but they were ordered not to by a court and had no choice but to comply -- thereby employing the player without incurring the wrath of college coaches?

4) The USFL had a different rule than the NFL Draft for allocating players -- each team had the exclusive right to select five players from each of five colleges in the team's territory. See Statement of Uncontroverted Facts 15-16. By having local college players play for the professional team in their vicinity, the USFL hoped to transfer local college loyalty to become local fan loyalty for the USFL team. Is this better or worse than the NFL's draft? Does it have greater or lesser procompetitive benefits?

5) As the much weaker, secondary professional football league, should the USFL fare better under the antitrust laws? Under the Rule of Reason, was the USFL strong enough or important enough to restrain the relevant market for professional football player services? If not, then the USFL's restraints would not violate the Rule of Reason, because the plaintiff must prove anticompetitive effects in an overall relevant antitrust market -- not just injury to a few competitors. Therefore, if the court had not applied a per se rule, could the plaintiff have prevailed under the Rule of Reason? See N & Q 3. Should the law permit a secondary league to impose restraints that the dominant league cannot? Arguably, yes -- if the restraints cause some procompetitive benefits (e.g., help the secondary league survive and thereby prevent the dominant league from securing a monopoly position), and do not cause any overall anticompetitive effects, while the dominant league's restraint causes substantial anticompetitive effects in the overall market, the primary league's rule violates the antitrust laws, and the secondary league's do not. The idea is not unusual -- for example, a monopolist may be guilty of predatory pricing if it reduces prices below cost to take away business from new entrants, but a new entrant, trying to entice consumers to try its product rather than the product of the dominant firm, may offer promotional prices below its costs.
Notes and Questions:  N&Q 1 suggests that it is difficult to understand how the decision in Boris is consistent with virtually all other sports decisions about what conduct should be subject to *per se* analysis or the Rule of Reason. It appears that the judge believed what was occurring in this case was wrong, and decided to resolve the dispute as quickly as possible. It is also possible that the USFL did not mind losing this case – all that occurred was that a USFL team was permitted to draft and sign a player they presumably wanted, and the colleges could not blame the USFL – the court decision left them without a choice.

N&Q 2 raises the question of the applicability of the labor exemption to a major professional sports league draft. The answer is that if there were a USFL union (whether or not there was a collective bargaining agreement), the restrictions on players, including the draft, would be labor exempt based on the Second Circuit’s decision in Wood (see pages 365-66, N&Q 6 following Mackey) and the Supreme Court’s decision in Brown (see pages 399-417).

N&Q 3 focuses on the difference between *per se* and Rule of Reason analysis. Given the USFL’s second class status (arguably the USFL did not have market power) and the fact that the challenged rule only affected NCAA underclassmen or football players who did not go to an NCAA institution who were good enough to play in the USFL, but were delayed by the USFL rule challenged by Boris. How many players was that likely to be? Were enough players adversely affected that it could be said that the rule adversely affected overall market competition in a relevant market? It is likely a court would conclude that competitors, not competition, were adversely affected, and no Rule of Reason violation could be proven. If one of the purposes of *per se* analysis is to identify clear antitrust violations for which the Rule of Reason is unnecessary, how can a restraint not violate the Rule of Reason, but constitute a *per se* violation? We return to this issue when we address the Molinas and Blalock decisions.

N&Q 4 is intended to focus the students on two specific issues as they read the Molinas and Blalock cases that follow.


Primary Reason for Inclusion:  This case illustrates that the Rule of Reason is not always applied as it should be -- Judge Kaufman finds a rule against gambling inherently reasonable and lawful without any discussion of relevant markets, anticompetitive effects, or procompetitive benefits. It is also an example of a court ruling quickly, almost summarily, for a sports league in a player discipline case.

Points to Emphasize:
1) Judge Kaufman did not apply the Rule of Reason analysis described in Chapter 7.

2) Teams alleged to have violated the antitrust laws may not admit they did not participate in exhibition games -- the collateral restraints -- because of an agreement. What does the plaintiff have to show to prove a conspiracy? Can he meet that burden? If the league did mandate that teams and players not participate in exhibition games with the plaintiff and not associate with him, should that violate the antitrust laws? Should it violate some other prohibition (e.g., tortious interference with contract or tortious interference with prospective business advantage)?

3) As discussed in detail in N & Q 1, a Rule of Reason plaintiff must show an injury to an overall market -- the market for basketball player services in this case -- not just injury to himself. Could Molinas satisfy that requirement? Given that the suspension simply cause Molinas to be out and one player to be substituted, it is difficult to see how this is an antitrust case in the modern era -- unless Molinas has a tort claim (see above) or a contract claim (the league violated its rules or the team violated Molinas' contract with the Pistons and the league tortiously interfered with that contract).

4) This case can be the vehicle for a variety of other discussions -- about gambling in sports (see N & Q 2), about the Rose case from Chapter 3 (see N & Q 3), etc.

5) This may be a useful place to consider the recent (December, 1997) dispute involving the National Basketball Association ("NBA") and Latrell Sprewell, who allegedly attacked and tried to kill his coach -- P.J. Carlessimo. Sprewell's team released him and voided Sprewell's contract, based on his alleged breach. That made Sprewell a free agent, but the NBA suspended Sprewell from playing for (or even signing with) any NBA team for a period of one year (until almost mid-way through the 1998-1999 season). On the one hand, what is the legitimate business reason for prohibiting all of the teams in the league from contracting with Sprewell if they so choose? Does "sending a message" to fans and others constitute a procompetitive justification? On the other hand, how is overall market competition in any relevant market affected by the suspension?

The Sprewell controversy presents issues about the power of the Commissioner (see Chapter Three), labor law (see Chapters 14-16), and other issues, as well. Sprewell retained O.J. Simpson's lead counsel, Johnnie Cochran, to represent him and there were allegations that Sprewell was being discriminated against because of his race. You may also want to consider the Sprewell case as a discussion point if and when you get to Chapter Seventeen.
(Discrimination and Sports).

6) You may want to consider Molinas and Blalock together -- they both were suspended for breaking the rules of the sport -- Molinas was suspended for life and Blalock won because the Court held that the LPGA Tour committed a per se violation of the antitrust laws.

Notes and Questions: N&Q 1 discusses the concept that restraints directed at a few competitors or a small group of competitors in a market with many competitors may not adversely affect overall market competition. If the Rule of Reason is applied, this deficiency may be reflected in a finding that the plaintiff has not proven sufficient overall anticompetitive effects in a relevant market to sustain the claim. Another way the issue may be stated is that a court may find that because the restraint adversely affects competitors, not competition, it does not state an antitrust claim, based on the legal doctrine that the plaintiff has not suffered “antitrust injury.” This is the same issue discussed after the Boris decision, and this N&Q provides citations to a great number of cases that dismissed plaintiffs’ antitrust claims on this basis. However, the court did not conduct anything approaching that clear of an analysis — merely asserting that the decision to exclude Molinas was clearly “reasonable.” Is this consistent with what Rule of Reason analysis is supposed to be as outlined in the primer chapter — Chapter 7?

Does the fact that Molinas admitted his guilt suggest that he would have a difficult time proving that excluding him was anticompetitive or does it suggest that there were procompetitive benefits (ridding the sport of the taint, maintaining fan interest, preserving the integrity of the sport) from his exclusion? This question is suggested by N&Q 2. Molinas was not the only sports figure alleged to have had involvement with gambling, and some examples are collected in N&Q 2.

N&Q 3 discusses the Pete Rose controversy from Chapter 3 as a possible antitrust claim. The problems with such a claim are many. First, would the baseball exemption apply — see Chapter 8. Second, it would have been very difficult for Rose to even articulate what overall relevant market might have been adversely affected or to suggest any anticompetitive goal that was furthered by his exclusion. Third, with respect to his exclusion from the Hall of Fame, who “agreed” to the exclusion to satisfy Section 1 of the Sherman Act’s “contract, combination . . . , or conspiracy” requirement. Fourth, what relevant market was affected by exclusion from the Hall of Fame — does that involve commerce or simply honor and recognition? Fifth, having never sought reinstatement by Major League Baseball, would Rose have to prove futility to defend against the argument that he waived his claim?

N&Q 4 suggests that the outcome in the case that follows — Barbara Jane Blalock’s successful antitrust case against the LPGA — was a surprise, given that the LPGA took
the position that Blalock was an admitted cheater and was excluded for only one year based on that offense.


**Primary Reason for Inclusion:** It is an individual sports case that arguably stands for the general proposition that competitors in a sport should not be able to sit together and make subjective decisions that adversely affect other competitors. It applies a *per se* rule in a player restraint case, even a player discipline case. It may have implications in many other contexts, and is a favorite case for plaintiffs in sports antitrust litigation, even though it is a district court case from Georgia in 1973.

**Points to Emphasize:**

1) The decision strikes down the discipline for two reasons -- first, it is administered by Barbara Jane Blalock's competitors, who stand to gain from her exclusion, and second, because it involved "a completely unfettered, subjective and discretionary determination of an exclusionary sanction." With respect to the first issue, what if there was a small minority of competitors involved in the decision making, but those few had been the ones pressing for a major suspension? Does every competitor have to recuse himself or herself? Those questions are not answered in *Blalock*. See N & Q 1.

2) One key factor in the judge's decision appears to be that a decision was made about the penalty to be issued to Blalock ($500 fine and a year's probation), and for no reason other than Blalock admitting that she was guilty (and thereby, presumably, offering the defendants some comfort that Blalock would not have a leg to stand on no matter what penalty they issued), they reconsidered the penalty and suspended her for a year. That may be what caused the judge to emphasize that it was "a completely unfettered, subjective and discretionary determination."

3) If the judge had been required to decide what penalty would be reasonable, he would have had to second guess a private association in its decision making about how to run its sport. Who can say what is a reasonable penalty for cheating? By holding the process *per se* unlawful, he did not have to take any position on whether the penalty would have been permissible if issued by a neutral, independent decision maker, or a circuit commissioner who did not stand to gain from Blalock's exclusion from the tour.

4) As discussed in N & Q 3, there is an interesting question about what is necessary to prove anticompetitive effects. If Blalock was, at the time of the decision, winning
even after event in 100-woman fields, would her exclusion and replacement by a new 100th-ranked player constitute anticompetitive effects in an overall antitrust market? It would change the earnings of the top players -- giving them money Blalock would have been likely to earn. However, the total number of events, the total number of women playing, and the total prize money being paid would arguably not be affected. Would the plaintiff have to prove that the suspension of Blalock was having some sort of anticompetitive deterrent effect on other competitors (and if that effect was to over-deter cheating, would that be a bad outcome)? Therefore, it may be that Blalock could not win under a Rule of Reason analysis, but wins because the Court held the restraint to be per se unlawful. That is anomalous in the opinion of some, because of their understanding that per se violations are simply restraints where conducting a Rule of Reason analysis is unnecessary because that category of restraints always violates the Rule of Reason.

Notes and Questions: N&Q 1 raises an open question – what happens if only part of a decisionmaking body competes with the adversely affected competitor? This issue is discussed above, in the Points to Emphasize. Similarly, N&Q 1 suggests that the initial “slap on the wrist,” followed by the severe penalty, may have suggested to the court that Ms. Blalock was not getting a fair hearing, precisely because she was a competitor (perhaps an unpopular competitor, and certainly a successful competitor) and the LPGA board members saw an opportunity to banish her from the tour for a year.

N&Q 2-4 return to the question raised after Boris and Molinas – there was held to be a per se violation, but a Rule of Reason violation may have been difficult to prove. However, this case is different, that those, because there is an argument that the decision by the LPGA in Blalock had a much broader impact and significance – it was not merely a decision to suspend Blalock, but rather a decision that the competitors on the LPGA board had the power to regulate all competition, to decide who would and who would not be permitted to play. Anyone accused of some rule infraction could have been concerned about their fellow competitors deciding their fate – not just underage football players as in Boris or admitted gamblers as in Molinas. If the claim by Blalock had been unsuccessful, could she have brought a tortious interference claim or a state due process claim, on the basis that the decisionmakers were biased – similar to the legal route followed by Pete Rose in Chapter 3? The fact that there were no other tours strengthens Blalock’s argument that an overall market was affected. Exclusion from one of three tours might be perceived as having even less overall market impact – as it would only exclude Blalock from a portion of the events in the market. If other tours decided to honor the suspension and Blalock could not show there was an agreement among the tours, that would present difficulties both in getting relief against the other tours and in proving that her damage was the result of an antitrust agreement.
N&Q 5 and the text that follows is intended to provide a lead-in and some background to the students as they prepare to read the Volvo decision.

**Case:** *Volvo North America Corporation v. Men's International Professional Tennis Council*, 857 F.2d 55 (2d Cir. 1988) and Background of Men's Professional Tennis that precedes the case

**Primary Reason for Inclusion:** There are very few cases that discuss individual sports at any length. Given the importance of professional golf and tennis, this case is an opportunity to consider a lot of the issues discussed in Chapter 2 that concern individual sports. In addition, as discussed above, player restraints in individual sports often serve additional anticompetitive purposes beyond reducing player compensation. They are often the means by which a group of events tries to force all of the top players to play exclusively in the group's events, to disadvantage competing events or groups of events. To understand which restraint has which consequences, the students have to understand each restraint and its effect on the business.

**Points to Emphasize:**

1) The history of the ITF and its "sanctioning" power, which are discussed on pages 450-51, are not unique to tennis. Today in soccer, for example, if a league is not sanctioned by FIFA, either directly or through the national governing body (a FIFA member) in the country where the league operates, players who play for teams in the unsanctioned league may lose their eligibility to ever play in sanctioned leagues or in FIFA events (e.g., the World Cup or the Olympics). Similarly, in swimming there have been recent issues about distance swimmers who swim in non-sanctioned events (events that compete with events favored by FINA) being disqualified from participating in the World Championships or other FINA-controlled or sponsored events.

   Once an athlete or a team, league, or event "leaves the fold," and crosses the international federation that "governs" that sport, in many sports the international federations "black-ball" the athlete or the team, league, or event, and stigmatize anyone who competes against the athlete or participates in the disfavored league, team, or event. This eliminates any possibility an unsanctioned team, league or event can attract athletes, and ensures that a banned athlete cannot compete against athletes in good-standing because of a fear that it will become clear that the best athletes are banned and the sanctioned events do not include the best athletes, thereby hurting the sanctioned events financially.

2) The history detailed on pages 451-454 is the factual background to the Volvo lawsuit and shows a number of things, including the dramatic growth of professional
tennis (63 top professional tournaments in 1970 to 122 by 1978), the years when the Grand Prix and the WCT agreed to divide the year to avoid direct head-to-head competition between their events (e.g., in 1973, 1974, and 1976) and the years when they could not reach agreement and competed directly against each other (e.g., in 1970-1972, 1975, and 1977), and the eventual development of individual "special events" that competed directly against tour events (see pages 453-454).

It should also help the students understand the alphabet soup of the:

- MIPTC (Men's International Professional Tennis Council -- a nine member panel that ran the Grand Prix with three ATP representatives, three ITF representatives, and three "tournament" representatives)

- ITF (International Tennis Federation -- formerly the International Lawn Tennis Federation -- the international federation that governed tennis and still governs the Grand Slam events, the Davis Cup, and tennis in the Olympics)

- USTA (United States Tennis Association -- formerly the United States Lawn Tennis Association -- the United States National Governing Body for Tennis, and therefore a member of the ITF, it produces the United States Open in Flushing Meadow, New York -- formerly the United States Lawn Tennis Championships in Forest Hills, New York)

- WCT (Lamar Hunt's World Championship Tennis tour)

- ATP (the Association of Tennis Professionals, an association formed by the players)

- The ATP Tour (no real relationship to the ATP other than the ATP made the decision to launch the ATP Tour -- the name of the tour that was started after the Volvo decision and replaced the Grand Prix and the MIPTC)

- IMC (International Merchandising Corporation -- one (the tennis corporation) of the more than ten corporations that are part of Mark McCormack's International Management Group (IMG))

3) The *Volvo* case illustrates the new world of Section 1 -- we know price fixing, horizontal market division, and certain group boycotts are all *per se* violations, but what is price fixing? What is horizontal market division? What is a group boycott and which group boycotts are *per se* violations? What is the analysis -- is it some sort of a reasonableness analysis
to determine if the application of a Rule of Reason analysis is necessary? If so, what is left of a per se rule -- what does it mean that group boycotts are subject to a per se rules? All of this analysis has to take place in the context of the issue of whether a per se analysis is ever appropriate in a case about professional sports.

Basically, what has occurred is that the Supreme Court has delineated a type of analysis for group boycotts that replaces a totally open-ended rule of reason analysis, and directs the court toward the key issues to be considered. However, to ascertain whether the defendant has market power, some sort of market definition analysis has to be conducted. That is contrary to the traditional concept of per se analysis -- which was to the effect that the plaintiff did not have to prove the relevant market and there were few (if any) defenses available once the fact of the per se agreement was proven.

4) One significant typographical error in the Notes & Questions is as set forth below:

In the middle of N & Q 4, the sentence should be changed as follows:

While nominally "owned" or "controlled" by the players, the ATP Tour is a not-for-profit entity that has continued to employ most of the same restrictions found by the Volvo court found may to be per se unlawful.

5) The Volvo decision is an excellent case for focusing on the multiple markets at issue in antitrust analysis of professional sports. The Complaint identifies three separate relevant markets. Discuss the relevant markets, the participants in those markets, the restraints on those markets that are challenged by the plaintiffs, and the participants who are injured (and those who are not injured) by each restraint on each market.

6) An extremely important antitrust issue is the question of antitrust injury, which is related to the issue of antitrust standing. The basic concept is that plaintiffs seeking to invoke the antitrust laws are supposed to be the persons the antitrust laws were designed to protect and that were injured in ways that the antitrust laws are concerned about -- for example, consumers who pay higher prices because of price fixing and other restraints, competitors who are put out of business because of exclusionary or predatory practices, and so on. In addition, there are situations in which an antitrust violation has ripple effects -- for example, the violation injures a corporation, the corporation fails, and the employees and shareholders of the corporation are damaged as a result. Because of concerns about duplicative recoveries and the indirect nature of their damage, the employees and shareholders are unlikely to be able to assert antitrust claims in their own name. Issues of antitrust injury are discussed at some length in
Volvo -- one of its important holdings is a clear statement that a participant in an illegal conspiracy can sue to dissolve the illegal agreements. Another key point is that both the players who are the subject of the restraints and the tournaments that are the target of the restraints on the players should be permitted to pursue claims against the tour. See N&Q 9.

There are many other points that can be discussed based on the Volvo decision, some of which are addressed in the twelve notes and questions that follow the case.

NOTES AND QUESTIONS: N&Q 1 discusses a substantial problem in “sports antitrust litigation” – judges who are unable or unwilling to perceive sports businesses in the same light as other businesses. Prejudices and biases derived from reading the sports pages may make it difficult for certain judges to fairly apply the antitrust laws in antitrust litigation about sports.

N&Q 2 presents some of the history of the Volvo litigation, while N&Q 3 discusses the post-decision history. The Second Circuit in Volvo says that a variety of conduct that is still ongoing may constitute a per se violation. N&Q 4 asks how a circuit can continue to engage in conduct that may be per se unlawful – the answer is that it is only unlawful conduct if a plaintiff invests the necessary funds to pursue an antitrust case to judgment.

N&Q 5 discusses the ATP Tour’s argument that it is differently situated in 1998 from the MIPTC in 1988 because the Grand Slam events (Wimbledon, U.S. Open, French Open, Australian Open) were part of and controlled by the MIPTC, while they are independent of the ATP Tour. When the casebook was published there was already substantial coordination between the Grand Slam events and the ATP Tour that called that argument into substantial question. In 1998, the ATP Tour went much farther, entering into a series of allegedly anticompetitive agreements with the Grand Slam events – forcing ATP Tour players to participate in the Grand Slams, affording the Grand Slams substantially increased ranking system benefits, and seeking to convince the Grand Slams to eliminate the competition the ATP faces from the annual Grand Slam Cup. Whatever benefit the ATP Tour might get from its independence will be lost, and it will be much more difficult for the Grand Slams and the ATP Tour to allege and prove procompetitive benefits of coordination between and among events that are not part of the same tour. Perhaps all that is necessary for the ATP Tour to be held to have violated the antitrust laws is a motivated plaintiff with standing who suffered antitrust injury.

N&Q 6 discusses the horizontal market division aspects of the Volvo case, while N&Q 7 discusses the relationship of the analysis of the Blalock case to the facts at issue in Volvo.

N&Q 8 explains a fundamental problem with the district court’s analysis – restraints that prevent individual events from operating and require instant creation of a full
competitive circuit certainly restrain trade unreasonably. It is not necessary that restraints prevent any creation of an entire competing circuit. However, one additional problem with the restraints was that they made it impossible for a number of separate events to develop, prosper, and eventually come together to form a competing tour.

N&Q 9 discusses the various groups of people and businesses who were adversely affected by the challenged conduct and suffered antitrust injury. While the closer question is whether players could assert damage claims, the better view is that they should be permitted to assert such claims.

N&Q 10 encourages students to focus on each element of challenged conduct and to consider the consequences of each element – who does the rule or agreement help and who is hurt? The last sentence points to the Ninth Circuit’s decision in *Raiders II (Los Angeles Memorial Coliseum Commission v. NFL)* that a plaintiff who both benefited and suffered as a result of a challenged rule or agreement is only entitled to the net negative effects of the rule or agreement on that plaintiff.

N&Q 11 discusses a fundamental difference between many of the player restraints in *Volvo* and the other player restraints considered in the featured cases in this Chapter. Most of the *Volvo* case restraints were not designed to hurt players – they were designed to control the players to hurt any competing events. N&Q 12 asks the students to consider what procompetitive benefits the MIPTC could assert in defense of its rules and agreements if the case, upon remand, had been submitted to a trial under a Rule of Reason standard.
CHAPTER 11
ANTITRUST AND SPORTS: MONOPOLIZATION AND RESTRATNS ON INTER-LEAGUE COMPETITION

I. INTRODUCTION

There is one area of sports antitrust jurisprudence that no one questions -- it is unlawful for the only professional league or circuit of events in a sport to put a fledgling competing league or circuit of events in that same sport out of business by means of improper conduct (if the production and exhibition of games in that sport constitutes a relevant market). In other words, if a dominant league, by unfairly eliminating (or blocking the entry of) all competing leagues, can gain monopoly power, the dominant league should only be allowed to behave in reasonable, lawful ways, not in unreasonable, predatory, or exclusionary ways. The primary question becomes apparent -- what are reasonable, lawful ways to prevail over one's rivals, and what are unreasonable, exclusionary, and predatory ways?

The featured cases in this Chapter are all about the National Football League. The reasons are simple -- first, the only other dominant major sports leagues that have faced competitive challenges that have been the subject of litigation are (1) the National Basketball Association (from the American Basketball Association) and (2) the National Hockey League (from the World Hockey Association). The ABA did institute antitrust litigation against the NBA, but the primary litigation was by the players-- the Robertson litigation -- when the ABA and NBA began to discuss a merger. See Chapter Seven's discussion of the history of the NBA and antitrust litigation at pages 281-283. Eventually, while the litigation played on, the ABA was forced to fold and four ABA teams became NBA expansion teams in 1976. The NHL faced substantial antitrust litigation from the WHA, which was the subject of a lengthy decision of a district court. See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) and Chapter Seven's discussion of the history of the NHL and antitrust litigation at pages 290-293. However, for teaching purposes, we determined that the NFL cases were more useful. It is also our view that it is helpful to have the Chapter focus on the development of the NFL and the litigation against that league, as the background facts discussed in the series of cases should help the students learn the facts necessary to understand the cases.

In Major League Baseball, the reported decision that comes the closest to being a monopolization challenge by a competing league would probably be the 1922 Federal Base Ball Club case discussed in Chapter Eight, in which baseball's exemption was established (remember -- the Federal Base Ball Club of Baltimore sued, alleging that the National League and the American League conspired to monopolize baseball by, among other things, inducing all of the Federal League teams (except one) to join their leagues).

In the world of individual sports, the reported decision closest to a decision about a dominant circuit's efforts to prevent competition from a competing circuit or individual competing events is the Volvo decision that ended Chapter Ten's discussion of player restraints. Therefore, as discussed in the beginning of Chapter Eleven (see pages 472-473), the Chapter Ten
discussion of the *Volvo* case transitions well into a focus on monopolization cases involving professional sports leagues.

For all of these reasons, the cases in Chapter Eleven are cases that focus on the historical development of the NFL and challenges to the NFL by the AFL, WFL, USFL, and, to a lesser extent, the North American Soccer League. The most basic questions for the students to focus on as they read each of these cases are:

1. What did the plaintiffs allege the defendants did to harm the competing league (the plaintiffs)?

2. Were the plaintiffs able to prove that defendants did what the plaintiffs alleged?

3. Was any of the challenged conduct held to be exempt from antitrust scrutiny? If yes, what was the basis of an exemption?

4. What relevant market(s) was at issue in the case?

5. Did the challenged conduct involve an agreement? If it did, did the challenged conduct violate Section 1 of the Sherman Act as a "contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade"?

6. Were the defendants found guilty of unlawful monopolization?

Similar questions appear in the text on page 474.

It may be useful to suggest to the students that they re-read the Chapter Seven discussion of Section 2 of the Sherman Act -- the law of monopolization, attempts to monopolize, and conspiracy to monopolize -- found at pages 269-277.

II. ANALYSIS OF THE CASES


**Primary Reason for Inclusion:** The case includes a good discussion of the history of the American Football League and its competition with the NFL and it addresses the fundamental question of monopolization cases -- what conduct can a dominant firm or league engage in and what conduct that would be lawful for a business in a competitive market will not be permissible for a dominant firm or a firm with monopoly power? To what extent can the dominant league
defend based on the concept that only one league can survive in the country or only one team can
survive in most cities, because the league or the teams are "natural monopolies"? By
strategically awarding franchises to potential AFL cities and potential AFL team owners, did the
NFL violate the antitrust laws?

Points to Emphasize:

1) The district court's analysis of the relevant geographic markets and the Court of
Appeals' analysis of those issues (pages 476-478) are the key to the decision. The opinion
discusses the various markets in which the parties competed -- competition for recruiting players
(the market for professional football player services), competition for nationwide television
contracts and coverage, and competition for spectators (live gate attendance). For each of those
markets, the geographic market definition could be different, but the opinion concludes that the
competition between the two leagues is nationwide. When the NFL took individual cities or
potential team owners away from the AFL, the court concludes that was merely part of the
overall nationwide competition -- not monopolization of a local geographic market around that
city.

2) The opinion also discusses two factual conclusions that are interesting to consider
now, about thirty-five years later -- (a) sixteen teams is the maximum one league can efficiently
accommodate, and (b) there were thirty-one suitable locations to locate a professional football
team to locate. See N&Q 2 on page 480. The lists of teams and their locations that are found at
pages 555-561 may be useful to consider in connection with this discussion.

3) The opinion is quick to accept that certain cities (Baltimore, Washington, Boston,
Buffalo, Houston, Denver, and San Diego) can only support one team because they are "natural
monopolies." Is the court correct? Assume two football leagues, with each playing a sixteen
game season (eight home games per team) in stadia that hold 60,000 to 70,000 fans. Given that
many football fans purchase season tickets and attend at least half (and some attend all) of the
home team's games, how large a population center is necessary to sell-out the home games of
both teams? Is the concern the size of the population center, the interest level of the fans in the
area, or the availability of adequate stadia to support two teams?

4) The district court found and the court of appeals agreed that the NFL did not have
monopoly power -- which is often defined as the power to control price or exclude competition --
based primarily on the fact that the AFL survived. The Court of Appeals even cites back at the
AFL their press statements, made at the end of the 1960 season, that "declared that the League's
success was unprecedented." See pages 478-479. Is that fair? What would you expect a
struggling league, seeking to reassure the media and its fans that it would not fold, to say? The
AFL owners incurred major losses for many years, as they struggled to go head-to-head against
the NFL. Of course, a league with unlimited resources and a willingness to incur losses indefinitely will survive -- but what should be the standard in assessing whether an existing league has the power to exclude competition? Does the NFL today have monopoly power -- could it block entry by a new league if the NFL engaged in exclusionary conduct, or even if it did not? Eventually the AFL and NFL merged with the blessing of Congress. See pages 279-280.

5) The statement of law in the opinion (see page 479 -- "[w]hen one has acquired a natural monopoly by means which are neither exclusionary, unfair, nor predatory, he is not disempowered to defend his position fairly") should be emphasized -- even having monopoly power (if lawfully secured) is not unlawful. And, a business with monopoly power that was lawfully obtained can defend that monopoly position by lawful means. What is prohibited is acquiring or maintaining a monopoly position by exclusionary, unfair, or predatory means, or utilizing monopoly power that was obtained unlawfully. The court seemed to believe that the NFL had simply gained its position by being first -- sometimes called "superior skill, foresight, and industry" in antitrust parlance. See pages 276-277. Was it unfair for the NFL to expand into cities the AFL was considering if it could be proven that the sole reason was to block AFL entry? Was it unfair to offer potential AFL team owners NFL franchises to take those owners away from the AFL and to make it difficult for the AFL to have the minimum number of teams they needed to launch their competing league? If the courts had concluded that the NFL had monopoly power, the outcome of the case, and the fate of the AFL, might have been different. Compare the analysis and the conduct of the NFL to the events twenty-five years later when the NFL faced another real threat -- from the USFL in the 1980's. See USFL v. NFL at pages 490-513. See also N&Q 3 at pages 480-481.

NOTES AND QUESTIONS: The answer to N&Q 1 is “Yes,” the court did affirm the district court’s finding that the NFL lacked the power to monopolize professional football in the United States (including Hawaii and portions of Canada) – what it found to be the relevant market. That finding was based on the court’s belief that (1) there were 31 cities that could support an NFL team (and a few could support more than one team) and (2) sixteen teams is a maximum that one league can efficiently accommodate. The court held that the NFL could not block the formation of a competing league.

It is clear that the NFL now accommodates thirty teams (and Cleveland will be number 31). N&Q 2 suggests that the court’s conclusion that the NFL could only accommodate 16 teams, whether correct or not in 1963, is not correct in 1998. Or, is it possible that the NFL does not accommodate 31 teams “efficiently,” even now? Have changes in technology (travel, television, cable, etc.) made it possible for a league to accommodate additional teams or does a league grow over time, so that it is able to accommodate more teams over time?
N&Q 3 explores the antitrust concept that incurring losses in order to block entry can constitute unlawful monopolization. Is that why the NFL expands – to foreclose access of competing leagues to cities (and stadia) that can support competing teams (and, thereby, facilitate a competing league)? Are the agreements between the NFL and the CFL or the NBA and the CBA designed to (1) foreclose a revitalization of and competition from these leagues or (2) keep a weak competing league alive to foreclose the creation of a new, stronger competing league?

N&Q 4 discusses the fact that the relevant product market may vary from case to case – depending on what is at issue in the dispute. The competition that is alleged to have been restrained may alter the relevant market at issue. Restraints on television broadcasts may implicate a television market, restraints on relocation may adversely affect a stadium market, and so on.

Case: *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977)

**Primary Reason for Inclusion:** This case discusses the antitrust concept that a monopolist may have an obligation not to exclude a potential competitor from an "essential facility." It is the decision that may keep owners of teams in a dominant national sports league from using their power to keep a competing team or league from gaining access to a facility that the competitor may need to challenge the dominant league.

**Points to Emphasize:**

1) The market definition in this case stands in marked contrast to the market definition in the preceding case (*AFL v. NFL*). In *AFL v. NFL*, brought by the league, the court concluded the market should be defined nationally, based on the overall national competition between the two leagues. The defendants in *Hecht* argued that the same market definition should apply in *Hecht*. The district court agreed, but the Court of Appeals did not and held that the market should be defined to be the metropolitan area of Washington, D.C. See pages 483-484 and notes 13 and 20. Do you find the Court's distinguishing of the *AFL v. NFL* market definition persuasive? If not, which court is right?

2) The Court of Appeals did not enter judgment for the plaintiffs -- it merely reversed the district court and sent the case back for a new jury trial, with specific changes to be made when the trial is conducted the next time. Those changes, however, are dramatic, and would have been likely to lead a different jury decision.
3) The defendants' ability to keep a potential entrant from ever getting started and then to defend based on the argument that someone who never got started lacks standing is discussed on page 483 and in N&Q 1 on page 489.

4) The elements of an essential facility claim and the possible application of the "essential facility doctrine" to other sports situations is an important issue. This issue is explored in some detail in N&Q 3 at pages 489-490.

5) In Hecht, the defendants' conduct was challenged under both Section 1 and Section 2 of the Sherman Act. The Redskins did not own the stadium, but they utilized a restrictive covenant in their agreement with the Armory Board that prohibited any lease with a football team in a competing league. Therefore, to win under Section 1 of the Sherman Act, Hecht only had to show the restrictive covenant restrained trade unreasonably, not that it led to monopolization of a relevant market. However, the elements of an essential facility claim have generally been defined the same by courts, whether the restraint was pursuant to an agreement (as in Hecht) or pursuant to a unilateral refusal to deal (which would have been the situation if the Redskins had owned the stadium). This is one point where you might want to discuss some of the benefits of asserting a Section 2 claim (it is more clear in the USFL case) -- for example, by alleging monopolization, not just that a particular restraint restraints trade, testimony and evidence about the means by which the defendant acquired its monopoly power (past exclusionary, improper, or predatory conduct) is relevant and admissible.

NOT A TYPO IN THE CASEBOOK, BUT PERHAPS IN THE REPORTED DECISION

NOTE: On page 488, in the first line of Hecht's discussion of "C. Expert Testimony", the decision refers to "testimony of plaintiffs' experts." It appears clear from the context that the testimony was by defendants' experts, not plaintiffs' experts, but the casebook accurately quotes the court's decision.

NOTES AND QUESTIONS: N&Q 1 explores a defense used frequently by the NFL over the years. After blocking competition or competitive conduct before it can even get started, the NFL contends that the plaintiff never progressed far enough along to establish injury or, in turn, standing. See, e.g., Sullivan case in Chapter 12.

N&Q 2 discusses the concept of “natural monopoly,” the idea that it is inevitable that only one competitor can survive. While defendants have argued that the antitrust laws should be indifferent as to which competitor survives if it is inevitable that there will only be one survivor, the courts have not generally agreed, holding that the antitrust laws protect each competitor’s right to compete to be that surviving natural monopolist.
N&Q 3 explains the “essential facility” doctrine, and describes its requirements.

N&Q 4 discusses the fact that the Hecht decision, which dealt with competition in one geographic area, defined the relevant geographic area locally. If the lawsuit concerns league-wide competition against a competing league, should the relevant market be defined nationwide or should the restraint be analyzed as it impacts on a number of local geographic markets where teams are located? The answer may turn on whether the challenged conduct was local in nature or was national in character. The issue is presented in the USFL v. NFL case, which follows.


Primary Reason for Inclusion: This is the most comprehensive modern antitrust case between two competing leagues and the case discusses a fairly comprehensive list of conduct that could be used by an incumbent dominant professional sports league to deter and block entry by a new, competing league.

Points to Emphasize:

There are a great many points that can be gleaned from this case -- issues concerning nominal damages (the $3 (after trebling) jury award), attorneys fees to the USFL as the prevailing party -- did the USFL really prevail, the consequence of the jury's finding of illegal monopolization by the NFL, and so on, but the following are a few for you to consider.

1) If a dominant league desired to block new entry by a competing league, it would generally have to do so by entering into agreements with others -- those who supply necessary inputs to the competing league (e.g., investors of the capital and management skill necessary to operate the teams and the league, and suppliers of player services, stadium services, referee services, coaching services) or those who purchase the league's output -- the games and an association with the games (e.g., fans who come to the games, television companies, sponsors, licensees of the league and team marks and logos). The dominant league would have to cause suppliers or purchasers of the output to boycott the new league or to only agree to deal with the new league on burdensome terms and conditions. If the new league could not get access to quality stadia, players, referees, coaches, or owners, it would have a difficult time creating a product that could compete with a dominant league. Similarly, if the new league could not sell its product, because sponsors, television companies, or other consumers of league games were coerced not to deal with the new league, it would be difficult for the new league to generate sufficient revenue to stay in business. See generally N&Q 7 at pages 510-511. The issue in the
USFL case was whether the NFL had in fact engaged in those strategies, and if it had, whether the conduct was unlawful.

2) The history of the USFL is set-out at some length in the USFL opinion. A full reading of the record in the case makes it clear that the USFL was started by some owners with an idea that could have succeeded -- start a spring professional football league, keep costs low, over time improve the quality of the players in the league, and at some point, after fan loyalty and television support had been established, decide whether to continue playing in the Spring, or move the schedule of games to compete head-to-head against the NFL. The problem the USFL faced was with owners who were unwilling to keep costs low -- the temptation of attracting a major player caused a number of the USFL owners to offer superstar salaries to top players to attract them away from the NFL. This led to spiraling team costs, and the USFL teams that did not go after top players, but rather filled their rosters with players the NFL teams released, suffered on the field in competition against teams like the New Jersey Generals who, after they were purchased by Donald Trump, fielded a number of NFL-quality players. Eventually, the USFL strategy changed (forced by Trump and a few other owners who had not been part of the original USFL) -- a) move the USFL teams out of the major television markets with NFL teams and into potential NFL expansion markets, b) move the USFL games into the Fall, and c) sue the NFL. The strategy was geared toward forcing a merger with the NFL or securing an antitrust jury damages verdict in excess of $1 billion. The job of the court and the jury was to determine to what extent the ultimate demise of the USFL was caused by the USFL’s own strategy or by anticompetitive conduct by the NFL.

3) The primary conduct the USFL alleged the NFL engaged in was coercing the three major over-the-air networks (ABC, CBS, and NBC -- this was pre-FOX and ESPN was not received in nearly as many homes as today) not to enter into a contract to televise NFL games. If the jury had been convinced that the NFL had engaged in this conduct, that would have been sufficient to support a major verdict in favor of the USFL, but the court affirmed the jury's $1 verdict.

4) The opinion shows that by alleging not just a series of agreements to restrain trade, but an attempt to monopolize and monopolization, the plaintiff was permitted to put in evidence about the NFL's intent and motive and evidence about how the NFL achieved its monopoly power. The court of appeals reviewed the decisions of the district court about which prior antitrust judgments against the NFL could be described to the jury, and which prior judgments had to be excluded. See pages 504-505.

5) The Noerr-Pennington doctrine gives an antitrust exemption to efforts by a competitor to achieve a competitive advantage or even to gain a monopoly by asking the government for such relief. Whether lobbying Congress, filing a meritorious lawsuit, or
pursuing a matter before an administrative agency, the conduct is protected from antitrust scrutiny unless it is a "sham" -- i.e., the government action is not what was sought, but rather the direct interference in a competitor's business that the nominal effort to petition the government for redress of grievances might cause. The *Noerr-Pennington* doctrine is introduced and discussed at pages 505-506.

6) Various insights to the factual background and aftermath of the *USFL* decision and the ramifications of the litigation are offered in various notes and questions that follow the decision. In particular, see N&Q 1-4 and 9.

**NOTES AND QUESTIONS:** N&Q 1-2 and 4 provide additional information about the *USFL v. NFL* case. N&Q 3 discusses the fact that the federal antitrust laws award prevailing plaintiffs their reasonable attorneys fees, in addition to treble damages. The district court held that the USFL was the prevailing party and awarded over $5 million in attorneys fees despite the jury only awarding $1 dollar (trebled to $3) of damages. The United States Court of Appeals for the Second Circuit affirmed the district court’s attorneys fees award. The jury held against the USFL on many points, but held that the NFL had unlawfully monopolized professional football in the United States.

N&Q 5 questions Judge Winter’s assertion that in-season competition would be more expensive than off-season competition, even though players still had to choose one league and could not play in both. It is difficult to understand the basis for that conclusion. Does anyone believe that the WNBA and ABL would compete more intensely for players if their seasons were played at the same time of year?

N&Q 6 questions what remedies would enhance competition. Many alleged that the USFL owners sued for over $1 billion in an effort to force the NFL to award them expansion franchises. The *Mid-South Grizzlies* case held that an order giving teams from a competing league franchises in the dominant league was not procompetitive, because it would simply make the league more dominant, further restricting competition or the likelihood of the creation of a competing league.

N&Q 7 discusses conduct that an existing league can engage in to attack or block entry by a competing league and identifies conduct that was recommended to the NFL by Professor Porter.

N&Q 8 discusses reason why a plaintiff who can prove the “contract, combination . . . , or conspiracy” that is required by Section 1 of the Sherman Act might nevertheless also allege unlawful monopolization under Section 2 of the Sherman Act.
N&Q 9 explains the history of the World League of American Football and the competitive (anticompetitive) reasons for its creation.

N&Q 10 discusses the NFL’s television broadcast strategy. In fact, the NFL opted in 1998 to continue to leave one network out (NBC), in order to get more from the three networks (ABC, CBS, and FOX) that agreed to broadcast NFL games. N&Q 11 discusses when prior antitrust judgments may or may not be relevant and admissible in a subsequent antitrust trial.


Primary Reason for Inclusion: A case about competition between the NFL and a soccer league, this case discusses ownership of sports teams and provides a great transition from cases about disputes between leagues and disputes among owners within one league, as this case involves both.

Points to Emphasize:

1) This case gives some information about the history of the North American Soccer League, which disbanded within three years of the court of appeals decision. Despite the continued existence of the Major Indoor Soccer League into the 1990's and several other professional soccer leagues -- both indoor and outdoor -- the next true national professional soccer league that could make the claim of being a major league was Major League Soccer ("MLS"), which began play in 1996, following the United States' success in World Cup '94, the first World Cup played in the United States. Once again, the launch of the MLS depended on NFL owners -- again the Kansas City Chiefs' Lamar Hunt, and this time Bob Kraft of the New England Patriots. The fact that soccer games and football games are played in the same stadia makes an owner of a football stadium a prime candidate for purchase of a professional soccer league team.

2) The key to this case is again the market definition. The court accepts the concept of a limited sports capital market (sports ownership capital and skill). The best evidence for the plaintiffs on all issues seems to be the fact that if enforcing the cross-ownership ban and forcing Lamar Hunt and Joe Robbie out of the NASL would not have mattered, because there would be plenty of alternative capital investment available, what would possibly have motivated Max Winter and Leonard Tose and the other NFL owners to face major antitrust litigation in order to enforce the ban.
3) As a Section 1 case, this is a great case for consideration of the "less restrictive alternative" component of the rule of reason. The NFL defended the cross-ownership ban on the basis that confidential NFL data might be used to promote a competing league, but the NFL had never done anything to preserve its confidences -- e.g., keep owners with interests in teams in other leagues off of committees that discuss sensitive competitive issues (e.g., the television committee or the NFL committee that oversees NFL Properties). See court's discussion of this issue at 520-522.

4) This case illustrates that not all inter-league disputes focus primarily on Section 2 of the Sherman Act. This case would have been much more difficult as a Section 2 case -- what market is being monopolized? There was no need to admit evidence of past antitrust violations - the restraint itself was indefensible under the facts of this case.

5) The subsequent history of the NFL's cross-ownership ban is chronicled in N&Q's 1-4. If the NFL tried to enforce the ban against MLS owners, would the plaintiffs have to relitigate the issue, or could they prevail pursuant to a) the prior permanent injunction or b) res judicata/collateral estoppel theories? See N&Q 1. Recent exceptions to the cross-ownership ban were recently passed by the NFL owners in order to accommodate Wayne Huizenga and Paul Allen. See N&Q 4.

6) N&Q 5 provides a problem that puts the cross-ownership ban in a very practical hypothetical situation. Cross-owners Peter Angelos (Major League Baseball's Baltimore Orioles), George Steinbrenner (Major League Baseball's New York Yankees) and Michael Eisner of Disney, the owner of the NHL's Mighty Ducks of Anaheim) seek to purchase the team. Do the New York Yankees really compete in the same market area as the New York Giants and New York Jets, who play in the Meadowlands in New Jersey? However, could Major League Baseball be harmed by the NFL's cross-ownership ban? The NHL is weaker than Major League Baseball, and technically Disney, not Eisner, owns the Mighty Ducks. Therefore, there may not even be a cross-ownership issue with Eisner. In addition, while the NFL still contends that cross-ownership by an owner of a team in the Los Angeles or Anaheim area is prohibited, because that territory has been reserved by the league in the aftermath of the departures of the Rams and Raiders, the argument is much weaker when there is no NFL team in Anaheim or Los Angeles and Paul Allen is permitted to purchase the Seahawks because his Portland Trailblazers are not within the territory of any NFL team. These are some of the issues suggested by the problem.

7) The "special event" rule in the Volvo case from Chapter Ten is very similar to a cross-ownership ban, as designed for an individual sport. However, given the autonomy of the events in the MIPTC's Grand Prix circuit and the fact that the cross-ownership prohibition was so broad and was geared to prevent ownership or any involvement in any competing circuit or
event, the *Volvo* restraint is much less defensible. This may be a good fact situation for the students to compare and contrast, to help prepare them for an issue-spotting exam.

8) The *NASL* decision can be used as a transition from discussing inter-league restraints in Chapter Eleven to discussing intra-league restraints in Chapter Twelve, because the *NASL* case could be placed in either chapter.

**NOTES AND QUESTIONS:** N&Q 1 presents a difficult question – would a 1982 decision, based on market conditions at that time, govern an attempt to apply the same ban sixteen years later. The authors of the casebook do not know how a court would see that case. However, there is a strong argument that the court held the ban unlawful, and given that the owners of the NFL teams have arguably not reenacted the ban by the necessary ¾ vote of the owners, there is currently no cross-ownership ban. The response of the NFL was that the league has operated on the understanding that the ban is still in effect, and the enactment of the exception to the rule (see N&Q 4) constitutes in effect a reaffirmation of the ban. It is likely, however, that while the NFL could get ¾ of the owners to say the ban did not apply to Messrs. Huizenga and Allen and others in similar situations, they would have been hard-pressed to get ¾ of the owners to reaffirm the ban. There may be a strong argument that there have been so many more sports teams and sports leagues and sports owners over the past sixteen years that the sports investment capital market is now stronger and broader, and the NFL, despite its thirty (soon to be thirty-one) teams, does not have the power over that overall market that it once yielded. It may be that an additional factor with respect to soccer that is key involves the amount of control the NFL owners collectively wield over stadia in the United States that are suitable for a major professional soccer league team.

N&Q 2 raises another difficult question – what market impact does the NFL cross-ownership ban have on Major League Baseball (“MLB”), the NBA, and/or the NHL? Could a plaintiff show the same anticompetitive purpose and effect, given that there is only overlap between the early of the NBA and NHL seasons with NFL games? Could the NBA and NHL cite the competition for television coverage as evidence of competition, even though there tends to be more direct competition between the end of Major League Baseball’s season and NFL games for television coverage? Remember – except for Monday Night Football and Saturday and Thursday night games after the college football season is over, NFL games and broadcasts are generally limited to Sunday afternoons and evenings. The NBA has thrived without substantial NFL cross-ownership, and it would be difficult to attribute any difficulty (if difficulty exists) in attracting competent NHL ownership and management to the NFL’s cross-ownership ban.

N&Q 3 discusses the concept that there might be more business justification (hence greater procompetitive benefits under the Rule of Reason) for a cross-ownership ban that
only restricted ownership in a competing professional football league. The confidential business information of one football league and other competition between the teams in the leagues (at least for players) would be greater if the two leagues played the same sport and sought to employ many members of the same work force.

N&Q 4 chronicles the Wayne Huizenga and Paul Allen exceptions to the NFL cross-ownership ban. Having permitted owners of MLB and NBA teams to own NFL teams and to have access to league information that those NFL owners are able to share with all other MLB and NBA owners, it will further weaken the NFL’s efforts to establish any procompetitive benefits from the cross-ownership ban. A plaintiff challenging the ban is likely to assert that the “exceptions” demonstrate that the NASL court correctly concluded that the primary motivation for the ban is to insulate NFL teams from competition in their “home territories.” Given that the league plays very little role in competition at the local level for sponsorship, ticket sales, luxury suite sales, etc., the argument that an NFL team will get substantial confidential competitive business information about another NFL team’s local competitive efforts is not strong. And, while a team owner may gain access to national competitive strategy information, which could possibly help a competing league with its national competitive efforts, that has not been a sufficient concern to motivate the NFL to maintain an across-the-board ban.

N&Q 5 is an issue spotting question concerning the legality of a cross-ownership ban. Some of the factual observations that students might make include the following: (1) the geographic proximity of the Orioles and the Baltimore Ravens is the greatest (across a parking lot), (2) the Yankees, while within 75 miles of East Rutherford, New Jersey (the Meadowlands) and the Jets and the Giants, are presently quite a ways away, (3) there is presently no NFL team in Los Angeles and no immediate prospect of a team, and it is only the NFL’s “reserving that territory for the league” (whatever that means) that places Eisner in a different situation than Paul Allen, and (4) Eisner does not own any NHL team – his corporation does, so by its terms the ban may not apply to him. With these factual points in mind, and the questions raised above (see discussion of N&Q 1-4, above), including the discussion about whether a plaintiff could prove anticompetitive effects in the relevant market, you can conduct a classroom discussion about what a court’s analysis of this factual scenario.

N&Q 6 discusses the purpose of the NFL cross-ownership ban and what consequence that purpose should have in litigation. Given that it can be inferred that the purpose was to harm a rival league, should the NFL be permitted to come forward and defend on the basis that despite their knowledge of the business and the industry and their purpose in enacting the rule, they were in error, and the ban would not have harmed competition? Could a claim be brought on a state common law tortious interference with contract theory or some other business tort theory?
N&Q 7 gives students an opportunity to apply their knowledge of the law and the court’s analysis to craft a rule that might achieve the NFL’s goals, and that would also be more easily defended against an antitrust challenge. In effect, can the students identify a less restrictive rule that might nevertheless achieve the NFL’s goals. One possibility would be to draft a rule that causes no significant anticompetitive effects to a rival league. Another alternative, however, would be to try to design a rule that appears more reasonable and would be more defensible, but that achieves the purpose of harming the rival, as well, in case your clients (the league or the owners) advise you in confidence that a narrowly-tailored rule that does not hurt the rival league is unacceptable, in large part because they do want the rule to disadvantage a competing league. Does it raise ethical questions to draft a rule that might be unlawful under the federal antitrust laws?
CHAPTER TWELVE -- ANTITRUST AND SPORTS:
INTRA-LEAGUE RESTRAINTS -- LIMITATIONS ON OWNERSHIP,
LEAGUE MEMBERSHIP, AND FRANCHISE RELOCATION

I. INTRODUCTION

This Chapter focuses on a variety of disputes that relate to sports league decision making. Ever since the Oakland Raiders joined the Los Angeles Memorial Coliseum Commission's lawsuit against the National Football League (and to some extent even before then), whenever a league decides to (1) turn down a prospective new owner, (2) deny a prospective expansion team's application, (3) restrict a team's relocation, (4) limit a team owner's right to transfer ownership to an entity or partial public ownership, or (5) place other limits on a team's business operations, the aggrieved party(ies) may consider filing an antitrust action against the league and its member teams. This Chapter explores some of the issues presented by those disputes, including a few of the most common league defenses against such actions.

The most commonly litigated issue is #3, league restrictions on team relocations. Pages 527-572 explore the history of team relocations is sports leagues and some of the litigation that has resulted. Pages 572-588 focus on the NFL's dispute with a former owner of the New England Patriots concerning the owner's efforts to solve his financial problems by selling a minority, non-voting ownership interest in the team to the public. Finally, pages 588-607 consider the National Basketball Association's six year battle with the Chicago Bulls concerning league limitations on the Bulls' right to authorize superstation broadcasts of Bulls games and the so-called "single entity defense," one of the primary defenses to Sherman Act Section 1 claims raised by teams in cases of the type addressed in this Chapter.

II. ANALYSIS OF THE CASES

Case: Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir. 1984)

Primary Reason for Inclusion: This is a landmark case, which opened the door for intra-league antitrust claims.

Points to Emphasize: This lawsuit was initially filed by the LAMCC. After the Rams agreed to leave the Coliseum and Los Angeles to relocate to Anaheim, the LAMCC sought a new NFL tenant for the Coliseum. The NFL rule then in effect required unanimous team approval for a team relocation out of its home territory. When it became clear that no team would even discuss a relocation to Los Angeles (because there was no chance of approval), the LAMCC sued the NFL, seeking a declaratory judgment that the NFL rule was unlawful. Eventually, the Oakland Raiders (who were a defendant in the original LAMCC suit) entered into negotiations to relocate to the Coliseum and moved from the defendant side of the lawsuit to become an additional plaintiff. Aware that a rule requiring unanimity would be much more difficult to defend, the NFL modified its rules to require only three quarters (3/4) of the teams to approve a relocation, and then voted to disapprove the move, with 22 team owners voting against and 5 teams abstaining. Because the rule requires three quarters of the teams, not three quarters of the votes
cast, an abstention counts as a "No" vote. It is interesting to note that a move that the jury concluded would be procompetitive could not garner a single vote in favor, thereby suggesting that the NFL's process was fundamentally flawed or unfair or simply not based on any factors approximating the analysis of the likely competitive effects of the relocation.

The court of appeals engaged in a fairly comprehensive analysis of the NFL's argument that it is a "single entity" and thereby not subject to scrutiny under Section 1 of the Sherman Act. This is a common argument, made by sports leagues ever since teams began filing suit against their leagues. The court of appeals incorrectly believed that 90% of the league's revenues were shared equally; that was absolutely not true, the correct figure was closer to 50%, yet the court nevertheless concluded that the NFL is not a single entity. Close to 90% of the league's revenues were shared to some extent, but only television revenue and NFL Properties' licensing and sponsorship revenue, which was minimal in 1984, was shared equally. Gate receipts were shared with 34% going to the visiting team, and parking, concessions, luxury box, and other stadium revenues were not shared at all. For a discussion of the tremendous difference between sharing revenues and sharing revenues equally, see page 568.

The court's discussion of the relevant market and its discussion of the ancillary restraints doctrine. Consider the different relevant markets alleged by the two plaintiffs (LAMCC and the Raiders) -- did the Raiders have standing to allege a restraint on the stadium market -- certainly, as the buyer of stadium services, but issues of antitrust injury and standing were not as clear in 1982 (when the trial was held) or in 1984. The opinion includes a useful summary of the process of identifying anticompetitive and procompetitive effects, to be compared and balanced in light of any reasonably less restrictive alternatives. Rather than immunize the defendants' conduct, the fact that the restraints on relocation were ancillary to the other cooperation among the NFL teams merely required application of the rule of reason.

Two issues to consider and revisit throughout the chapter are the court's admonitions that (1) the NFL should apply objective standards to assess proposed relocations, rather than unfettered voting by team owners with anticompetitive motives, and (2) to the extent the NFL disagreed with the federal antitrust laws, it should seek its remedy with the United States Congress. By this time, NFL Commissioner Rozelle had been seeking just such a remedy from Congress for more than two years, without success. See pages 570-72. The history of NFL relocation is described in Chapter 7 -- see pages 287-289 -- and later in Chapter 12 -- see pages 539-542, 546-548. One point raised by the NFL was the procompetitive effects their restraint had of protecting competition between the Oakland Raiders and the San Francisco 49ers. The court of appeals dismissed the issue by saying the defendants were free to argue it to the jury. Is that a satisfactory response? Should the jury have balanced those effects?
The United States Court of Appeals for the Ninth Circuit affirmed the liability findings and subsequently affirmed the LAMCC damage award, but remanded the Raiders' damage award for a new trial. *See* 791 F.2d 1356, discussed at pages 547-548.

Should the people who formed the NFL be free to set any rules they want in forming their league? Could they have just agreed that there would be no relocation or that the league could purchase any team that proposes to relocate?

**Notes and Questions:** N&Q 1 provides additional information about the "single entity defense" of professional sports leagues and its development. N&Q 2 explores the concept of an eminent domain action to try to force a team to stay put, which was first attempted by Oakland to try to force the Raiders to stay.

N&Q 3-5 explores some of the history of NFL relocation that closely followed and were a function of the Ninth Circuit's decision affirming the NFL defendants' liability.

**Material:** NFL Provisions Concerning Franchise Relocation

**Primary Reason for Inclusion:** These are the rules Commissioner Rozelle promulgated in 1984. They include nine "guidelines" (*see* page 544) that were drafted by now-Commissioner, then outside counsel, Paul Tagliabue for submission to Congress as part of a bill that would have given the NFL an antitrust exemption if they applied those nine factors to deny a request to relocate.

**Points to Emphasize:** The NFL claims (during litigation) that the procedures were drafted in response to the recommendation of the Ninth Circuit in the above LAMCC decision that the NFL promulgate objective standards. However, an analysis of the nine guidelines does not suggest much in the way of objective standards.

**Notes and Questions:** N&Q 1 takes the students through the guidelines, asking questions about the nine factors and their application to focus on their significance (the team owners remain free to vote any way they want and for any reason), their application, their purposes, what it would take to satisfy the guidelines, and reasons why the Commissioner may have an incentive to report that no proposed relocation satisfies the guidelines.

N&Q 2 raises the possibility that the indefiniteness and open-ended references to other factors in the NFL Procedures might provide a basis for the NFL contending that the Guidelines were reasonable and consistent with the *Raiders* decision. However, it is extremely difficult to argue with a straight face that the NFL Procedures do any more than provide the Commissioner with a basis for concluding that every proposed relocation is impermissible. The factors are not objective, are not tailored to distinguish procompetitive from anticompetitive
relocations, and are designed to prevent relocation -- not to comply with the Ninth Circuit's opinion in *Raiders*.

N&Q 3 points out that the *Raiders* jury and the NFL owners disagreed completely about whether the Raiders' relocation to Los Angeles should have been permitted. The NFL blamed the difference on Los Angeles jurors wanting to bring another NFL team to Los Angeles, and prior to the trial had sought to transfer venue to avoid the jurors' alleged bias, but the court refused to transfer the case on that basis.

N&Q 4 and 5 discuss issues of antitrust standing and antitrust injury. N&Q 6 discusses the error in the court's understanding about the NFL sharing of revenues.

N&Q 7 explains the court's decision in *Raiders II* -- the Ninth Circuit's decision on the appeal of the damage verdict in the *Raiders* case. This decision was the judicial discussion that led to the leagues' claim that they have the right to assess an expansion opportunity fee or a relocation fee on teams that seek to relocate. In addition, in *Raiders II* the Ninth Circuit said that the initial *Raiders* decision did not hold that NFL Constitution Article 4.3 was unlawful on its face, but rather just that it was unlawful as applied to block the Raiders' proposed relocation from Oakland to Los Angeles.

N&Q 8 provides a lead-in to the *Clippers* case.

**Case:** *National Basketball Association v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987)

**Primary Reason for Inclusion:** The Ninth Circuit's decision in *Clippers* attempts to explain and apply the earlier Ninth Circuit decision in *Raiders*. In particular, it states that *Raiders* did not hold that a franchise movement rule is unlawful in and of itself and addresses the issue of league assessment of fees on relocating teams.

**Points to Emphasize:** The district court opinion in *Clippers* was issued after *Raiders*, but before the clarification of *Raiders II* (the appellate decision on the damage trial issues). The district court believed the NBA's rule that owner approval was necessary was unlawful without objective standards, as suggested by *Raiders I*. The court holds that *Raiders* was merely affirming a jury verdict and the recommended objective standards were well-advised, but were not necessary conditions to the legality of league rules that restrict relocation.

The court also made it clear that *Raiders II* did not validate league assessment of "expansion opportunity" fees or "relocation fees," but rather only held that league interference with a relocation violated the antitrust laws, there would be a damage offset to the extent that the league rule challenged by the plaintiff actually benefitted the plaintiff. If the NBA was seeking
the authorization for assessing such a fee, it would have to look to the NBA Constitution (either express or implied provisions) for such a right.

The court remanded the case to the district court for a trial of the plaintiff's claim under Section 1 of the Sherman Act under the Rule of Reason.

**Notes and Questions:** N&Q 1 discusses the aftermath of the *Clippers* case. It then poses some difficult questions -- if the relocation fee is part of a league effort to deter relocation in violation of the Sherman Act, the agreement to impose the fee can be unlawful. In addition, if there is no legal authority to assess the fee, as suggested by *Clippers*, it can be challenged as a breach of contract or a violation of the rules of the private association. It is unclear whether the non-relocating owners can vote to change the league Constitution & Bylaws to authorize a fee and then assess just such a fee on the relocating owner.

N&Q 2 discusses open questions about league efforts to impose a wide variety of conditions on relocating owners. If those conditions are part of an unlawful effort to deter and restrict relocation, they can violate the antitrust laws in the same way as an agreement to assess a relocation fee. *See* discussion of N&Q 1, above.

N&Q 3 -- the NBA made more substantive alterations in its relocation rules, in order to comply, as least in appearance, with the *Raiders* recommendations concerning objective guidelines. Those rules require team owners to base their votes about relocation solely on specified factors. What does that really mean? Is that enforceable in any meaningful way?

**Materials:** NBA Provisions Concerning Franchise Relocation and League-by-League History of Team Relocation

**Primary Reason for Inclusion:** These materials are intended to show the aftermath of the *Clippers* case -- the NBA's response in changing its Constitution & Bylaws. They also give the students a list of all of the teams in the four major sports and their history of name changes and relocation.

**Points to Emphasize:** The NBA rules are different than the NFL rules. The NFL rules have been challenged frequently, and the NFL has generally been forced to permit relocation in the face of a credible threat of litigation (Cardinals -- St. Louis to Phoenix, Rams -- Los Angeles to St. Louis, Raiders -- Los Angeles to Oakland, Browns -- Cleveland to Baltimore Ravens, Oilers, Houston to Nashville). There has been absolutely no relocation in the NBA during that same time period (since the Clippers' relocation discussed above).
There has been no relocation in Major League Baseball since the Seattle Pilots relocated to become the Milwaukee Brewers in 1970. Is the existence of the protection of the baseball exemption from the antitrust laws the reason?

**Notes and Questions:** N&Q 1-3 discusses the NBA's battle with one team that tried to relocate. The NBA utilized a strategy that flows out of the Raiders case and the NFL’s battle with Leonard Tose and the Philadelphia Eagles in late 1984 -- sue the team that is seeking to relocate in its home territory -- ask the local court and a local jury to keep the team at home, thereby avoiding a judge and jury in the city that is seeking a new franchise.

**Material:** Franchise Relocation and the Business of Professional Sports Leagues

**Primary Reason for Inclusion:** This textual section is intended to put the students in the position of relocating owners, non-relocating owners, the Commissioner, and the league office, to understand their motivations when a franchise relocation is proposed.

**Notes and Questions:** N&Q 1-4 discuss possible legislative responses to the fact that league restrictions on franchise relocation may violate federal and state antitrust laws.

**Case:** Sullivan v. National Football League, 34 F.3d 1091 (1st Cir. 1994)

**Primary Reason for Inclusion:** Important recent decision concerning team owner's challenge to a league restriction on the sale of ownership interests in league teams to the public. Includes an important recent ruling rejecting leagues' argument they are a single entity that cannot conspire under Section 1 of the Sherman Act.

**Points to Emphasize:** This case considers a number of issues concerning the viability of plaintiffs' claim and the fairness of the trial that resulted in a substantial jury verdict for the plaintiff. The first two thirds of the edited opinion concerns NFL arguments that, if accepted, might have required entry of judgment for the NFL. The final third of the edited opinion concerns NFL arguments that the trial was unfair because of evidence submitted to the jury or because the NFL was precluded from arguing certain issues to the jury.

The NFL turned one argument -- that its teams are part of a single entity -- into several allegedly separate arguments. They argued that because they do not compete (with respect to the sale of ownership interests in NFL teams), (1) Billy Sullivan could not prove that competition was injured and (2) Billy Sullivan could not prove that he suffered injury that arose out of an injury to competition -- therefore he did not suffer antitrust injury. They also argued that the teams and the league are one single entity that could not conspire under the antitrust laws. The district court and/or the jury ruled against the NFL with respect to all of these arguments and the First Circuit affirmed those decisions.
Then, the First Circuit considered the NFL's attempt to revive and expand the "ancillary restraints" doctrine. That doctrine states that if parties enter into a procompetitive joint venture, restraints on competition that are closely related to the joint venture, which might otherwise be considered *per se* violations of Section 1, should instead be analyzed under the Rule of Reason. If the "ancillary restraint" is essential to achieving procompetitive benefits associated with the joint venture, those procompetitive benefits should be balanced against the anticompetitive effects of the ancillary restraint, in light of less restrictive alternatives -- the same basic analysis as any case under the Rule of Reason.

The NFL prevented Sullivan's plan to sell stock to the public from ever getting off the ground. At trial (and in the First Circuit), the NFL argued that the fact that Sullivan never carried forward to request a formal NFL vote or to take steps to prove that the sale to the public would have been successful, meant that Sullivan could not prove that the NFL's conduct caused his injury. The First Circuit acknowledged that the evidence was thin, but that was because of the NFL's conduct, not Sullivan's, and it declined to dismiss Sullivan's case on that basis.

Having rejected all arguments that would have led to judgment for the NFL, the court turned to arguments that the trial was unfair and the case should be re-tried. The court accepted a number of these NFL arguments and remanded the case for a new trial. First, the court considered the issue of the "equal involvement defense." Under the antitrust laws, the mere fact that Billy Sullivan and his Patriots were parties to the NFL's rules does not constitute a bar to Sullivan's seeking treble damages and an injunction against the rules. However, if the plaintiff "bears at least substantially equal responsibility for an anticompetitive restriction by creating, approving, maintaining, continually and actively supporting, relying upon, or otherwise utilizing and implementing, that restriction to his or her benefit," that will bar a damage recovery for the equally involved plaintiff. The court considered the history of the NFL's bar on public ownership and concluded that the NFL's argument that Sullivan was equally involved because Sullivan, among other things, relied upon the rule to his benefit, was an argument that should have been submitted to the jury.

Then, the court said that because Sullivan failed to request a vote did not bar his claim, but it was an issue that should have been submitted to the jury.

The court also considered the question of proper rule of reason analysis of a restraint that causes anticompetitive effects in the relevant market (the market for ownership interests in NFL teams) and alleged procompetitive benefits in on or more other markets (the market for the NFL's games on television or the market for live attendance at NFL games -- referred to by the NFL as the market for the NFL's entertainment product). The court held that the rule of reason analysis should generally focus only on effects in the relevant market, but held that the procompetitive effects alleged by the NFL might have caused indirect procompetitive
effects in the relevant market. The court concluded that the instructions given by the district court may have mislead the jury to disregard the defendants' alleged procompetitive benefits in their entirety, and remanded the case for a new trial with instructions that the instructions to the jury should be improved.

The court also held that the plaintiffs' counsel's repeated references to the many prior antitrust decisions against the NFL was prejudicial, because they did not bear on the reasonableness of the NFL's policy at issue in this case. Therefore, the court held that on remand those decisions should not be mentioned.

Notes and Questions: N&Q 1 and 2 focus on the NFL's justifications for its prohibitions on public ownership of teams or ownership by corporations with other businesses. One justification offered by the NFL is a concern that the league will be unable to control transfers of ownership, such as a corporate takeover of an NFL team by a corporate raider. Another justification is that public corporations, with boards of directors, cannot respond quickly and make decisions like a team with a single decisionmaker, as mandated by the league's rules. The primary concern, however, is a concern of owners without great independent wealth that these other forms of ownership will give some teams additional financial wherewithal and resources such that the existing owners will be unable to compete. None of these concerns were implicated by the minority sale of ownership interests proposed by the Sullivan family.

N&Q 4 focuses on the issue of rule of reason analysis balancing procompetitive effects in another market against anticompetitive effects in the relevant market, which is discussed above.

N&Q 5-7 discuss the subsequent history of the Sullivan case and related litigation. N&Q 5 also discusses the advisability of the NFL's consistent approach -- prevent prospective plaintiffs from getting anywhere with their plans, so even if they eventually sue, the league can argue that their claims of injury or their estimates of damage are speculative.

N&Q 8 offers some thoughts about the NBA and the Chicago Professional Sports Limited Partnership case that follows.


Primary Reason for Inclusion: Final reported decision in six years of litigation about the NBA's restrictions on the Chicago Bulls' sale of television broadcast rights for broadcast on a superstation. Decision breathes new life into leagues' single entity arguments.
Points to Emphasize: This was the final judicial chapter in the six-year battle between the NBA and the Chicago Bulls. The origin of the dispute was simple -- the popularity of and public interest in Michael Jordan grew to a level that it exceeded the interest in the rest of the NBA. Therefore, there was a desire to broadcast every game in which Michael Jordan was playing. The problem that is the subject of the litigation was that certain local television stations are also superstations, meaning that they can be viewed by many cable subscribers around the United States. TBS in Atlanta and WGN in Chicago are two leading superstations. The question was how many of the Chicago Bulls’ home game broadcasts could be made available on cable nationally as superstation broadcasts.

Is this an issue of one team unfairly capitalizing on the fact that it has the greatest basketball player in history, seeking to extract more than its share of national television revenue? Is this like the Jerry Jones/Dallas Cowboys dispute with the NFL, as one owner whose team is on top, seeking to benefit from its present popularity? Or, is it action by all but one of the owners in a league, trying to limit aggressive, permissible competition by one of the teams in the league?

As this opinion chronicles, earlier opinions in the case dealt with the proper interpretation of the Sports Broadcasting Act of 1961 and 1966 (“SBA”). The district court held the NBA’s conduct outside the conduct for which the SBA grants antitrust immunity, and the Seventh Circuit affirmed that holding.

The prior Seventh Circuit opinion suggested certain NBA conduct that might be permissible and remanded the case. The NBA engaged in a course of conduct very close to that suggested by the Seventh Circuit, but the district court was not impressed. For example, the Seventh Circuit suggested that the NBA could assess the Bulls a fee for extra superstation broadcasts, and the NBA responded with a fee of $138,000 per telecast, which the district court found was impermissibly high. The Seventh Circuit in this opinion holds that the fee is only impermissible if it would have caused the Bulls not to broadcast the games and would, therefore, have reduced output.

The Seventh Circuit then launched into an analysis of whether the district court incorrectly rejected the NBA’s argument that all the teams in the NBA constitute a single entity for antitrust purposes, who thereby cannot violate Section 1 of the Sherman Act. Despite the district court’s rejection of that argument, the Seventh Circuit (Judge Easterbrook) remands the case back again to the district court, for further consideration of the issue. The analysis of the single entity issue is explored in the text that follows the decision at 600-07.

Notes and Questions: N&Q 1 discusses the long, tortured history of the Chicago Professional Sports Limited Partnership case, including the settlement that followed the Seventh Circuit’s second opinion.
N&Q 2 chronicles another dispute between a rebel team owner and a major professional sports league – Jerry Jones against the NFL.

N&Q 3 identifies an issue that lurks in intra-league antitrust disputes in which the so-called “single entity defense” is litigated. The team that is suing its league wants to win, but all teams in the league, including the plaintiff team, would probably be better off if the league were insulated from all antitrust litigation under Section 1 of the Sherman Act if the court were to hold the league a single entity. This note asks whether the court should be mindful of that conflict when assessing whether the parties have fully litigated that issue or whether the parties are sufficiently adverse with respect to that issue.

N&Q 4 merely introduces the conflicting views about “single entity” treatment of sports leagues, as an introduction to the text that follows at the end of this Chapter.

Material: The "Single Entity Defense" by Traditional Model Sports Leagues -- A Historical and Functional Analysis

Primary Reason for Inclusion: Text to provide additional information concerning the "single entity" argument and professional sports leagues.
CHAPTER THIRTEEN --
ANTITRUST AND SPORTS: EQUIPMENT RESTRICTIONS

I. INTRODUCTION

The business of professional sports has spawned a great number of peripheral businesses. Trading cards, sports-related computer games, sports memorabilia, and licensed clothing are just a few of the businesses that draw upon the public's interest in professional and amateur sports. The primary sports legal issues related to those businesses are addressed in Chapter 19, which focuses on intellectual property law. This Chapter focuses on another set of sports-related businesses: the businesses that produce the equipment that sports participants use during competition. The introduction to this Chapter attempts to provide a list of some of the many different types of equipment used by sports participants, but equipment is as varied as are the many sports that utilize equipment.

Once it is determined that equipment will be used in a sport, the people or entities who are responsible for that sport will need to set rules and/or standards about the equipment that is and is not permitted (or decide that no regulation is necessary). At the same time, manufacturers and competitors are likely to test the limits of the rules concerning equipment, in an effort to gain a competitive advantage through the development of superior equipment. In addition, the business of manufacturing and selling equipment can become a very substantial business, and the manufacturers may be willing to pay substantial amounts to a professional league or circuit in order to cause the league or circuit to only purchase or use that manufacturer's equipment. By having his equipment used by the professional league or circuit or by the top competitors in that league or circuit, a manufacturer may hope to convince the vast market of non-professional participants in the sport that his equipment is superior. If his equipment were not superior, why would the people whose careers and livelihood depend upon it choose to use it?

This Chapter considers what happens when an equipment manufacturer believes its equipment has in some way or to some extent been wrongfully excluded from use in the sport, and seeks to challenge the exclusion in court.

Before you turn to the reported decisions, you might want to explore your students' views about the hypotheticals posed on page 610. This is a great subject to get students thinking and talking, especially if the questions have been posed in advance of class and the students have taken some time to think about the questions. Issues you might want to discuss include:

1. Should the legal standard courts apply when reviewing equipment decisions be the same for equipment decisions of a professional sports league (e.g., MLB, MLS, NBA, NFL, NHL) or professional sports circuit (e.g., ATP Tour, PGA Tour) as decisions by a rulemaking organization that promulgates the rules for a
sport that are applied in both amateur and professional competitions (e.g., golf's rulemaking bodies -- the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews)? Does it matter that the USGA produces the U.S. Open golf tournament and other United States championship events (U.S. Senior Open, U.S. Amateur Championship, etc.) and the R&A produces the British Open and other United Kingdom championships? This may be the vehicle for an important discussion about the significance of the relevant market for antitrust analysis. Is use of the product by professionals a separate market? If not, and the market includes use by non-professionals, is it likely that exclusion from a professional league or circuit will have a significant effect on the overall market for the product? Does it depend on the product? Does it depend on whether the amateur or collegiate leagues or circuits follow the professional organization's lead? For example, compare from among such products as baseballs, baseball bats, golf clubs, tennis rackets, and baseball gloves. I doubt what gloves professional baseball players wear or the baseballs Major League Baseball uses would have a devastating effect on the other manufacturers. Might the answer be different for golf clubs? Are amateur golfers more concerned about purchasing the same equipment that the pros use?

2. Should a manufacturer be permitted to "bribe" a professional sports league or circuit to use only that manufacturer's equipment? The league or circuit will receive a lot of money and the manufacturer can advertise that its product is the only product of that type used by the pros. After your students have discussed that question, you might ask them if it would affect their views if the agreement is a fifteen-year exclusive? One year as the exclusive product with competitive bidding for that honor conducted every year? Does it matter how central the equipment is to the sport (e.g., the only golf ball or the only putter that the players can use or the only shoe NFL players can wear or the only pole that vaulters can use on the pro track and field circuit)?

3. Do the students have a different view of question 2 if the sports league is the Continental Basketball Association instead of the National Basketball Association or a new competing football league instead of the NFL? Would they have a different view if the European PGA Tour granted Titleist balls an exclusive for that tour, while the United States PGA Tour granted the Pinnacle ball an exclusive? The CBA obviously lacks the market power of the NBA, so a restraint by the CBA is not likely to affect any overall relevant market. If two different sports circuits each select a different ball, the impact may be different. How important to United States golfers would it be that all pros on the U.S. pro tour use Titleist balls? Would it lessen that impact if Pinnacle could advertise its exclusive position on the European pro tour?

4. Would the students' view change if the reason for selecting a single manufacturer's product were to equalize competition (for example, to make a race
a test of athlete skill, not equipment or technology or financial support, only one make and model of bicycle or race car could be used)? Do they have a different view if after years of allowing the hundreds of balls on the USGA's "conforming ball list," the PGA Tour suddenly decides to go to a single golf ball for the entire tour? Is that different from the ATP Tour requiring a single tennis ball to be used in all of its tournaments? Is it different because golfers have traditionally supplied their own balls and tennis players use whatever the tournament provides (you cannot have two players arguing over which balls will be used -- or can you? -- could each player choose his own balls to serve, or would the switching of balls every game make it too difficult for the players to become adjusted to how the balls will bounce?)?

5. Now, whatever the students' views about #'s 1, 2, 3, and 4, above, are the federal antitrust laws the proper vehicle for regulating these issues? Are the students concerned about fairness (to whom -- the manufacturers, the fans, whom?) or conduct that is likely to put competing manufacturers out of business, permit the favored manufacturer to raise prices to consumers to an unreasonable level, or help the favored manufacturer acquire monopoly power?

Another subject you might want to discuss before turning to the cases is how a plaintiff might seek to bring this type of dispute before a court as an antitrust suit.

Who does the manufacturer want to sue and why?
[Answer: if possible, the manufacturer wants to sue the competing (favored) manufacturer, in order that it looks like an antitrust issue -- an effort by his competitor to put him and other competing manufacturers out of business to achieve a monopoly position that can be exploited in the future. The plaintiff does not want the dispute to appear that the court is being asked to substitute its judgment for the judgment of a private sports organization about how to run a particular sport].

Why might the manufacturer be reluctant to sue the sports organization?
[Answer: in some circumstances, the manufacturer that makes equipment in a sport where the sports organization has tremendous importance and power may be reluctant to become adverse with the sports organization for the long term. In addition, if the fans or the players generally have a very positive view of the sports organization, it might be bad for image and overall business to be perceived as adverse to that organization].

What are the most common antitrust theories asserted by plaintiffs in equipment restriction cases? Why?
[Answer: plaintiffs want to start with a per se claim under Section 1 of the Sherman Act, if possible. Therefore, they need to try to allege that the equipment restriction involves an agreement between two separate parties (usually the competing manufacturer(s) and the sports organization or between two sports organizations or the sports organization that sets the rules of the sport and those who choose to use those rules in producing their
sports events). Then, to state a per se claim, the plaintiff needs to allege that the conduct constitutes price fixing, bid rigging, horizontal market division, tying, or a group boycott. The latter is the most likely and the most common, because the plaintiff whose equipment is disallowed or excluded can claim that the agreeing parties are agreeing not to deal with his equipment, thereby interfering with his efforts to market his product. Of course, the defendant will contend that the Supreme Court's decision in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 95-96 (1984), mandates that per se analysis not be applied to professional sports, or at least not to league sports. The scope of the NCAA decision - for example, whether its theory that agreements between teams in a league are necessary for the product to be available at all applies to individual as well as league sports and the scope of league agreements that should not be subject to per se analysis -- remains unsettled. However, even if the court will eventually decide to apply Rule of Reason analysis, plaintiffs' attorneys often believe it is worthwhile to point out to judges that if it were not for the sports context in which the issue arises, there is a strong argument that it would be per se unlawful. The goal is to convince a judge considering the application of the Rule of Reason in a sports context that the restraint at issue should be scrutinized carefully and is likely to cause substantial anticompetitive effects. You may want to recommend that your students re-read pages 263-266 of Chapter 7 as preparation for the cases in this Chapter.

As you go through this Chapter, you should see a substantial difference between the group boycott analysis in the first case -- the 1981 Gunter Harz district court and court of appeal decisions -- and the group boycott analysis followed by the Supreme Court in its 1985 *Northwest Wholesale Stationers* decision.

II. ANALYSIS OF THE CASES


Primary Reason for Inclusion: A pre-*Northwest Wholesale Stationers* equipment restriction case, the court applied the analysis of the Supreme Court in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), to determine if the process was reasonable, whether the plaintiff was afforded due process, and whether the decision that was actually rendered appears to have been a reasonable decision -- to hold that "spaghetti-strung tennis rackets" do not conform to the rules of tennis.

Points to Emphasize: This case is the vehicle for discussing the differences between the *Silver* analysis and *Northwest Wholesale Stationers*. Should a sports rulemaking body have to justify every equipment decision it makes under this level of scrutiny? If the court (or the jury) decide the decision was unreasonable, would the USTA and the ITF be liable for all of the profits manufacturers of spaghetti rackets would have made if use of those rackets had been permitted?
It may seem strange that an organization that does not make equipment and does not compete in the equipment market could be held liable for monopolizing or restraining trade in that market. However, consistent with Supreme Court precedents, the United States Court of Appeals for the Eighth Circuit held that "[a]ntitrust regulation is proper when, as here, an association wields enormous economic clout by virtue of its exclusive control over the conduct of a major sport." See page 621.

Notes and Questions:  
N&Q 1 discusses the change in perception that results if the plaintiff manufacturer can convince the fact finder that the equipment decision was not made in good faith, but was the result of an agreement with or improper pressure from one or more competing manufacturers. That is precisely what Karsten Manufacturing Corporation tried to do in its case against the PGA Tour, the Gilder case. See pages 628-35. This note considers the continued viability of the Blalock decision from Chapter 10 and how that case should be interpreted. What happens if a couple of the decisionmakers are biased and should have recused themselves, but do not. Does that taint the entire decision because they participated, or only if the decision could not (or would not) have been made if they had not participated? There is no clear answer, and plaintiffs continue to rely on Blalock's reasoning, but it must be remembered that defendants will argue that Blalock is merely a district court opinion from Georgia that was issued twenty-five years ago.

N&Q 2 raises the question of who should be the plaintiffs. In Gilder, Karten Manufacturing paid for its endorsers to be the first-listed plaintiffs in the litigation. However, as long as there are proper plaintiffs, with standing, who suffered antitrust injury, it should not alter the basic antitrust analysis.

N&Q 3 summarizes the current state of the law -- in general, sports associations will be allowed to govern their sports, leagues, or tours. You might want to compare that analysis with the Casey Martin case involving the Americans with Disabilities Act -- a specific statute addressing the rights of the disabled may impose limits on sports associations, if it applies to the private, not-for-profit sports organization.

N&Q 4 raises the question of whether any court can apply the detailed analysis called for in Gunter Harz without substituting its judgment if it believes the decision was a mistake.

N&Q 5 illustrates that market definition was not perceived as necessary under the Silver test. Therefore, the court did not dwell on that issue. Now, under Northwest Wholesale Stationers, market definition will be essential to determine whether the defendants satisfy the requirement for having market power in the relevant market(s).

N&Q 6 and 7 present a number of additional hypothetical issues for discussion. In addition, N&Q 6 is intended to point out that tennis players may be independent contractors to professional events, not employees, and therefore not entitled to the protection of the federal labor laws when they strike or threaten to strike -- a strike is just an employee boycott to try to
force a change in management's position. The FTC v. Superior Court Trial Lawyers case referenced in the note held it per se unlawful when the lawyers who took assigned criminal cases in Washington, D.C. said they would boycott the taking of those assignments (and thereby shut down the criminal justice system) until the Washington, D.C. government increased the fees to be paid to lawyers taking those cases.

N&Q 8 asks whether a "unilateral" decision to apply a rule, not because of agreement but because the benefits of a uniform worldwide rule exceed the costs of the rule being misguided, constitutes an agreement. If the USTA were required to apply the rule as a member of the ITF, that would probably satisfy the agreement requirement, no matter what the USTA's subjective motivation was. However, you might want to note that the USTA's litigation position would have been worse, not better, if it had made it clear that it believed the rule was wrong and then "agreed" as a member of the ITF to nevertheless apply and enforce that rule. If the USTA were not a member of ITF and were not compelled in any way to follow ITF rules (as is the case, for example, with the USGA setting and interpreting the rules of golf in the United States, Mexico, Guam and Puerto Rico and the Royal and Ancient Golf Club setting and interpreting the rules of golf throughout the rest of the World), the unilateral decision to apply the same rule in the interest of uniformity, which would help manufacturers, competitors, and others, no Section 1 agreement (the contract, combination, or conspiracy requirement) may exist, requiring any antitrust challenge to be made under Section 2, which is likely to be very problematic because the rule is unlikely to lead to anyone having a monopoly.

N&Q 9 addresses international sports issues. The Behagen case held that the Amateur Sports Act of 1978 created an antitrust immunity for United States National Governing Bodies for Olympic and Pan-American sports when they apply and observe their international federations' rules governing amateur standing. The various opinions in Butch Reynolds' case address the world of international sport drug testing, including the question of United States jurisdiction over an international federation and the fact that United States national governing bodies must comply with United States law, without regard to threats of retribution against both United States athletes and the United States national governing body from international federations, designed to compel compliance with the international federation's mandates.

N&Q 10 simply raises the question of whether the United States body could simply have deferred to its international federation without changing the court's analysis. There is no clear answer. N&Q 11 provides a lead-in to the cases that follow.

Case: Weight-Rite Golf Corp. v. United States Golf Ass'n, 766 F. Supp. 1104 (M.D. Fla. 1991)

Primary Reason for Inclusion: Antitrust case concerning an equipment restriction in which the court considers the requirement of Section 1 of the Sherman Act that the plaintiff must challenge an agreement ("contract, combination or conspiracy") that restrains trade. The court also considers the threshold issue, central to many equipment cases, that the plaintiff must prove more than injury to itself -- injury to competition must be alleged and proved.
Points to Emphasize: Golf is the primary battleground for equipment cases, because of the many items of equipment that might assist a golfer. These include, but absolutely are not limited to, devices that measure the distance from the ball to the pin, devices that measure wind speed and direction, golf balls that do not hook or slice, golf gloves that lock the golfer's wrist in place, putters that emit an infrared beam to show where they are pointing, and golf shoes that deter players from "swaying" when they address the ball and swing. See N&Q 7. The likely competitive edge these and other devices may have is a subject that can be debated, but there is a lot of money that can be made selling these and similar products, and decisions of the United States Golf Association, the PGA Tour, or the Royal & Ancient Golf Club of St. Andrews about these products may impact (again, to an oft-debated extent) their sales.

Try to get clear in the students' heads the roles of the various organizations. The two primary United States organizations are the USGA and the PGA Tour. The United States Golf Association (the "USGA") is the national governing body in the United States of amateur golf, and it produces national championships for juniors, men, women, and seniors, including the U.S. Open and the U.S. Seniors Open (professional tournaments) and the U.S. Amateur and U.S. Senior Amateur Championships. The USGA also promulgates, amends, and publishes the Rules of Golf for the United States, Guam, Puerto Rico, and Mexico. The PGA Tour administers a circuit of professional tournaments in the United States, which do not include the Masters Tournament in Augusta or the U.S. Open. Outside the United States, the Royal & Ancient Golf Club of St. Andrews (the"R&A"), in Scotland, promulgates, amends, and publishes the Rules of Golf for the rest of the world -- the part not covered by the USGA. The R&A is also the national governing body in the United Kingdom of amateur golf, and it produces national championships for juniors, men, women, and seniors, including the British Open (professional tournament) and the British Amateur Championships. There is a European PGA Tour which administers a series of professional events in Europe.

Make it clear to the students that golfers can use equipment that does not conform to the Rules of Golf as interpreted by the USGA on golf courses all across the United States. Only golf tournaments (including club tournaments) are likely to be "played under the Rules of Golf" as strictly interpreted.

The plaintiffs in this case canal't allege that the USGA's decision that the Weight-Rite golf shoe does not conform to the Rules of Golf violates Section 2 of the Sherman Act. There are many manufacturers of golf shoes and the exclusion of Weight-Rite cannot be said to have a dangerous probability of yielding anyone a monopoly in any relevant market. That leads to the plaintiffs' decision not to oppose the USGA's motion for summary judgment with respect to Section 2 of the Sherman Act. See page 627.

The district court holds that Weight-Rite had only come forward with weak evidence that the USGA's interpretation of the Rules of Golf (that the Weight-Rite shoes do not conform) has hurt Weight-Rite's sales, but no evidence that this has affected an overall market -- no evidence of likely increases in prices, reduction in overall output, etc. It may be tough for a
new manufacturer to come forward with proof that a new, promptly held to be non-conforming, product would have been such a significant product in the market that the overall market will be affected by its exclusion (if it can prove exclusion). Do your students believe that is fair -- no claim if the manufacturer cannot prove market impact, but the exclusion prevented the manufacturer from having that impact?

The district court also holds that the decision by golf clubs and other USGA members to follow the Rules of Golf and the USGA’s interpretation is not mandated and is not pursuant to an agreement -- it is free choice. Therefore, the plaintiff cannot identify anyone who has conspired with the USGA and Section 1's agreement requirement is not satisfied. Therefore, the court grants summary judgment for the USGA on the Section 1 claim.

**Notes and Questions:**

N&Q 1 cites an old merger case, the 1964 Supreme Court decision in *ALCOA (Rome Cable)*, which held unlawful a merger by which a very small market share competitor would have been absorbed, based on the fact that the small firm was an aggressive, innovative competitor whose exclusion would reduce overall market competition.

N&Q 2 identifies the key overall difference between pre- and post-*Northwest Wholesale Stationers* group boycott analysis. The focus of the Supreme Court in *Silver* on procedural due process has been eliminated.

N&Q 3 discusses the *Hoosier Racing Tire* case, which concerned short-term exclusivity to a single supplier of racing tires. The court of appeals reversed the district court's holding that the rule was a per se violation, deferring to the business judgment of an independent sanctioning organization.

**Case:**  *Gilder v. PGA Tour, Inc.*, 936 F.2d 417 (9th Cir. 1991)

**Primary Reason for Inclusion:** Another equipment case, this battle was against a professional tour, not a rulemaking organization. It also suggests the continued vitality (any even expansion) of the analysis of the district court's *Blalock* decision from Chapter 10.

**Background:** There were two controversies involving the grooves in Ping Eye2 iron golf clubs. The background is as follows. Before 1984, the Rules of Golf of the USGA and the R&A required that the grooves in all golf clubs be "V" shaped and that the spaces between the grooves be three times as wide as the width of the grooves themselves. In 1984, the USGA and R&A learned that it would be a great benefit in the manufacturing process if manufacturers could make "U" shaped grooves, and when testing revealed no significant difference between "U" and "V" shaped grooves (as long as the 3 to 1 width of space to width of groove ratio was maintained), the Rules of Golf were amended by both organizations to permit non-"V" shaped grooves.

Karsten Manufacturing ("Karsten"), founded by Karsten Solheim, began selling clubs with "U"-shaped grooves and those clubs became very popular, not because of the grooves, but because of other attributes of the clubs. Two separate controversies then developed -- (1) the
USGA and the R&A measured the spaces between the grooves and the grooves in Kartsn'd clubs and believed they violated the 3 to 1 ratio requirement, and (2) the PGA Tour board voted to ban all non-"V" shaped clubs, despite the USGA decision that non-"V" grooves conformed to the Rules of Golf.

Karsten sued the USGA and R&A. The suit against those organizations is discussed in N&Q 6. The case against the R&A was dismissed for lack of personal jurisdiction. The suit against the USGA eventually settled, with Karsten agreeing not to violate the 3 to 1 ratio rule in the future and the clubs that violated the rule that had already been manufactured and sold were permanently grandfathered in the United States (the R&A had decided to grandfather the clubs because of a concern for golfers who had unknowingly purchased the non-conforming clubs, but that grandfather period expired in 1996.

The other dispute -- the PGA Tour's efforts to ban non-"V" groove irons -- was at issue in the Gilder case.

Points to Emphasize: The facts are that the ten PGA Tour board members met to consider the "V" versus "U" groove issue and seven of the board members recused themselves because they currently or at one time were affiliated with or sponsored by a golf club manufacturer. The reason they recused themselves was the old Blalock decision (see Chapter 10) that competitors (or, by extension, those associated with competitors) should not vote on issues that might be adverse to a fellow competitor. That left only three board members to vote. They voted, 3 to 0, to ban non-"V" groove irons. Unfortunately for the PGA Tour, under its Constitution & Bylaws, a quorum of a majority of their board members was required and those for some misguided reason, members who recuse themselves do not count for a quorum. Therefore, when 7 members had recused themselves, the three remaining and voting members did not satisfy the 5 or 6 members required for a quorum and the vote was ineffective. Therefore, the full board voted to amend the Constitution & Bylaws to provide that recused members count for a quorum and the same three remaining board members voted to ban non-"V" grooves. Extending Blalock, the district judge held that because all ten voted to permit the three to ban non-"V" grooves, the action taken by the three remaining board members was infirm under the per se analysis of Blalock. The district judge granted a preliminary injunction against the non-"V" groove ban and the PGA Tour appealed. The Ninth Circuit opinion in the casebook reviews the standards for a preliminary injunction as applied to this case and affirms the district court's decision.

The PGA Tour did not have the arguments that the USGA had in Weight-Rite. First, the tournaments and players in the PGA Tour all have to agree to follow the PGA Tour's rules, thereby satisfying the Section 1 agreement requirement. Second, by the time of the preliminary injunction hearing, Karsten's Ping Eye2 irons were top selling clubs (fueled dramatically by all of the publicity over the USGA, R&A, and PGA Tour disputes about the clubs, which may have led some golfers to believe they were magic clubs that would solve all their problems or at least reduce their golf scores dramatically). Therefore, the absence of competitive market impact was not clear and certainly could not be established at a preliminary stage of the litigation (e.g., the preliminary injunction hearing). In addition, the rule at issue, the
PGA Tour's attempt to ban non-"V" groove clubs from the top professional tour in the United States, would have forced about 70% of the PGA Tour golfers to switch clubs (based on the survey that 73% of the players surveyed responded that they used "U" groove clubs -- see page 629).

Notes and Questions:  
N&Q 1 discusses the strategic issue of adding players as plaintiffs. Do players have standing? Does it sound like players who did not use "U" groove clubs were trying to ban their competitors' clubs?

N&Q 2 discusses the effect of a decision that eliminates a competitor from the market as opposed to a rule that leaves the competitor in the market but eliminates certain product offerings of that competitor.

N&Q 3 asks whether the PGA Tour's alleged breach of fiduciary duty should affect the antitrust analysis. In what way? How is it relevant after Silver? Does it bear on the antitrust reasonableness analysis or is that analysis limited to a comparison of anticompetitive and procompetitive effects in light of less restrictive alternatives?

N&Q 4 returns to the issue of the agreement that yields an exclusive equipment supplier for a professional sports league or circuit. This issue was also addressed in the Hoosier Racing Tire case in N&Q 3 following the Weight-Rite case (see pages 627-28). Unless the manufacturer can show that there is a direct impact on the overall equipment market (the overall market for football helmets), the antitrust laws will not protect the manufacturer against an exclusive deal of this type.

N&Q 9 addresses equipment rules about safety. Outside of the antitrust context, although it did not concern safety issues but rather the exclusion of a disabled player on another basis unlike the one-eyed hockey player in Neeld, the Casey Martin case arose under federal disability legislation. This could be a good place to discuss Casey Martin for those who will not be covering discrimination issues in the context of Chapter 17, but who want to tap into the discussion-generating benefits of the Casey Martin case.

HYPOTHETICAL PROBLEM:  Flacket and Crosby v. National Football League

Analysis: This hypothetical case is designed to illustrate the difficulty of antitrust analysis of equipment issues. The plaintiffs could be Crosby and Flacket and Crosby's team, the icebergs. The plaintiffs need to allege an antitrust conspiracy to state a Section 1 claim. They will allege that the NFL Rules Committee is itself an agreement among the teams of the NFL and the NFL teams joined the conspiracy by following the decision. The defendants will have a hard time getting summary judgment under the "no agreement" theory of Weight-Rite.

The plaintiffs will then seek a per se Section 1 claim to assert -- a group boycott is the obvious candidate. They will argue that the other NFL teams were motivated by an interest in hurting the Icebergs, thereby creating a per se violation under Blalock. They will allege that
the motivation was to hurt the Icebergs. However, in what market? Would the antitrust laws protect the Icebergs from an anticompetitive scheme to win games and deprive the Icebergs of the championship? Would consumers be adversely affected in any way? The same number of games would be played -- only the outcome would be affected. However, is that different from Blalock?

The plaintiffs will seek evidence that other manufacturers of jerseys pressured the NFL not to permit the handwarmer jersey, perhaps even alleging a conspiracy with those manufacturers. If they can produce such evidence and evidence that the handwarmer jersey would have affected the overall market for jerseys, they can get past the requirement of showing injury to competition, not competitors, addressed in Weight-Rite.

There may be other issues, but this gives you some of the primary issues to discuss with your students.
CHAPTER 14
LABOR LAW AND SPORTS: A PRIMER

We have decided to provide a primer chapter on labor law as well as contracts and antitrust because of the crucial role that labor relations has played in sports, particularly professional sports over the last 25 years. As the introductory material indicates, this primer can in no way can serve as a substitute for a course in labor law and is only a cursory review of the issues arising under the National Labor Relations Act ("NLRA"). Although other labor-related legislation is considered in Chapter 17 and alluded to in Chapters 3 and 20, for the most part this chapter deals with union employer relations in a private sector setting. As with the chapter on contracts, this chapter could be simply assigned as an optional read or could be summarized in an entire part of the class in order to provide the students with a brief overview of the types of labor law issues that will be covered in Chapters 15 and 16. However, because all students will have had contracts, but not all students will have had labor law (barring your designation of labor law as a prerequisite), we believe that there is a greater need to assign all or part of this chapter or at least to give a fairly detailed summary prior to treating Chapters 15 and 16. If you should desire to emphasize labor law as a predominant part of your sports law course, then the assignment of Chapter 14 becomes almost imperative.

In assigning a hierarchy of importance to the areas addressed, we would recommend that greater emphasis be placed on employer unfair labor practices given the fact that the preponderance of Chapter 15 is devoted to these types of cases. As suggested in the text itself, there have been very few fully litigated cases involving unfair labor practices committed by players' associations, therefore those portions of the text dealing with violations of Section 8(a)(1) through 8(a)(5) will be the most significant. As an overview, I would make every effort to ensure that the students develop a basic comprehension of the following:

(1) The organizational structure of the National Labor Relations Board ("NLRB") and the manner in which it adjudicates both representation and unfair labor practice cases. Students should be made aware of those employees and employers who are covered by the NLRA and what that basic coverage entails;

(2) The development of collective bargaining as a method of determining wages, hours, and working conditions;

(3) The representation/organizing process, both in terms of union efforts to unionize employees and, in limited circumstances, employees' efforts to bargain on their own behalf, together with the NLRB's role in fostering the process of organizing and the establishment of collective bargaining prerogatives;

(4) The difference between representation and unfair labor practice cases and how the procedures vary in each context;

(5) The proscriptions of the NLRA, particularly Sections 8(a) and 8(b) with, as indicated above, greater emphasis placed upon employer unfair labor practices;

(6) The types of remedies that will be afforded to the affected parties in litigation before the NLRB;

(7) The nature, legal implications, and professional sports history of strikes and other work stoppages. Emphasis here should be placed upon the impact of strikes upon an
employer and the employer's prerogative to take various types of defensive action in the event of a strike. Students should be made aware of the differentiation between an economic and an unfair labor practice strike, especially the manner in which this distinction affects the right of the employees to return to their jobs upon the strike's expiration;

(8) The role that arbitration and other voluntary dispute mechanisms play in modern labor relations. Students should be apprised that an entire chapter of this text is devoted to arbitration, and should be provided a brief recapitulation of the arbitration process and the considerable deference that it is shown by courts and administrative agencies;

(9) The recent developments in collective bargaining. There is no substitute for a full review of the most recent collective bargaining agreements; however, the text highlights a few of the more compelling developments, particularly those that may have precipitated a labor strike or postponed agreement on a collective bargaining agreement. At this point, it is advisable to explain in some detail issues that may have already been addressed earlier such as salary caps, free agency, and salary arbitration.

We have found it extremely useful to pinpoint those portions of the outline that will be given more elaborate treatment in subsequent chapters. For the most part, the text earmarks those areas; yet, a specific reminder with some preliminary indications as to how the sections of the primer relate to subsequent chapters would be invaluable in terms of stimulating class discussion and fostering student understanding when you reach those points in the text. For example, there is a very brief mention made of the union's right to gain access to relevant information during bargaining or grievance adjustment in a reference to the *Truitt Manufacturing* case. A slightly more extensive discussion of this issue will enhance the students' appreciation of the significance of the first *Silverman* case appearing on page 719. Likewise, a brief discussion of discrimination and the tests employed in the context of a pretextual discharge (e.g., *Wright-Line*) and strikers' rights to reinstatement during the strike will, in all likelihood, make the first two cases in Chapter 15 more rewarding and edifying experiences. As a final example, a discussion of the "exclusivity" principle and the nature of an employer's bargaining obligation once a union has been certified or recognized -- together with the limited circumstances in which such exclusivity is "suspended" -- will make the *Midland* case and the problem that follows easier to absorb. Certainly, these issues are of special importance in the sports context given the fact that in most typical industrial settings individual employees surrender all rights to bargain on their own in favor of the exclusive rights of the collective. Due to the peculiarities of professional sports and the gross differences in the skills of professional athletes, suspension of this regime is almost a foregone conclusion. Yet, there has never been any definitive resolution as to what the parameters of such limitations of exclusivity are. This text does not presume to answer them, but certainly will make every effort to identify where the more difficult issues arise.

The evolution of sports unions is among the more fascinating sports law phenomena. As is indicated at various points in the text, when professional sports unions originated, no one including the employees themselves viewed them as typical trade unions. In all likelihood, thoughts of late-night negotiating sessions, strikes, lockouts, and permanent replacement of players never even entered the contemplation of the athletes or their representatives. On the contrary, the assumption seemed to be that the parties would almost treat each other as social partners discussing various issues in a casual, precatory fashion. It soon became apparent to the players that this type of informal request for a response from sports owners would not be forthcoming. Cynics would suggest that this lack of response reflects the owners' plantation mentality in which players were viewed as chattel; their demands were almost considered with some amusement. The various sports unions in almost simultaneity seemed to recognize the
futility of their efforts and escalated their own militancy. Marvin Miller, Larry Fleisher, Ed Garvey, and others had no intention of perpetuating the fraternal society approach that had been cultivated by Bob Feller in baseball, Dante Lavelli in football, and Bob Cousy in basketball during the early days. With the development of these unions, came an evolution of sports jurisprudence resulting in a few representation and several unfair labor practice cases that would be typical of a normal industrial setting. It is possible that labor strikes will enter a dormancy period given the fact that all collective bargaining agreements in the past few years are not due to expire until the early 21st century. However, while unfair labor practice and strike activity may be minimized during the next few years, these entrenched collective bargaining agreements, replete with complex provisions regarding revenue sharing, salary caps, luxury taxes, etc. may serve as bases for numerous grievances and arbitration decisions. Conceivably some of these actions could also form the predicate for unfair labor practice charges before the NLRB as well as possible Title VII claims arising from various types of discrimination.

In any event, the foregoing should make it very clear that labor law, along with antitrust, is among the most crucial aspects of sports jurisprudence today. While there are courses that have been developed along two credit hour lines that do away with either labor or antitrust in the name of giving comprehensive attention to one of the two, most three credit courses should discuss labor law in some detail, and even a two credit course should at least allude to it in some fashion. Hopefully this primer chapter will enhance the students' understanding of the principles and will make your task in terms of synopsizing the basic rudiments somewhat easier.
CHAPTER 15
LABOR-MANAGEMENT RELATIONS AND SPORTS:
REPRESENTATION AND UNFAIR LABOR PRACTICES

I. Introduction

This chapter will provide a more intense overview of unfair labor practices and representation cases as they arise in the context of professional sports. The primer chapter familiarized the students with the union organizing process both from the standpoint of the strategies employed in attempting to unionize an employer's operation as well as the National Labor Relations Board's involvement in terms of the legal processes attending union organizing attempts. If the primer chapter has not been designated as a discrete reading assignment, then some review should be undertaken in terms of what is involved in the determination of an appropriate collective bargaining unit and the idiosyncrasies of sports that may indicate the inevitability of certain unit configurations. In particular, there should be some discussion of the difference between voluntary recognition and NLRB certification, the community of interest factors that are considered whenever there is a dispute as to the appropriateness of a collective bargaining unit, the procedures to be employed in making such determinations, and the possibility that, in professional sports, existing unit configurations (which, in most cases, have been the result of a voluntary recognition and consensual arrangement) might change in the next several years.

The introduction is brief given the fact that the primer chapter has set the stage for the material that will be covered in both Chapters 15 and 16. It does highlight those areas of particular concern and those areas that have generated the most significant controversy in terms of representation and unfair labor practice litigation before the NLRB. Alerting students to these issues and earmarking the cases that will assist in the resolution of such questions will foster student preparation and, hopefully, provoke more animated discussion of these issues when they are considered in the lead cases and the Notes and Questions that follow.

II. The Representation Process

Case: North American Soccer League v. NLRB

Primary reason for inclusion: To illustrate the rare example in professional sports where there has been a litigated controversy over the bargaining unit.

Points to emphasize:

1) This case ended up in the United States Court of Appeals because the NASL refused to bargain, thereby generating an unfair labor practice complaint, eventually reviewable in the appropriate U.S. Court of Appeals. Generally, issues involving representation questions are not appealable beyond the NLRB determination. A tactic that is sometimes employed, but frequently frowned upon, is to refuse to bargain, prompting the filing of unfair labor practice charges and an adverse decision, eventually reaching culmination in an appellate court where the unit issue may be revisited.

2) In appropriate circumstances, several employers may be required to bargain jointly with a collective bargaining representative. There is a difference between consensual multi-employer bargaining, in which the appropriate employing unit may be each individual employer, and joint employer or single employer bargaining, where the nature of the employing unit requires that bargaining continued to be conducted in an across-the-board fashion.
3) The question of appropriate bargaining unit status from the standpoint of employees is separate and distinct from the joint employer finding. Having decided that the league must bargain on a joint basis, the NLRB still had to decide what the appropriate bargaining unit of employees would be, including designation of supervisory personnel and other questions affecting the body of employees that would be represented by the players' association, assuming that a majority of the players exercised their franchise in support of union representation. On page 690, the court takes pains to differentiate the NASL situation from the Greenhoot case. Due to the centralized control of labor relations policies and the interdependence of the various clubs in terms of formulating rules governing wages, hours, and working conditions, the joint employer finding was inevitable and league-wide, across the board bargaining was deemed to be the only appropriate vehicle to develop a harmonious collective bargaining relationship.

Notes and Questions:

N&Q 1 focuses on subtle distinctions between a joint employer and a single employer finding. For all intents and purposes, such distinctions are not significant in the context of the collective bargaining relationships that have developed in professional sports. Certainly they could affect employer liability and also could affect the degree to which current bargaining configurations in terms of the employee bargaining unit and the possibility of the joint employer bargaining on a club-by-club basis could be impacted.

N&Q 2 resurrects the question of whether existing collective bargaining units may be altered in the coming years. With the possible advent of rival leagues, this becomes an omnipresent possibility. However, insofar as current league structure is concerned, because the existing collective bargaining agreements are scheduled to remain in effect at least through the year 2000, this issue is one of largely academic curiosity at the present time.

N&Q 3 focuses on the status of the commissioner. This issue has not yet been definitively resolved but students should be reminded of the discussion of the commissioner as head of the player relations council, and the Notes and Questions following the Vincent case, as well as the "commissioner fine" issues that were raised in the NFL Management Council case. The question is joined further in the first Silverman case on page 710.

N&Qs 4, 5 and 6 discuss both the real and hypothetical situations of new organizing activity in professional sports. N&Q 4 particularly requires the students to revisit the primer in terms of the basic procedures employed by a union in an attempt to organize an employer. N&Q 6 more or less seeks to stimulate the students' creativity in terms of ways in which the respective parties attempt to persuade employees to vote for or against a labor organization in a union campaign. Clearly the development of a new league and the unique employment conditions endemic to professional sports would remove the situation from the rubric of traditional industrial bargaining. However, at the same time, many of the same concerns would apply in the professional sports context. Typically, an employer in this situation would attempt to ensure that those concerns of players that could be alleviated by union representation are addressed at the initial stages of the league's formation and the development of labor relations policies. Of course, if there is no competing league, it will be difficult to make a judgment as to competitive salaries and other matters that may allay player fears and forestall the possibility of union organizing.

The second question raised in N&Q 6, though poorly phrased, attempts to elicit student response on the question of a league that favors one labor organization over another. That is, if confronted with labor organization and two or three potential labor unions are involved, what
problems are presented if an employer chooses one labor organization over the other. Obviously, this requires students to address Sections 8(a)(2) and 8(b)(1)(A) and to identify the unfair labor practice liability inherent in showing favoritism to one union or cooperating or dominating that labor organization in any way. Here, students should be referred to that portion of the primer dealing with those unfair labor sections and also to pages 708 and 709 following the Seattle Seahawks case.

The final question in N&Q 6 requires a review of the primer section dealing with threats, interrogations, promises, and surveillance. This TIPS analysis generally covers most relevant points in terms of an employer's potential liability for violating rules governing the parties' pre-election "campaigning."

III. Unfair Labor Practices

(A) Discriminatory Treatment for Engaging in Protected Concerted Activity

Case: NFL Management Council and NFL Players Ass'n

Primary reason for inclusion: To provide students with a major unfair labor practice case dealing with Sections 8(a)(1) and 8(a)(3) of the NLRA and exposing them to the type of analysis employed in a major work stoppage attended by unfair labor practice activity.

Points to emphasize:

1) Upon an unconditional offer to return to work, strikers are entitled to their former jobs if those jobs or substantially equivalent jobs are available and if the employees are capable of performing them. Of course, in an unfair labor practice strike, the employees are entitled to their jobs even if it would require the employer to terminate the services of the replacement employees.

2) Both the Administrative Law Judge and the NLRB found that the union unconditionally offered to return to work and thereby demanded reinstatement of employees to available jobs.

3) The league imposed a deadline rule which placed limitations on the players' ability to return to work as requested. Thus, the denial of employment opportunity and the alleged interference with protected rights, as well as the discriminatory treatment of returning strikers, was triggered by the imposition of the deadline rule -- particularly at the eleventh hour. In these types of situations, the NLRB and the courts will employ various tests to ascertain employer liability. At the threshold, the NLRB and the courts will assess the degree of intrusion upon employee rights and, if such intrusion is not inherently destructive, will apply a type of balancing test in which the employer will be provided the opportunity to submit legitimate business reasons for the conduct. If the impact on employee rights is comparatively slight, and the employer has offered some valid rationale, the General Counsel must offer proof of anti-union animus to sustain his or her burden. (See N&Q 2 following this case and N&Qs 1 through 4 following Seattle Seahawks.)

4) The reasons offered by the league for the justification of the rule were found to be pretextual. Students should be aware of the fact that, even where the decision to employ or reinstate is inherently subjective, such as in the context of professional sports, an employer's offered reasons for the rule must still survive scrutiny under a good faith
standard. In this case, the league offered reasons that simply failed to survive even a cursory review. Perhaps the most dramatic example of the pretextual nature of the league's response is its contention that the deadline rule was imposed for safety reasons. In reality, no other deadline rule in a non-strike setting had been so strict; the suggestion was clear that the rule has been intended to retaliate against strikers rather than to protect their health and safety.

5) The Board does not even reach the question of whether the conduct is inherently destructive, finding that even with a comparatively slight interference, the employer must still show some type of business justification for the rule, which it has failed to do in this case.

Notes and Questions:

N&Qs 1, 2, and 3 focus on the points emphasized above, particularly the need for the General Counsel to demonstrate antiunion motive in this context. It is safe to say that the discriminatory conduct, combined with the absence of any type of legitimate business reason created the inference of antiunion motive justifying the finding of 8(a)(1) and 8(a)(3) violations in this case. At the conclusion of N&Q 3, there is some discussion regarding the need to show motive. Students should be asked whether or not motive is also implicitly considered in an 8(a)(1) situation. For example, as a general proposition, employers must have knowledge of union or concerted activity prior to a finding of a violation of Section 8(a)(1) for interference with such activity. Some commentators have suggested that knowledge is of questionable relevance unless the NLRB and the courts are attempting to ascertain the motivation underlying certain conduct. For example, if an employer gives a pay raise during a union organizing drive, without any knowledge that such activity is underway, it is unlikely that the NLRB would find an unfair labor practice stemming from the employer's alleged attempt to influence the outcome of the campaign. Thus, if this type of scienter is a prerequisite to a finding of a violation of Section 8(a)(1), have we not also implicitly suggested that the employer's motive to pay money as a bribe to woo employees away from voting for the union was the employer's motivation?

N&Q 4 provides background information on the 1987 strike and reminds students of the circumstances surrounding the eventual negotiation of the current collective bargaining agreement following that strike.

Case: Seattle Seahawks

Primary reason for inclusion: To demonstrate that, notwithstanding the inherent subjectivity in making employment decisions and the equally inherent difficulty in sustaining an unfair labor practice against a club, certain types of management conduct will not be immune from scrutiny and, as in the previous case, could result in unfair labor practices.

Points to emphasize:

1) Students should become intimately familiar with the Wright-Line test as it is the formula employed by the NLRB to ascertain liability in the context of a mixed motive or pretextual discharge situation.

2) The NLRB is extremely deferential to the credibility findings of administrative law judges and will, wherever possible, defer to such findings based on the expertise of the fact finder and his or her opportunity to observe the demeanor of witnesses.
3) In this case, the NLRB adopted the findings of the Administrative Law Judge and the NLRB did not credit the testimony of management personnel. Given the disparate treatment of the charging party, the NLRB found that his reassignment was a product of his union activity and thus violative of Section 8(a)(3).

4) Again, when an employer offers reasons justifying a particular course of action, it must be prepared to prove that such action was consistent with prior conduct and that it was not merely a pretext for conduct designed to discourage union membership or affiliation.

Notes and Questions:

N&Qs 1 and 2 summarize the history of the Seattle Seahawks case and rehash the Wright-Line mixed motive test that is discussed in the case. It is important to note that Wright-Line does provide an employer who has acted with antiunion motive to explain that such conduct would have occurred notwithstanding the improper motivation.

N&Q 3 entails a sophisticated administrative law analysis that may be beyond the confines of a sports law course. Simply stated, the question asks if a reviewing court is supposed to consider the entire record as a whole and, if so, how does the command square with the notion that the NLRB may review the case as if it were before it de novo? See 5 U.S.C. §§ 556 and 557. See also, Bernard Schwartz, Administrative Law, § 10.7.

N&Q 4 bears repetition because it emphasizes the subjective nature of the sports personnel decisions and illustrates that the standard for determining whether or not certain conduct is appropriate will be based on one's good faith rather than a reasonable person/objective standard. Yet, even with a more relaxed good faith standard, certain types of conduct will still run afoul of Sections 8(a)(1) and (3).

N&Q 5 is a fascinating situation in which both authors of this text participated. Subsequent to the NFLPA’s decertification and victorious prosecution of the McNeil lawsuit under the antitrust laws, the NFLPA and the NFL negotiated a 7-year collective bargaining agreement. The authors participated in the filing of unfair labor practice charges before Region 5 of the NLRB in which hundreds of pages of position papers were advanced in support of charges that the negotiation between the NFL and the NFLPA was unlawful. The gist of the charges centered on the fact that the labor negotiations had begun prior to the time the NFLPA had been recertified as collective bargaining representative. Therefore, the NFL was negotiating with a union that did not, at the time, represent a majority of NFL players. The issue never reached a denouement because Norman Braman, owner of the Philadelphia Eagles, sold the club to entertainment mogul Jeffrey Lurie and, as part of the terms of that purchase agreement, all unfair labor practice charges were withdrawn.

N&Qs 6 and 7 provide additional background on the strike that occurred in 1982. The question posed in N&Q 7 requires students to differentiate an economic strike from an unfair labor practice strike. In the latter, the employees cannot be permanently replaced; they are entitled to their former jobs upon demand, even if replacements have been hired. This issue was addressed in Chapter 14 and students should be referred to the discussion of strikers' rights.

(B) The Refusal to Bargain in Good Faith
As the primer chapter and the brief introductory material to this section illustrate, employer refusals to bargain may assume many forms. In the cases, several of these types of unlawful activity are considered.

(1) Refusal to Furnish Information

Case: Silverman v. MLB Player Relations Comm., Inc.

Primary reason for inclusion: To provide an example of a refusal to bargain predicated on an employer's refusal to furnish relevant information.

Points to emphasize:

1) This case assumed critical importance because the denial of the injunction would de facto have compelled the MLBPA to strike or "hold its peace" for another two years.

2) It is a settled principle that a collective bargaining representative is entitled to relevant information as part of the bargaining or grievance adjustment process. Difficult questions, however, surround whether such information is available when it involves an employer's proprietary financial data. Generally, this information is off-limits unless the employer has, in a manner of speaking, waived its privilege by claiming an inability to pay.

3) At various points during these negotiations, league and individual club officials made comments suggesting that free agency and increasing salaries threatened competitive balance. These protests, however, were not made at the bargaining table and were not made by members of the Player Relations Committee. In discussing this aspect of the case, students should be asked to focus upon who actually made the comments, what was their status (i.e., are not club owners "employers" even if they lack official title as a member of the collective bargaining team), and whether their protests amounted to a claim of a financial inability to meet the players' demands.

Notes and Questions:

The answer to the first N&Q would seem to be that Werker has missed the boat. Whether Marvin Miller may have known or speculated about the owners' financial condition is irrelevant to a determination of the union's right to obtain substantiation and verification. On the contrary, disclosure of the information not only could have either dispelled Miller's doubts and possibly resulted in a softening of the union's position or exposed the league's remonstrations as pretexts -- in either event, a more meaningful negotiation may have resulted.

N&Q 2 provides interesting history and N&Q 3 raises a question that is answered in the opinion itself. Because of the arrangement between the owners and the Players' Association, a strike deadline had been set; the denial of the injunction forced the players to strike for fear that the status quo would be maintained for several more years while the unfair labor practice charges were pending.

N&Qs 4 and 5 raise issues addressed earlier regarding the status of the commissioner as agent of the employers (owners). In this case, the issue became secondary because the comments in question had been made away from the bargaining table and, in a literal application of prevalent authority, did not amount to a claim of financial impossibility triggering a "duty to furnish." However, if the "bargaining table" had been construed to include other venues incident
to actual negotiations, the commissioner's comments, as well as the statements made by other owners, may have resulted in an order requiring the owners to turn over important proprietary information. The new role of the commissioner in the bargaining process will undoubtedly cause him to be more circumspect in what he has to say in response to positions taken and demands made by the Players' Association.

N&Qs 6 and 7 provide a little history on the continuing controversy surrounding baseball owners' crying of wolf and protests that free agency will sound the death knell for meaningful competition. In truth, owners have consistently failed to provide hard evidence of their fears and the views of respected economists have cast further doubt on the validity of the league's claims. See, e.g., Andrew Zimbalist, Baseball and Billions (1992).

N&Qs 8 and 9 set the stage for cases that follow. These cases will demonstrate that litigation over the duty to bargain with an exclusive collective bargaining representative has had a profound impact on the current labor-management situation in professional sports.

(2) Bypassing the Collective Bargaining Representative

Case: Morio v. North American Soccer League

Primary reason for inclusion: To provide an illustration of the exclusivity concept and the manner in which sports league owners may run afoul of Section 8(a)(5) by ignoring the collective bargaining representative.

Points to emphasize:

1) The NASL in various ways dealt directly with bargaining unit players and otherwise bypassed the certified collective bargaining representative by unilaterally implementing changes in the players working conditions. The most dramatic example of such conduct was the league's negotiation of individual deals with players subsequent to the certification of the union as collective bargaining representative.

2) The league did not contest that it engaged in the alleged conduct of bypassing the union. The league contended that the initial unit determination was incorrect and they questioned their duty to bargain. As suggested earlier, because an employer cannot appeal an adverse representation decision (e.g., an appropriate unit finding) it will at times simply refuse to bargain, hoping to get the unit issue before the Court of Appeals on review of the unfair labor practice finding that the refusal to bargain constituted a violation of Section 8(a)(5). Recall in the primer chapter, an adverse decision from an administrative law judge in an unfair labor practice case can be appealed to the NLRB in Washington, D.C., and eventually to the appropriate United States Court of Appeals.

3) As part of the relief, the court renders the individual deals voidable (as opposed to void) at the behest of the union. This remedy may seem somewhat bizarre, but the rationale is simply that the union is the exclusive representative and bargains on behalf of all unit employees. Yet, there may be aspects of the individual contracts that are beneficial to the players and the court allows the union to make that determination.

4) While sophisticated pre-emption questions are certainly beyond the scope of this block of instruction, an interesting question would present itself if the individual employee wished to retain a contract that the union "voided." Could the employee seek to enforce
the contract in state court? Relevant authority appears to leave that option open notwithstanding potential pre-emption issues. See generally Caterpillar, Inc. v. Williams, 482 U.S. 386, 396 (1987).

Notes and Questions:

N&Q 1 addresses the issue raised in the "points to emphasize" above. It is certainly conceivable that those contracts could have been voided to the extent that they were negotiated subsequent to the certification of the union as collective bargaining representative. Even if the contract pre-dated the certification, it is arguable that all individual bets are off in terms of wages, hours, and working conditions. If the individual contracts presumed to guarantee minimum benefits even in the event of a successful union organizing, then the pre-emption/state law enforcement issue referenced above again could take center stage.

N&Q 2 introduces the Midland case. Although Midland is totally unrelated to sports, it presents a useful analog that may resurrect itself in sports arbitration and unfair labor practice cases in the future. It is, at least, an important building block that will facilitate an understanding of those sports cases that have arisen due to the tension created by a collective bargaining agreement that allows special covenants and limited individual bargaining.

Case: Midland Broadcasting Co.

Primary reason for inclusion: To present students with an illustration of case authority in which a balancing test was applied to ascertain whether individual bargaining violated the exclusivity principle in the context of a union’s qualified waiver.

Points to emphasize:

1) Footnote 1 contains waiver language that arguably permits the employer and individual employees to conduct some one-on-one bargaining. Students should compare this language to the special covenants provisions in a typical collective bargaining agreement covering professional athletes.

2) The dissent attacks the majority's approbation of the individual bargaining stressing that such conduct ranged beyond the narrow parameters of the "waiver."

3) The dissent acknowledges the legitimacy of the waiver, but it emphasizes that negotiation of any term that falls below the CBA minimum, regardless of the corresponding benefit, will implicate Sections 8(a)(5) of the NLRA.

Notes and Questions:

N&Qs 1 through 4 expound upon the basic points advanced in Morio and Midland, and provide some interesting arbitral authority in the sports context. The true test of the students' appreciation of this issue will lie in their handling of the Problem at the end of this section (page 735). There is no definitive answer; but they should be able to identify the potential 8(a)(5)/breach of contract issues prompted by the individual bargaining and also should be able to call upon the Special Covenants provision as a viable defense (as far as it goes).

(3) Unilateral Implementation of a Mandatory Subject of Bargaining
Case: Silverman v. MLB Player Relations Comm., Inc.

Primary reason for inclusion: To highlight the decision that played an integral role in the ending of the 1994-95 baseball strike.

Points to emphasize:

1) Judge Winter, who has long been a proponent of resolving labor market restraint problems through the labor law route as opposed to antitrust litigation (see, e.g., Wood v. NBA, 809 F.2d 954 (2d Cir. 1987)), took the owners to task for unilaterally changing working conditions prior to a legitimate impasse.

2) The court found that the anti-collusion provision, free agency, and salary arbitration were mandatory subjects of bargaining. Judge Winter stressed that to catalog such issues as permissive subjects of bargaining would "ignore the history and economic imperatives of collective bargaining in professional sports." This finding was crucial to the General Counsel's case and doomed all league attempts to impose these terms absent a bona fide impasse.

3) The most remarkable aspect of Judge Winter's conclusion perhaps is his finding that salary arbitration is a mandatory subject. He acknowledges that interest arbitration is a permissive subject, but he refuses to clarify salary arbitration as "interest arbitration." Students should be asked whether Judge Winter's conclusions are logical given the common definition of interest arbitration. (Here, you may want to jump ahead briefly to pages 747-750 and refer back to page 681-682 to give students a wider view of arbitration.) This discussion should provoke a brief, but lively debate and, hopefully, will provide some indications of whether the students understand the concepts of unilateral changes, post-impasse employer prerogatives, and interest arbitration.

Notes and Questions:

N&Q 1 focuses upon an issue that has been subject to robust debate in the circuits. Our personal experience also reflects that it is a favorite topic among law school moot court denizens. Students should be able to assess the implications of a "just and proper" standard vis-a-vis and approach that applies traditional equitable principles. In this instance, the granting of an injunction saved the baseball season and provoked the eventual negotiations resulting in the current settlement.

In N&Q 2, the players returned to work because they were able to resume play without the owner-imposed changes in salary arbitration, anti-collusion, etc. Further, the finding of further bad faith bargaining in the wake of the Second Circuit's decision could visit contempt consequences upon the owners. Therefore, the players returned to work with a greater outlook on the prospects for a meaningful settlement. One other factor should not be ignored. The players offer to end the strike, after a major victory in the courts, enabled them to gain a considerable advantage in the battle for public support. In all respects the players took the "high road" -- not an incidental feature in the ultimate resolution of the remaining issues.

N&Q 3 speaks for itself. If the adopters of this casebook will indulge a touch of jaundiced editorializing about Albert Belle and Jerry Reinsdorf -- they deserve each other. It is truly a marriage made in heaven.
I. Introduction

The introductory material provides a roadmap of the chapter and expands on the arbitration overview contained in Chapter 14. It should familiarize students with the basic rudiments of voluntary dispute adjustment mechanisms in labor relations and the extent to which courts and administrative agencies are deferential to such processes. At this point, students should consider the value of arbitration as an alternative to formal litigation and also should assess the substantial homage that reviewing forums pay to arbitration and arbitrator's decisions. Students should also be apprised of recent scholarly commentary that questions the substantial sacrifice of individual rights that is endemic to any collective bargaining regimen. In particular, considerable criticism has focused on decisions that find state or federal judicial consideration of controversies to be preempted by grievance/arbitration procedures of union contracts. A recent symposium conducted by the University of Denver Law Review examines in detail the interplay between individual employer rights and the deference to a mechanism agreed upon by a collective group and its bargaining representative. See Symposium, The New Private Law, 73 Denv. U. L. Rev. 1 (1996).

II. Grievance Arbitration

(A) Free at Last -- Almost

Case: Kansas City Royals Baseball Corp. v. MLB Players Ass'n

Primary reason for inclusion: To illustrate the degree to which reviewing courts will defer to an arbitrator's decision and to expose students to a case that may be the most significant arbitration in the history of Major League Baseball.

Points to emphasize:

1) Two fundamental questions were presented in this case: the arbitrator's jurisdiction to resolve the "perpetual reserve" question; and the substantive determination of whether the reserve clause could be interpreted to bind a player to one club in perpetuity. As the Notes and Questions illustrate, the arbitrability question was by no means simple. The league advanced a colorable argument that the reserve clause was beyond the arbitrator's jurisdiction. The union offered an effective rejoinder that there was no clear evidence of an intent to exclude the grievance over the reserve system from the arbitrator's jurisdiction. Two points are worthy of emphasis here: the owners' counsel admitted that language centered on free agency and the reserve system was intentionally ambiguous; and the evolving importance of arbitration as a dispute resolution mechanism portended the arbitrator's assertion of jurisdiction absent the most indisputable and unmistakable evidence of an intent to exclude reserve system controversies from the grievance machinery.

2) Several attempts had been made to resolve the reserve system debate through challenges under the antitrust laws. Each time, the players' effort failed due to Major League Baseball's exemption from the antitrust laws. As a preface to Notes 1 and 2,
students should be reminded of this history as a possible additional factor that may have prompted Arbitrator Seitz to err on the side of finally reaching the merits of this controversy.

3) In evaluating the substantive issue of contract interpretation, Seitz was left with a relatively simple array of alternatives. To construe the system as one of perpetual reserve, especially with no clear agreement on such an interpretation, would be tantamount to enforcing contracts of vague or interminable duration. It would also be at war with recent precedent in other contexts that essentially rejected that option out of hand. Thus, Seitz was left the choice of finding all player contracts void for indefiniteness (or enforceable as a perpetually renewing option) or purposefully interpreting the contract as having a one-year option on player services and rendering the players free to negotiate elsewhere as the anniversary date of their contract's expiration. He chose the latter. This should trigger some discussion as to whether Seitz was within his rights as a matter of substantive arbitrability (\textit{i.e.}, did this decision exceed his power only to interpret the terms of the collective bargaining agreement?)

Notes and Questions:

Notes 1 through 5 reprise the importance of arbitration as a means of resolving disputes and the lengths to which decisionmakers will go to make the process effective. It is conceivable that Seitz gave an expansive view of the reserve system's arbitrability, and found ambiguity where none existed. It is more likely that the parties' contractual ambivalence in terms of their hedging of bets on the free agency issue created enough true ambiguity to open the door for Seitz to assume jurisdiction.

Note 6 is included for a few reasons. First, it illustrates that arbitration decisions do not have precedential value or \textit{stare decisis} effect -- especially when different collective bargaining agreements are implicated. Second, it shows that arbitration was an unavailing vehicle to rid professional football players of the NFL's reserve system. Thus, the strike and/or antitrust route emerged as the only viable options to effect a change -- especially after the NFLPA made free agent concessions following victories in the \textit{Mackey} and \textit{Smith} cases. (See, \textit{e.g.}, Chapter 10 at page 430.) Arbitrator Luskin's decision foretold more litigation and labor strife and helped to set the stage for the infamous work stoppages in 1982 and 1987, the \textit{McNeil} lawsuit, and the controversial settlement that is now embraced in the 1993-2000 collective bargaining agreement. Students should be asked whether Luskin's decision is plausible contract analysis. They should focus upon whether there are factors present in this case that were not present in \textit{McNally-Messersmith}. They should also ponder whether either decision could have been influenced by the arbitrator's perceptions of their roles and their status in the entire litigation scheme. That is, because of the baseball exemption, it is unlikely that the issue would ever see the light of day in an adjudicatory or quasi-adjudicatory forum. In the football case, it is possible that Luskin interpreted the clauses in question literally and narrowly, recognizing both that the players had already won the battle once, only to surrender it at the table, and that the players could always relitigate the matter in the antitrust forum (assuming that they would not be barred by the labor exemption).

Note 7 introduces the collusion case which is useful not so much for any profound arbitral analysis as for a manifestation of the league's imprudent negotiation strategy and its unbridled arrogance in believing that it could engage in a virtually unmasked conspiracy in direct violation of the union contract without fear of reprisal.
**Case:** In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the Twenty-Six Major League Baseball Clubs

**Primary reason for inclusion:** To explain why and how baseball swallowed a $280,000,000 settlement for conspiring to suppress free agency in the face of an antitrust exemption that would appear to insulate such activity from sanction.

**Points to emphasize:**

1) The language in Article XVIII(H) should be read carefully. Its direct message is difficult to ignore especially given that it was included at the behest of the league.

2) In light of the clear instruction of Article XVIII(H), this case turns heavily on the facts and whether the almost non-existent movement of players from club to club was coincidental or was the product of the owners' orchestrations. In addressing these questions, attention should be drawn to the arbitrator's assessment of the evidence, both in terms of the direct evidence of the commissioner's clarion call for restraint in spending as well as the inferences drawn from the comparisons to other years in which free agent, even marginal players, were wooed by numerous teams.

3) The final three paragraphs of Arbitrator Nicolau's award synopsizes the folly of the league's arguments. Baseball's leadership sent a message to the owners to tighten the purse strings; the owners complied. In Nicolau's eyes their compliance, the blatant disinterest in any available player, was too transparent to be ignored.

4) Subsequent arbitration, before another arbitrator, yielded similar results. The owners were found guilty of collusion for three separate seasons.

**Notes and Questions:**

Note 1 reports on a monetary settlement that was years in the making. The MLBPA was custodian of the funds and assumed responsibility for distribution to the affected players. Several players became free agents and were freed from existing contractual relationships. Given the results of the collusion decision(s), students should be asked how they would handle the "problem" of spiraling salaries. What would owners say if they were told simply to make assessments of what they can afford (on an individual basis) and tailor their operating budgets accordingly. It is precisely what every other business does as a routine matter. If past is prologue, students should engage in a robust debate that brings into play earlier classes dealing with the nature of a league as a cooperative venture, an individual owner's rights versus his or her duty to the collective, the various antitrust exemptions, salary caps or revenue sharing as solutions, the emerging strength of players' unions, the parties' ability to absorb the effects of a lengthy strike, and numerous other issues.

As the text indicates, the next few cases are designed to show that arbitration is serious business, whose procedures must be faithfully followed and whose ultimate dispositions will be scrupulously enforced by courts and pertinent administrative agencies. At the same time, arbitrators are not immune from reversal simply because they have been selected by the litigants themselves. Much like the deference that the judiciary shows league commissioners, a court's propensity to enforce an arbitrator's award is not unlimited.
(B) Judicial Response to the Arbitration Process: Respect for the Process but Not Blind Deference

Case: NFL Players Ass’n v. Pro-Football, Inc.

Primary reason for inclusion: To provide an example of the relatively rare instance in which a court will vacate an arbitration award and, substantively, to illustrate the tension that can develop between state labor laws that have not been preempted by federal law. This case is also noteworthy because it exposes some of the chinks in the NFLPA’s solidarity armor created by the settlement culminating in the current collective bargaining agreement.

Points to emphasize:

1) Virginia and the District of Columbia have adopted dramatically different positions regarding the union shop. Students should be referred to Chapter 14 to review the union security/right to work dichotomy and the fact that the National Labor Relations Act has given individual states license to prohibit union shop clauses. It does not often cause conflicts between states but professional sports presents a fertile ground for such a dispute.

2) The background of this controversy is relevant because, if players had not been disenchanted with the perceived antics of their collective bargaining representatives and refused to pay dues, the Redskins would never have been asked to take action against the alleged recalcitrants. As evident throughout various parts of this text, the current collective bargaining agreement was not warmly embraced by all NFL players, and this refusal to pay dues was but a small manifestation. At another time, the problem may not have surfaced because, even in a non-union shop context where periodic dues may not be required as a condition of employment, players would likely voluntarily tender the monthly dues to show solidarity or to avoid the castigation of fellow dues-paying players. Likewise, the union, if the refusal to pay were isolated and not a show of dissidence by more than a few players, may have pursued the issue with less vigor.

3) The arbitrator placed considerable emphasis on the locale of RFK Stadium, the site of the Redskins home games. The court did not question the arbitrator’s authority nor did it find his decision to be implausible. Further, the court acknowledged that arbitrators' decisions are entitled to considerable deference. It also pointed out considerable flaws in the defendant’s case. Yet, because it found that affirmance would result in a violation of Virginia law, and would be manifestly at war with the Supreme Court's decision in Mobil Oil, the court declined to enforce the award.

Notes and Questions:

N&Qs 1 through 3 require the students to assess whether the arbitrator's decision was a reasonable reading of Mobil Oil. Clearly, if the Supreme Court has spoken on a given issue, a contradictory arbitral decision will not be enforced. Further, while many arbitration clauses limit the arbitrator's authority to the interpretation of the agreement, that does not foreclose arbitrators from considering analogous judicial or administrative authority as part of its decision making. The degree to which arbitrators look beyond the contract will vary from arbitrator to arbitrator and issue to issue. Courts will allow some latitude in this regard -- but, this court believed that the language of the Mobil Oil opinion was explicit enough not to indulge much arbitral discretion. Students should examine whether Judge Hogan merely paid lip service to the notion of deference or whether deference in this case would plainly have amounted to an abdication of judicial
responsibility and condonation of a violation of Virginia law. They should, as part of this analysis, discuss the extent to which arbitrators should call upon analogous precedent for guidance.

**Case:** *Sharpe v. NFL Players Ass'n*

**Primary reason for inclusion:** To illustrate the importance of following arbitration procedures and exhausting contractual remedies.

**Points to emphasize:**

1) **Plaintiff instigated the arbitration process and then sought to have the matter resolved in a judicial forum.** The collective bargaining agreement allows for the initiation of grievances by the player or the NFLPA. As will be discussed below, it seems that, even when the player files a grievance on his own behalf, the union is never totally divorced from the process (directly or indirectly).

2) **Because the arbitration claim against the Packers was pending at the time of the lawsuit, the court refused to consider the plaintiff's claim against the team and the union -- both of which are inextricably entwined.** Students should here consider what purpose is to be served by staying any judicial action pending arbitration. Issues such as possible futility, judicial economy, and pre-eminence of arbitration as a dispute-resolution mechanism should be explored as part of this discussion. Also, students should be asked to consider what hat the union wears at the arbitration stage of the proceeding -- even though an individual player has activated the machinery.

**Notes and Questions:**

While the distinctions are often elusive, students here should be given a brief reprise on the concepts of ripeness, primary jurisdiction, and exhaustion of remedies. The differentiation may help to explain judicial hair-splitting in assessing whether to assert jurisdiction in a particular case. For a useful summary of such issues see William F. Fox, Jr., *Understanding Administrative Law* 271-285 (1992).

N&Q 2 somewhat loosely suggests that in the pending arbitration the union may be serving as the plaintiff/grievant's representative. This point reiterates the statement made above regarding the "iffy" status of the union in this context. A perusal of the collective bargaining agreement shows that the players association is arguably still a part of the process. A question of the union's allegiance thus arises in cases where the issues raised may be relevant to the union's future representation of grievants with related claims even though the union sees little merit in the instant grievance and is, at some level, at war with the grievant.

The remainder of the *Notes and Questions* speak for themselves in terms of the need to be attentive to procedural prerequisites and the unique aspects of injury grievances. The question posed at the end of N&Q 5 is largely one of opinion, but the response most likely would be that even the elaborate injury grievance language leaves room for interpretation. For example, whether an injury is football-related or whether it was a new (as opposed to an aggravated) condition still may present difficult questions for examining physicians and/or arbitrators.

**Salary Recompense During a Strike**
The introduction to Section C provides an overview of an employee's right to compensation during a work stoppage. This introduction, together with the appropriate section of Chapter 14, should provide the students with an adequate, albeit sketchy, synopsis of the relevant law in this area. The players' agents have attempted to protect their clients from the vagaries of injuries, work stoppages, and other occurrences that interfere with performance by negotiating salary guarantees. As we saw in Chapter 6, the effectiveness of these guarantees will turn on the language of the contract and other ancillary circumstances that manifest the parties' intent. The following case, which was one of a series of cases involving the applicability of a salary guarantee provision in the face of a strike, illustrates that a player's eligibility for continued salary during a strike will often depend upon subtle factors and slight variations in contract language.

Case: *Tommy John Arbitration, Case No. 50(D)*

**Primary reason for inclusion:** To provide a brief overview of broad salary guarantee clauses and their applicability to strikes or related work stoppages.

**Points to emphasize:**

1) The Special Covenants provision of Tommy John's contract guaranteed his salary unless the player "arbitrarily" declined to "render his professional services." As the arbitrator indicated, the language was unremarkable, and the ultimate resolution of this case turned on the negotiating history and other pertinent background.

2) Despite specifically asking that the salary guarantee be qualified in several ways, the club neglected to ask that the broad guarantee exclude situations in which John did not play because of a players' strike. After the contract's Special Covenants had been signed by the club, owner George Steinbrenner raised this issue and, as a result, the contract was modified to exclude recompense during a strike if the club would guarantee payment during the lockout and would up the ante on an insurance policy. After the league president allegedly refused to approve the lockout addendum, and the parties engaged in more sabre rattling, the club told the players that it would agree to the Special Covenants as originally agreed upon, with no qualifying language regarding either a strike or a lockout. Thus, this "arbitrarily refuse to work" verbiage in the Special Covenants was really presented to the arbitrator as a naked abstraction.

3) There is no dispute about John's entitlement to recompense while he was disabled. The controversy centered on the grievant's eligibility subsequent to his recovery but prior to the termination of the strike. The arbitrator rejected the clubs arguments that the contract was intended to address injuries not work stoppages and that John was ineligible for benefits.

**Notes and Questions:**

N&Q 1 is answered by references to the negotiating history surrounding John's standard player contract. The arbitrator concluded that the owner's remonstrations and subsequent recanting established his acquiescence in John's interpretation of the questionable language. John adduced evidence of correspondence between the parties establishing that the salary guarantee clause would apply in a strike context. Absent this additional information, it is likely that the arbitrator would have denied John's grievance. *See Arbitration Between Major League Baseball Player*
N&Qs 2 and 3 emphasize the importance of protecting one's client at the transaction stage. Again, the key to success will rest upon the parties' bargaining strength. As discussed in Chapter 5, the ability to insist on precise language and the strategic prudence of such persistence will depend upon the economic power of the adversaries. Many arbitrators, consistent with one of the traditional contract interpretation saws, will construe an ambiguous contract against the drafter. Of course, given the perceptions of today's wealthy and well-represented athletes, together with the relative openness and bi-lateral input (as opposed to the boilerplate language of the remainder of the standard player contracts) characterizing special covenants language, this interpretation stand-by may be ignored with increased frequency.

N&Q 4 requires students to revisit the *John* opinion at pages 797-798. Conceivably, a declaration that a player would have not worked even if physically able, would require a reassessment of the "arbitrarily refuse" language and a resolution of that ambiguous phraseology in the context of a strike. Yet, the arbitrator suggests that, even if the player were to proclaim support for the strike, his disability deprived him of any choice in the matter. Therefore, it would be difficult to argue persuasively that he willfully withheld his services. Of course, if there were no salary guarantee, the player would probably be ineligible for compensation during a strike even if he were truly disabled. The expressed rationale has been that, whether he was on strike or disabled, absent a guarantee provision, he or she would not receive any recompense during the period in which he or she was ineligible to perform. See *Arbitration Between Major League Players Ass'n and Major League Baseball Players Relations Comm., Inc.*, Panel Decision No. 49. Regarding alternative service, the club's ability to insist that a player perform functions other than traditional play would turn on the language of the guarantee read together with other pertinent provisions of the standard player contract, the collective bargaining agreement, and, of course, any pertinent negotiating history.

### III. Salary Arbitration

The excerpt from Frederick Donegan's article will provide students with a useful overview of salary arbitration in major league baseball. Students should be encouraged to focus on the arbitration format, particularly the "last best offer" procedure. Also, students should be asked to assess the impact of salary arbitration upon spiraling salaries in the era of qualified free agency. The Notes and Questions following the Donegan excerpt seize on these points. In responding to the questions, students should be made aware that the "last best offer" procedure eliminates outlandish demands on both sides because it prohibits the arbitrator from issuing a compromise award. It has always been hoped that this approach will streamline the negotiating process and, in many respects, provide an impetus for realistic proposals that will oftentimes obviate the need for arbitration.

In some respects salary arbitration is viewed by owners as more of an anathema than free agency itself. Once an arbitrator has slotted a player at a particular level, that designation becomes a new floor above which all similarly-situated players will insist upon becoming eligible for free agency. It has been a source of considerable consternation since its inception and, as the second *Silverman* case in Chapter 15 illustrated, was a major bone of contention in the 1994-95 negotiations and strike.

Finally, students should be asked to revisit *Silverman* and, armed with a more detailed explanation of salary arbitration, discuss whether this form of grievance adjustment should be deemed a mandatory subject of bargaining.
CHAPTER 17
DISCRIMINATION AND SPORTS

I. Introduction

This chapter could be expanded into an entire volume itself. An attempt was made to provide a cross-section of discrimination problems arising in the world of sports. Unlike earlier chapters, Chapter 17 treats legal issues in both professional and amateur sports contexts (see, e.g., the discussion of Title IX). Hopefully, this chapter will stimulate both student and professor interest in this topic, and perhaps will provide the impetus for other courses. One of us currently teaches a seminar entitled Race, Gender and Sports, and we are available to discuss any thoughts or questions that you may have regarding such a seminar.

II. Sex Discrimination and Professional Sports

Case: Ludtke v. Kuhn

Primary reason for inclusion: To introduce students to the types of discrimination faced by women who seek to enter sports-related professions historically occupied by men, and to familiarize students with the concept of state action as it applies to constitutional issues arising in a sports context.

Points to emphasize:

1) The key factor contributing to a finding of state action included the stadium lease arrangement with the City of New York, which resulted in considerable interdependence between the Yankees and the City of New York. Thus, professional sports teams and leagues may be vulnerable to constitutional attack notwithstanding their essentially private character.

2) Having found the requisite state action, the court warmly embraced the plaintiff's equal protection and due process claims. In this regard, the court was confronted with dueling rights -- the plaintiff's right to equal treatment under the law versus the player's right to privacy. It is noteworthy, that the players themselves did not object to the presence of female reporters in the locker room. Students should address the extent to which this factor may have had a psychological impact on the court.

3) The league rule functionally threatened the livelihood of female reporters who would have been denied an equal opportunity to gain access to players and stories that were available to other journalists. At this point it is advisable that students consider whether even if privacy concerns are implicated, there were less onerous alternatives that the league could have employed. For example, after many high-profile sporting events, reporters are now given the opportunity to meet players and coaches in a large interview room immediately following the game or match.

Notes and Questions:

N&Q 1 illustrates that the NCAA is likely immune from sanction under the constitution, but that each member institution may be vulnerable if the requisite state action exists. Thus, a
public institution will not avoid constitutional censure simply because it is a member of the
NCAA, but the NCAA as a governing body will not be deemed a state action.

N&Q 2 explores the possible unstated motivations underlying the court's decision. Doubtless, the fact that the players were vocally unopposed to the presence of female reporters influenced the court's assessment of whether the privacy issues would outweigh the equal protection and due process concerns. While the questions raised involve guesswork, it seems logical to assume that the league's rationale was not purely a concern for privacy. Certainly, subsequent incidents in which players have engaged in lewd and demeaning displays in front of female reporters underscore the problems of sexual tension. The celebrated case of Boston Globe reporter Lisa Olson, who allegedly was subject to ridicule and abuse in the New England Patriots locker room, presents the most glaring illustration. The question about the gay reporter forces students to confront whether the issue is one of preservation of locker room maleness or one of sexual discomfort.

N&Qs 3, 4, and 5 present the omnipresent slippery slope phenomenon. Logically, men should be permitted in a women's locker room much the same as women are permitted to enter a similar male enclave. Yet, the issue becomes more delicate as we consider the sensitivities or vulnerabilities of younger athletes. Students should be encouraged to attempt to identify a point, if any, at which the equal protection and due process considerations in Ludtke are outweighed by other countervailing factors.


Primary reason for inclusion: To demonstrate the difficulties encountered by women and minorities who seek upper-echelon positions in sports related enterprises.

Points to emphasize:

1) The elements of the prima facie case and the shifting burdens of persuasion and proof should be highlighted. We have characterized the employer's burden of production and persuasion as requiring a showing that the discriminatory business practice was "consistent" with business necessity or related to the particular job. The statute calls for the employer to establish business necessity and job relatedness. However, in practical application it appears as though the courts have applied these defenses in the disjunctive or at least have presupposed that one begets the other. These issues are revisited in more detail in the Notes and Questions that follow the case.

2) The court found that the plaintiff had produced insufficient evidence to establish discriminatory motive as a factor in NBC's decision to deny the Sports Director's position Ms. Roth. Again, emphasis should be placed upon Roth's mixed motive claim and the resultant burden upon the defendant.

3) The court found that the plaintiff had failed even to establish a prima facie case. While the court acknowledged that plaintiff need not prove "flawless" performance, it nonetheless concluded that she lacked the skills necessary to fulfill the demands of the job. It is necessary here to point out that the court had doubts about Roth's "creativity" and "leadership." There are few more amorphous or subjective terms, and therein lies the problem. The court's acknowledgment of the validity of such subjective variables in the employment decision underscores the hurdles that a Title VII plaintiff has in attempting to demonstrate competency in a particular managerial position.
4) Students should be aware of the distinctions between the court's treatment of plaintiff's application for the director, as opposed to associate director, position. In the former, the court denied that a prima facie case had been shown and added that, even assuming the establishment of such prima facie case, NBC showed that legitimate reasons prompted the decision at issue. With regard to the associate director position, the court found that Roth had made out a prima facie case but that NBC had effectively rebutted it by establishing legitimate business reasons -- and that such justification was not pretextual.

Notes and Questions:

N&Qs 1 and 2 provide a summary of the various types of Title VII claims and the burdens of proof and available defenses that attend each one. They elaborate on the analysis contained in Roth and discussed in the Postema case that follows.

N&Q 3 focuses upon the BFOQ defense and its relationship to employer "consumer preference" arguments. Students should discuss the viability of arguments that compliance with Title VII will result in a loss of consumer patronage. Frequently, employers will claim that their customers will not patronize their product or service if the sales force or other personnel are members of certain protected classes. Controlling precedent suggests that this defense will seldom be effective. This issue is discussed further in the Notes and Questions following the Postema case.

Case: Postema v. National League of Professional Baseball Clubs

Primary reason for inclusion: To illustrate the effects of the "good old boy" network in professional sports and, again, to expose the frailties of Title VII as a cause of action where the ultimate employment decision is based on subjective criteria.

Points to emphasize:

1) The litany of verbal abuse is noteworthy. These facts provoke discussion of whether this type of "aggressive" colloquy is part of baseball. There are those who would argue that an inability to "handle" this type of language, which is part of baseball's culture, might suggest that women are not ready to accept the travails of umpiring Major League Baseball games. The obvious rejoinder is that the type of "commentary" visited upon Postema, particularly with no kinship or camaraderie of fellow umpires, seemingly went far beyond the typical umpire baiting.

2) Plaintiff could not establish a prima facie case in the denial of her application for a Major League umpiring position. The league simply did not hire any other umpires during the period within which the plaintiff applied; thus, one of the fundamental elements necessary to establish a prima facie case (unsuccessful application for a vacant position) was lacking.

3) With regard to the Triple A termination claim, the court denied the league's motion for summary judgment. The matter was reserved for subsequent decision after more facts could be adduced regarding the defendant American League's participation in the plaintiff's discharge from Triple A. This point is important because it illustrates that third party conduct precipitating discriminatory conduct may violate Title VII.

Notes and Questions:
N&Qs 1 through 4 revisit issues that were addressed earlier in the chapter, to wit, subjective criteria and consumer preference. The use of subjective factors in assessing one's fitness is prevalent in upper echelon jobs, particularly in a sports context. Yet, as N&Q 2 indicates, abstract factors are not relevant to an assessment of an umpiring position, and it is at least arguable that employment of these types of criteria in an umpiring context could be viewed as a pretext to avoid hiring female umpires. Clearly, consumer acceptance will not qualify as a BFOQ and will likely entertain little success as an offered business justification. Should co-worker rejection be given greater deference as a defense, especially where teamwork is an essential part of the enterprise? It is doubtful that the hostility of co-workers and resultant counter-productivity would justify an employer's disparate treatment -- but the point (revisited in N&Q 8) is worthy of discussion. Even if the BFOQ were grounded in fears for the female employee's health and safety, there is little likelihood that it would prevail on that basis alone. The active involvement of women in the military and the court's unwillingness to risk frustrating Title VII in the name of paternalism or protection portends that this type of defense will continue to be unavailing.

N&Qs 5 through 10 provide background information and require no elaboration. With respect to the questions at the end of N&Q 5, experience in a particular field on the surface clearly is a legitimate factor in many employment decisions. However, in evaluating its legitimacy, attention should be given to its job-relatedness, the degree to which it has been deemed as a relevant employment criteria as applied to other employees, and the employer's past practices of precluding job candidates from satisfying those criteria (i.e., denying access to a certain job and then making experience in that job a prerequisite to another position).

N&Q 11 through 13 raise questions that require a differentiation between a BFOQ defense to a disparate treatment claim and a business necessity defense to a disparate impact claim. Students should be encouraged to compare and contrast the situations presented in these notes and to offer possible solutions (legislative or otherwise) that might correct what they may deem to be a statutory technicality.

N&Qs 14 through 17 reprise the subjectivity factor and stress that the use of amorphous factors is a license to legitimize latent biases and preconceptions that Title VII and related legislation were designed to eradicate. The article that follows these notes highlights the problem and offers a solution that is creative but perhaps a little too sanguine. Given Major League Baseball's checkered past in the area of race relations, it is certainly arguable that Professor Shropshire's approach could fall upon deaf ears. The Notes and Questions that follow the Shropshire piece should provoke considerable student comment regarding affirmative action generally and its utility in addressing the problem of underrepresentation of minorities in sports management positions. Students should also be asked to explain why black entrepreneurship has encountered resistance even from other African Americans. Finally, the irresistible issue is whether certain "elite" sports such as golf and tennis have (consciously or unconsciously) systematically excluded African Americans. Inevitably, the debate turns to whether the discrimination is based upon racism or simply is a product of economics and class differentiation. The article following N&Q 5 sheds some light on this issue.

III. Race Discrimination and Professional Sports

The Notes and Questions that follow the Ethnic Newswatch piece and the Bodo excerpts speak for themselves, but they do compel some exploration of subconscious or subterranean racism or class discrimination. In this regard, students should be encouraged to identify facially neutral aspects of country club sports that serve to exclude various groups.

IV. The Problem of Logos
Case: *Harjo v. Pro-Football, Inc.*

**Primary reason for inclusion:** To present a recent illustration of a judicial/administrative challenge to logos that may disparage a minority group.

**Points to emphasize:**

1) Trademark laws may provide a vehicle to challenge offensive logos.

2) The difficulty that plaintiffs will encounter is the timing of the logo's registration. The ultimate outcome will turn upon the scandalous nature of the trademark at the time of the registration.

3) Notwithstanding the apparent impediments to a successful claim, this case is still pending and the trademark judges have refused to dismiss the allegations. This factor alone is somewhat remarkable given the manner in which the Redskins are idolized in the District of Columbia. It will be interesting to see whether the death of controversial owner Jack Kent Cooke has may impact on the eventual disposition of this case.

**Notes and Questions:**

The *Notes and Questions* seek to raise student consciousness of the logo issue but also ask whether there has been an overreaction in some instances. The cited articles are very enlightening in terms of identifying the concerns that minorities share and helping non-minorities understand the significance of the nickname controversy. Students might be interested to know that some of the more pejorative "mascots" had very benign and, in fact, complimentary origins. For example, the Cleveland American League franchise was renamed the Indians in honor of a former Native American player, Louis Sockalexis, who had become a cult hero. Again, an irresistible question is whether the legitimacy of the motives should make any difference when the dignity of an entire class of people has been compromised.

Few pieces of recent legislation have generated the controversy and critical commentary provoked by Title IX. While an entire course could be devoted to the legal and social ramifications of this statute and the attendant regulations, the *Brown University* case should provide an instructive overview of the many issues that have arisen in the years following Title IX's enactment.

**V. Discrimination and College Sports**

**(A) Women and Intercollegiate Athletics; Title IX**

**Case:** *Cohen v. Brown University*

**Primary reason for inclusion:** To highlight the types of issues that have been at the forefront of Title IX litigation and to point out potential downsides to Title IX, including the compliance by contraction phenomenon and possible adverse effects upon male and female minorities.

**Points to emphasize:**
1) Title IX is not program-specific, but rather is applied institution-wide if any part of the school receives federal funds. This result was statutorily mandated in direct response to the Supreme Court's Grove City decision which adopted a program-specific approach.

2) The administrative regulations are a critical part of Title IX. Both HHS and DED have been entrusted with the regulatory responsibility, but DED is considered to be the governing administrative body. Courts have accorded its regulations considerable deference, especially given the interstices left by the legislation itself.

3) There are several ways in which an institution can violate Title IX delineated by three major compliance areas. The most common point of attack has centered upon "Effective Accommodation of Student Interests and Abilities." Students should be familiar with all three compliance areas, particularly "effective accommodation" and the three benchmarks that attend this third category. It is noteworthy that the first of the ten suggested levels of inquiry in the second compliance area ("Equivalence in Other Athletic Benefits and Opportunities") is "whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes...." The correlation of this element as a "level of inquiry" for the second area of compliance and, at the same time, as its own discrete compliance area has served to confuse litigants and jurists alike.

4) The court stresses the term "full accommodation" and interprets the DED regulations strictly, prompting defendant Brown University to argue that the entire statutory scheme is unrealistic. Students should be asked whether the First Circuit's opinion is borne from a desire to apply and enforce Title IX in the most vigilant manner or a desire to employ a mechanical approach that is more "serviceable" and predictable -- even if it yields some unfair results. In this sense, some attention should be paid to Brown's track record and to the question of whether Brown represents the type of discriminating scofflaw that Title IX seeks to eliminate.

5) The burden of proof, which has been subject to so much massaging and refinement in other anti-discrimination legislation, is perceived by the First Circuit to be a simple calculus, not needing analogous reference points. Students should be asked whether the court's interpretation of the burden allocation, applied literally, makes it almost impossible for an institution to defend a Title IX lawsuit once a prima facie case has been proved.

5) Footnote 15 seems to cause more emotional student reaction to Title IX than most other aspects. Students should focus on it for revisitation in the Notes and Questions.

Notes and Questions:

N&Qs 1 through 3 expand upon the Brown case and are self-explanatory. N&Qs 4 and 5, however, probe a little deeper into the potential consequences of full compliance both from the standpoint of the historically overrepresented population (read "white males") as well as from the vantage point of already disenfranchised students who may now be pushed further into intercollegiate athletic oblivion. Reference to the cited articles should provide a fertile ground for a lively and provocative debate. For another outstanding treatment of this issue, as well as a provocative discussion of race and gender issues in intercollegiate athletics, see Rodney K. Smith, When Ignorance is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics, 61 Missouri L. Rev. 329 (1996).
(B) African Americans and Intercollegiate Athletics: Myriad Problems with Few Solutions

Professor Leroy Clark's article succinctly articulates the problem confronting minorities in college athletics. It segues conveniently from the previous discussions of Title IX compliance and its possible adverse impact on minorities. It is worthwhile reading not only because Professor Clark is one of the more well-respected and creative commentators in the Civil Rights areas, but because it causes us to rethink college athletics and the continuing efficacy of the current model. His approach is directed primarily to minority youth but it plainly has far-reaching implications.

The Notes and Questions following Professor Clark's piece cite examples of other responses to the problems bedeviling college athletics. Students should be encouraged to consider these approaches and assess whether they are realistic given the entrenched nature and economic realities of college sports as we know them.

VI. Equal Pay for Equal Work: Gender-Based Discrimination in Coaches' Compensation

Equal pay is an issue that has not commanded center stage attention in sports law. Obviously, the dearth of litigation or other controversy is due to the absence of significant numbers of female coaches or athletes operating on the same scale as male coaches. However, with the emergence of women's athletic programs providing both more job opportunities and an expanded learning ground for future coaches, equal pay issues could become more prominent. The types of issues that could arise are reflected in the Stanley case.

Case: Stanley v. University of Southern California

Primary reason for inclusion: To present students with case precedent that provides an overview of a typical "equal pay" analysis in a sports context.

Points to emphasize:

1) The basketball coach with whom the plaintiff compared herself, George Raveling, was one of the more well-respected coaches in college basketball and a prominent member of the Black Coaches Association. It is difficult to assess the psychological impact of such a factor; however, given the importance the court placed upon the pressure on Raveling's program and the revenue that the program generated were critical components of the court's finding that the male coach assumed greater responsibility than the plaintiff.

2) The principal infirmity in Coach Stanley's case is her failure to address relevant evidence to support her claims. In this regard, students should be cautioned that prevailing views denigrating women or other protected classes and societal indifference to the concerns of these groups, while offensive, will often be irrelevant to a determination of whether an employer has discriminated against a member or members of that class in a given case. In the cited case, the plaintiff not only attempts to prove her case by showing that the university failed to promote women's sports (a somewhat amorphous contention in itself) but she attempted to demonstrate this fact by introducing evidence of "societal discrimination."

3) As the Notes and Questions indicate, the employer in an equal pay case has layers of defenses. The plaintiff's ability to succeed will depend upon a clear showing that the skills, efforts, and responsibilities were essentially the same. The available evidence in the
subject case seemed to demonstrate vast differences between plaintiff and the "comparable" male coaches. Do you agree?

Notes and Questions:

N&Qs 1 and 4 provide background sources for additional research in the area of "equal pay" in an athletic context and the general relationship between the Equal Pay Act and Title VII.

N&Q 2 requires students to differentiate the rebuttal of a *prima facie* case from the failure to establish a *prima facie* case *ab initio*. In reality, a prudent approach to the question posed would be to argue the points addressed in the alternative.

N&Q 3 requires students to focus upon whether the Equal Pay Act addresses the person performing the coaching function or the gender of those individuals performing for the coach. Students should consider the interrelationships between and among Title VII, Title IX, and the Equal Pay Act in order to understand fully the possible avenues of redress for a coach alleging discrimination in compensation based on his or her gender or the gender of the team that the putative plaintiff coaches.
CHAPTER 18
TORTS AND SPORTS

I. Introduction

This chapter attempts to provide an overview of the more common tort issues that have arisen in the world of sports. For the most part, the questions presented are subject to a typical torts analysis. However, there are certain idiosyncratic aspects of sports that may lend a peculiar twist to the analysis such as the potential for spectators to be injured at a game (negligence), the public figure status of certain athletes (defamation), etc. Still students should be reminded that, notwithstanding the somewhat unique circumstances that the world of sports often presents, torts is still torts and applying traditional principles is the appropriate starting point.

II. Torts and the Participant

(A) On the Field Disputes: Agressiveness or Assault

Perhaps the most fascinating aspect of the torts/sports regimen involves the participants themselves -- the players. The lines drawn between aggressiveness and recklessness are often almost imperceptible. The bite felt around the world in the Mike Tyson - Evander Holyfield heavyweight championship appears to represent a clear line of demarcation between overly aggressive play and conduct that constitutes criminal or tortious conduct. Yet, is it clear that Holyfield would emerge successfully in a tort action against, or that a district attorney would indict, Tyson for his behavior? The question is by no means simple and we provide no ready answers. However, the chapter does attempt to identify the proper levels of inquiry.

Case: Hackbart v. Cincinnati Bengals, Inc.

Primary reason for inclusion: To help students to identify the possible bases for a tort action stemming from one participant's infliction of an injury on another participant during an athletic contest.

Points to emphasize:

1) The trial court dismissed the plaintiff's claim, reasoning that it was part of the competitive warfare of professional football, notwithstanding the fact that the player who administered the blow in question admitted that it was entwined with, and prompted by, his frustration. The trial court noted that, after the play in question, the players returned to their sidelines without complaining to officials and that the officials did not even assess a penalty.

2) The court of appeals reversed the lower court, explaining that the rules of football do not condone the conduct involved and that, in other contexts, the conduct would have created some civil liability.

3) The court of appeals also took pains to differentiate negligence, recklessness, and assault/battery. By articulating a view that a cause of action can proceed even if the on-the-field activity does not amount to an intent to cause physical harm, the court makes clear that athletes may be liable for their reckless (or perhaps even negligent) conduct.

Notes and Questions:
N&Qs 1 through 3 constitute a mini-primer on negligence, recklessness, and assault and battery; they also treat the available defenses to these causes of action. Students should focus on these issues and refresh their memories on the rudiments of each area, particularly with regard to emerging, jurisdiction-peculiar doctrines such as comparative fault.

N&Q 4 poses a semi-rhetorical question in the sense that the late-hit and low-blow are typically "accidental" or, at worst, "heat of the moment" events. On one hand, given the passions ignited in many sporting events, they would probably be characterized as foreseeable. On the other hand, these actions are transgressions in the eyes of the sport and its officials and, in that sense, could be labelled as unforeseeable. Of course, there are circumstances in which a late-hit or low-blow could very well be the product of some malice aforethought. During the current (1997) NFL season a defensive player was fined heavily for a late hit after it was determined that the perpetrator believed that the victim had made anonymous, threatening telephone calls to his home. Certainly, the fact that one chooses the athletic arena for his locus of revenge does not insulate such conduct from civil or even criminal sanction. Further, to the extent that on-the-field injuries are foreseeable, even those that violate the rules of the game, intentional or reckless acts could receive little sympathy or indulgence from a reviewing court.

N&Q 5 raises a question that is plaguing lawyers and social scientists of various stripes; it is likely to be a subject to which considerable scholarship will be devoted in the next decade. Among the sub-issues that have been spawned are: 1) whether athletes are more prone to domestic violence or whether they simply are more "visible" and more prone to exposure in the print and broadcast media; 2) whether incidents of female abuse of partners is higher among female athletes than non-athletes; 3) whether athletes involved in contact sports are more likely to engage in violence with partners than non-athletes or athletes involved in non-contact sports; and 4) whether courts, agencies, and other symbols of authority are more indulgent of athletes who are guilty of domestic violence and treat them with a cavalier "boys will be boys" attitude. These issues and myriad others are worthy of some classroom discussion and certainly more in-depth research.

In N&Q 6, the questions posed at the beginning are again close calls, subject to anyone's guess. The note offers a plausible approach to these questions, but is not so foolhardy or ambitious as to presume to provide definitive answers. As with any issue involving scope of employment, no manner of definition will provide a litmus test approach; the resolution in each case will turn on subtle and almost imperceptible differences in the facts presented.

N&Q 7 again raises questions that will provoke hours of vigorous debate and little finality. While apologizing for the cop-out, we demur from suggesting definitive answers for the simple reason that the culture of sports, particularly its "play with the little hurts" mentality makes any attempt to provide precise responses a risky exercise. A review of the suggested scholarship in this area will aid in the analysis and will provide workable approaches to the problem. Yet, for the physician making the tough call, or the attorney giving that person advice, the responsibilities are substantial and perils of offending someone are significant. That is, a conservative approach is likely to alienate the players, fans, alumni (in a college setting) and numerous others. A rasher course could jeopardize one's professional career if the athlete should eventually succumb to injuries that are the predictable product of an earlier condition.

(B) Workers' Compensation

The section on worker compensation is only intended to provide an overview of the basic principles governing the law in this area. Students should be advised that any workers'
compensation issues that arise should be addressed by resort to the particular state law that
governs the employment relationship. Students should also be advised that, in a professional
sports context, the determination of what jurisdiction's law governs a particular situation may
present its own share of problems. Finally, students should be made aware of the fact that workers
compensation is the exclusive remedy for most "workplace torts" but that fairly recent judicial
authority has circumscribed the "exclusive remedy" concept particularly in the face of intentional
torts.

Case: Sielecki v. New York Yankees

Primary reason for inclusion: To demonstrate that the standards governing what constitutes a
compensable injury vary from jurisdiction to jurisdiction.

Points to emphasize:

1) The event leading to an injury entitling a claimant to compensation need not be
   a single, traumatic occurrence.

2) There may be circumstances under which professional athletes may be statutorily
   excluded from coverage for workers' compensation.

3) The fact that surgery had corrected an earlier condition was irrelevant; the act of
   pitching aggravated the earlier condition and, under the theory of "repeated trauma,"
   justified a finding that plaintiff was eligible for workers' compensation.

Notes and Questions:

Each of the questions posed at the end of this case are answered in the notes themselves
with appropriate cited authority in each case. Generally, students do not have enough general
understanding of the discrete area of workers' compensation to answer the questions themselves
or to use analogous authority to formulate a response. In this section of the chapter, we do not
provide a great deal of background in this area. Thus, in this section, as we have at points in other
chapters, rather than "hide the ball" we posed the typical questions and provided likely responses
and relevant precedent.

(C) Injuries Caused by Defective Equipment

Case: Everett v. Bucky Warren

Primary reason for inclusion: To make students aware that injuries caused by defective
equipment can raise issues of negligence and strict liability and that the causes of action could lie
against the team, retailer, or manufacturer.

Points to emphasize:

1) The trial court ruled in favor of the defendants on the negligence claim
   notwithstanding the jury's verdict. The appellate court makes it abundantly clear that
   questions such as contributory negligence should rarely be taken from a jury; thus, it
   reverses the trial court's judgment n.o.v. on this issue. Perhaps this point would be
   appropriate for a general discussion of the deference that an appellate court shows a fact
   finder (in this instance, a jury) on issues such as those presented in a tort case.
2) The court, having concluded that the helmet in question was negligently designed and supplied, stressed that assumption of risk carries a subjective standard. This factor could be critical because it mandates that the determination turn on the particular "victim's" individual assessment of the helmet's safety (not unlike a victim of duress in a contracts case). Accordingly, in certain circumstances, there may be no finding of "assumption of risk" even if a more sophisticated user would have known that the wearing of the helmet presented some potential hazard.

3) The question as to whether assumption of risk is a viable defense to a strict liability claim was never reached because this court found that plaintiff had not assumed the risk. However, this issue could resurrect itself in other contexts in which there may be stronger evidence that some risk had been assumed.

4) With regard to the merits of the strict liability issue, liability can arise either from the manufacturer's error in producing the product or from the product design itself. In this case, the fault lay in the helmet design itself.

Notes and Questions:

In N&Q 1, we pose a question that forces students to consider the significance of a subjective approach to assumption of risk and contributory negligence. Once again, how a sophisticated or even merely "reasonable" person may have responded will likely be irrelevant to a determination of whether plaintiff assumed the risk of the injury or contributed to its occurrence.

N&Q 2 suggests that students consider the outer reaches of a plaintiff's negligence claim against a manufacturer for a failure to warn users of the possible risks. The cited authorities join the debate and require students to consider whether it makes sense to require manufacturers to apprise users of conditions and possible risks that should be obvious to the average consumer. For example, should the manufacturer of a trampoline be required to expose users to the apparent risks of falling or landing in a haphazard fashion? As they consider these questions, they should be apprised of the fact that many consumers, including superstar athletes, have been seriously injured jumping on a trampoline. Trivia answer: Brian Steinberg. Can you supply the question?

N&Q 3 necessitates a review of the relevant code provisions to ascertain whether an action grounded in contract, as well as the obvious tort claims, could be successful. A perusal of Sections 2-314 and 2-315 suggests that such a contention, at the least, states a colorable claim. While ascertaining whether plaintiff would prevail in such a suit would require a greater exposition of the facts, it seems as though plaintiff could present a forceful argument on this issue. See John E. Murray, Murray on Contracts § 100 at 542 et. seq. (3d ed. 1990).

The answer to N&Q 4 is fairly self-evident. It is probable that the risks of injury and the attendant liability that may be assumed by manufacturers will result in increased prices for several reasons, including the mentioned reduction in the number of competitors and higher insurance, as well as the expenditure of more money on research and development.

III. Torts and the Spectator

As the cases in this section demonstrate, injured spectators will rarely find a hospitable judiciary due to the nature of sporting events and the risks inherent in attendance. As a prefatory matter, students should be asked whether jurists' (and jurors') experience as fans makes them more
likely to be sensitive to the injured spectator or to the sport itself (and, derivatively, to the stadium owner or club).

Case: *Friedman v. Houston Sports Ass’n*

**Primary reason for inclusion:** To expose students to a stadium owner's duty of care and the emerging concept of comparative fault.

**Points to emphasize:**

1) This court affirmed the trial court's judgment n.o.v. and reaffirmed the notion that a stadium owner has limited liability for spectator injuries.

**Notes and Questions:**

The first question points out some careless drafting in the majority opinion. The tenor of the decision suggests that the court assumes that the prospect of 30,000 spectators asking for protected seats is extremely unlikely or that such a demand would be unreasonable and beyond the stolen owner's duty (e.g., a screened area in center field 400 feet from home plate would rest well outside the stadium owner's need to protect the spectators.

N&Q 2 has been addressed above and again raises the issue of risk assumption as a subjective determination. It is possible that the stadium owner's duty might not be directly or theoretically affected but that the interest to which he or she may claim assumption of risk may be. N&Q 3 simply introduces the next case.

Case: *Neinstein v. Los Angeles Dodgers, Inc.*

**Primary reason for inclusion:** To illustrate that comparative fault concepts do not affect the definition of a stadium owner's duty to exercise care nor does it eliminate the potential applicability of assumption of risk notions. It also clarifies the extent of the stadium owner's duty and reinforces the idea that his or her responsibilities are narrowly drawn.

**Points to emphasize:**

1) This court perceives the case as presenting a limited choice for stadium owners: 1) disturb all spectators, which will compromise everyone's view as well as the playing of the game itself; and 2) leave things as they are and escalate ticket prices to secure insurance or create a fund to compensate fans for injuries incurred during the athletic contest. Once framing the issue in this fashion, the court removed any hope for the plaintiff that tort law would provide consolation or compensation.

2) The court concluded that there a baseball stadium owner assumes limited liability for spectator injuries. It is important to note that the court does not deny that a stadium owner has a duty of care; it simply defined that duty in a narrowly circumscribed fashion. The court, however, did not find that a stadium owner had a duty to warn.

3) Justice Cohen's concurring opinion requires students to revisit an issue addressed earlier, the difference in approach in any type of assumption of risk regimen where a pre-adolescent child is involved. In this case, the distinction was not material because the
minor plaintiff was accompanied by an adult. However, the question may beg for more definitive resolution in other contexts.

4) Reframing what it considers to be a better choice of alternatives, the court reasoned that a person who fears injury because of his or her proximity to the field, has the choice of refraining from attending a game or sitting in a more distant portion of the park.

5) The court acknowledged that the development of comparative fault does not eliminate the defense of assumption of risk but, simply, that the elimination of contributory negligence may, to the extent assumption of risk is a part of that calculus, limit the applicability of that defense.

6) In this case, there was no need to inject the assumption of risk component into the analysis because the court found that there was no breach of any duty on the part of the stadium owner. Therefore, comparative fault, which assumes the existence of some fault on the part of the defendant, is inapplicable.

7) With regard to the duty to warn, this court reinforces the traditional view that there is no duty to warn and that putative plaintiffs in this context are sufficiently warned by the very nature of the sport. Again, this point may be diluted in the context of a minor or other person who would not in the ordinary course of events recognize the dangers inherent in a particular enterprise.

Notes and Questions:

N&Q 1 synopsizes the court’s opinion but asks whether comparative negligence and assumption of risk can peacefully coexist. There is little doubt but that this defense has more limited applicability in a comparative fault regimes; however, as this court suggests, it appears to have survived at some level.

N&Qs 2 and 3 ask students their opinions regarding the parameters of a duty to provide safe seating. The question calls for the impressions of a legal commentator as well as of a fan. It provides the basis for an interesting discussion as to whether or not the two perspectives digress at some point. This observation is particularly relevant with regard to N&Q 3 and Judge Compton’s rather severe admonition that fans who do not want to take the risk of being struck by a ball should avoid the game altogether. Judge Cook in the cited Davidoff case disdains the cavalier options that Judge Compton provides the average fan.

N&Q 4 simply advises students of the best repository of the available cases dealing with spectator injuries, although the list is probably somewhat dated.

IV. Torts and the Written or Spoken Word: Defamation and the Sports Figure's Right of Privacy

The introduction to this section provides students with a cursory overview of defamation and available defenses. Obviously, given the high public profile of many sports figures, these issues have particular idiosyncracies in the context of a sports law casebook. *Time, Inc. v. Johnston* and *Spahn v. Julian Messner, Inc.* illustrate some of the unique aspects of these questions to the sports and entertainment fields.

Case: *Time, Inc. v. Johnston*
Primary reason for inclusion: To familiarize students with the notion of "privileged publication" and to illustrate that a sports figure or other public figure may maintain this "special status" years after much of his or her notoriety has subsided.

Points to emphasize:

1) When the publication in question was released, the plaintiff was still a college basketball coach, although much of his fame and public acclaim had dissipated. Earlier, he had been a prominent member of the Philadelphia Warriors basketball team of the National Basketball Association.

2) As the notes indicate, the court was somewhat mystified by the fact that plaintiff would question the applicability of privilege due to his falling from the public eye, yet, at the same time, claim that he was entitled to judgment because his reputation and standing as a coach depended significantly on public recognition. This internal inconsistency warrants special mention to the students because it is a potential problem any time a public figure sues for defamation and, simultaneously, questions his continued status as a public figure.

3) This court also showed that it was extremely hospitable to defendant's position by articulating an expansive view of the public figure concept, holding that the first amendment's protection applies to matters of public interest, even if the persons are anonymous or have limited fame. Thus, the court found two ways to justify its positive response to defendant's privilege argument: plaintiff's public figure status, and the general interest surrounding the topic.

4) Finally, the court summarily dismissed plaintiff's argument that, assuming the existence of the privilege, the defendant's publication was reckless. As the notes indicate, students should be conscious of the fact that basketball icon Red Auerbach was used as support for the statements made in the publication and that such reliance may have a profound adverse effect on a plaintiff's claim that particular comments were malicious or reckless.

5) One additional noteworthy point that is seemingly most compelling in a sports context is the court's indulgence of the print media's use of hyperbole. Students should be reminded of judicial concerns for the proverbial "slippery slope" in the sense that the finding of defamation here could paralyze sports commentary otherwise viewed as colorful and vivid.

Notes and Questions:

Response to N&Q 1 has been addressed above and clearly presents courts with grounds for finding that a similar plaintiff's contentions are internally inconsistent. Students should be asked how they would tailor a complaint to achieve the plaintiff's objectives, without, in the process, giving defendant a basis to argue that the particular publication was privileged.

With respect to N&Q 2, this point visits the court's understanding that media hyperbole is part of the game. To be sure, schoolyard epithets that have been adopted by the press and manufacturers of sports equipment, reinforces the idea that a certain amount of exaggeration should be tolerated and that plaintiff has somewhat overreacted to the publication in this case.
With regard to N&Qs 3 and 4, there is little doubt that an athlete's fame is fleeting and that, with the exception of very few Hall of Fame type performers, today's heroes are today's trivia answers. Given this fact, it might seem appropriate for courts to draw the lines governing the duration of a public figure's notoriety somewhat tighter. The quote contained in N&Q 4 is extremely salient because it highlights the problem presented by the supposed public figure who really has no access to the press for purposes of rejoinder.

N&Q 5 poses the public figure/invasion of privacy issue and introduces the Spahn case that treats this question.

**Case: Spahn v. Julian Messner, Inc.**

**Primary reason for inclusion:** To introduce students to the notion of the right of privacy and its applicability in the context of sports personages.

**Points to emphasize:**

1. The court provides a worthwhile introduction into the notion of one's right to privacy with particular emphasis upon a comparison and connection between the Fourth Amendment's protections from governmental intrusions into one's private life and what has been characterized as a person's "private" right of privacy.

2. Acknowledging that the right of privacy is inviolate at one level, the court also suggests that it is not absolute. Thus, the sports figure who profits from his or her acclaim in the news media or other compromise of his or her privacy must recognize that the right to privacy can be waived -- again, with certain qualifications.

3. The most important qualification to this waiver idea deals with the public figure's continued right to avoid commercialization of his or her personality through publications that do not really involve "dissemination of news or information." The court also cautioned that such immunity from invasion applies to fictionalized or novelized accounts.

4. The court gives an elaborate (heavily edited) account of the numerous examples of license that the author took with respect to Warren Spahn. In some instances, the accounts were not disparaging but, rather, painted a portrait of a person of heroic proportions. In numerous respects, however, the accounts were untrue and did not reflect even a slight indication that the reporting was the product of industrious research.

5. Finally, despite the broad swath cut by the public figure privilege, in this instance the plaintiff was successful, although his damages were fairly minimal.

**Notes and Questions:**

With regard to the first question, it is conceivable that plaintiff may still have been able to maintain this action simply because there was such an extensive exposition of plaintiff's private life that was not newsworthy. Of course, to the extent that plaintiff would claim that he had been placed in a false light in the public eye, the facts assumed in N&Q 1 would compromise his chance of success.

With respect to N&Q 2, this issue resurrects the question raised in the Johnston case. Certainly, the waiver or immunity that defendant would assert would have limited utility in the
context of someone who had been away from the sport that had made him famous for twenty years. Unlike Johnston, however, it is conceivable that this factor would not jeopardize his privacy claim in the same way that Johnston’s response to the privilege issue created an internal inconsistency in his defamation action.

N&Qs 3 and 4 require students to assess whether certain types of falsehoods may be better than others. A fictionalized account of a heavyweight boxer that paints him as a war hero and great scholar when, in fact, the person was a conscientious objector and someone who had failed to finish high school (to the extent that scholars must attend school) is untrue but not disparaging. Would an action lie under any of the criteria for invasion of privacy discussed above? In this regard, how much sanctuary can a defendant find in the fact that his or her account constitutes historical fiction. The court seems to indicate that, while a fictionalized account may at first blush appear to provide greater latitude to an author, such novelization will not create absolute immunity for the publication.

Finally, the final N&Q requires students to engage in a discussion on the role of the press vis-a-vis today’s sports figures. The advent of the new communications age and the availability of information through the Internet and similar technology, together with the fashionable status of irreverent journalism and "shock jock" approaches to reporting, suggest that rules governing privacy and defamation may be in need of some retooling.
CHAPTER NINETEEN --
INTELLECTUAL PROPERTY AND SPORTS

I. INTRODUCTION

This Chapter focuses on one of the most quickly developing areas of legal analysis of professional sports -- issues of intellectual property. For those classes in which the Torts and Sports chapter (Chapter 18) has just been completed, this chapter offers a transition from libel and defamation and related aspects of a sports personality's "right of privacy" to the individual's ownership of a "right of publicity." For those classes that will not cover Torts and Sports and those that are proceeding out of order, this chapter presents the issue in a manner that should be self-contained and should not suffer in any way because Chapter 18 has been bypassed.

The business of sports has always been primarily a business of intangible assets (e.g., the license to enter the ballpark to view a game, the contract right to a player's services, the "franchise" or membership right in an association that entitles the owner of a team to be part of a league, and the right to broadcast a sports exhibition or game). However, little has been written about that phenomenon. In recent years the lawyers and businessmen have focused a great deal more attention on the limits and character of those intangible rights, as well as ways to protect intangible rights. Advances in technology, from television to cable to satellite to the internet, all increase the attention being focused on sports and the intangible rights associated with them.

In general, the law of intellectual property is no different for sports than for other businesses, especially businesses in the entertainment industries. Entertainment industry celebrities and athletes face similar issues concerning the misappropriation of their names and likenesses and claims that their performances have been misappropriated. However, there are issues that are different for sports, and this chapter focuses primarily on those issues. What are the ownership rights of athletes, team owners, and other event producers?

In a perfect world, this chapter would be preceded by "primer chapters" about rights of privacy and publicity, copyright law, trademark law, and the common law of misappropriation. [We have not even attempted to cover patent law issues, which primarily arise for the equipment businesses, such as golf equipment manufacturers.] However, this chapter is intended as a mere survey of these subject matters, and few sports law courses will be able to take enough time (and to require students to do enough reading) to study these subjects in depth. The goal of this chapter is to focus sufficient coverage on the issues and cases that bear directly on the business of sports, in order that the instructor or student who masters the cases covered in these chapters should be well on his or her way to knowing much more than the above average (or even the well above average) sports law practitioner. The instructor or student will certainly not be prepared to hang out a shingle as an intellectual property expert, but they should have a working knowledge of the general subject matter and the most important sports law cases in these areas.
II. ANALYSIS OF THE CASES


Primary Reason for Inclusion: This case addresses the issue of under what circumstances an athlete is entitled to restrict commercial use of his or her identity, including statistical information about the athlete's career.

Points to Emphasize: This case (like virtually all others addressing similar facts) gives broad protection to information about athletes. Draw attention to the case at issue -- (1) none of the athletes were identified on the box, so it was not the identity of the individual golfers that was used to attract the person reading the box and considering a purchase. The purchaser of the game had to buy it (or hear about its contents from a previous purchaser) to know what golfers were featured in the game, and (2) the data is merely publicly available, factually accurate information about each of the twenty-three golfers.

The case draws a line between "dissemination of news or articles or biographies" and other "commercial project[s]." This can be fertile ground for a discussion about hypotheticals -- e.g., (1) a newspaper that runs a "fantasy baseball" game, in which the subscribers select a team of players and the players' statistics yield winners and losers or (2) a golf encyclopedia that includes statistics about all of the top professional golfers who ever lived, with a fold-out game board and instructions for how to play a game using the statistics in the book. See also N&Q 5.

The case includes the judge's ruminations that "[p]erhaps the basic and underlying theory is that a person has the right to enjoy the fruits of his own industry free from unjustified interference . . ." Does the theory depend on the idea that the product interferes with the athlete's own effort to exploit his identity commercially? The court seems to say it does not, but suggests the reason may be to preserve the option for the athlete in the future:

They may not all desire to capitalize upon their names in the commercial field, beyond or apart from that in which they have reached their known excellence. However, because they presently do not should not be justification for others to do so because of the void. They may desire to do it later.

A hypothetical to consider would be a reclusive ex-athlete who has sworn that he will never support a commercial endeavor involving his statistics for religious reasons. Does he have a right of no-publicity?

Consider the game producer who does not want to track down all of those ex-athletes. Could he produce a PGA Tour game with the statistics of top former PGA Tour players? How about a Major League Baseball game, with statistical information about top former major leaguers? The answer to these questions turns on what rights the tour or the league
secured from their athletes by virtue of the express or implied contracts that existed between the athletes/players and the league/tour. See also N&Q 4, below.

Notes and Questions: N&Q 1 forces the student to focus on what claim was asserted. The case says the plaintiffs contended the defendants' use of their names and career statistics was "an invasion of their privacy and an unfair exploitation and commercialization of their names and reputations." Strictly speaking, it appears to have been a tort case for invasion of privacy. However, there are elements of different theories suggested by the court's analysis -- unjust enrichment, misappropriation, and so on.

N&Q 2 addresses the fact that although generally based on a "right of publicity" theory, the idea is one of a protected intellectual property interest, like a copyright or a trademark or a patent -- such that it can be sold, assigned or licensed, on an exclusive or non-exclusive basis, and the assignee or licensee can file claims against alleged infringers.

N&Q 3 and 4 explore the policy issues presented by the fact that athletes' decisions to refuse to license their identities or to assign too high a price for such a license may prevent the development and production of worthwhile products. It also mentions the role of players associations in "group licensing" -- granting a licensee the right to utilize the identities of all of its members in a group setting, such as trading cards, computer or board games, and other licensed products.

N&Q 5 discusses the issue of right of publicity after death, which is a question that varies from state to state, based on interpretation of common law or statutes specifically enacted to create a post-death right for the celebrity's estate.


Primary Reason for Inclusion: This case presents a case on the line between news use and commercial exploitation and is one of the few cases resolved against the athlete.

Points to Emphasize: The magazine went about as far as a magazine can go in utilizing Joe Namath's identity to sell magazines. It did not just say "read about Joe Namath in Sports Illustrated." It promoted the magazine as "How to Get Close to Joe Namath." Could readers have been misled into believing that Joe Namath had endorsed Sports Illustrated or had been paid by Sports Illustrated for the use of his name?

The courts says the following:

There is nothing degrading, derogatory or untruthful about the copy.

Couldn't the same have been said about the contents of the game in Palmer? Namath had not suggested it was defamatory. Somehow the newspaper or magazine can extend its right to
publish news information about public figures to be a right to use the public's interest in athletes and celebrities to promote the sale of the newspaper or magazine.

Notes and Questions: N&Q 1 & 2 ask how far the envelope of promoting the paper can be pushed. What about shirts depicting cover pages of *Sports Illustrated*? Does it matter if the t-shirts were sold and generated a profit as opposed to being given away for free as part of an effort to increase the subscription base?

N&Q 3 and 4 provide information about how professional sports leagues and tours purport to secure specific rights of publicity from their athletes. Those agreements are based on contract law principles, and the questions are intended to consider issues of implied contract, contracts of adhesion, and similar issues.

Case: **Hirsch v. S.C. Johnson & Son, Inc.**, 90 Wis. 2d 379, 280 N.W.2d 129 (1979)

Primary Reason for Inclusion: This case provides a more comprehensive analysis of the history of the concept of a right of publicity as it explores a different issue about the scope of the protection -- does it extend to an athlete's nickname? It also discusses protection of a nickname under the law that protects trade names.

Points to Emphasize: The court discusses the public policy implications and attempts to craft a cause of action consistent with public policy. However, that yields different conclusions -- for example, the court is concerned about whether something is in fact been taken from the athlete. Therefore, the court discusses the fact that Hirsch had taken steps to enhance and protect his public image and its value for promotional purposes and the fact that Hirsch had been paid in the past for the use of his name.

The decision also discusses trademark law and its similarity to and relationship to common law protection of an athlete's right of publicity. This provides a transition into the next portion of the chapter -- where trademark and copyright law are discussed as the means by which other intangible assets are protected.

The decision does not hold that Hirsch should prevail -- merely that he is entitled to have the issue submitted to a jury, which will have to assess whether the name of the product - - Crazylegs -- refers to Hirsch and is likely to confuse the public into believing that Hirsch sponsored the product.

Notes and Questions: N&Q 1 asks whether the test should be the intent of the seller of the product or whether consumers share the sellers' belief and are likely to be confused. If the sellers believe that the public will associate the product with the athlete because the nickname is used, but the public misses the association, there was an intent to misappropriate the athlete's right of publicity, but nothing was really lost because the athlete's effort to promote himself was not diluted. One might take the position that if you intended to misappropriate the athlete's right of publicity and the plaintiff can prove it, he should not be required to conduct consumer surveys to
prove the effort was successful. Even if most consumers were not misled, if any were, that may be enough.

N&Q 2 and 3 identify cases that have considered whether drawings and other depictions that are recognizable as artists' renditions of an athlete or a celebrity infringe upon the right of publicity. As with nicknames, if the effort is to identify a particular person, that person must be consulted.


Primary Reason for Inclusion: Provides an introduction to basic concepts of trademark law and suits for infringement of rights protected by trademark law.

Points to Emphasize: The facts and the testimony of the defendants clearly established that the intent of the infringers was to sell merchandise to consumers who would associate "New Jersey Giants" with the "New York Giants" football team, and they had engaged in the same conduct to cause "New York Cosmos" fans to purchase "New Jersey Cosmos" merchandise. The court expressly found that the defendants' efforts were only about making money, and the challenged conduct did not involve an effort to convince the team, which is located in New Jersey, and plays its home games in East Rutherford (the Meadowlands), New Jersey, to change its name. Therefore, the judge concluded that this case did not raise concerns about using trademark law to infringe upon freedom of speech.

The court discusses some of the concerns of trademark law -- for example, the defendants' merchandise competes with the merchandise sold by legitimate licensees of the team via NFL Properties and, thereby, hurts the plaintiffs' sales. In addition, the defendants' merchandise is of extremely inferior quality, and it might cause the consumer of that merchandise to have a bad impression of the NFL and all of its properly licensed merchandise.

Despite the clear evidence of intent, plaintiffs had to produce evidence of actual consumer confusion, which they did -- the form of a consumer survey conducted in accordance with accepted principles of survey research, showing evidence of confusion.

The court rejects the argument that the licensed merchandise promotes the watching of NFL games. The importance is that one of the plaintiffs' arguments is that the infringement in selling the merchandise infringed the plaintiffs' "service marks," as well as their trademarks. If the infringement interfered with the plaintiffs' sale of tickets to football games and interfered with the NFL's efforts to cause viewers to watch television broadcasts of NFL games, it would have constituted service mark infringement as well as trademark infringement.

The trademark infringement yields several independent causes of action -- violation of the federal Lanham Act, state law unfair competition, tortious misappropriation of the plaintiffs' goodwill and reputation, and tortious interference with business relationships.
Notes and Questions: N&Q 1 discusses a much more difficult question -- situations where businesses in a city from whence a team has relocated use the departed team's name (e.g., the Baltimore Colts and the Brooklyn Dodgers). In one reported decision, a Canadian Football League team was prevented from calling itself the Baltimore Colts or the Baltimore CFL Colts, to identify a football team, and Major League Baseball tried to prevent a restaurant in New York City from calling itself the Brooklyn Dodger Sports Bar and Restaurant. Could fans in Baltimore really have believed the Baltimore CFL Colts were affiliated with the NFL team that had left Baltimore more than ten years earlier? Would New York residents believe the sports bar was associated with a Los Angeles baseball team? If the latter were true, would it have adversely affected Major League Baseball? If consumers had bad experiences at the sports bar, is it likely that such experiences would have hurt the business of Major League Baseball? What about Major League Baseball's business of licensing restaurants? Should it matter if Major League Baseball has or has not, in fact, licensed any sports bars to date?

Other cases -- involving major professional sports league teams adopting names previously used by much lesser teams in the same, similar, or different sports -- are discussed in 2-4. Is it perhaps more difficult to show consumer confusion when you operate such a lesser, less widely known team that consumers may not know you exist, and are therefore less likely to be confused? Is that fair? What if the same percentage of people who have ever heard of your team are confused, even though those people are a small percentage of the overall population?

Is there a need for injunctions to prevent the use of the same or similar names? N&Q 5 chronicles the great many teams in different sports and the great number of universities that share the same names. Can those facts be used to help an alleged infringer defend an infringement suit?

N&Q 6 discusses the fact that a consumer survey may identify confusion among people who have no interest in the business or products of either the alleged infringer or the plaintiff, but no confusion among anyone with an interest in the businesses at issue in the case. The Boston Marathon case, discussed below, suggests that indifferent consumers' views may be disregarded when assessing the likelihood of consumer confusion. N&Q 6 goes on to suggest that the NFL's concern may not have been one of confusion, but rather that the Baltimore CFL Colts might prove to be a rallying point for former fans of the NFL Colts, who might turn their loyalty toward the new professional team, thereby limiting the ability of the NFL to transfer that loyalty to a future NFL expansion (or relocated) team in Baltimore or to continue to sell old Baltimore Colts memorabilia in Baltimore. The issue is, "what interests are we trying to protect?" Is it a concern for consumer confusion or are we protecting some intangible asset that we believe belongs to the team or league? This is a theme that carries through the rest of the cases in this Chapter.

N&Q 7 suggests that only consumers who will be targeted by the alleged infringer should matter -- Baltimore area residents who might buy Baltimore CFL Colts merchandise matter -- not fans in Indiana who may or may not support the Indianapolis Colts, but who are
unlikely to ever have the opportunity to purchase CFL Colts merchandise, the sale of which is likely to be limited to the team's immediate drawing area.

**Case:** National Football League v. Governor of Delaware, 435 F. Supp. 1372 (D. Del. 1977)

**Primary Reason for Inclusion:** Decision addresses teams' "ownership" of the city in which they play their home games as the name or "trademark" of the team, and the extent to which a professional sports league can regulate the use that is made of the results of league games.

**Points to Emphasize:** This decision is merely a single decision of one United States District Court, issued over twenty years ago, dealing with the specific facts before the court. However, ever since this decision was issued, professional sports leagues and other businesses have operated under the assumption that it is permissible, with a disclaimer, to refer to professional sports league teams, for commercial purposes, by reference to the city in which the teams play their home games (or the geographic identifier the teams use -- e.g., New York for the Jets and Giants, who play their home games in East Rutherford, New Jersey). As a result, advertisers may play an athlete to participate in an advertisement and refer to the fact that the athlete plays for St. Louis or Boston, without perceiving a need to secure a license from the league or team for which the athlete plays.

The issue, once again, is what belongs to a team or a league. If it is clear that the reference is to the performance of the Minnesota Vikings football team, but we believe consumers will not be confused into believing that the Vikings authorized the use or that the commercial venture has an association with the Vikings, is there nevertheless an intangible property interest the Vikings own and can protect through the courts?

Put differently -- it is the question the court asks -- do defendants' efforts to capitalize on the popularity of NFL football constitute misappropriation of assets or rights belonging to the plaintiffs? It is clear that an effort to capitalize on the popularity of NFL football is permissible, as long as the defendants do not misappropriate something that belongs exclusively to the NFL and its member teams. This may be a good time to introduce the concept of improper misappropriation based on the common law that was introduced by the Supreme Court in International News Service v. Associated Press, 248 U.S. 215 (1918). This Supreme Court precedent will be the primary focus of the Second Circuit's decision in the Motorola case in 1997, which is the last featured case in this Chapter.

In connection with the legal question of misappropriation, this might be a good time for a discussion of the business concept of "ambush marketing." That concept is introduced in the text at pages 941-943.

One point for discussion might be whether the students believe the fact that the defendant was a state government entity that was generating profits for state governmental purposes influenced the court's decision.
Another point for discussion might be the question of whether disclaimers cure everything. The court in this case required a "clear and conspicuous statement that Scoreboard is not associated with or authorized by the National Football League." Can profiteers infringe upon professional sports league marks and logos and simply include a disclaimer that the products are not associated in any way with the NFL or its member teams? The answer is, of course, that they cannot. It is only when there is no use made of the protected marks or logos, as in this case when only unprotectable city names are used. In addition, if it were necessary to use the league's registered marks in an incidental manner to identify a service being performed or an offer being provided by the alleged infringers (e.g., in a publication that offers information and analysis of each team in a league and its players), that may be permitted, as long as done in a manner that does not create "an impression in the mind of the relevant segment of the public that a connection exists between the services offered and the holder of the registered mark when no such connection exists."

**Notes and Questions:** N&Q 1 focuses on the question of the sufficiency of a disclaimer in another sports-related context, a tee-shirt that described the Boston Marathon.

N&Q 2 discusses one case that dealt with alleged ambush marketing in a common context. A corporation runs a promotion that features officially licensed sports merchandise, which the corporation purchases. Does the corporation have to pay the sports organization for the right to conduct such a promotion? In this case, the court concluded that consumers were misled into believing there was an association between the corporation and the sports organization or a license from the latter to the former.

N&Q 3 provides commentary about the consequences of the district court's decision. N&Q 4 describes the dormancy of state lotteries based on the outcome of sports league games and its re-emergence in the late 1980's. The NFL v. Governor of Delaware decision had noted the NFL's concern about fifty states having lotteries based on NFL games, but had not been impressed by that concern. This note describes the NBA's litigation against Oregon and N&Q 5 chronicles the leagues' legislative initiative when states finally started following Delaware's lead. The litigation was not as successful as the legislative efforts. The leagues' lobbying efforts resulted in federal legislation barring any additional states from following the lead of Delaware and Oregon.

**Case:** Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986)

**Primary Reason for Inclusion:** This case is included to introduce students to copyright law and the application of intellectual property protection to television broadcasts of sporting events. The case includes discussion of how the players' rights of publicity, discussed earlier in this Chapter, interface with the copyright in the broadcast.

**Points to Emphasize:** This lawsuit basically arose as part of the collective bargaining process. All of the Major League Baseball teams filed this litigation, seeking a declaratory judgment, in
response to the claim by the Major League Baseball players association that the players held property rights in the broadcast of the players' performances during major league baseball games. The clubs sought a definitive affirmance of their position on this issue, in order to remove any uncertainty about the position being asserted by the players and to avoid having to bargain about that issue.

The court concluded that the telecasts (not the games themselves) were copyrightable. The creativity necessary for a work to be copyrightable is supplied by the decisionmaking concerning how the game is filmed.

The court also concluded that participation in the broadcasts of games was within the scope of the players' employment. Therefore, the court held that the broadcasts constituted works made for hire and the employers (the teams) were presumed to own all rights in the broadcasts "in the absence of an agreement to the contrary."

The court then turned to the question of how the teams' copyright in the broadcasts interacts with the players' rights of publicity. The court held that the federal copyright law preempts the players' rights of publicity in their game-time performances as soon as they are broadcast and are thereby "fixed in tangible form."

Notes and Questions: N&Q 1 seeks to apply the reasoning of the Baltimore Orioles case to licensing by a professional sports league, to an unrelated corporation, of the right to use game footage in advertisements. The league is not permitted to license use that would cause the ordinary viewer to believe the licensee's product has been endorsed by players featured in the footage, without the players' consent. Other questions about permissible use must be answered with reference to copyright law, as modified (if at all) by the collective bargaining agreement between the players and the teams in the league, as explained in the Baltimore Orioles case.

N&Q 2 identifies the very difficult conflict of laws question presented by the fact that Major League Baseball's operations include two teams located in Canada. The issue was alluded to by the court at the end of its opinion.

N&Q 3-6 address issues of labor law suggested by the decision. The NLRB staff issued an advice memorandum that concluded that football players' rights of publicity for group licensing constitute mandatory subjects of bargaining (N&Q 4); therefore, if that position is sustained, that element of the Mackey labor exemption test from Chapter Nine would be satisfied in N&Q 5. N&Q 6 asks under what circumstances an individual employee can yield to his employer rights that he would otherwise retain under the terms of the collective bargaining agreement. Cross-references to the relevant portions of Chapters 14 and 15 are included in the note.

The Baltimore Orioles decision does not address whether the players' performances or the games, as separated from the recordings of those games, can be copyrighted. N&Q 7 poses that question and refers the students to the 1997 Motorola decision, the last
featured case in this Chapter, where the United States Court of Appeals for the Second Circuit held that sports events or performances are not "authored" and cannot be copyrighted.

Case: **WCVB-TV v. Boston Athletic Ass'n, 926 F.2d 42 (1st Cir. 1991)**

**Primary Reason for Inclusion:** This case focuses on the question of what it is that a sports event producer owns -- what constitutes misappropriation or ambush marketing or impermissible free riding, and what constitutes an asset created by the event producer that can be used in various ways by anyone who chooses to do so?

**Points to Emphasize:** This case presented a very interesting hypothetical situation concerning a professional sports event. For years, Channel 5 had broadcast the Boston Marathon live in the Boston area, without securing any license from the producer of the event, the Boston Athletic Association ("BAA"). In the late 1980's and early 1990's, the BAA believed it needed to generate additional revenue in order to offer increased prize money to attract top competitors. The New York Marathon and other marathons that offered much greater prize money were leaving Boston without a first class field of runners. One of the BAA's plans for generating increased revenue was to grant exclusive television broadcast rights to the event to one television station. Channel 5 participated in the competition for those broadcast rights, but made it clear that it intended to broadcast the marathon whether it received rights from the BAA, or not. Channel 5 did not secure the rights, and went ahead with its plan to broadcast live the marathon, from television cameras that showed the progress of the event, which is run on public streets. Channel 5 offered to "broadcast whatever disclaimers" the BAA would want, and to broadcast them at virtually whatever frequency the BAA might want (including every thirty seconds), to make it clear that the Channel 5 broadcast was not associated with the BAA and did not have "any special broadcasting status."

The court identifies an important distinction from other trademark cases -- there is no issue that consumers are being confused about whether they are watching the "real" Boston Marathon or a "knock-off," and many viewers may not have any idea (and may not care) whether they are watching an "officially sanctioned" broadcast or not.

The court then takes head-on the issue of what "free riding" or seeking to benefit commercially from public interest in someone else's product or business, is impermissible. Unless the BAA can identify a legally protected, intangible property interest that is being violated, they cannot cause the court to enjoin the alleged free riding.

**Notes and Questions:** The court discussed language from the Supreme Court's decision in **International News Service v. INS**, but at the end of the opinion states that it has not addressed issues of state law because those issues were not properly before the court. In fact, the INS case concerned the state common law concept of misappropriation. Therefore, it is not clear to what extent the court was rejecting the doctrine's applicability to this case. This issue is explored in N&Q 1 and 3.
Is the Boston Marathon case's significance limited to events run on public streets with respect to which the event producer cannot feasibly exclude competing broadcasters, in situations in which the event has historically been broadcast by television companies that have not been required to pay a fee? Does the court's reliance on the prior precedent involving a parade on public streets support that view? This issue is considered in N&Q 2.

N&Q 2 goes on to provide a history of cases about unauthorized radio broadcasts and play-by-play reporting. Those cases from the 1930's and 1950's generally supported sports event producers' right to prevent unauthorized broadcasts. The Boston Marathon decision and the next case, the 1997 Motorola decision, may have changed the legal landscape.

Case: National Basketball Ass'n v. Motorola, 105 F.3d 841 (2d Cir. 1997)

Primary Reason for Inclusion: This is a landmark decision that addresses issues concerning what alleged "free riding" can be blocked by producers of sports events. The decision discusses the extent to which the federal copyright laws preempt a state law "hot news" misappropriation claim based on INS v. AP and the scope of that misappropriation doctrine.

Points to Emphasize: This is a landmark decision issued in 1997 that dramatically changed the legal landscape. The district court had ruled for the NBA and the United States Court of Appeals for the Second Circuit ruled against the NBA in a broad and sweeping manner. As of this writing, requests for rehearing *en banc* or review by the Supreme Court pursuant to a writ of certiorari had not been resolved. The decision has not yet been interpreted or applied by lower courts. Therefore, its meaning and importance is not yet clear.

Prior to the Motorola decision, based on the cases cited in N&Q 2 following the Boston Marathon decision, it was generally thought that the line of what was and was not permissible would be drawn by some demarcation of whether the information being provided was sufficiently immediate and detailed as to constitute "play-by-play" coverage or something close enough as to draw people away from television or radio broadcasts or other "official," "licensed," or "authorized" coverage of the event. It was thought that the more the coverage looked like very current (up to the minute) news coverage of the event, as opposed to an alternative broadcast of the event, the more likely it was that the court would permit it, out of a concern about inhibiting the value of internet coverage and the electronic news coverage of the future.

There were many narrow ways in which the court could have resolved this case and still reversed the decision of the district court. For example, the court could have held that the minimal information provided by the pager at issue did not constitute a sufficient infringement upon any property interest of the NBA. However, that was not the course chosen by Judge Winter and his three-judge panel.
The opinion holds that only a narrow "hot-news" misappropriation claim, and not the broad application made of that doctrine by New York courts, survived the enactment of the 1976 amendments to the federal copyright laws. The court then set-out a narrow, restrictive five-part test (see page 981 and 987-88) that must be satisfied for a plaintiff to assert a "hot news' INS-like claim."

Although peripheral to the decision, the court's analysis of whether a game is copyrightable is interesting and a worthwhile issue for class discussion. This question had never been addressed squarely by a court, although the commentary had taken the position that sports events were not copyrightable.

Then, the analysis of whether taking facts from broadcasts constituted an infringement of the broadcast is an important part of the court's decision. By confirming that it was not an infringement, the court is permitting the generation of a wide variety of news and/or entertainment products by persons who simply watch the broadcasts and generate a product that concerns the sporting events that are being shown on television. It is not permissible to utilize the commentary that accompanies the broadcast or any of the copyrightable expression of the games, but the factual detail about the game itself can be reproduce and retransmitted without infringing the copyright in the telecast. The remaining question is whether the use that is made of the information violates the "hot-news" misappropriation requirements that the court holds survived the enactment of the 1976 copyright amendments.

The New York cases had perceived that there was a broad prohibition on misappropriation of undefined property rights of commercial value. The Metropolitan Opera case, discussed by the court in Motorola, went so far as to state that such misappropriation was commercially immoral and offensive to ethical principles, and thereby justified a "broad and flexible" prohibition. The court rejects that analysis and narrowly circumscribes the permissible misappropriation claims.

Notes and Questions: The notes and questions that follow the Motorola decision are designed both to explore the implications of the decision and to integrate the issues of the Motorola decision with the learning of the other cases in this Chapter, concerning copyright law, rights of publicity, and other legal theories.

N&Q 1 describes a lawsuit that was settled prior to the Motorola litigation by the grant of a license by the NFL. The question that is presented in N&Q 1 and 2 is whether an internet site could provide play-by-play descriptions of professional sports league games while they are in progress. If the sports league does not provide that type of coverage, is the fourth prong of the Motorola test satisfied? If a sports league provides that coverage on its own internet site (see N&Q 5), could they ever prove that the efforts of a competitor would so reduce their incentive to produce that coverage that its existence or quality would be threatened? Is it the internet coverage that would have to be threatened or the coverage of the games in the broadcasts? Footnote 8 of the decision (page 988) suggests that the "primary product" -- the
games or the television broadcast of those games -- would have to be threatened. N&Q 7 explores what evidence the league would have to present to satisfy its burden on that point.

If an independent internet provider can provide the information, presumably there is no basis for prohibiting enhancement of the presentation with various graphical depictions. Might it be more fun for some to "watch" the World Series games "live," with the players replaced by cartoon characters moving around the field? See N&Q 2.

N&Q 3 asks how the players' right of publicity claims work into this analysis. Presumably their rights of publicity are not infringed by incidental references to them that are necessary to describe the action in the game. However, what if an internet site included integrated access to biographical and statistical information about the players that enhanced the product. For example, the viewer could click on prompts that would disclose the batter's lifetime and season batting average against the pitcher he is facing and in situations with runners on base and two outs. The mere integration of access to that information onto the screen where the play-by-play description of the game occurs would seem to be permissible.

With respect to the hypothetical of N&Q 4, as long as a disclaimer is included that eliminates consumer confusion and makes it clear that the internet site is not authorized by or associated with the NFL, the NFL v. Governor of Delaware case suggests that teams can be identified for any purpose by city names, and Motorola indicates that there is no misappropriation if the entire team name is used to identify factually who is playing, as long as the five-part test is not violated.

N&Q 6 and 7 pose one question not answered by Motorola -- could anyone watch NFL games on television and conduct a radio broadcast of the game -- on the internet or over the air (assuming no infringement on the copyright of the broadcast -- no use of the commentary)? How would that violate the five-part test outlined in Motorola? How much would the NFL have to prove? Would the facts described in N&Q 7 be sufficient? Are they facts the NFL must prove in order to prevail?

N&Q 8 asks the policy question -- what should the law be in this area?
CHAPTER 20
THE PLAYER AGENT AND SPORTS

I. Introduction

The introductory portions of Chapter 20 are devoted to providing students with backgrounds on the nature of a sports agent's duties and responsibilities, the most prevalent complaints regarding their failure adequately to fulfill such obligations, and the various responses that have been implemented to address many of these problems. It is strongly recommended that the students read this introductory portion carefully to gain a general understanding of, and to remove several misconceptions about, the role that the typical sports agent plays.

While many functions are incident to a traditional law practice and involve legal representation of clients, numerous aspects of the sports agent's daily routine have nothing to do with the practice of law. The introduction will provide students with a summary of the broad panoply of functions that the agent serves.

Of equal significance is the considerable criticism that has been visited upon sports agents over the past twenty years. As in many other professions, the activities of the most flamboyant and frequently unscrupulous participants receive the most publicity and provoke the most sensational litigation. The cases that follow in the text provide stark illustrations of the various types of agent abuses that have occurred in the past twenty-five years, and the judicial, as well as legislative, responses to such abuses.

IV. Agent Abuses and Related Litigation

Case: Zinn v. Parrish

Primary reason for inclusion: To illustrate the care that an agent must exercise in representing his or her client, including assurances that proper licenses and registrations have been secured depending upon the type of advice being provided. In this case, the agent was vindicated and was able to enforce his contract with the athlete; however, the case is worthwhile to expose an agent’s potential vulnerability.

Points to emphasize:

1) Although the agent emerged victorious in this case, the lower court had concluded that his contract was void because he had served as an investment advisor without effecting the proper registration.

2) This court carefully differentiates ordinary business advice from securities advice. The court of appeals believed that the district court was far too expansive in its interpretation of the 1940 act, and that that legislation in no way was intended to govern the general relationship between an athlete and his manager or advisor. It is of considerable importance that the court found isolated transactions that may include some investment advice incident to the agent's principal purpose of negotiating players' contracts does not constitute the business of providing advice on investment securities that the act contemplates. Again, even though the agent escaped unscathed in this situation, the court did note that registration might be required even if the agent limited...
his activities to screening the securities recommendations of others prior to passing them along to his clients.

3) With regard to the defense that the agent had failed to satisfy the conditions of his contract, the district court concluded that, because the agent did not procure employment, provide substantial investment advice, or secure any more than the most superficial tax consultation, among other things, the agent had failed to fulfill his obligations of the agreement and was entitled to no recompense. The court of appeals emphasized that the actual securing of employment was not required by the agreement but, rather, that the agent was simply obliged to exercise reasonable efforts. Interestingly, the court, at different points, defines the agent's obligations as "good faith" efforts and "reasonable" efforts. Students should be instructed to focus on the possible distinctions between these two terms because one might suggest a reasonable person/objective approach while the other may suggest a more subjective good faith approach. In any event, the court's opinion makes it abundantly clear that the agent's duty was not actually to succeed in his attempts to secure employment or lucrative endorsement contracts but, rather, to make every effort to do so.

Notes and Questions:

With regard to N&Q 1, it is certainly arguable that certain aspects of the agent's contract would seemingly render it illusory and lacking consideration. Yet, given the nature of the business and the indulgence that courts have shown toward termination clauses, it is likely that these contracts will continue to be enforced notwithstanding certain illusory aspects.

With respect to N&Q 2, students are sometimes troubled at the notion that the court would seemingly tolerate isolated advice regarding securities from an "unregistered" agent. The suggestion has been made that an unsophisticated advisor (such as one who does not meet certain registration requirements or, at the least, is not cloaked with some cosmetic legitimacy through the registration) may give poor advice costing his client a considerable sum of money, even though such advice may only be given in an isolated and limited fashion. It is at least arguable that the agent's good faith and the absence of any conflict of interest does not correct all the evils that the statute sought to rectify.

N&Q 3 is simply a reprise of the material breach/substantial performance discussion that was entertained in the Performance section of Chapter 4. The potential risks of refusing to perform a contract under the assumption that the other side has materially breached should be emphasized to students, with Professor Farnsworth's quote on page 1012 providing the most telling illustration.

N&Q 4 again points out the potential differentiation between "good faith" efforts and "reasonable" efforts. Although the term "good faith" has been employed, it is conceivable that in ascertaining whether or not the proper efforts have been made a court will probably look beyond a subjective judgment and consider what others in the similar position would have done.

Case: Brown v. Woolf

Primary reason for inclusion: To familiarize the students with the notion of constructive fraud and to make students aware that even the most reputable of sports agents may be vulnerable to an athlete's claim of inadequate representation.
Points to emphasize:

1) Agents have exercised considerable care in marketing the potential result that they will be able to achieve for a particular client. There is often a thin line between puffing that does not amount to a promise and an actual representation or "warranty" equivalent in which the agent's failure to perform will constitute a contract breach or, at the very least, will give rise to a finding of misrepresentation or fraud that permits the other party to rescind the agreement.

2) The notion of constructive fraud embraces both contracts and torts components. Certainly, to the extent that it is a tort, remedial limitations inherent in contract law (e.g., that the remedy primarily is limited to compensatory damages) might not apply. It is also worthwhile to emphasize that, given the confidential nature and the fiduciary relationship in the agent/athlete context, it is conceivable that constructive fraud could be perpetrated without a fraudulent intent.

3) The fact that this case was tailored as a summary judgment is extremely relevant here because the court found considerable questions of fact that were unresolved. For this reason, the court, confronted with deposition excerpts, affidavits and other documentary evidence, denied the motion for summary judgment.

Notes and Questions:

N&Qs 1 and 4 are related. That is, N&Q 1 requires an explanation of the factors that would establish the tort of constructive fraud and an assessment of whether or not it was likely that plaintiff demonstrated the existence of such facts. N&Q 4 poses the question as to what evidence plaintiff should introduce to establish a contract breach or fraud. Among the facts that require further elaboration are whether the defendant/agent in fact made material statements regarding guaranteed results of future negotiations, whether any monies due and owing were withheld, and whether recklessness or oppressive conduct justifying punitive damages can be demonstrated.

N&Qs 2 and 3 compel students to review the measure of damages that would be available in the context of torts and contract actions and also requires them to revisit the basic rudiments of a summary judgment motion. The final question at the end of N&Q 3 really is one that is essentially rhetorical in the sense that obviously a summary judgment would be appropriate if there had been no material issues of fact and if the affidavits had effectively responded to any factual questions. See Rule 56(c), Fed. Rule Civ. Pro.

Case: Sims v. Argovitz

Primary reason for inclusion: To provide a case that exposes the worst elements of agent representation and the types of activities that have resulted in a clarion call for legislative action and other institutional response.

Points to emphasize:

1) Although defendant/agent Argovitz had made some effort to advise his client that he had applied for and later secured an interest in a football team that would at some point be bidding for his client's services, the court concluded that the client was simply unable to comprehend (and Argovitz knew that the client would be unable to comprehend) the degree of Argovitz's involvement with the club. In essence, the agent as a prominent
owner negotiated a standard player contract on behalf of both the club and the player. A more egregious conflict is difficult to envision. As the court pointed out, the governing league constitution prohibited the owner of any interest in a member club from acting as the representative of a player.

2) Among Argovitz's defenses was that an agent is not responsible for losses stemming from the agents decision to follow his principle's instructions. However, this tenet has no applicability in this case, according to the court, because the agent consciously placed himself in a position adverse to that of the principal.

3) Students should consider carefully the court's elaborate exposition of the facts in this case. It is noteworthy that the court does not find Sims to be an entirely credible witness; however, the court found all other testimony to be so "unappealing" that it rendered Sims' testimony unnecessary.

4) The statements of law listed at various points on pages 1020 and 1021 illustrate that Argovitz assumed the position of fiduciary in his relationship with Sims and that such position carried a high degree of responsibility which the defendant flagrantly disregarded. Perhaps the most telling aspect of this entire decision is the listing of the many matters of which defendant failed to apprise plaintiff. It is difficult to contemplate a situation in which someone bearing a fiduciary responsibility could have withheld more pertinent facts. Fortunately, cases like this have provided the impetus for more extensive legislation and a more pointed judicial response to the problems of agent abuse.

Notes and Questions:

N&Qs 1 and 2 provide background on the interrelationships between individual agents and collective bargaining representatives.

N&Q 3 raises the potential antitrust liability of a league that attempts to regulate agent activity by reaching agreement with the players' collective bargaining representative on rules governing such conduct. It is conceivable that such agreement could run afoul of the antitrust laws unless it were rendered exempt through the non-statutory labor exemption. Given the expansive view of the labor exemption by the Supreme Court in the Brown case, there seems to be a reasonable likelihood that the incorporation of an agreement to govern agent activity into a collective bargaining agreement would likewise be exempt. Whether or not the Baseball exemption would insulate a similar agreement between Major League Baseball and its Players' Association is anyone's guess given recent interpretations of the exemption by cases such as Piazza and Butterworth, addressed in Chapter 8. To the extent that the Baseball exemption is limited to matters involving the reserve clause, then clearly such agreements would rest outside the exemption. However, such a narrow interpretation of the exemption is subject to some question as discussed in the Notes and Questions following the Piazza case in Chapter 8.

With regard to N&Q 4, it is conceivable that such state laws could be deemed intrusions upon the NLRB's jurisdiction. Essentially, matters that are arguably protected by Section 7 or prohibited by Section 8 of the NLRA would be deemed exempt. However, certain matters are so deeply rooted in state concerns as to warrant local legislation even though arguably protected or prohibited by the cited sections of the NLRA. In this situation, it is at least arguable that protecting one's citizens from unscrupulous agents is a matter so grounded in state concerns so as to warrant legislation that would be enforceable and not preempted by federal law.
With regard to N&Q 5, it seems as though the Players' Association Regulations prohibiting representation of individual players is wholly appropriate. Not only does such individual representation create the appearance of impropriety in an area that is already rife with concerns regarding appropriate representation, it also could involve actual conflicts in the context of salary caps and other devices that may establish a point of departure between the best interests of the collective as a whole and the interests of individual athletes.

N&Q 6 answers itself in the sense that relying on the fact that the principal is following his agent's instructions is counterintuitive when the agent is unaware that the principal is a potential adversary.

N&Q 7 requires a revisitation of basic remedies available in a tort and contract context. Plainly, the advantage of suing in tort is that the possibility of punitive damages may be enhanced, unlike a contract action which is limited generally to compensatory damages. One other potential advantage is that the limitations period for a tort and contract action may vary, and a longer limitation period for one or the other could salvage a claim that otherwise would be time barred.

N&Q 8 raises the question of whether a victim of duress, misrepresentation, or similar conduct can forfeit his or her right to disaffirm by expressly or tacitly ratifying the agreement. As N&Q 8 indicates, there can be no ratification until the offending conduct ceases to exist.

In N&Q 9, students should be asked whether a contract negotiated with "a gun to one's head" is any less voidable because it constitutes a great deal for the victim. In the context of agent misconduct, the court will likely look not only at the subject case, but also will want to send a message that such misconduct will not be tolerated, even where no serious harm has resulted.

Case: Walters v. Fullwood

Primary reason for inclusion: To illustrate the types of abuses that occur in the representation of amateur athletes and also to demonstrate a creative approach to reaching the untoward acts of agents.

Points to emphasize:

1) Typically, where an agent has engaged in improper conduct with a college athlete, the principle victims in terms of outside sanction are often the athlete and the university. That is, college eligibility could be compromised, victories could be forfeited, etc. As part of the penalty, the university may be required to surrender revenues derived from postseason tournament participation. Through various state legislation and NCAA regulation, there have been attempts to reach the offending agent and expand the range of punishment beyond the student-athlete and the university. However, as we have seen, these penalties have not been totally responsive to the problems of agent misuse of power vis-a-vis colleges and their athletes.

2) By characterizing the relationship between student and athlete as a contract, the agent's disruption of such relationship gives rise to an argument that such conduct constitutes tortious interference with a contractual relationship.

3) In this case, the court "punishes" both parties by refusing to enforce the contract against the "breaching" defendant player and by denying the defendant's request to stay
this action and to compel arbitration. The critical aspect of this case illustrates that inappropriate agent conduct may be penalized in a variety of ways. State legislation, NCAA Rules and Regulations, certification by the National Football League Players Association, and creative common law approaches suggest that agent conduct will be subject to greater scrutiny in the future.

4) It is noteworthy that the plaintiff, Walters, and another agent, Lloyd Bloom, were subsequently indicted for mail fraud occasioned at least in part by the types of relationships with college athletes that characterized the relationship between plaintiff and defendant in the subject case. See N&Q 4. Students should be asked to address the applicability and prudence of criminal sanctions to address the problems of sports agent abuse.

Notes and Questions:

The first N&Q reiterates the principle that the court will not enmesh itself in a dispute involving two parties who have engaged in conduct that is violative of public policy. While Walter's actions in this case precluded him from the type of relief that he requested, the critical aspect of this litigation, the viability of a tortious interference claim, bears the greatest emphasis. N&Q 1 makes it very clear that, given the settled status of an enforceable contractual relationship between student/athlete and university, the tortious interference claim is an omnipresent possibility whenever an agent has in some way disturbed the relationship between student and university through fraudulent conduct or other untoward activity.

N&Q 2 requires students to revisit the types of issues that arise when a party seeking injunctive relief has unclean hands. Again, a determination as to whether or not a party is *in pari delicto* or somehow precluded from gaining the benefits of equity will vary from judge to judge and jurisdiction to jurisdiction. Suffice it to say that the lessons learned from *Weegham v. Killefer* and *Munchak Corp. v. Cunningham* in Chapter 6 will have applicability in contexts such as the subject case in terms of the fluid standard that courts will apply to "illegal" conduct or other conduct that would jeopardize one party's ability to "gain equity."

In N&Q 3 the question raised is whether or not this case would have been stayed pending arbitration. In all likelihood, with the prevailing judicial predilection toward staying court action until the voluntary dispute adjustment mechanisms can be completed, and the overriding principles involving exhaustion of remedies, it is likely that the matter would have been stayed. Of course, here, that prevailing view may not have been as compelling given the fact that the mechanism was not voluntarily agreed upon (such as you might find in a typical collective bargaining agreement).

N&Qs 4 through 6 simply provide the readers with some "fly on the wall"-type information regarding other types of agent conduct that has resulted in criminal sanction and further civil sanctions. Unfortunately, it speaks to a critical situation that continues to exist with respect to representation of amateur athletes.

Case: *George Foreman Associates, Ltd. v. Foreman*

**Primary reason for inclusion:** To familiarize students with the notion of boxing promotion and management of individual sports participants.

**Points to emphasize:**
1) The definition of manager at page 1035 is the critical question because of the placement of the plaintiff within the jurisdiction of the California State Athletic Commission. The term "manager" is broadly defined in the California code and, given the considerable power bequeathed to the plaintiff, clearly would place him within the crosshairs of a "manager" definition.

2) In two respects, the court found that Associates was indeed a manager of defendant and subject to the jurisdiction of the state athletic commission. This conclusion sounded the death knell for plaintiff's case because in numerous aspects the contract fails to comply with pertinent rules and regulations. Therefore, the agreement was unenforceable.

3) It is also noteworthy that there was no California precedent governing this controversy, but the court borrowed liberally on New York law. Students should be made aware of this psychological "comity" between New York and California in the entertainment and sports context given the fact that both states are intimately connected with, and derive considerable revenues from, those industries.

4) The remedy in this case was extremely bizarre and one that students might not see replicated in many other decisions. In essence, a defendant's motions for summary judgment were granted because the contracts were deemed to be illegal and unenforceable. Yet, as part of its remedy, characterized as "equitable," the court required the defendants to reimburse plaintiffs for sums that had been advanced, including money under the agreements found to be unenforceable.

Notes and Questions:

With regard to N&Q 1, the court gave "manager" a broad definition because it seems as though such construction is consistent with the spirit of the California code. Moreover, in a close case, it is likely that a court would give the broadest possible scope to such definition so as to place the issue within the considered discretion of the California State Athletic Commission, the agency vested with the authority to interpret questions involving proper representation of athletes, among other things.

With regard to N&Q 2, the plaintiff argued persuasively that the Commission had limited jurisdiction, extending only to boxing matches held in California. It is arguable that the Commission's assertion of jurisdiction does overextend the statutory authority provided by the State of California. However, the court differentiated the regulation of boxing matches from regulation of managers. With regard to the latter point, nothing in the statute restricted the coverage of those rules to contracts affecting bouts held in California. Therefore, the court concluded that the Commission had not exceeded its statutory mandate by regulating such agreements. Moreover, it is a commonly held tenet of administrative law that an agency in the first instance has authority to determine its own jurisdiction. While a reviewing court may take issue with the agency's determination, considerable discretion has been given to agencies in terms of ascertaining its own authority. This point does not suggest, of course, that an agency palpably ranging beyond its jurisdiction may escape a finding that it has acted ultra vires.
SAMPLE EXAMINATION QUESTIONS

The following are nine actual examinations in Sports and the Law. They are provided for your use as you see fit -- as sample questions to be distributed to and discussed with your students, or as samples for you to consider when drafting your own examination questions. We do not recommend that you use any of these same questions, primarily for reasons of security. These examinations have been used in the past, have been distributed to students as sample questions, and are on file as prior examinations at law schools where the authors of this casebook teach Sports and the Law. Therefore, there is no guarantee that your students will not have access to these questions.

As you will see, most of these examinations were intended to be two hours in length, as they were the examination for a two-credit course. One or two of the earlier examinations were for three-credit sports law courses.

Please note that the admonition at the beginning of each exam is entirely correct -- although real sports figures may be mentioned in the problems, many of the facts are simply false -- while they may in some circumstances be modeled after actual fact situations, they are purely hypothetical and do not accurately describe any actual fact situation.

The examinations primarily focus on issues concerning the Power of the Commissioner (Chapter 3), contract law (Chapters 4-6), and antitrust law (Chapters 7-13). However, there are some questions that require a knowledge of labor law (Chapters 14-16), intellectual property law (Chapter 19), and tort law, including workers compensation issues (Chapter 18).

If you have any questions about preparing an examination in general, questions you plan to use in your examination, or what we believe to be the "correct answers" to these exam questions, we are more than willing to field telephone calls from other professors of sports law courses. Please do not hesitate to call us.

EXAMINATION IN SPORTS & THE LAW
2 HOURS

May, 1998

FACTS FOR QUESTION 1 AND BEGINNING OF FACTS FOR QUESTION 2

All facts presented in this exam, while they may or may not be modeled after actual fact situations, are purely hypothetical and they do not accurately describe any actual fact situation.
INTRODUCTION

Anticipating Michael Jordan's retirement, Charles Barkley's possible retirement, and the possible lock-out by the National Basketball Association ("NBA") of its players for the 1998-99 season (or a possible strike by the players), Jerry Jones and several other owners of National Football League ("NFL") teams decide that it is a good time to start a competing basketball league. Launched in 1998, the Football Owners' International Basketball League Enterprise ("FOIBLE") is a twenty-team, "single entity" league that will play at about the same time of year as the NBA, and is designed to avoid mistakes of the NBA and other traditional model leagues.

FOIBLE starts by signing several players who retired before their contracts with NBA teams were completed. FOIBLE's first announcement, on May 1, 1998, is that FOIBLE has signed Earvin "Magic" Johnson as the league's first player. Magic Johnson was an NBA all-star who retired before his contract with the Lakers expired when Magic learned he had tested positive for the HIV Virus. The Lakers supported Johnson's decision to retire because of, among other reasons, public concerns (and other NBA players' concerns) about spread of the virus. Johnson subsequently became a 10% owner of the Lakers.

JOHNSON'S CONTRACT WITH THE NBA'S LAKERS

Magic Johnson's contract with the Lakers had several years remaining in it and it included the following terms:

1. The contract was for 4 years, with a $1 million signing bonus and a $2 million per year salary. Johnson played the first two years, then retired.

2. If Johnson ever tried to breach his contract by playing for a team in another league in the United States, he is required to return the $1 million signing bonus.

3. If Johnson retires or voluntarily chooses not to play for any reason, the remaining contract years are suspended. If Johnson decides to come out of retirement, the contract will be reactivated and continue from that point under the same terms as provided for the remaining years of his contract.

4. Paragraph 9 of the Uniform Player Contract states:

"The Player represents and agrees that he has extraordinary and unique skill and ability as a basketball player, that the services to be rendered by him hereunder cannot be replaced or the loss thereof adequately compensated for in money damages, and that any breach by the Player of this contract will cause irreparable injury to the Club and its assignees. Therefore, it is agreed that in the event it is alleged by the Club that the Player is playing, attempting or threatening to play, or negotiating for the purpose of playing, during the term of this contract, for any other person, firm, corporation or organization, the Club and its assignees (in addition to
any other remedies that may be available to them judicially or by way of arbitration) shall have the right to obtain from any court or arbitrator having jurisdiction, such equitable relief as may be appropriate, including a decree enjoining the Player from any further such breach of this contract, and enjoining the Player from playing for any other person, firm, corporation or organization during the term of this contract. . . . "

5. The contract provides that any dispute between any Team and any Player shall be resolved in arbitration before the Commissioner of the NBA.

JOHNSON'S CONTRACT WITH FOIBLE

Johnson's FOIBLE contract includes the following terms:

1. A signing bonus -- as the first star player to sign on with the new league -- $3 million paid as follows: $1 million when he signed, $1 million the first day of the second FOIBLE season, and $1 million the first day of the third FOIBLE season.

2. $5 million salary per year for three years.

THE LAKERS' RESPONSE

The Lakers send Magic Johnson a letter to notify him that the Lakers are very excited that Magic Johnson has decided to come out of retirement and they expect him to honor the two years remaining on his contract with the Lakers. A copy of the letter is sent to NBA Commissioner David Stern. Johnson responds that he retired as an NBA player several years ago, his contract ended, and he will not be playing for the Lakers. The Lakers notify Commissioner Stern of their dispute with Mr. Johnson.

THE NBA'S RESPONSE

Commissioner Stern sends two letters to the Lakers and Magic Johnson. NBA Letter #1 tells the Lakers and Johnson that their dispute will be arbitrated before the NBA Commissioner. NBA Letter #2 tells the Lakers and Johnson they are violating the NBA Constitution & Bylaws, which prohibits an active NBA Player from owning any interest in any NBA Team, and the Commissioner is convening a separate hearing to deal with that issue.

Magic Johnson's attorney writes to Commissioner Stern, disagrees with both NBA letters, and says Commissioner Stern cannot arbitrate either dispute, Magic Johnson will not be participating in either hearing for a great many reasons, and Magic Johnson reserves all of his rights.

THE ARBITRATION HEARING

Commissioner Stern appoints a noted sports law professor and author, Michael Cozzillio, to represent Magic Johnson's interests at the arbitration hearing, and the NBA agrees
to pay Professor Cozzillio at his normal hourly consulting rate for whatever work he believes is necessary to represent Magic Johnson's interests. Professor Cozzillio informs the Commissioner that if Johnson were his client (as opposed to merely being appointed to represent his interests), Professor Cozzillio might recommend that Johnson go to Court to try to get a court order, enjoining Commissioner Stern from proceeding. Nevertheless, Professor Cozzillio does not file with a court, but rather attends the arbitration hearing and makes all of the arguments he can imagine on Johnson's behalf, and does a first class job.

**COMMISSIONER STERN'S ARBITRATION DECISION**

Commissioner Stern rules that the Lakers' contract with Magic Johnson is valid and enforceable and has two years remaining. He orders Magic Johnson to play for the Lakers or face a substantial fine. He also issues a decree enjoining Magic Johnson from any further breach of his contract with the Lakers, and enjoining Johnson from playing for any other person, firm, corporation or organization during the remaining term of his contract with the Lakers.

Commissioner Stern then holds that Magic Johnson's continued ownership of an interest in the Lakers is improper for two reasons. First, because he is now again under contract to play for the Lakers, he is prohibited from holding such an interest in an NBA team. Second, Commissioner Stern decides that Johnson's support of a competing league is a breach of his fiduciary duty to the NBA and the Lakers, and constitutes conduct not in the best interest of basketball under the NBA Constitution & Bylaws. In his decision, Commissioner Stern makes it clear that no ownership by any NBA owner in a competing professional basketball league will be permitted.

Commissioner Stern orders that the Lakers not permit Magic Johnson to have any role in the management of the Lakers and that his interest in the Lakers be sold within ninety (90) days, either by Magic Johnson, or by Professor Cozzillio if Mr. Johnson refuses.

**THE PROCEEDING IN COURT**

The NBA and the Lakers go into a Court with jurisdiction and file suit against Earvin "Magic" Johnson, seeking injunctive and declaratory relief to enforce Commissioner Stern's arbitration decision. In the alternative, the NBA and the Lakers file breach of contract claims against Johnson, seeking the same relief as that ordered by Commissioner Stern. FOIBLE intervenes in the lawsuit as a defendant to enforce its contract with Magic Johnson. Johnson defends the lawsuit and, in the alternative, files a cross-claim against FOIBLE, seeking a declaratory judgment that FOIBLE must pay him the full $3 million signing bonus when the payments come due.

**QUESTION 1**

The Judge handling the NBA's and Lakers' lawsuit turns to you for advice about the non-antitrust issues, because you are her only law clerk who has taken a sports law class. Please draft a memorandum for the Judge, explaining the arguments of the parties, and giving
her your recommendations about all of the issues (except, please do not address any antitrust issues) and what decisions she should issue.

THE NBPA'S REACTION TO FOIBLE

The National Basketball Players Association ("NBPA") is the union that represents NBA players in collective bargaining negotiations with the NBA and its member teams. The NBPA Executive Director sent a letter to FOIBLE, expressing support for the concept of a second major professional basketball league, but criticizing FOIBLE's plans to use its alleged single entity status as a means for depressing player salaries. The NBPA seeks a meeting with the leadership of FOIBLE. FOIBLE's counsel responds that FOIBLE has not yet hired all of its players, and its players have not indicated whether they want to be represented by a union and, if so, by which union. Therefore, FOIBLE's counsel writes, "it would be inappropriate for us to meet with you, and it is inappropriate for you to seek such a meeting. However, we appreciate your interest in FOIBLE, and we hope your interest continues."

THE NBA'S NEGOTIATIONS WITH THE NBPA

The NBA's labor agreement with the NBPA expired July 31, 1998. As anticipated, despite the launch of the new league, FOIBLE, collective bargaining negotiations between the NBA and NBPA have not yielded an overall collective bargaining agreement. The NBPA has made it clear to the NBA that if the parties reach an impasse and the NBA locks out the players or forces the players to strike, the players will vote to decertify the NBPA as their collective bargaining representative and will immediately file antitrust claims against all of the NBA's player restraints, including the NBA salary cap, NBA restrictions on free agency, and the NBA player draft. In the meantime, the NBA and the NBPA continue to negotiate and to operate under the provisions of the recently-expired collective bargaining agreement.

THE NBA-NBPA AGREEMENT ON ADDITIONAL TERMS

However, on August 31, 1998 the NBA and the NBPA announce that they have reached a limited agreement on the following amendments to the expired collective bargaining agreement, and that these terms will take effect immediately:

1. During any strike or lock-out, no NBA player can play for any competing league.

2. Because of the players' interest in competition between FOIBLE and the NBA, no NBA owner can own any interest in FOIBLE or any FOIBLE team. The players' concern is that if a player is drafted by an NBA team with an owner associated with FOIBLE, the player will be unable to cause a bidding war between that NBA team and FOIBLE.

3. To ensure that the NBA networks are promoting the NBA and NBA players, television networks (over the air or cable) that broadcasts NBA games will have exclusive contracts that will prohibit them from broadcasting any professional football games or any non-NBA professional basketball games. This provision will affect all of the NBA's
broadcast partners -- NBC, TBS, TNT -- and the superstations that broadcast NBA games nationally (e.g., WGN in Chicago), but not non-superstation over-the-air television stations that have local contracts with a single NBA team.

4. Players who leave the NBA when their contracts expire, to retire or to play for a single entity professional basketball league, will not be free agents if they decide they want to return to the NBA. Rather, they will be subject to a supplemental draft on the same terms as the NBA rookie draft and will be subject to the NBA's three year restrictions on free agency (but will not be subject to the NBA rookie salary cap) if and when they decide they want to return to the NBA.

FOIBLE'S RESPONSE

As soon as the new NBA-NBPA terms are announced, FOIBLE and its owners file suit in federal court against Commissioner, Stern, the NBA and its member clubs, and the NBPA, alleging violations of federal antitrust laws. The case is assigned to the same judge handling the NBA's case against Magic Johnson that was discussed in Question 1.

QUESTION 2

The Judge's law clerk handling the antitrust issues decided he really did not want to be a lawyer and quit.

Therefore, the Judge has turned to you to do a second memorandum, this one addressing all of FOIBLE's potential antitrust claims based on any of the conduct described (whether in the original fact pattern or the continuation). Please draft a memorandum for the Judge, explaining the arguments of the parties, and giving her your recommendations about all of the antitrust issues and what decisions she should issue.

END OF MAY, 1998 EXAM
A new Commissioner of Baseball, Bob Uecker, has been elected unanimously. He is hired pursuant to the attached provisions of the Major League Agreement. Shortly after Commissioner Uecker takes office, the owners of Major League Baseball's ("MLB") Pittsburgh Pirates announce the sale of their team to Billionaire Bill Gates, the Chairman of Microsoft, for $250 million, and Gates announces that he is relocating the team, to be the Hawaii Microchips and play its games in Honolulu and Maui. Gates makes it clear that his purchase of the team will not go forward if the relocation is disapproved.

The sale of the team to Gates is approved unanimously, but the relocation is disapproved. All fourteen (14) American League team owners vote to approve the relocation, but the National League owners vote 3-7-4: 3 support the move, 7 oppose the move, and 4 abstain. It is clear from the prior interpretation of the Major League Agreement that abstentions count the same as "No" votes -- they are not votes to approve. The voting was as set out below.

In the meeting, the Cubs and Rockies owners said they abstained because of concern that the Major League rules about relocation may violate federal antitrust laws. The Padres' owner said he abstained because he believed he had a conflict of interest -- his team played a few 1997 games in Hawaii, and could not do so if a team relocated to Hawaii.

The Reds' owner said she voted "No" because she could not take her dog to Hawaii for Reds away games. The other owners who voted "No" identified a number of reasons for their decision to oppose the relocation. These included: (1) the Pirates were an historic franchise and it would hurt baseball and its tradition if the Pirates left Pittsburgh, (2) if the Pirates were permitted to relocate, other teams might believe they had the right to relocate, (3) Congress would be very upset with baseball if they permitted the Pirates to relocate, (4) travelling to Hawaii for away games would be very expensive, (5) traditional rivalries, such as New York-Pittsburgh, Philadelphia-Pittsburgh, and St. Louis-Pittsburgh would be lost, (6) the distance, flight time, and time change to Hawaii would wreak havoc with television schedules, would cause player jet lag, and would make game scheduling difficult (because of the long flights), (7) Hawaii might not have enough population to support an MLB team with eighty-one home games, and (8) MLB had already alienated fans enough with strikes, lockouts, and concerns about free agents leaving their teams -- it does not need "franchise free agency." Two owners also said they voted "No" because of a concern that Bill Gates would use his billions of dollars to buy-up all of the top free agents in the league, and that would be likely to cause a further escalation in overall player salaries.

A number of owners who voted "Yes" said they opposed the relocation, but voted "Yes" because of antitrust concerns.

**VOTE ON RELOCATION OF TEAM TO HAWAII**

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QUESTION #1. Commissioner Uecker is very concerned about the owners' vote to block relocation. He believes solving the Pirates' financial problems and bringing Bill Gates into the league would be in the best interests of baseball. Uecker believes the litigation that is likely to result from the disapproval of the relocation may tear baseball apart. He wants to use his power as the Commissioner to stop that from happening.

Therefore, Commissioner Uecker responds as follows:

1. Commissioner Uecker asks the Pirates to send him a letter complaining about the decision if they oppose the MLB owners' decision to disapprove the request to relocate. The owner of the Pirates sends Uecker a complaining letter.

2. Commissioner Uecker investigates the disapproval of the request to relocate, pursuant to Article I, Section 2(b) of the Major League Agreement, upon the Pirates' complaint and his own initiative.

3. Commissioner Uecker adopts rules and regulations, effective retroactively, that require that a request to relocate only be disapproved if the owners determine that the relocation will cause an overall reduction in interest in baseball, will hurt the sport of baseball, will cause the public and fans to lose confidence in Major League Baseball, and will hurt Major League Baseball economically.

4. Applying the standard set out in #3, above, Commissioner Uecker says that (1) having Gates, with his technological brilliance, as an owner of an MLB team and a participant in league operations will help MLB in many ways, (2) having a team in Hawaii will help MLB reach new fans in Hawaii and Japan, (3) having Gates as an owner and a team in Hawaii will help MLB expand the sport of baseball internationally, (4) attendance in Hawaii will almost certainly exceed recent attendance figures for the
Pirates in Pittsburgh, and (5) the interest in a new team will lead to
tremendous marketing potential for Hawaii Microchips licensed products.
Therefore, Uecker determines that the standard is not satisfied.

5. Commissioner Uecker issues a decision that states that (a) the disapproval
may be unlawful, and to avoid the illegality of the conduct and the risk of
MLB antitrust liability, it must be overturned, and (b) the standard in #3,
above, was not satisfied, and therefore the disapproval must be overturned
because the disapproval was an act not in the best interests of the national
game of baseball. The decision approves the relocation of the Pirates to
Hawaii.

6. Commissioner Uecker's decision also orders that any disagreement with
his decision to approve the relocation shall be submitted to arbitration,
with Commissioner Uecker or someone he will designate as the arbitrator,
pursuant to Article VII, Section 1 of the Major League Agreement.

7. Commissioner Uecker's decision also orders all MLB owners to refrain
from filing any action in any court challenging his decision, citing the
waiver of recourse provision in Article VII, Section 2 of the Major League
Agreement, based on Uecker's determination that litigating these issues in
a public forum would not be in the best interests of the national game of
baseball. The decision makes it clear that if an owner or team files an
action in court to challenge his decision, Uecker will respond with severe
penalties pursuant to Article I, Section 3 of the Major League Agreement.

Ten MLB teams file suit in federal court against Commissioner Uecker, seeking
an injunction against his order on the basis that Commissioner Uecker exceeded his authority and
violated the Major League Agreement. See Complaint, Atlanta Braves, et al. v. Uecker, 97 Civ.
509 (S.D.N.Y. May 9, 1997). Uecker responds by fining each of those ten teams $250,000,
suspending the owners of those ten teams for a period of six months, and ordering that Uecker's
attorneys fees will be paid, on a pro rata basis, by those ten teams, through deductions from
league payments of television and licensing fees.

ASSIGNMENT FOR QUESTION #1: You are one of the law clerks to the district judge
who is hearing the lawsuit, and he turns to you because of your sports law expertise. The parties
are preparing to file cross-motions for summary judgment on an expedited basis, and because of
the urgency, before the briefs are filed, the judge has asked you to prepare a memorandum,
explaining (1) the best argument for the plaintiffs and Uecker's best responses, and (2) your
recommendations concerning the opinion the judge should issue.

QUESTION #2. Assume that Commissioner Uecker issued his report analyzing the
relocation but did not reverse the disapproval. You have been retained by the owner of the
Pirates and by Bill Gates because they have been told that you are the World's foremost authority
on the legality of efforts by professional sports leagues to restrict relocation.
ASSIGNMENT FOR QUESTION #2: Your clients have asked you to send them a memorandum, discussing claims they may have because of the disapproval. They have asked you to describe, discuss, and analyze their best legal theories and defenses the defendants would be likely to raise. Finally, they want any strategic recommendations you believe they should follow, an assessment of the likelihood they will succeed on the merits, and the relief, if any, that they are likely to receive.

END OF MAY, 1997 EXAM

[EXCERPTS FROM MAJOR LEAGUE AGREEMENT]

MAJOR LEAGUE AGREEMENT

THIS AGREEMENT, entered into by and between THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, and each of its Members, on the one part, and THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS, and each of its Members, on the other part.

* * *

Article I

THE COMMISSIONER

Sec. 1. The Office of the Commissioner created by the Major League Agreement of January 12, 1921, is hereby continued for the period of this Agreement.

Sec. 2. The functions of the Commissioner shall be as follows:

* * *

(b) To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball, with authority to summon persons and to order the production of documents, and, in case of refusal to appear or produce, to impose such penalties as are hereinafter provided.

(c) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League clubs or individuals, as the case may be.

* * *

Sec. 3. In the case of conduct by Major Leagues, Major League Clubs, officers employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, punitive action by the Commissioner for each offense may include any one or more of the following:

(a) a reprimand; (b) deprivation of a Major League Club of representation in Joint Meetings; (c) suspension or removal of any officer or employee of a Major League or a Major League Club; (d) temporary or permanent ineligibility of a player; (e) a fine, not to exceed Two Hundred Fifty Thousand Dollars ($250,000) in the case of a Major League or a Major League Club, not to exceed Twenty Five Thousand dollars ($25,000) in the case of an officer or employee, and not to exceed Five Hundred Dollars ($500) in the case of a player; and (f) loss of the benefit of any or all the Major League Rules, including but not limited to the denial or transfer of player selection rights provided by Major League Rules 4 and 5.
Sec. 4. Notwithstanding the provisions of Section 2, above, the Commissioner shall take no action in the best interests of Baseball that (i) requires the clubs to take, or to refrain from taking, joint League action (by vote, agreement or otherwise) on any of the matters requiring a vote of the Clubs at a Joint Major League Meeting that are set forth in Article I, Section 9 or in Article V, Section 2(b) or (c), or (ii) requires the Member Clubs of either League to take, or to refrain from taking, League action (by vote, agreement or otherwise) on any matter to be voted upon by member Clubs of the League pursuant to their League Constitution; provided, however, that nothing in this Section 4 shall limit the Commissioner's authority to act on any matter that involves the integrity of, or public confidence in, the national game of Baseball.

* * *

Article IV
RULES AND REGULATIONS

Any rules or regulations proposed by the Commissioner, the Executive Council, a League or any Club, adopted as provided in this Agreement, shall be binding upon the Major Leagues and their constituent Clubs and shall not thereafter be amended except as provided in Article II, Section 2(d) or in Article V, Section 2 hereof. The authority of the Commissioner to determine finally a disagreement between Major Leagues shall extend to the case of a disagreement over a proposed amendment.

Article V
JOINT MEETINGS
* * *

Sec. 2.

(b) The following types of actions shall require other than a simple majority vote of all Member Clubs:

* * *

(3) The vote of three-quarters (3/4 of the Clubs in the League in which the described transaction is occurring, together with a majority vote of the Clubs in the other League, shall be required for the approval of any of the following:

(i) The expansion of either League by the addition of a new Club or Clubs;

* * *

(iii) The relocation of a Club in either League's Circuit; provided, however, the transfer of a Club to any city in the Circuit of the other Major League shall require the three-quarters (3/4) approval of the Clubs in such other League, as provided in Major League Rule 1(c)(1).

* * *

(f) Interpretation and applicability of this Section 2 shall be made by the Commissioner and that decision shall be non-appealable.

* * *

Article VII
ARBITRATION
Sec. 1. All disputes and controversies related in any way to professional baseball between Clubs (including, without limitation, their owners, officers, directors, employees and players), other than those whose resolution is expressly provided for by another means in this Agreement, the Major League Rules, the Constitution of either Major League or the Basic Agreement between the Major Leagues and the Major League Baseball Players Association, shall be submitted to the Commissioner, as arbitrator who, after hearing, shall have the sole and exclusive right to decide such disputes and controversies. The procedure set forth in this Section is separate from and shall not alter or affect the procedure set forth in Article V governing the role of the commissioner at Joint Meetings of the two Major Leagues or the Commissioner's powers to act in the best interests of Baseball under Article I.

Sec. 2. The Major Leagues and their constituent Clubs recognize that it is in the best interests of Baseball that all actions taken by the Commissioner under the authority of this Agreement, including, without limitation, Article I and this Article VII, be accepted and complied with by the Leagues and Clubs, and that the Leagues and Clubs not otherwise engage in any form of litigation between or among themselves, but resolve their differences pursuant to the provisions of this Agreement. In furtherance thereof, the Leagues and Clubs (on their own behalf and including, without limitation, on behalf of their owners, officers, directors and employees) severally agree to be finally and unappealably bound by actions of the Commissioner and all other actions or decisions taken or reached pursuant to the provisions of this Agreement and severally waive such right of recourse to the courts as would otherwise have existed in their favor. In the event of noncompliance by any League or Club (including, without limitation, their owners, officers, directors and employees) with any action of the Commissioner, with any action or decision taken or reached pursuant to the provisions of this Agreement, or with the terms or intent of this Article VII, and in addition to any other remedy which may be available to the Commissioner, the Commissioner may direct that the costs, including whether as plaintiff or defendant, of any court proceeding or other form of litigation resulting therefrom be reimbursed to the Office of the Commissioner or such other Baseball entity by such non-complying League or Club (on its own behalf and including, without limitation, on behalf of its owners, officers, directors and employees). Nothing herein shall be construed to limit any rights of indemnity which the Major Leagues or their constituent Clubs may have against any Club.

* * *

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed in triplicate in its name by its duly authorized officer the day and year first above written.

Signed by:
The NATIONAL LEAGUE of
PROFESSIONAL BASEBALL
CLUBS and each of its fourteen
(14) constituent Member Clubs.

Signed by:
The AMERICAN LEAGUE of
PROFESSIONAL BASEBALL
CLUBS and each of its fourteen
(14) constituent Member Clubs.
EXAMINATION IN SPORTS & THE LAW
2 HOURS

May, 1995

All facts presented in this exam, while they may or may not be modeled after actual fact situations, are purely hypothetical and they do not accurately describe any actual fact situation.

QUESTION 1. Former tennis star Ollie Overhead is the owner of the NationsBank Richmond Tennis Classic, an annual men's professional tennis event in the ATP Tour -- one of the ten "Championship Series" events of the 75-event ATP Tour. The ten "Championship Series" events are the top ATP Tour events, other than the annual year-ending ATP Finals. In addition to the 75-event tour, the ATP Tour sanctions about 100 "satellite" and "challenger" tournaments for players ranked below 100 in the World. Ollie Overhead has come to see you, to ask your advice about the legal implications of some new rules enacted by the Board of the ATP Tour. The new rules are as follows:

1. The ATP Tour has created exclusive tour sponsors in the following ten categories:
   a. Official Automobile Manufacturer
   b. Official Hotel Chain
   c. Official Publication
   d. Official Airline
   e. Official Alcoholic Beverage
   f. Official Non-Alcoholic Beverage
   g. Official Clothing Manufacturer
   h. Official Tennis Racket Manufacturer
   i. Official Tennis Ball Manufacturer
   j. Official Tennis Shoe Manufacturer

   The tour will guarantee the sponsor in each of these categories exclusivity at all ATP Tour events.

   As a result of this rule, the Richmond event, which used to receive about $500,000 per year from sponsors in these categories, will be out $500,000. The ATP Tour says it will use the additional funds to promote tennis and some funds will be distributed to the individual ATP Tour events. Ollie Overhead estimates that he will receive $100,000 from the ATP Tour as a result of this new initiative.

2. Starting in 1997, the ATP Tour will not include any tournaments owned by individuals or any for-profit partnership or corporation or other for-profit organizations.

   This second rule would require Overhead to sell his tournament to a not-for-profit organization or to operate it as a non-ATP Tour event. It will also require many other owners of ATP Tour tournaments to sell their events to not-for-profit organizations.
Overhead does not want to sell his tournament and he is concerned that with a great number of events up for sale with the same deadline, it will be a buyer's market and he may not get fair market value for his event. He is also worried that there may be few not-for-profit organizations with the interest and ability to run a tennis tournament in Richmond, so he doubts that there will be many prospective purchasers. Of course, he could sell to someone contemplating moving the tournament to another city, but he is not certain whether the ATP Tour would approve a relocation of the event, and that uncertainty may reduce the amount anyone is willing to pay to buy the event.

The ATP Tour Board consists of three player representatives (one current player and two former players) and three tournament representatives: one for Europe, one for North America, and one for the Rest of the World. The European tournament representative runs the Italian Open for the Italian Tennis Federation, the not-for-profit organization that is the national governing body for tennis in Italy. The Rest of the World tournament representative runs tournaments in Brisbane and Sydney, Australia, which are owned by a not-for-profit organization. The North American tournament representative operates a tournament in California that may soon be sold to the Southern California Tennis Association. Overhead tells you that despite a tremendous amount of objection from ATP Tour tournaments that are owned by "for profits," the ATP Board vote was 6-0 in favor of the new proposed rules.

Overhead and several other independent owners of ATP Tour events threatened to file antitrust claims against the ATP Tour, but the Tour's response was the following:

1. We do not have market power because the International Tennis Federation and its member national federations run the four Grand Slam events in tennis (French Open, Wimbledon, U.S. Open, and Australian Open), the Grand Slam Cup (eight man $2 million event in November), and the Davis Cup (competition among teams representing different countries). If you do not like our rules, run your events outside of our tour.

2. We need to have a single exclusive ATP Tour sponsor in each of the sponsor categories to create a tour identity -- we want fans and consumers to see that all of these tournaments around the World are part of a single, unified tour.

3. We are concerned that some owners of ATP Tour events have recently experienced financial problems, forcing them to sell their events, thereby often disrupting the quality of the event or forcing relocation of the event. In addition, with for-profit ownership, a single individual or a single business could buy a number of ATP Tour events, and might then be in a position to take those events, leave our tour, and set-up a competing tour. It is our experience that events owned by not-for-profit organizations (e.g., the Washington, D.C. tournament owned by the Washington Area Tennis Patrons Foundation and the tournaments owned by national federations around the World) are more stable, and more consistent, and are seldom relocated. Therefore, we will require not-for-profit ownership of all ATP Tour events.
ASSIGNMENT: Ollie Overhead has asked you to send him a memorandum, discussing claims he may have because of the new rules. He has asked you to describe, discuss, and analyze his best legal theories, defenses the defendant(s) would be likely to raise (including, but not limited to, the initial ATP Tour arguments referenced above), and the likely judicial decisions about those issues. Finally, he wants any strategic recommendations you believe he should follow, an assessment of the likelihood he will succeed on the merits, and the relief, if any, that he is likely to get from a court.

QUESTION 2. Andy Athlete was a very tall (6' 10") superstar at the University of the West Coast ("UWC"). He was a star wide receiver on the football team, a power forward on the basketball team, and the leading spiker in UWC's conference (the Left Coast Conference) in volleyball, graduating in May, 1995. The National Football League's Jacksonville Jaguars and the National Basketball Association's Washington Bullets each picked Athlete in the first round of their respective drafts. After negotiations with the Jaguars and the Bullets, Athlete signed a three-year NBA uniform player contract, which includes the following provisions:

2. The Club agrees to pay the Player for rendering the services described herein the compensation provided for in Exhibit 1 hereto (less all amounts required to be withheld by federal, state, and local authorities) . . .

9. The Player represents and agrees that he has extraordinary and unique skill and ability as a basketball player, that the services to be rendered by him hereunder cannot be replaced or the loss thereof adequately compensated for in money damages, and that any breach by the Player of this contract will cause irreparable injury to the Club and to its assignees. Therefore, it is agreed that in the event it is alleged by the Club that the Player is playing, attempting or threatening to play, or negotiating for the purpose of playing, during the term of this contract, for any other person, firm, corporation or organization, the Club and its assignees (in addition to any other remedies that may be available to them judicially or by way of arbitration) shall have the right to obtain from any court or arbitrator having jurisdiction, such equitable relief as may be appropriate, including a decree enjoining the Player from any further such breach of this contract, and enjoining the Player from playing for any other person, firm, corporation or organization during the term of this contract. . . .

17. The Player and the Club acknowledge and agree that the Player's participation in other sports may impair or destroy his ability and skill as a basketball player. The Player and the Club recognize and agree that the Player's participation in basketball out of season may result in injury to him. Accordingly, the Player agrees that he will not engage in sports endangering his health or safety (including, but not limited to, professional boxing or wrestling, motorcycling, moped-riding, auto racing, sky-diving and hang-gliding); and that, except with the written consent of the Club, he will not engage in any game or exhibition of basketball, football, baseball, hockey, lacrosse or other athletic sport, under penalty of such fine and suspension as may be imposed by the Club and/or the Commissioner of the NBA. Nothing contained herein shall be intended to require
the Player to obtain the written consent of the Club in order to enable the Player to participate in, as an amateur, the sport of golf, tennis, handball, swimming, hiking, softball or volleyball.

Exhibit 1 to the contract provides:

<table>
<thead>
<tr>
<th>Season</th>
<th>Compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995-96</td>
<td>$3.0 million</td>
</tr>
<tr>
<td>1996-97</td>
<td>$3.5 million</td>
</tr>
<tr>
<td>1997-98</td>
<td>$4.0 million</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Description of Bonus</th>
<th>Amount</th>
<th>Date of Payment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Signing Bonus</td>
<td>$3.0 million</td>
<td>Date Athlete Signs Contract</td>
</tr>
</tbody>
</table>

Athlete had a tough rookie season in 1995-96. In the first sixty-two games of the season, Athlete had 15 points, 8 rebounds, 1.5 blocked shots, and 4 assists per game. His shooting percentage was 54% from the field and 84% from the foul line. However, at the end of the season he missed ten games because of injuries, then he only saw limited action in the last ten games of the regular season because he was recovering from his injuries, and the Bullets did not qualify for the play-offs. The fans were tough on Athlete at the end of the season.

Athlete's injuries the last twenty games of the season took a toll on him. An 82-game season was much tougher than he had expected, and he was starting to lose his love of the game. Losing like he had experienced on the Bullets was new to him, he had never before been jeered or booed by fans, and he felt he was playing for the money, not for the enjoyment of the sport.

On May 15, 1996 Athlete called a press conference to announce his retirement from the NBA. Representatives of the Bullets and the NBA were shocked, said they were very sorry that Athlete had decided to retire, said they hoped he would change his mind (the same way that Michael Jordan had "seen the light"), said they hoped he would regain his love of the game, and wished him all of the best in whatever he decided to do.

On June 1, 1996, Athlete announced the following:

1. He had signed a two-year contract to play wide receiver for the Jacksonville Jaguars, for a $1 million signing bonus, $1 million for the 1996 season, and $1.5 million for the 1997 season.

2. He had been selected to play for the United States National Volleyball Team -- both six-man and beach volleyball -- in the 1996 Summer Olympic Games.

3. He had signed a two year contract to play for the National Volleyball League ("NVL"), starting with the league's inaugural 1996-97 season. The NVL season runs from November to May, but the NVL and the Jaguars had worked out a deal whereby Athlete would only report to the NVL after the Jaguars' season is over.
The NVL contract paid Athlete a $100,000 signing bonus and $5,000 per game that he plays each 40-game season.

In the press conference, Athlete explained that he preferred the NFL's 16-game season and the 25 NVL games that would be left each year after the Jaguars' season ended (even less if the Jaguars made it to the NFL play-offs).

One week after hearing of Athlete's announcements, Bullets owner Abe Pollin held a press conference to announce that the Bullets had filed suit against Athlete, seeking an injunction against his playing (1) for the United States National Volleyball Team, for which he would be paid $50,000, (2) for the Jaguars, for which he would receive $2 million during his first season (counting the signing bonus), and (3) for the NVL, for which he would receive about $225,000.

The Bullets' lawsuit alleges that Athlete would receive about $2,275,000 for playing sports during 1996-97, a year that he would be breaching his NBA contract. The Complaint also alleges, based upon information and belief, that Athlete began negotiating these deals before he announced his "retirement" from the NBA, and the "retirement" press conference was choreographed to hide Athlete's true plans. The Bullets' lawsuit also seeks the return of $2 million (2/3 of the $3 million signing bonus) that the Bullets paid to Athlete, on the theory that Athlete played 1/3 of the contract term and should only keep 1/3 of the signing bonus.

**ASSIGNMENT:** You are a law clerk for a U.S. District Judge. The case was just filed today, and only the Complaint has been filed. The Judge has asked you to prepare a memorandum, setting out the Bullets' likely arguments, Athlete's likely responses, questions you believe the Judge will need to ask and information he should seek, and your preliminary views about how the Judge should rule.
are members of the League; national television and sponsorship revenue is shared equally among the teams; the owners select the NTL Commissioner -- Mr. Iron Fist, and he functions in much the same manner as the Commissioner of the other sports leagues. NTL teams have some revenue sharing, but local team costs are not shared at all.

Each team has ten players who sign standard player contracts that, among other things, require the players during the term of their contracts to refrain from playing tennis for any other team or any tennis tour or in any tennis event during the NTL's six-month season. For the past few years, a labor organization, the National Tennis Players Association ("NTPA" or the "union"), has represented all NTL players.

During recent collective bargaining agreement ("CBA" or "union contract") negotiations, talks broke down -- primarily over the union's request for unrestricted free agency. The owners were insisting upon continuing numerous existing restrictions on free agency and adding limitations. The NTPA called a strike. The strike lasted for several weeks, and hurt both the NTL owners, who lost considerable sums of money at the box office, and the NTPA, whose members lost their salaries during the strike. Yet, most observers believed the union was the bigger loser. It became apparent that a prompt settlement was necessary.

The NTPA contacted the NTL and informed it that the players were prepared to accept the NTL's proposals. The strike was called off, the players returned to their teams, and "regular season" play resumed. The parties scheduled a negotiating session to "finalize the CBA and fine-tune minor language problems." This session was scheduled to be held at a date two weeks after the resumption of play.

As part of an economic analysis undertaken to assess the loss of revenue occasioned by the strike, marketing experts advised NTL owners that the league was in considerable financial trouble because of the strike and because tennis fans believed tennis was too boring and there was a need to make tennis more exciting. In particular, the marketing analysts recommended that NTL attire and equipment be tailored to make the sport more exciting -- wild colored uniforms and new, larger "double-strung" rackets that allowed players to serve and hit the ball harder and make the ball travel faster. The NTL could also make very lucrative deals with companies like Nike, Reebok, and Starter, each of which would design uniforms for four teams and then market copies of those official uniforms to the public.

As a result, team owner Peter Powerful ("Powerful"), contacted the NTPA president Oscar Organizer ("Organizer"), and asked for the union's cooperation in helping to resolve some of the economic problems plaguing the league. He stated, "look, it would really be helpful if your union and the NTL could present a united front by including these equipment changes and uniform changes into the imminent CBA." Organizer replied, "I don't like the ideas, and I do not think most of my membership will want any part of it -- many of the players have not tried or do not like the new double-strung rackets and some are not comfortable with wild uniforms."

Notwithstanding Organizer's protest, the NTL, as the next negotiating session scheduled to finalize the CBA, informed the NTPA that the deal was off unless the NTPA agreed to accept the following language:
1. All NTL players will wear only official NTL tennis attire while participating in any league matches. This attire may bear a logo reflecting team affiliation or a commercial affiliation (e.g., Nike, Reebok, or Starter) (at the sole discretion of the NTL). No other exceptions will be tolerated, including the wearing of any logo reflecting the players' endorsement of any product.

2. All NTL players will use double-strung rackets that meet standards set by the NTL. No other rackets will be permitted. The NTL will insure that at least two manufacturers' double-strung rackets that meet the NTL standards will be made available to team members."

The NTPA said it was troubled by the last minute alteration in the owners' proposals, but added that it would perhaps consider the equipment/uniform demands if the owners would reconsider their outright rejection of the NTPA's earlier request for unrestricted free agency. The NTL absolutely refused to reconsider and demanded that the NTPA accept the language regarding equipment and uniforms.

During the bargaining session, the team owners offered no reason for their insistence on their new proposals or for their outright refusal to reconsider the free agency issues (except to say and repeat, "We must be economically viable").

Shortly before the next negotiating session, NTL team owner Powerful called union president Organizer aside and whispered, "You had better come to an agreement and fast. I have learned a petition is circulating and more than 60% of the players do not want to be represented by you any longer. Apparently they are as fed up with you as my colleagues. There is no CBA in effect and nothing to stop the players from filing a decertification petition and trying to vote you out." He added, "Look, I have it on good authority that a large number of players may prefer to be represented by a new union." So, let's be honest. We both need this deal." Organizer replied simply, "I get your message."

In any event, it had become obvious that the NTL had no intention of acceding to the players' request for unrestricted free agency, nor would the NTL sign an agreement without the equipment and uniform restriction language. Accordingly, the NTPA, with obvious reluctance, signed a CBA with the equipment and uniform restriction provisions, and without any change in the owners' hard-line free agency position.

Several months later, an NTL player, Chris Control, was accused of playing with a prohibited racket. Control's racket was a double-strung racket manufactured by Sports, Inc. and included a device that Sports, Inc. advertised would give a player more control. The racket, known as "Controlled Fury," had been designed by renowned racket designer Donna Designer ("Designer"). Sports, Inc.'s entire advertising campaign for "Controlled Fury" centered around Chris Control and his success with the racket in NTL matches.

NTL Commissioner Fist immediately began an investigation and advised Control he would be suspended pending a hearing to be held in the Commissioner's office within thirty (30) days. Control was told that if were found guilty of violating the equipment restriction rules, he would be suspended for three months to one year.
When Control informed the Commissioner that he would appear at the hearing and that he would present expert testimony from Designer, the racket designer, regarding its compliance with the NTL standards, Commissioner Fist said, "Bring whomever you want, but Designer is a crackpot and has been a laughing stock of the tennis community for years. Good luck having her convince me this racquet is within specifications. Remember, this isn't a federal case, it's just a little hearing. "Why can't you just play tennis by our rules and quit rocking the boat?"

Immediately after Control was suspended, but prior to his hearing, he contacted a prominent official on the ATP Tour about the possibility of participating in the tour on a temporary basis or in some exhibition matches. He was told he would be welcome to play in the ATP MidWinters Series, which consisted of four consecutive weekends of play in Germany, Austria, Italy and the United States -- aired on television Worldwide. Control signed a contract with the 1995 Title Sponsor of the Midwinter Series -- Mercedes-Benz. During the negotiations with the ATP and Mercedes-Benz, Control said, "I am just anxious to play in any event that's being run by you people at Mercedes-Benz; I am sure that you will run a first class tournament." Among other things, the contract called for a $20,000 bonus to be paid in advance, and prohibited him from playing in any other tennis events or participating in any tennis event in any capacity during the term of the agreement (four weeks). It also called for him to receive a 1996 Mercedes-Benz to drive for an entire year. Within a few days, however, Mercedes-Benz decided not to renew its sponsorship for 1996 and assigned its rights to the ATP, which made a deal with another sponsor, R. J. Reynolds Tobacco, Co., for it to be the 1996 ATP/R.J. Reynolds Midwinter Series. Control, who had engaged in numerous public service messages opposing smoking, was dismayed. His anger was exacerbated when the new sponsor informed him that it "obviously would not be providing him a Mercedes, but that he could have all the cigarettes and snack food (R.J. Reynolds owned Nabisco) he desired for one year." He immediately repudiated his contract with Mercedes/Reynolds and signed a contract to play a series of one-on-one exhibitions at various clubs throughout the United States beginning at about the same time as the MidWinters series.

R. J. Reynolds and the ATP Tour promptly filed an injunction action, seeking to prevent Control from playing in these exhibitions and to require him to participate in the MidWinters Series.

The NTL promptly filed an injunction action, seeking to prevent Control from playing in these exhibitions and to prevent him from participating in the ATP Midwinters Series.

Control immediately comes to you for advice.

**QUESTION 1A.** Control wants advice about a possible antitrust claim against the NTL, challenging Rule #2 -- the double-strung racket rule -- and its enforcement as violative of Section 1 of the Sherman Act. Please advise Control of the issues and his options and your assessment of Control's likelihood of success. What strategy suggestions do you have for Control, if any? (Approximately 45 minutes)
QUESTION 1B. If the CBA incorporating the equipment and uniform restrictions had expired prior to the discipline imposed upon Control, and negotiations for a new agreement were ongoing at the time of his suspension and subsequent lawsuit, how would your analysis in Question 1(A) be affected? You may assume that during these negotiations the NTPA again was opposing the inclusion of the equipment and uniform restriction language in the CBA.  
(Approximately 10 minutes)

QUESTION 2A. Control wants advice about defending the suit filed by the ATP Tour and R.J. Reynolds. He has asked you to describe, discuss, and analyze the plaintiffs' claims, his best legal theories in response, defenses he should raise and arguments he should make, and the likely judicial decisions about those issues. Finally, he wants any strategic recommendations you believe he should follow, an assessment of the likelihood he will succeed on the merits, and the relief, if any, that the plaintiffs or he are likely to get from a court. (Approx 35 minutes).

QUESTION 2B. Control wants advice about defending the suit filed by the NTL. He has asked you to describe, discuss, and analyze the plaintiff's claims, his best legal theories in response, defenses he should raise and arguments he should make, and the likely judicial decisions about those issues. Finally, he wants any strategic recommendations you believe he should follow, an assessment of the likelihood he will succeed on the merits, and the relief, if any, that the NTL or he is likely to get from a court. (Approx 20 minutes).

END OF DECEMBER, 1995 EXAM

EXAMINATION IN SPORTS & THE LAW  
2 HOURS  
May, 1994

All facts presented in this exam, while they may or may not be modeled after actual fact situations, are purely hypothetical and they do not accurately describe any actual fact situation.

QUESTION 1. The National Football League (“NFL”) and the National Football League Players Association (“NFLPA”) finalized a new collective bargaining agreement (“CBA”) on May 6, 1993. That agreement provides for a salary cap on the amounts NFL teams can pay players and a rookie cap that severely limits the amounts NFL teams can pay first year players. The 1994 cap of $34.608 million per team has already caused substantial decreases in player salaries from the amounts paid in 1993. Many teams have released players or told players they will be released if they do not agree to substantial salary reductions. Many NFL players and recent college graduates are very dissatisfied with the salary situation in the NFL.
In May 1994, the formation of a new football league, the “A League” was announced. The A League’s investors include Anheuser-Busch, Disney, Federal Express, PepsiCo, and other publicly-held corporations that are not permitted (by the NFL rules and regulations) to own NFL teams. CBS, having lost the bidding for NFL broadcast rights, will broadcast A League games.

The A League Players Association was formed and negotiated a collective bargaining agreement with the A League that does not contain any salary cap or rookie cap. In June, the A League began to sign new college graduates who were top NFL draft picks and former NFL players who believe the salary cap has unfairly limited the amount they would otherwise negotiate from NFL teams. Dissatisfied players left the NFL to go to the A League, and NFL players have been highly-critical of the NFLPA for agreeing to the salary cap and the rookie cap.

Following the announcement of the formation of the A League and the signing of a number of NFL free agents to A League contracts, in July, 1994 NFL Commissioner Paul Tagliabue met with NFLPA Executive Director Gene Upshaw and reached an agreement to modify the NFL-NFLPA Collective Bargaining Agreement. The modifications were as follows.

Free agency for all veteran players was restricted in the following way:

**Paragraph 19.7 Veteran Free Agency – Right of First Refusal.** The provisions concerning free agency are modified to provide that all players who become free agents will be subject to a right of first refusal. NFL players who are free agents can go out and negotiate their best offer from a new team, that offer must be submitted in writing to their existing team, and their existing team can re-sign them if it gives written notice within ten days that it will match all of the financial terms of the offer submitted.

In return, the salary cap and the rookie cap were liberalized:

**Paragraph 24.11 Salary Cap and Rookie Cap Exceptions.** There shall be one exception to the salary cap and the rookie cap provisions. NFL teams shall be permitted to exceed the salary cap and the rookie cap to the extent that they are matching any written offer to their own veteran free agents pursuant to Paragraph 19.7, above, or any bona-fide written offer to any rookie or non-NFL player.

Subsequent to the announcement of these amendments, Commissioner Tagliabue held a press conference, at which he announced that in order to maintain the NFL as the highest quality football league in the World, NFL teams would be matching all A League offers to top NFL Players and top rookie prospects. In response to a question about whether some of the less successful teams in the NFL could afford to match the offers being made by A League teams, Commissioner Tagliabue said the league office would provide additional financial assistance to any NFL team that was forced to spend more than its fair share for player salaries because of the cost of matching A League offers.

**ASSIGNMENT:** The A League Board of Directors has contacted you and asked you to send them a memorandum, discussing any claims the A League may have against the NFL because of
the new modifications to the free agency and salary and rookie cap provisions. They have asked you to describe, discuss, and analyze their best legal theories, all the defenses the defendant(s) would be likely to raise, and the likely judicial decisions about all of those issues. Finally, they want you to make any strategic recommendations you believe they should follow and give them an assessment of the likelihood that they will succeed on the merits, and the relief, if any, they are likely to get from a court.

QUESTION 2. – NFL Constitution and By-Laws excerpts are attached.

Following the creation of the A League described in Question 1, Jerry Jones, the owner of the two-time NFL Champion Dallas Cowboys, entered into an agreement with Michael Eisner, the President of the Orlando Disney Beasts, a team in the A League. The Beasts had signed a number of top young players to contracts, but they had been unable to sign any big-name veteran NFL players. The Cowboys traded their back-up Quarterback, Bernie Kosar, and their Wide Receiver, Alvin Harper, with whom they were having salary disputes, to the Beasts in return for six top young players. Kosar and Harper agreed to the trades and the agreement was in compliance with all terms of the collective bargaining agreement. The Beasts and Cowboys kept the trades secret, pending approval by the Commissioner.

Upon advice of counsel that the trades were in compliance with all NFL rules, and based on his view that the trades would strengthen the NFL by bringing in top young players while giving away players who are past their prime, NFL Commissioner Paul Tagliabue approved the assignment. Immediately after the Commissioner’s approval of the trade, the Beasts held a press conference and announced that the acquisition of Kosar and Harper was a major coup for the A League, and demonstrated that the quality of A League players would be at least comparable to (if not better than) the quality of players in the NFL. At that press conference the Beasts announced that they had agreed to substantial increases in the 1994 contracts for both Kosar and Harper.

Various NFL owners were very critical of the Cowboys’ decision to trade away current top stars of the NFL. Those owners contacted Tagliabue and told him that his approval of the trade was likely to lead to additional trades of marquis NFL players to the A League. After conferring with those owners, Tagliabue called a press conference and announced that he had invalidated the Cowboys’ assignment of Kosar’s and Harper’s contracts to the Beasts, and that he would fine Kosar and Harper if they refused to honor their contracts with the Cowboys.

Tagliabue stated that although the assignments complied with the collective bargaining agreement and the NFL Constitution and By-Laws, it would be detrimental to the best interests of football for popular players, the players who draw fans to the games and to the broadcasts, to be traded to another football league. Tagliabue acknowledged that the trades would strengthen, not weaken, the Cowboys, in the long run, but said the Cowboys had not adequately considered the overall detrimental effects on the league because Jerry Jones and the Cowboys were too busy focusing on gaining a competitive advantage on the field. As a penalty to the Cowboys for engaging in conduct detrimental to the National Football League, Tagliabue fined the Cowboys $50,000 and ordered them to pay Kosar and Harper the increased amounts agreed to by the Beasts, with such fines and increases not to count against the salary cap, so other
players would not be adversely affected. With their NFL salaries now enhanced, Kosar and Harper were happy to return to the Cowboys.

The Cowboys sued the Commissioner in federal court (diversity jurisdiction), seeking to overturn his order. The Beasts sued Kosar, Harper, and the Cowboys in federal court, seeking a declaratory judgment that the Beasts’ contracts with Kosar and Harper are valid and enforceable, and seeking an injunction against Kosar and Harper playing for the Cowboys.

ASSIGNMENT: You are the law clerk to the federal judge who will be hearing these cases. Please draft a memorandum for him, explaining the claims, the defenses, and the analysis, and recommending what he should decide. YOUR CO-CLERK IS ADDRESSING ANY ANTITRUST CLAIMS – LIMIT YOUR ANALYSIS TO NON-ANTITRUST ISSUES AND DO NOT DISCUSS THE ISSUES PRESENTED BY QUESTION 1 IN ANSWERING THIS QUESTION.
EXCERPTS FROM THE NFL CONSTITUTION AND BY-LAWS

ARTICLE VIII – COMMISSIONER

Employment

8.1 The League shall select and employ a person of unquestioned integrity to serve as Commissioner of the League, and shall determine the period and fix the compensation of his employment. . . .

* * *

Jurisdiction to Resolve Disputes

8.3 The Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate:

(A) Any dispute involving two or more members of the League, or involving two or more holders of an ownership interest in a member club of the League, certified to him by any of the disputants.

(B) Any dispute between any player, coach and/or other employee of any member of the League (or any combination thereof) and any member club or clubs.

* * *

(E) Any dispute involving a member or members in the League, or any players or employees of the members or the League, or any combination thereof, that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League or professional football.

* * *

Disciplinary Powers of the Commissioner

8.13 (A) Whenever the Commissioner, after notice and hearing, decides that an owner, shareholder, partner or holder of an interest in a member club, or any player, coach, officer, director or employee thereof, or an officer, employee or official of the League has either violated the Constitution and Bylaws of the League, or has been or is guilty of conduct detrimental to the welfare of the League or professional football, then the Commissioner shall have complete authority to:

(1) Suspend and/or fine such person in an amount not in excess of Five Hundred Thousand Dollars ($500,000), and/or

(2) Cancel any contract or agreement of such person with the League or with any member thereof.

* * *
(4) In cases involving a violation affecting the competitive aspects of the game, award selection choices, and/or deprive the offending club of a selection choice or choices, and/or cancel any contract or agreement of such person with the League or with any member thereof, and/or fine the offending club in an amount not in excess of Five Hundred Thousand Dollars ($500,000) despite the provisions of sub-section (1) herein.

* * *

Miscellaneous Powers of the Commissioner

* * *

8.14 (B) The Commissioner shall have the power to hear and determine disputes between clubs in respect to any matter certified to by him by either or both of the clubs; he shall also have the power to settle and determine any controversy between two clubs which, in the opinion of the Commissioner, involves or affects League policy.

* * *

ARTICLE XVI

ASSIGNMENT OF PLAYER CONTRACTS

* * *

Approval by the Commissioner

16.8 (A) No sale or trade by a club shall be binding unless approved by the Commissioner. Immediately following such approval, the Commissioner shall notify all clubs of such trade or sale.

EXAMINATION IN SPORTS & THE LAW

2 HOURS

December, 1993

All facts presented in this exam, while they may or may not be modeled after actual fact situations, are purely hypothetical and they do not accurately describe any actual fact situation.

QUESTION 1. For the following question, you may refer to the Uniform Player's Contract, which is attached:
a) Leon "Neon" Jackson is an All-American in two sports: baseball and football. Leon has been drafted by both the N.Y. Giants and the N.Y. Yankees. He wants to play both professional baseball with the Yankees and professional football with the Giants. He hires you to represent him in his negotiations with both teams. What changes in the standard player contract would you seek to negotiate on behalf of Leon?

(20 minutes)

b) Following extensive negotiations, Brett Coleman, a star pitcher, and the Baltimore Orioles agree on a contract for $5 million per year for 3 years. The contract is guaranteed to the extent that: the Orioles would have to pay Coleman even if he "does not exhibit sufficient skill to make the Club or if he is injured." The agreement also provides under the Special Covenants section for a bonus which reads as follows:

**Signing Bonus**

"Upon the execution of this contract, the player shall be entitled to receive a signing bonus of $100,000 payable within 72 hours."

The contract provides for approval by the League President as follows:

"This contract or any supplement hereto shall not be valid unless and until approved by the League President."

Following the press conference announcing the deal, Coleman and the Orioles sign the contract. The Orioles send the contract to the League President in New York by overnight mail. That same night Coleman goes out with a few of his new teammates and the Orioles manager to celebrate at a bar in Baltimore. Coleman becomes drunk and gets into a fight with the bouncer at the bar. Coleman injures his arm in the fight. A medical examination at the hospital reveals that he has suffered a career-ending injury. When the Orioles learn of the injury, they announce that the deal is off. The Orioles call the League President and ask him to withhold his approval of the contract. The Orioles refuse to pay the signing bonus.

What arguments would you make to support the Orioles' refusal to pay the bonus and terminate the contract? Evaluate those arguments. Would Brett be entitled to workers' compensation? Why so or why not?

(35 minutes)

**QUESTION 2.** This question about professional football has two parts.

**Question 2.A.**

In November, 1989, the United States Court of Appeals for the Eighth Circuit held that the National Football League's ("NFL") non-statutory labor exemption had not yet expired, even though the most recent collective bargaining agreement between the NFL and the NFL Players Association ("NFLPA") had expired in 1987. Following that decision, the NFLPA disclaimed interest in representing NFL players in collective bargaining and a majority of NFL
players signed a petition terminating the NFLPA's position as their collective bargaining representative. Then, in McNeil v. NFL, 764 F. Supp. 1351, 1357 n.6 (D. Minn. 1991), United States District Judge David Doty held that the NFL's labor exemption had terminated.

On September 10, 1992, a jury returned its verdict in McNeil, and held the NFL's Plan B an unreasonable restraint of trade, violative of Section 1 of the Sherman Act. In November, 1992, Judge Doty was considering what injunctive relief to order in the McNeil case and in the White case, a class action primarily seeking injunctive relief. The plaintiffs in McNeil and White were asking Judge Doty to enjoin the NFL from enforcing Plan B or any similar plan.

Commissioner Tagliabue has retained you to give him advice about the following "Plan C" which has been proposed by a few NFL owners:

All NFL players would become unrestricted free agents and all NFL teams would reduce their rosters from 55 players to 33 players.

The owners proposing Plan C believe it is justified because the higher costs of free agent players would be offset by reduced costs related to smaller rosters. They believe Plan C would improve competitive balance by reducing the number of top players who could be stockpiled by the richer owners or the owners with teams in more desirable cities.

Commissioner Tagliabue has asked you to tell him if NFL players could attack Plan C under the antitrust laws, to explain the players' best antitrust arguments, and to give him your assessment of which side would win and why.

(25 minutes)

Question 2.B.

In May, 1993, the NFL and the NFLPA negotiated a seven-year collective bargaining agreement that contains the following provision:

CFL Rule: No Club may sign any player who in the same year has been under contract to a Canadian Football League ("CFL") club at the end of that CFL club's season (regular season or post-season, whichever is applicable).

The Canadian Football League season runs from July to November. Analyze the CFL provision under the antitrust laws. Make the arguments for and against the legality of the rule. Which side has the better argument? Would it change the analysis if the CFL played from April to August?

(30 minutes)
EXAMINATION IN SPORTS & THE LAW

2 HOURS

December, 1992

All facts presented in this exam, while they may or may not be modeled after actual fact situations, are purely hypothetical and they do not accurately describe any actual fact situation.

QUESTION 1. (Portions of the Major League agreement are attached for use in answering Question 1.)

A new Commissioner of Baseball has been elected unanimously. He is hired pursuant to the attached provisions of the Major League Agreement, which are unchanged. Shortly after taking office, the Commissioner is visited by a group of three Club owners who are greatly concerned about the financial condition of Major League Baseball in general and their franchises in particular. These club owners have franchises in “small market” areas and they have been unable to procure substantial local cable television contracts. They complain to the Commissioner that unless the “big market” clubs share their cable revenues, their “small market” franchises will go bankrupt within six months and the reputation and future of Major League Baseball will be ruined.

The Commissioner, who was previously the owner of a “small market” franchise, is sympathetic to their plight. After studying the problem for several months, the Commissioner issues a directive to all the major league clubs that beginning January 1, 1993 all franchises’ local cable revenues will be shared equally among the 28 major league teams. He announces that this revenue sharing is in the “best interests” of baseball.

The owners of the “big market” clubs who stand to lose the most from the Commissioner’s decision are outraged. They are particularly upset because the Major League Agreement provides as follows:

“The vote of ¾ (21) of all Major League Clubs (28) shall be required for the approval of any provision binding on both Leagues affecting the sharing of Member Clubs of revenues from any source.”

The Commissioner’s decision was made without a vote.

The owners of the “big market” clubs call for the Commissioner to resign. He refuses to do so. These owners threaten to fire him and have announced that they will refuse to comply with the revenue sharing directive. The Commissioner says he will not back down.
 Each of the relevant constituencies: The Commissioner, the “small market” Clubs, and the “big market” Clubs, consult their attorneys.

In light of the cases that we have read, the history of the Commissioner’s office, and the relationship among the league owners, analyze the legal rights and remedies of each. What advice would you give to each?

**QUESTION 2.** The major league baseball owners were under pressure to expand the number of major league teams and to increase their foreign revenues. In addition, their collective bargaining agreement came to an end without significant progress in their discussions with the union. The owners developed a new strategy. The owners of the thirty major league teams created a replacement league – the League of American Baseball Organized for Replacement (“LABOR”) – ten replacement teams, each replacement team controlled by three major league teams. The thirty major league owners agreed to share all LABOR revenues, expenses, and profits equally. The replacement teams were created in the following cities:

- Washington, D.C.
- Tampa Bay, Florida
- Phoenix, Arizona
- Salt Lake City, Utah
- New Orleans, Louisiana
- Charlotte, North Carolina
- Frankfurt, Germany
- Paris, France
- London, England
- Rome, Italy

The strategy was to achieve the following goals:

1. Expand American Baseball into Europe.
2. Increase sales and value of Major League Baseball licensed products in Europe.
3. Increase sales and value of Major League Baseball broadcast rights in Europe.
4. Have games for the major leagues’ television networks to broadcast if the Major League Baseball Players Association (“MLBPA”) strikes.
5. Put pressure on the MLBPA to be more conciliatory in collective bargaining negotiations.

The major league owners agreed to stop signing the rookies, draft picks, and minor league players to major league contracts, instead signing them to contracts with the LABOR teams.
With encouragement from the owners, the LABOR players formed a players association and negotiated a collective bargaining agreement with the owners. Included in the LABOR collective bargaining agreement after bona fide good faith negotiations were the following provisions:

1. All LABOR players receive $100,000 per season plus bonuses based on team performance.

2. To prevent injuries suffered in non-LABOR games or exhibitions, all LABOR players agreed not to play in any non-LABOR baseball game or exhibition without permission of the Commissioner of the LABOR. The penalty for playing in any non-LABOR baseball game or exhibition without Commissioner approval was left to the LABOR commissioner’s discretion, but the possible penalties included a suspension for up to two years from the LABOR and Major League Baseball and/or forfeiture of all payments to the player for playing in the non-LABOR game or exhibition.

The members of the MLBPA filed a class action, suing all thirty major league baseball owners under Sections 1 and 2 of the Sherman Act, challenging the formation of the LABOR and the two provisions of the LABOR collective bargaining agreement described above.

The major league owners contend that (1) the players lack standing and did not suffer antitrust injury, and (2) contend that the conduct and agreements do not violate the antitrust laws.

You have been retained by a multi-millionaire, Pamela Purchaser, who is considering buying the Baltimore Orioles. She wants to know all of the antitrust issues, including the arguments to be made by both sides, and she wants to know your prediction about the likely outcome. Please prepare an organized memorandum answering her questions.
QUESTION NO. 1

Peter Puck, a National Hockey League all-star with the Washington Capitals, became a free agent in the Summer of 1989 after six years in the NHL. The Capitals were having financial problems, so they were not willing to match the offers Puck received from other teams. Puck was originally from the Los Angeles area, his wife wanted to pursue her acting and modeling career in L.A., and they both were interested in raising their three grade school-age children in California, so in the Summer of 1989 Puck signed a five-year contract with the Los Angeles Kings. Under the NHL rules, the Capitals and Kings conferred and reached agreement on players and draft picks to be given by Los Angeles to Washington to compensate Washington for the loss of Puck.

Three years later, in 1992, the Kings signed another all-star free agent, Larry O. Millieu, who had played his first six seasons for the Quebec Nordiques. Quebec and Los Angeles could not reach agreement on compensation to Quebec for the loss of Millieu, so that matter was submitted to arbitration. The arbitrator ruled that Los Angeles had to send Peter Puck to Quebec to compensate Quebec for the loss of Millieu. Because Puck had been in the NHL for less than ten years, he had no right under the NHL collective bargaining agreement to insist that he be allowed to stay in Los Angeles.

After some difficult sessions with his family, Puck decided that even though he had two very lucrative years (1992-93 and 1993-94) remaining on his contract, he would not move to Quebec. When the NHL would not budge and Quebec refused to trade him, Puck retired in 1992 and did not play during the 1992-93 season.

One year later, in 1993, the new International Hockey League ("IHL") was formed and Puck signed a four-year contract with the Los Angeles franchise of the IHL, the L.A. Smog, starting with the 1993-94 season. The Quebec Nordiques filed an immediate action in Los Angeles, seeking an injunction against Puck playing for the Smog.

Prepare a memorandum for Puck, identifying all of the issues and arguments, giving Puck legal advice, and predicting the outcome of Quebec's lawsuit. If you do not have enough information to assess an issue or the strength of an argument, explain what additional information you will want to gather.

QUESTION NUMBER 2
Concerned about the continuing financial viability of their outdoor soccer league, and unable to reach agreement with their players' union, the five remaining owners of American Professional Soccer League (APSL) teams announced the termination of their league on May 1, 1992. One month later, on June 1, 1992, those five owners and five additional owners announced the formation of a new league, the United States Soccer League, Inc. ("USSL").

The USSL is a corporation with ten shareholders, each owning 10% of the stock. The former Commissioner of the APSL was named the President and Chief Executive Officer of USSL, Inc. and each shareholder was named Executive Vice-president and given responsibility for running one of the ten USSL, Inc. teams. All team expenses and revenues and all other league expenses and revenues are expenses and revenues of USSL, Inc. Each team is simply one division of the USSL corporation. The ten Executive Vice Presidents receive year-end bonuses that depend on the financial success of the corporation and the success of their division.

3. All players were paid based on their years of experience in professional outdoor soccer:
   a. Rookies - $30,000 per year
   b. For each year of professional outdoor soccer league experience -- another $10,000 per year (e.g., after four years, player's annual salary is $70,000).
   c. Bonuses based on team performance (e.g., an extra $10,000 per player if team makes the play-offs).

4. The initial player selection is determined by a player draft of all eligible players by the ten executive vice presidents.

5. All player contracts are for one year, with the league having three one-year options.

6. When computing a player's years of experience in professional outdoor soccer to determine the player's salary in the USSL, years played in any professional outdoor soccer league in any country count as years of experience for USSL purposes.

7. However, if a player plays for a non-USSL soccer team in the United States in 1992 or any subsequent years, and then subsequently signs with a USSL team, unless the USSL President issues a special waiver of this rule, the player will be considered a USSL rookie for salary purposes when he signs with the USSL team.

8. Any calendar year in which USSL players first form a union or refuse to play through a boycott or strike does not count in determining those players' years of experience playing professional soccer outdoors, because those events are likely to limit the amount of soccer experience the players achieve during those years.

It is now 1993. USSL players are considering forming a union and the Professional Outdoor Soccer League ("POSL") is being formed, with eight teams -- all in the United States. You have been consulted by Tony Goalie, a former APSL Player who now plays...
for a USSL team and has been drafted by a POSL team. You have also been consulted by some of the owners of POSL teams.

Goalie and POSL want to know what claims they may have against USSL, Inc. and its owners. Prepare a memorandum, discussing (a) the legal rights, claims, related issues, and remedies of the players and (b) the legal rights, claims, related issues, and remedies of the POSL owners. Please identify all of the issues and arguments, and predict the outcomes.

If you do not have enough information to assess an issue or the strength of an argument, explain what additional information you would want to gather.

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EXAMINATION IN SPORTS & THE LAW
2 HOURS
May, 1991

All facts presented in this exam, while they may or may not be modeled after actual fact situations, are purely hypothetical and they do not accurately describe any actual fact situation.

QUESTION NO. 1

Andy Attackman is a junior and the top player on Pennsylvania State University's top-ranked hockey team. At the end of the hockey season, Attackman interviewed several professional hockey agents and signed an athlete-agent contract with Oscar Opportunist in late February, 1991. Under NCAA rules, Attackman thereby forfeited his remaining NCAA eligibility and Opportunist violated the Pennsylvania athlete-agent statute which provides in pertinent part, as follows:

§ 7107. Unlawful actions by athlete agents.
(a) Offense defined -- An athlete agent shall not do any of the following:
(1) Enter into an oral or written contract . . . with a student athlete before the student athlete's eligibility for collegiate athletics expires.

* * *

(b) Penalty -- An athlete agent who violates subsection (a) commits a misdemeanor of the first degree and shall, upon conviction, be sentenced to pay a fine of not more than $10,000 . . . or imprisonment for not more than one year, or both.
The Pittsburgh Penguins had the rights to the first pick in the National Hockey League draft, so Opportunist contacted them to see if they were interested in Attackman. The Penguins were very interested and signed a four-year deal with Attackman in March, 1991 under which Attackman would receive $200,000 per year plus a $200,000 house for Attackman's mother in Pittsburgh. To protect Opportunist from Pennsylvania discovering that Opportunist had violated the Pennsylvania athlete-agent statute, Attackman, Opportunist, and the Penguins all agreed to keep the deal a secret from the press until after Attackman announced that he was going to leave Penn State to turn professional.

Attackman wanted to wait until April to announce his deal with the Penguins because Attackman's mother was still upset about Attackman's father's death in December, 1990. Attackman knew his mother would be heartbroken when she learned Attackman was not going to finish and get his college degree from Penn State.

In late March, before any announcement, a new professional hockey league was announced, the International Hockey League ("IHL"). The owner of the Harrisburg Highstickers, an IHL franchise in Harrisburg, Pennsylvania, offered Attackman a contract that would pay Attackman to finish college in the off-season plus one million dollars over four years, plus a $400,000 house for Attackman's mother in Harrisburg.

On April 15, 1991, Attackman and Opportunist held a press conference. At the press conference, Attackman announced that he was foregoing his final year of NCAA eligibility. After that announcement, Attackman and Opportunist announced that they were going to support the formation of a new hockey league and, in front of all of the cameras, Attackman announced that the Harrisburg Highstickers has offered to pay for Attackman to finish his college education at Penn State in the off-season and to get his law degree after his hockey career ends. At that point, Attackman announced that he would sign the Harrisburg Highstickers contract and signed the contract in front of all of the media. Attackman's mother was at the press conference and she was so happy that she cried when Michael Cozzillio, the owner of the Highstickers, gave her a model of the $400,000 house they were going to build for her and a certificate for free tuition for Attackman at Penn State and the law school of his choice.

When the Penguins learned of the announcement, they held a press conference and produced a copy of their contract with Attackman, which was executed in March, 1991 and signed by the NHL Commissioner on April 1, 1991. The Penguins promptly filed suit against the Harrisburg Highstickers and Andy Attackman, seeking (1) a declaratory judgment that their contract with Attackman is valid and (2) an injunction against Attackman playing for the Harrisburg Highstickers.

(a) What arguments would the Penguins make in support of their position?
(b) What arguments would the Highstickers and Attackman make in response?
(c) You are the Judge-how would you rule and why?

QUESTION NUMBERS 2 AND 3

In the aftermath of Bo Jackson's apparently career-ending injury, a leading medical journal published an article by and orthopedist, Dr. U. R. Hurt, about the reasons for
Jackson's condition. Dr. Hurt concluded that Jackson's career-ending condition was caused by Jackson playing both baseball for the Kansas City Royals and football for the Oakland Raiders. According to Dr. Hurt, the same condition is likely to occur in any other athletes over 20 years old who attempt to play those two sports at the highest professional levels during the same twelve-month period. As the article explained, it is Dr. Hurt's view that the stresses involved in the contact inherent in football, when combined with the stresses involved when running bases and fielding in baseball, put too much pressure on the hip joint and can cause it to deteriorate. Dr. Hurt's article concluded that this condition is less likely to develop if athletes take twelve months off before switching from baseball to football or vice versa.

The national news media picked-up the story and headlines in newspapers all over the country read "Bo Jackson Crippled By Leagues' Decision To Let Him Play Two Sports," and "Leagues Did Not Know What Was Best For Bo." Jackson was a very popular player, as his "Bo Knows" commercials for Nike and his book, Bo Knows Bo, were very positively received by fans nationwide. Hundreds of fans wrote to National Football League Commissioner Paul Tagliabue and Major League Baseball Commissioner Fay Vincent, criticizing the commissioners and threatening to boycott NFL and Major League Baseball games and broadcasts.

Both Tagliabue and Vincent were concerned about the fans' reactions and protecting their players from career-ending injuries, so they began meeting to discuss the situation. After several meetings, they each issued a new rule to address the problem:
National Football League Rule

No team in the National Football League or any representative of any NFL team shall negotiate or sign a contract with any athlete (except if the athlete will be employed by the NFL team solely and exclusively as a punter or a kicker) who is involved in negotiations with or is under contract with any Major League or Professional Minor League baseball team. Any contract between an NFL team and an athlete that is signed while the athlete is under contract or in negotiations with a Major League or Professional Minor League baseball team is void and will not be approved by the NFL Commissioner (except if the athlete will be employed by the NFL team solely and exclusively as a punter or a kicker).

Major League Baseball Rule

No Major League Baseball team or any representative of a Major League Baseball team shall negotiate with or sign a contract with any athlete who is involved in negotiations or is under contract with any National Football League, World League of American Football ("WLAF") or Canadian Football League ("CFL") team (except if the athlete is involved in negotiations or is under contract solely and exclusively to be employed as a punter or a kicker). Any contract between a Major League baseball team and an athlete that is signed while the athlete is under contract or in negotiations with an NFL, WLAF, or CFL team is void and will not be approved by the Commissioner of Major League baseball (except if the athlete is involved in negotiations or is under contract solely and exclusively to be employed as a punter or a kicker).

Shortly after these rules were issued by the NFL and Major League Baseball commissioners, 6'8" Dan McGwire of San Diego State University was drafted by the Seattle Seahawks in the National Football League and by the San Diego Padres Major League Baseball team. Dan's older brother, Mark McGwire, was already a superstar with the Oakland A's. Dan signed a three-year contract with the Seahawks, and became their second-string quarterback. As two frustrating years of sitting on the bench were coming to an end, Dan McGwire contacted the San Diego Padres' management and indicated that he would like to talk to them about either (1) leaving the National Football League to play baseball or (2) playing baseball for the Padres in the Spring and Summer, and playing football for the Seahawks in the Fall. The Padres' management responded that McGwire still had a year remaining on his NFL contract and his NFL team was negotiating with him concerning renewal of his contract, so Vincent's rule prohibited negotiations with the Padres or any other major league baseball team.

Question Number 2 is:

What advice would you give Dan McGwire if he came to you to ask about possible antitrust litigation against Fay Vincent and the Major League Baseball rule?
Question Number 3 is:

What advice would you give Dan McGwire if he came to you to ask about possible labor litigation, including arbitration, by McGwire or the NFLPA or the Major League Baseball Players Association to allow McGwire to negotiate to play baseball or both baseball and football?
FACT PATTERN FOR QUESTIONS 1, 2, and 3 (2 Hours)

During Major League Baseball’s 1986 winter meetings (November-December 1986), the consensus opinion among league owners was that something should be done to commemorate the 40th anniversary of Jackie Robinson’s breaking of baseball’s infamous color barrier. After discussing several options, the owners decided to mark the occasion by demonstrating their opposition to the apartheid policies of South Africa. Because the U.S. Congress had recently voted to repeal its earlier imposition of sanctions against South Africa, the owners drafted the following rule:

No player may enter into an agreement to endorse commercially (for profit) the product or services of any company doing business with the government of South Africa. Although existing contracts may be honored, new contracts are prohibited. Likewise, any contract which is renewable at the option of the player may not be renewed under this rule. Renewal of a contract through exercise of such an option is tantamount to executing a new contract. Any player who violates this rule shall be subject to discipline by the Commissioner, including a fine not to exceed $25,000 and/or a suspension not to exceed one year. The appropriate contractual grievance arbitration mechanism for any player disciplined under this section is a hearing before the Commissioner.

Shortly after the rule had been drafted, the owners met to decide the best means of promulgating it. At this meeting, there was considerable debate about the need to propose the rule to the Major League Baseball Players’ Association (“Players’ Association”). According to the collective bargaining agreement, the Players’ Association is the “sole and exclusive collective bargaining agent for all major league players with regard to all terms and conditions of employment except . . . Special Covenants to be included in Uniform Player Contracts, which actually or potentially provide additional benefits to the player.” After inconclusive discussions with their attorneys, the owners “out of an abundance of caution” (in their words) decided to bargain with the Players’ Association prior to implementing the rule.

Negotiations for a new collective bargaining agreement (due to expire at midnight on March 31, 1987) began in late February. From this point until late March, no mention was made of the “no endorsement” rule. However, on March 28, when all issues had seemingly been resolved except for a few, insignificant remaining player demands, the owners placed the “no endorsement” rule on the table. They offered to accept the remaining player demands in exchange for the players’ acceptance of the no endorsement language. After vehement protest by the players and three full days of hard bargaining, the players yielded at 11:49 P.M. on March 31. As a result, the rule was implemented and made a part of the new collective bargaining agreement, effective April 1, 1987.
On April 2, 1987, the Commissioner’s office, after considerable discussion with most of the club owners, sent a memorandum to every player advising them of the Commissioner’s intent to enforce strictly the letter of the “no endorsement” provision. In addition, the memorandum indicated that the Commissioner intended to enforce the spirit of the new rule through his broad “plenary” powers as custodian of baseball’s integrity. The Players’ Association responded to the Commissioner with a brief note cautioning him about, and objecting to, any “overstepping of his authority with respect to the South African situation.” There was no further correspondence between the parties.

Ricky Branch was a veteran superstar for the Texas Rangers and party to a lucrative endorsement package with Love Those Krugerrands, In. (“LTK”), an investment company doing substantial business with the government of South Africa. On April 30, 1987, the expiration date of his endorsement contract, Branch exercised a one year option to renew the contract at an increase of $50,000 per year (from $75,000 to $125,000). Because Branch had no legal or contractual duty to renew the contract, he was, by his own admission, in technical violation of the “no endorsement” rule. As a result, he was fined $25,000 and suspended for three months. Nonetheless, Branch continued to honor the endorsement contract and voluntarily (without pay) added to his endorsement duties three one-minute television commercials in which he offered his support for the government of South Africa and his encouragement of American commercial enterprise in that country. As a result of these commercials, the Commissioner levied an additional $5,000 fine on Branch. In each case, the Commissioner gave the proper notice of opportunity for hearing.

Branch admitted that he had violated the no endorsement rule by his endorsement contract, but denied that his voluntary T.V. ads constituted a violation of any established league rules. Further, he was infuriated at the Commissioner’s action and with what he considered to be his team’s complicity in it. As a result, he notified the club that he would terminate his relationship immediately, change sports, and join the Peoria Pillagers of the newly formed Summer Professional Football League (“SPFL”). Branch’s Rangers contract was “standard” in all respects including a clause prohibiting him from participating professionally in any sport during the duration of the agreement (three years). In addition, the contract contained a special covenant that required him to report to spring training on February 15 for the purpose of preparing annual training films to be presented to rookies at spring training each year. The contract provided for a $15,000 bonus for the completion of each training film. Note: this clause was drafted to override a provision in the collective bargaining agreement that prohibited clubs from requiring a player to report for spring training prior to March 1.

Within three days of his fine and suspension, Branch “made good” on his threat and executed a two year contract to play quarterback with the Pillagers. This contract, insofar as is relevant, contained standard language prohibiting him from participating professionally in any other sport during the duration of the agreement. This contract also contained a special provision that gave him the right to veto any trade, reassignment, or other material change in his employment status.
After signing with the Pillagers, Branch played two games and played very well. Unfortunately, the Pillagers were not doing as well as the box office. Alarmed at this dismal financial outlook, Pillagers’ owner Roz Davis offered the club for sale. Amazingly, within one week, wealthy entrepreneur Ivan Toesky came up with the cash and purchased the club “lock, stock, and barrel.”

A few days later, Branch was contacted by his former club, the Rangers. During this conversation, the Rangers encouraged him to return under his old contract and get back to playing his game – baseball. After pondering his decision for a few more days, Branch quit the Pillagers and immediately returned to the Rangers under his former contract terms. Given the foregoing fact pattern, discuss each issue and both sides of each issue in terms of the arguments that could be raised pro and con in the context of the following legal actions commenced shortly after Branch’s return to the Rangers:

1) **Branch** brings an action in the United States District Court alleging that the league’s action (the “no endorsement” rule) constituted an unlawful combination in restraint of trade violative of Section I, Sherman Antitrust Act. You may assume that this court is the proper forum and that there are no problems with ripeness. (50 minutes)

2) The Players’ Association files two unfair labor practice charges with the National Labor Relations Board alleging refusals to bargain in good faith against:

   a. The Commissioner/League, for imposition of the $5,000 fine upon Branch for the voluntary T.V. commercials supporting South Africa. (15 minutes);

   b. The Texas Rangers, for negotiating the February 15 spring training reporting clause in Branch’s Uniform Player Contract in derogation of the collective bargaining agreement. (15 minutes)

You may assume that there is a grievance/arbitration provision (calling for a neutral arbitrator) in the collective bargaining agreement and that it covers all disputes under that agreement, except where specifically indicated (e.g., the no endorsement clause) and except for matters involving Commissioner-imposed discipline for on-the-field misconduct or conduct affecting the integrity of baseball. Such “exceptions” are reviewable by the Commissioner as final and binding arbitrator.

3) The Pillagers sue Branch in U.S. District Court seeking an injunction prohibiting him from playing baseball for the Rangers during the term of his Pillager’s Standard Player Contract. Again, you may assume that this court is the proper forum and that there are no problems of ripeness. (40 minutes)