

SPORTS & ENTERTAINMENT

LAW JOURNAL



UNIVERSITY OF
DENVER

Sturm College of Law

Sports and Entertainment Law Journal
Sturm College of Law
University of Denver
2255 E. Evans Ave.
Denver, Colorado 80208

VOLUME XV

- EDITORIAL BOARD -

BEN ARCHER
Editor-in-Chief

BENJAMIN DAULTON
Senior Articles Editor

NADIN SAID
Technical Editor

RYAN KEELEY
JARED NAJJAR
JONATHAN SAADEH
Managing Editors

RYAN KEELEY
Candidacy Editor

Staff Editors

SARAH BRICKER
AMANDA FRAHM
KYLE MCDANIEL
JACLYN ROSANIA
ANSLEY SHEWMAKER
LINDSEY UHL

ASHLEY DENNIS
LEONARD LARGE
AMELIA MESSEGE
NADIN SAID
JEN TORRES

Faculty Advisors

STACEY BOWERS

JOHN SOMA

TABLE OF CONTENTS

ARTICLES

MMA NEGOTIATION3

GARRICK APOLLON

AMATEURISM INTERPLAY BETWEEN OLYMPIC EXCELLENCE AND NCAA
ELIGIBILITY27

TYLER DUMLER

MARYLAND SPORTS LAW49

ADAM EPSTEIN

CIRCUMVENTING THE NBA’S SALARY CAP:
“THE SUMMER OF DWIGHT”73

CHRISTOPHER C. KENDALL

LEGAL LIABILITY FOR SPORTS REFEREES IN TODAY’S LETIGIOUS WORLD -
IF YOU CAN’T KILL THE UMP, THEN SUE HIM83

MARC T. WOLIN & ROBERT D. LANG

MMA NEGOTIATION

Garrick Apollon*

*Practicing corporate lawyer of the Bar of Ontario, Canada (2004) and part-time Professor of Law at the University Of Ottawa's Faculty of Law, French Common Law Section and Telfer School of Management undergraduate, MBA and EMBA Programs. Professor Apollon earned his J.D. from the University of Ottawa, 2003; L.L.B. (Civil Law) from l'Université Laval, 2000; LL.M. (Master of International Law) from l'Université Laval, 2002; and LLCM (Master of Comparative Law) from the University of Pennsylvania Law School, 2012.

I. Introduction:

This article intends to develop a new school of negotiation and dispute resolution¹ named MMA Negotiation. The idea of MMA Negotiation originates from the fact that as a practicing corporate lawyer, and professor of negotiation and dispute resolution, the author has observed that the school of Negotiation Jujitsu taught in the celebrated book *Getting to Yes*² and the Program on Negotiation at Harvard Law School³ do not adequately prepare negotiators for “war” in the real world⁴. This article argues that the teaching of the school of “Negotiation Jujitsu” developed by Fisher and Ury, which encourages negotiators to focus on interest-based negotiation by using the strength of the other side to your advantage by deflecting it,⁵ while being a fundamental strategy is at the same time too narrow of an approach to the art of negotiation.⁶ There is no single generic actor or situation in negotiation.⁷ Therefore, like the

¹ Negotiation should also be regarded as a core dispute resolution mechanism integrated in the mediation, arbitration or litigation process. See Gary Bellow & Bea Moulton, *The Lawyering Process* 11 (Foundation Press, 1978) (defining negotiation as a dispute resolution mechanism as follows: negotiation is the process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests. It is accomplished consensually as contrasted with the force of law).

² See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES* (Penguin, 2d Ed. 1991) [hereinafter Fisher & Ury *Getting to Yes*] (the central ideas of the book are: separate the people from the problem, focus on interests and not positions, invent options for mutual gain, insist on using objective criteria, and understand your BATNA (Best Alternative To a Negotiated Agreement)).

³ Professors Roger Fisher, William Ury, & Bruce Patton are all from the Program on Negotiation (PON) at Harvard Law School. The mission of PON is to improve the theory and practice of conflict resolution and negotiation by working on real world conflict intervention, theory building, education and training, and writing and disseminating new ideas; see <http://www.pon.harvard.edu/academic-programs-faculty/> (last visited August 30, 2013). PON has offered an example of negotiation jujitsu in the Program on Negotiation Daily Blog; see PON Staff, *Become a (negotiation) jujitsu master*, HARVARD LAW PROGRAM ON NEGOTIATION DAILY BLOG (Oct. 22, 2009), <http://www.pon.harvard.edu/daily/negotiation-skills-daily/become-a-negotiation-jujitsu-master/> (last visited Aug. 30, 2013).

⁴ See Bruce Kahn, *Applying The Principle And Strategies Of Asian Martial Arts To The Art Of Negotiation*, 58 ALB. L. REV. 223, 223-24 (1994) [hereinafter Kahn, *Asian martial arts & the art of negotiation*] (theorizing that the practice of law revolves around conflict and lawyers serve their clients by helping them resolve or avoid disputes. Therefore, the emphasis on the context of the conflict which makes the study of Asian fighting arts so valuable for the lawyer involved in dispute resolution).

⁵ Fisher, Ury & Patton, *supra* note 2, at 40-56 (stipulating that one of the core principles of principled negotiation is the necessity to avoid positional bargaining in negotiation to create more durable (win-win) agreements that satisfy both parties). It is important to nuance that Fisher & Ury do not deny the distributive nature of negotiation in many contexts. Rather, they argue that their principled negotiation approach is more effective and will result in better agreements even when claiming value.

⁶ Ran Kuttner, *The Wave/Particle Tension in Negotiation*, 16 HARV. NEGOT. L. REV. 331, 359-60 (2011) [hereinafter Kuttner, *Wave/Particle Tension In Negotiation*] (offering the wave/particle duality in quantum physics as a new way of apprehending and approaching negotiation. Also discussing that the term “Negotiation Jujitsu” making use of the eastern martial arts as a metaphor needs further pedagogy to be developed in order to embrace what the martial arts have to offer. Though Fisher and Ury’s approach touches on some skills that the practitioner of martial arts develops (e.g., refraining from reactivity, sidestepping personal attacks), it is important to note that martial arts are more than a technique or set of skills to adopt. Rather, martial arts is a practice through which the practitioner cultivates a worldview, awareness and tools consistent with a more holistic view of conflicts).

⁷ *Id.* at 352 (explaining that the theoretical perspective that undergirds knowledge of negotiation has advanced considerably; however, the teaching of interest-based negotiation in *Getting to Yes* is a convenient simplification, because considering ‘the party’ as a single generic actor allowed scholars to apply all of their individualistically oriented theory to the intra-group, inter-group, intra-organizational, and international levels); see also Richard Shell,

practice of martial arts, MMA Negotiation maintains the necessity for mindfulness and perceptible fluidity as the central focus to the practice of negotiation and dispute resolution.⁸

A strict translation of the term Jujitsu means gentle, soft and flexible.⁹ This translation offers little insight into the martial art.¹⁰ However, negotiation scholarship emphasizes the power of reframing and the manner a negotiator frames or describes negotiation to help create a new dynamic and achieve better results.¹¹ This article argues that reframing Negotiation Jujitsu for MMA Negotiation, will help the negotiator move away from a specific and narrow style focused on using principled negotiation to a more holistic and balanced style allowing MMA negotiators to use a more adaptable mindset when analyzing negotiation situations and choosing which strategy and tactics to apply to a situation to achieve the best results.¹²

UFC President Dana White¹³ called the legendary Bruce Lee the “father of mixed martial arts (MMA)” stating: “If you look at the way Bruce Lee trained, the way he fought, and many of the things he wrote, he said the perfect style was no style. You take a little something from everything. You take the good things from every different discipline, use what works, and you throw the rest away.”¹⁴ Accordingly, MMA negotiators should not aim to focus too much on any predictable style of negotiation or specific professional expertise to achieve better results.¹⁵

Great MMA fighters like GSP¹⁶ and Anderson Silva¹⁷ use more of a defensive style such as jujitsu, but also other more offensive styles of fighting such as wrestling for GSP¹⁸ and Muay

Bargaining for Advantage: negotiation strategies for reasonable people, xvi-xvii (Penguin Books eds., 2006) [hereinafter Shell, *Bargaining for Advantage*].

⁸ Christopher Bates, *Lessons From Another World: An Emic Perspective On Concepts Useful To Negotiation Derived From Martial Arts*, 27 NEG. J. 95, 98-99 (2011) (discussing necessity for mindfulness and perceptible fluidity should be embraced as the core philosophy of engagement in conflict management) [hereinafter Bates, *Concepts Useful To Negotiation Derived From Martial Arts*].

⁹ RENZO GRACIE & JOHN DANAHER, *MASTERING JUJITSU*, 2 (Human Kinetics eds., 2003) [hereinafter Gracie, *Mastering Jujitsu*].

¹⁰ *Id.*

¹¹ Kuttner, *supra* note 6, at 338 (discussing the power of reframing in scholarship for the practice of negotiation).

¹² *Id.* at 352, 359-363 (discussing that interest-based negotiation is an over-simplification of negotiation and a more balanced pedagogy would help negotiators become aware of the interest/competitive-interest tension, allowing them to use both mindsets and approaches when analyzing negotiation situations and choosing which skills to apply in order to achieve best results. Also discussing the incorporation of the metaphor “Negotiation Jujitsu” in *Getting to Yes* has failed to present a mindfulness-based philosophy similar to the practice of martial arts).

¹³ Dana White is the President of the Ultimate Fighting Championship (UFC), and started in 1993 as a professional mixed martial arts (MMA) organization. Since then, UFC is known as the fastest growing sports organization in the world. Dana White is a respected corporate leader and is considered one of the most accessible and followed executives in sports, with over two million followers on Twitter; see UFC, <http://www.ufc.com/discover/ufc> (last visited Aug. 28, 2013).

¹⁴ Marc Wickert, *Dana White and the future of UFC*, FIGHT TIMES MAGAZINE, <http://fighttimes.com/magazine/magazine.asp?issue=1&article=24> (last visited Sep. 3, 2013); see also Kev Geoghegan, *Bruce Lee claimed as 'father' of Mixed Martial Arts*, BBC NEWS (July 17, 2012, 7:38 PM), <http://www.bbc.co.uk/news/entertainment-arts-18738422> (last visited Sep. 3, 2013).

¹⁵ Kahn, *supra* note 4, at 233-34 (theorizing that warfare is the art of surprise and part of surprise is never be to be too predictable and letting others penetrate your real intentions).

¹⁶ Georges “Rush” St-Pierre, also known as “GSP,” is a Canadian from Montréal, Québec, a professional mixed martial artist and UFC world champion who holds black belts in both Kyokushin karate and Brazilian Jiu Jitsu. GSP’s MMA fighting style includes Kyokushin karate (3rd dan black belt), Brazilian Jiu-Jitsu (black belt), Muay

Thai for Silva.¹⁹ It is important to note that MMA negotiation is founded on the well-known fact that just like in the worlds of fighting or sports, if a good defense helps fighters/players or teams to win championships; a good offense is indispensable to score points and create opportunities to win.²⁰ As a practicing corporate lawyer, the author has witnessed Negotiation Jujitsu often resulting in one party getting completely overpowered by the other.²¹ Therefore, this article argues that other blended techniques (especially if there is no real need to preserve a relationship or if your counterpart uses competitive tactics and deception) are necessary.²² MMA Negotiation

Thai, Boxing and Wrestling. See TOUCHFIT: GEORGES ST-PIERRE, <http://www.gspofficial.com/bio> (last visited Sep. 3, 2013).

¹⁷ Anderson da Silva is a Brazilian mixed martial artist and former UFC Middleweight Champion. Although known primarily for his mastery of Muay Thai Thai striking, Silva is also a Brazilian Jiu-Jitsu black belt. Silva holds the longest title defense streak in UFC history, which ended in 2013 with 16 consecutive wins and 10 title defenses. Silva is the consensus No. 1 pound-for-pound MMA fighter in the world according to ESPN, Sherdog, Yahoo! Sports and other publications. UFC president Dana White and other publications have called Silva the greatest mixed martial artist of all time. See Anderson Silva on UFC, <http://www.ufc.com/anderson-silva-profile> (last visited Sep. 3, 2013).

¹⁸ See TOUCHFIT, *supra* note 16.

¹⁹ See Silva, *supra* note 17.

²⁰ See TOBIAS MOSKOWITZ, & L. JON WERTHEIM, SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON (Three Rivers Press, 2011) (in this New York Times bestseller, the University of Chicago behavioral economist Tobias Moskowitz teams up with veteran Sports Illustrated writer L. Jon Wertheim to overturn some of the most cherished truisms of sports, and reveal the hidden forces that shape how basketball, baseball, football, and hockey games are played, won and lost. This book theorizes that when it comes to winning a title, or winning in sports in general for that matter, offense and defense carry nearly identical weight). See also ROY J. LEWICKI, ALEX HIAM & KAREN W. OLANDER, NEGOTIATION: READINGS, EXERCISES AND CASES, SELECTING A STRATEGY, 19-22 (McGraw-Hill, 5th ed. 2007) [hereinafter Lewicki & AI, *Negotiation: readings, exercises and cases*] (discussing the advantages and challenges of competitive strategy in negotiation).

²¹ For instance, I recalled my first opportunity to use interest-based negotiation strategy with lawyers and corporate leaders of a multinational oil company and felt overpowered and alienated (or more like a fool!). This bad professional experience also reminded me that while strongly advocating in favor of *Getting to Yes*, one of my MBA students (working as an executive in a Canadian oil company) at the University of Ottawa explained to me and the class that the interest-based theories behind *Getting to Yes* were too idealistic and impracticable to work in the real business world against greedy corporate leaders and organizations. See G.B. Wetlaufer, *The Limits of Integrative Bargaining*, 85 GEO L. J. 1996, 369-88 (theorizing on the limits of interested-based negotiation). The author explains that many of us who study and teach negotiations have been influenced by the possibilities of “win-win solutions,” “getting to yes,” “problem solving,” “value creation,” “expanding the pie,” “non-zero-sum games,” and “integrative bargaining.” Subject to slight variations in usage, these terms may best be understood in terms of game theorists’ distinction between “integrative” and “distributive” bargaining. Unlike in distributive bargaining (win-lose), in integrative bargaining (win-win), the amount of benefit available to the parties, and thus the size of the “pie,” is not fixed but variable. In this sense, integrative bargaining is a non-sum game presenting opportunities for “win-win” solutions. The adoption of “win-win” or “win-lose” strategy and tactic is principally determined by the nature of the opportunities presented by various bargaining situations. It is now conventional wisdom that opportunities for “win-win” negotiations are usually widely available, often unrecognized and unexploited. However, this article argues that opportunities for “win-win” negotiation are not nearly as pervasive as is sometimes authoritatively asserted in negotiation scholarship. The author cites as examples: the parties of creating-value under uncertainties by differing probabilistic assessments of the likelihood of some future event or differing assessments of the likely future value of some variable (in other words unless the parties are willing to bet, no opportunity to expand the pie exists), difference in risk aversion may also affects opportunities for creating-value (some people or some cultures of adverse to risk and uncertainty and will not be willing to bet on uncertain contingencies), difference in time preferences regarding the payment or performance, etc.). Overall, this author argues that willingness to assume risk is the essence of all capitalist ventures and market exchange).

²² See Kuttner, *supra* note 6, at 352 (theorizing that the teaching of negotiation cannot be conveniently simplified to the teaching of interest-based strategy). See also Shell, *supra* note 7, at xvi-xvii (theorizing that experienced

is all about using Negotiation Jujitsu (principled negotiation) as core strategy while being ready to use other strategies. Conventional wisdom shows that MMA Negotiation is a superior style of negotiating because it promotes full mindfulness and awareness of the human tension between adversarial and collaborative negotiation by blending all negotiation styles together.²³ Most ‘traditional’ negotiation arts such as Negotiation Jujitsu presented by Fisher & Ury have a specific focus; however, it is important to note that historically speaking, Jujitsu as a martial art had no specific focus.²⁴ MMA Negotiation has no specific focus and negotiators use experience and wisdom to determine which style is the most appropriate depending on the situation.²⁵ In organizational behavior, this approach in management is called situational leadership.²⁶

MMA Negotiation should not be viewed as a gladiator fight where there are no rules or ethics, and domination and victory are the only finalities.²⁷ Instead, MMA Negotiation should be

negotiators know that there are too many situational and personal variables for a single strategy to work in all cases and should aspire to transcend the dual-orientation between “win-win” versus “win-lose” orientation in negotiation); Lewicki, Hiam & Olander, *supra* note 20, at 98-108 (discussing on the myth of “win-win” and explaining the strategic advantages of power and competitive strategy in negotiation).

²³ The author argues that negotiation needs to be linked to philosophy as the study of general and fundamental problems, such as those connected with reality, existence, knowledge, values, reason, mind, and language. Plato has always described Socrates as the greatest philosopher and his hero for his versatility. Plato describes Socrates as superiority on his intellectual skill and moral seriousness, to all of his contemporaries—particularly those among them who claimed to be experts on religious, political, or moral matters. See Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/plato/>. For instance the Socratic Method is widely used in contemporary legal education by most law schools in the United States because the primary goal of this method in the law school setting is to build the intellectual versatility and practicality of law students. This method demonstrates that there are no unanswerable questions, and that critical thinking skills are necessary to explore the contours of often difficult legal issues. The theory behind the Socratic Method is that the law student is motivated to achieve greatness by the teacher’s questions to reason rather than to recite. The law student must seek continual clarification of a proposition of definition by testing it with alternative conflicting possibilities in order. See June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1012-13 (1989). See also Kuttner, *supra* note 6, at 364 (concluding that the task of a negotiator is not choosing between adversarial and collaborative negotiation, or between value-claiming and value-creating, but rather between two conflicting approaches to negotiation. An astute negotiator must realize that these two mindsets are consistent with conflicting human tendencies, an inherent tension that represents what is to be human).

²⁴ See Gracie & Danaher, *supra* note 9, at 12 (theorizing on the origins of Jujitsu. The term Jujitsu only came about late in Japanese history and has developed in an unsystematic manner with no formal places of study, without full-time research or syllabus of instructions); Kuttner, *supra* note 6, at 363 (explaining that the Negotiation Jujitsu metaphor presented by Fisher & Ury fails to incorporate the mindfulness-based philosophy of martial arts).

²⁵ See Kahn, *supra* note 4, at 238 (explaining that beyond principle and strategy, martial arts, like negotiating, is mostly situational or circumstantial).

²⁶ Barry-Craig P. Johansen, *Situational leadership: A review of the research*, 1 HUMAN RESOURCE DEVELOPMENT QUARTERLY, 73-85 (Situational Leadership Model is a theory of business leadership that promotes the benefits of combining a range of managerial styles to cater to different people within the same organization. This is opposed to the more traditional view of the executive manager who may employ the same leadership tactics across an entire organization. By employing the strategies put forth in the Situational Leadership Model (*i.e.*, one size doesn’t fit all), a manager would potentially have the capabilities to deal with a wide range of people and thereby create a more employee-centric and innovative organization through the level of direct contact he or she has with members at all levels. Situational leadership theory (SLT)—it sounds great, but will it work? This research concludes that is not possible to make a definitive statement based on experimental findings. This research notes that SLT is a good starting point for discussion about the dynamics of leadership behavior, subordinate expectations, leadership effectiveness, and decision making).

²⁷ See Susan P. Sturm, *From Gladiators To Problem-Solvers: Connecting Conversations About Women, The Academy, And The Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119 (1997) (criticizing the American ultra-

aligned with Richard Shell's pragmatic school of ethics in negotiation because, to put it bluntly, a pragmatic MMA negotiator will strike a bit more often than an idealist fighter from the Negotiation Jujitsu School from Harvard will.²⁸ However, just like in Shell's pragmatic school of ethics in negotiation, this article argues that a MMA negotiator should also always, "display great concern for the potential negative effects of deceptive conduct on present and future relationships."²⁹

II. Historical and philosophical overview of the fertility of the legal transplant of MMA Negotiation in the American legal system:

Following William Ewald's logic of legal transplants, before attempting to transplant a legal philosophy such as MMA Negotiation into the practice of law in a legal system, a historical and philosophical analysis should be conducted to explore the "*law-in-mind*" of American lawyers and see if the legal transplant can be fertile.³⁰ As William Ewald states, "an efficient comparative legal study cannot confine itself to an investigation of a single, present-day legal system, but must also contain a substantial historical and comparative component."³¹ Based on Ewald's theory (since this article invites the transplant of MMA Negotiation in the practice of law in the United States), this transplant must be preceded by an investigation of the American legal culture and history in order to know how American lawyers really think.³²

First, this article argues that MMA Negotiation is significant for lawyers based on the fact that the practice of law revolves around conflict.³³ Historically, in common law there were four modes of trial: by jury, by ordeal, by oath, and by combat.³⁴ Therefore, The American practice of law still revolves around conflict because Anglo-American common law always builds on past litigation and American law schools teach through the reading and discussion of case law.³⁵ The

masculine "Gladiator" model of legal education and lawyering celebrating analytical rigor, toughness, and quick thinking. Defining successful performance as fighting to win: an argument, a conflict, or a case: even in more in formal settings such as negotiations or in-house advising, lawyering often proceeds within the gladiator model. Discussing the lawyer reasons back from the ultimate fight-in the courtroom, at the bargaining table, or in the administrative hearing- to develop strategies and legal responses that would best position the client to win should a crisis occur).

²⁸ Shell, *supra* note 7, at 213-14.

²⁹ *Id.*; see also Lewicki, Hiam & Olander, *supra* note 20, at 25 (explaining seven factors to evaluate the importance of the relationship between the parties in a bargain: 1. whether there is a relationship at all; 2. whether that relationship is generally positive or negative (whether the two of you have gotten along well or poorly in the past); 3. whether a future relationship is desirable; 4. the length of the relationship and its history, if one exists; 5. the level of and commitment to the relationship; 6. the degree of interdependence in the relationship; and, 7. the amount and extent of free, open communication between the parties).

³⁰ See William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?* 143 U. PA. L. REV. 1889, 1894 (1995) [hereinafter Ewald, *Comparative Jurisprudence and Law in Minds*]; see also William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplant*, 43 AM. J. COMP. L. 489, 509 (1995) [hereinafter Ewald, *Logic Legal Transplant*] (theorizing a new approach to study legal transplant and that comparative law theories must be coupled with an awareness of the complex relationship between law and society and must also be grounded in an extensive investigation of the history of law).

³¹ Ewald, *Logic Legal Transplant*, *supra* note 30, at 510.

³² *Id.*

³³ Kahn, *supra* note 4, at 223.

³⁴ *Id.*

³⁵ See GEORGE P. FLETCHER & STEVE SHEPPARD, AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS, 18 (Oxford Univ. Press, 2005) [hereinafter Fletcher & Sheppard, *American Law in a Global Context*] (theorizing that common

better the law school, the less certainty, and the more students have to think for themselves.³⁶ Law students are encouraged to “*see the law not as black and white but as various shades of gray.*”³⁷ Therefore, it is possible to argue that Anglo-American common law is historically connected to a more philosophically holistic martial arts style of teaching and practicing negotiation in the American legal system than Negotiation Jujitsu offered in *Getting to Yes*.³⁸ Moreover, I will argue that wise common law practitioners need to embrace a more particularistic³⁹ philosophy of thinking like the Chinese Philosophy of Dualism represented by the Yin-Yang symbol.⁴⁰ This symbol from ancient China is the most popular East Asian symbol in the world and represents how things should work. The outer circle represents the holistic “everything,” while the black and white shapes within the circle represent the interaction of two energies.⁴¹ Also, like the Eastern philosophy of Zen, great common law practitioners need to embrace a “*state of doubt*” in the development of their legal thinking because doubt allows us to explore things in a critical, open, and fresh way.⁴²

law is based on history. Explaining that in civil law codification means that the legislative intervention broke with the feudal past. The civil code represents a new beginning. On the other hand, common law builds on the past on basis of case law, frequently reinterpreting the past in order to solve modern problems).

³⁶ *Id.* at 10.

³⁷ *Id.*

³⁸ Kuttner, *supra* note 6, at 360 (theorizing that Negotiation Jujitsu in *Getting to Yes* fails as a pedagogy to include an emphasis on the philosophical underpinnings of the wave-like mindset (*i.e.*, cultivate an holistic worldview, mindset and skills) in training/teaching for spiritual development); *see also* John Barkai, *Cultural Dimension Interests, the Dance of Negotiation, and Weather Forecasting: A Perspective on Cross-cultural and Dispute Resolution*, 8 PEPP. DISP. RESOL. L. J. 403, 444 (2008) [hereinafter Barkai, *A Perspective on Cross-cultural and Dispute Resolution*] (theorizing that the concepts of principled negotiation in *Getting to Yes* emerge from American scholars from Harvard University and is consistent with the American culture. *Getting To Yes* reflects with its emphasis on cooperation reflect feminine society whereas U.S. have been empirically classified by Hofstede as a highly masculine society where competition and confrontation are valued. *Getting to Yes* searches for “mutual gain” and a high long-term orientation in its search for enduring agreements, explaining that these principles are not consistent with American business values).

³⁹ FONS TROMPENAARS & CHARLES M. HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN GLOBAL BUSINESS* 29-50 (2nd ed. 1998) [Hereinafter Trompenaars & Hampden-Turner] (theorizing and offering empirical comparison between Universalist (rules-oriented) versus Particularist (situational-oriented) business people). American society is based on Universalism. This means for Americans justice and fairness is embedded in the definition of business relationships: the law and a contract ensures that all parties are treated in a transparent, accountable and consistent manner (universal justice is based on the contract- a “deal is a deal). However, a wise American lawyer will understand that each case presents particular circumstances and situations (such as the relationship between the parties) and must be argued on this basis. For instance, an experienced common lawyer will be able to use particularism of the facts to argue a fiduciary duty or constructive trust, two famous equitable remedies in common law imposed by a court to benefit a party that has been wrongfully deprived of its rights).

⁴⁰ *See* TONY FANG, *CHINESE BUSINESS NEGOTIATING STYLE*, 30 -32 (2000) [hereinafter FANG] (explaining that the Chinese Philosophy of Dualism is represented by the Yin-Yang symbol is the ancient Chinese understanding of how things should work: the outer circle represents the holistic “everything,” while the black and white shapes within the circle represent the interaction of two energies).

⁴¹ *Id.*

⁴² Kuttner, *supra* note 6, at 362 (explaining that in the teaching of Zen, doubt is a state of openness that allows us to explore things in an open and fresh way. In Zen this is not an existential doubt that should be overcome, but an inherent and essential insecurity one transforms into upon giving up the illusionary self-security or self-confidence of the “beginner’s mind”).

In sum, Asian martial arts philosophy asserts that there is no objectivity or absolute truth to serve as a benchmark in a fight.⁴³ Therefore, I argue that since American common law is based on case law and develops from litigation, the astute MMA negotiator understands that the idea of objectivity and universalism⁴⁴ in our legal system is an ideal, and that every case should be bargained on the basis of the particularism⁴⁵ of its own merits based on the applicable universal legal and ethical principles.⁴⁶

III. The four core disciplines of MMA Negotiation as the spirit of the MMA Negotiator:

The role of a lawyer is to manage legal risks by uncovering legal threats and opportunities associated with the negotiation of a deal or dispute.⁴⁷ A prudent lawyer knows that a risk level (high, medium or low) for a deal or dispute in legal risk management is generated by the interaction of the probability/likelihood of adverse outcomes and the potential negative consequences/impacts.⁴⁸ Negative consequences of a legal risk may not necessarily be legal but can be more corporate, financial, reputational, ethical, etc.⁴⁹ Therefore, to have practical utility

⁴³ Kahn, *supra* note 4, at 225-26 (theorizing that Asian philosophy has never been concerned with identifying and defining permanent laws of science or philosophy: rather, Asian thought focuses on the nature of process and with how to influence and shape these processes).

⁴⁴ See Trompenaars & Hampden-Turner, *supra* note 39.

⁴⁵ *Id.*

⁴⁶ Fletcher & Sheppard, *supra* note 35.

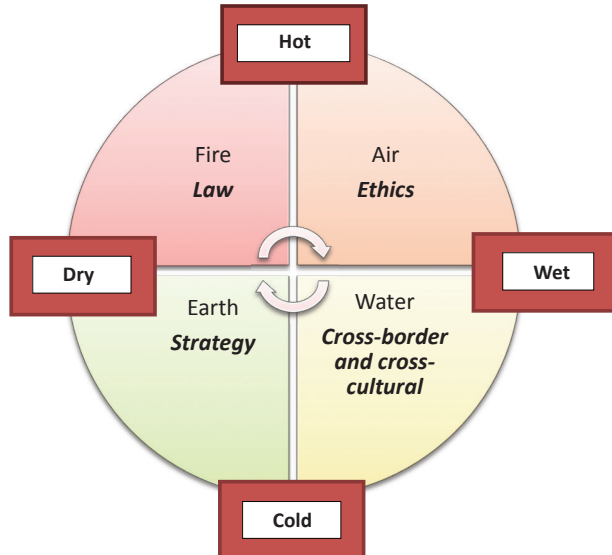
⁴⁷ See Richard Susskind, *THE FUTURE OF LAW* 290 (Oxford University Press, 1998) [Hereinafter *FUTURE OF THE LAW*] (predicting that the future of law will shift from problem solving (reactive) to problem prevention (proactive). While legal problem solving will not be eliminating in tomorrow's legal paradigm, it will nonetheless diminish markedly in significance. The emphasis will shift towards legal risk management).

⁴⁸ See TOBIAS MAHLER & JON BING, *STOCKHOLM INSTITUTE FOR SCANDIANVIAN LAW 1957-2010, CONTRACTUAL RISK MANAGEMENT IN AN ICT CONTEXT -- SEARCHING FOR A POSSIBLE INTERFACE BETWEEN LEGAL METHODS AND RISK ANALYSIS* 339- 357 (2006), available at <http://www.scandinavianlaw.se/index.php/display> (explaining that risk management is universally understood by ISO as a set of coordinated activities to direct and control an organization with regard to risk. The term "risk" is the interaction between the probability of unwanted event and its consequences. Authors explain that legal risk management is based on preventive law. The theory of preventive law means the legal and practical principles for anticipating and avoiding legal problems). See also SUSSKIND, *supra*, note 47 (predicting that the future of law will shift towards legal risk management).

⁴⁹ Educated in French-Canadian law schools, the author has great respect for the Cartesian philosophy. For Descartes, the essence or nature of a mind, is to think (Descartes' original phrase, "*je pense, donc je suis*" that can be translated in English as "I think, therefore, I am"). See GARY HATFIELD, *RENE DESCARTES, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed, 2011), available at <http://plato.stanford.edu/entries/descartes/> (last visited Aug. 13 2013). (explaining that for Descartes, if a thing does not think, it is not a mind. In terms of his ontology, the mind is a (finite) substance, and thought or thinking is its attribute. Although Descartes begins the analysis by an initial examination of adventitious ideas, he ultimately extends it to cover the idea of God, which is the paradigm of an innate idea. Despite the tensions that arise among Descartes' interpretations, scholars agree that with respect to innate ideas, Descartes recognizes at least three ways to see the reality: the idea of God, the idea of (finite) mind, and the idea of (indefinite) body). This article concurs with Descartes's *Discourse on the Method* presenting the method to arrive to understand reality as a set of fundamental principles that one can know as true without any doubt (i.e. this Cartesian philosophy can be linked with the martial arts theory of "state of doubt"). In other words, even though this article uses the Aristotle four natural elements for practicality, I agree with Kuttner theory of Wave/Particle as a alternative to Aristotelian physics, since the Wave/Particle theory expresses the duality between win-win/win-lose tension in negotiation as a valuable metaphor for approaching the need to hold both seemingly contracting negotiation approaches in a complementary manner. See Kuttner, *supra* note 6, at 333.

MMA Negotiation should be viewed and practiced on the foundation of four core disciplines like the four elements of nature to allow the negotiator to reframe his reality.⁵⁰

The Four Core Disciplines of MMA Negotiation as the Spirit of the MMA Negotiator:



According to Aristotle in his article “On Generation and Corruption,” the human existence could be viewed on the basis of the four natural elements.⁵¹ For the cognitive philology⁵² purpose

⁵⁰ See WILLIAMS, C., DE GENERATIONE ET CORRUPTIONE, Translated with a commentary, Oxford: Oxford University Press, 1983. (explaining the Aristotelian philosophical understanding that the reality is based on observations and real experiences; this essay offers the Four Elements (earth, wind, fire and water) to provide an explanation for the Greek philosophical theories on the perception of the reality and the world. The four Aristotelian elements, earth, air, fire, and water, had substantial forms that combined the basic qualities of hot, cold, wet, and dry: earth is cold and dry; air is hot and wet; fire is hot and dry; and water is cold and wet. These elements can themselves then serve as “matter” to higher substantial forms).

⁵¹ *Id.*

⁵² The purpose of this article is not to defend the philosophical adequacy of the Aristotelian Four Elements for negotiation and dispute resolution, but as cognitive philology processes to help negotiators in a practical manner to reframe their human mental process in face of the art of negotiation. See RICHARD MCKEON, ARISTOTLE’S CONCEPTION OF LANGUAGE AND THE ARTS OF LANGUAGE, *Classical Philology* 41, no. 4 (1946): 193-206. (theorizing on Aristotle’s conception of language and the arts of language. For Aristotle language is not only has a basis in man’s bodily organs and psychological powers, but it is, in turn, one of the natural bases of the virtues of social and political relations, and it constitutes the natural means of imitation in the art of literature and the matter of which literary works are formed. Aristotle analyses the arts of language in terms of symbolic properties and linguistic structures for the development and acquisition of knowledge, power, virtues, and arts. In sum, for Aristotle in philology, the artificial composition and symbolic structure, is the end of the numerous arts which are employed in scientific demonstrations, practical communications and regulations, and aesthetic compositions). This means the author wrote this article of the premise that despite is scientific components (e.g. game theory, psychology, etc.), negotiation remains an art. See Kahn, *supra* note 4, at 234 (stating that even the most empirically based authorities on the subject of negotiation agree that at a certain level negotiation is an art).

of understanding the human mental process of a MMA negotiator, Aristotle's view of the human existence should be as follows. Firstly, a MMA negotiator needs to be grounded and "down to earth" by understanding that strategy is the earthly aspect of all negotiations (earth). Second, a MMA negotiator should try to avoid "getting burned" by avoiding/managing legal risks and pitfalls (fire). Third, a MMA negotiator should aspire to be courageous and virtuous and maintain his morals by elevating his mind (air). Fourth, the mind of the MMA negotiator should be worldly and shapeless like water in order to adapt to cross-border and cross-cultural challenges (water). The fifth and transcendental element is the spirit of the MMA Negotiator because these four elements can themselves serve as "matter" to higher substantial forms, such as how the mind of a MMA negotiator sees the reality and the world.⁵³

a) Strategy discipline (Earth);

First and foremost, to understand MMA Negotiation, it is fundamental to move away from the common way of defining negotiation and dispute resolution as a dual-concern theory, meaning the opposition between a collaborative win-win approach versus a competitive win-lose approach.⁵⁴ As noted by Shell in "Bargaining for Advantage," defining negotiation as a dual-orientation between "win-win" (*i.e.*, collaborating by enlarging the "pie" by creating value for the deal that will allow both parties to completely satisfy their concerns and interests) versus "win-lose" (*i.e.*, when the negotiator focuses on value-claiming or value-expansion by only focusing on his individual profit and satisfaction) is a non-practical simplification of negotiation.⁵⁵ MMA Negotiation recognizes that negotiations and disputes cannot be strategized in a predictable manner. Sun-Tzu refers to strategy as "making the most favorable conditions in your favor."⁵⁶ This means using proactive action, controlling the rhythm and using the strategy of surprise.⁵⁷ MMA Negotiation recognizes that interest-based strategies like crafting your BATNA can be difficult to apply in practice.⁵⁸ On the other hand, applying effective

⁵³ The fifth and transcendental element is the Spirit (also referred to as Quintessence) represented things not of our everyday life or for the purpose of this article the Cartesian philosophy, martial arts "state of doubt", and ultimately the Kuttner theory of Wave/Particle as an alternative to Aristotelian physics. It is important to note that the concept of the five elements formed a basis of analysis for Eastern philosophy in both Hinduism and Buddhism. Therefore, Aristotle's view of the human existence can be viewed as consistent with martial arts and the philosophy of MMA Negotiation developed in this article.

⁵⁴ SHELL, *supra* note 7; see also JULIE MACFARLANE & JOHN MANWARING, DISPUTE RESOLUTION 137 (2d ed. 2003) (stating that a negotiator's dilemma metaphor should be taken seriously but not literally. The dilemma is also meant to apply to each tactical choice. The line between "creating" and "claiming" need to not be clear-cut. The essence of effective negotiation involves managing this tension, creating while claiming value).

⁵⁵ *Id.*

⁵⁶ Kahn, *supra* note 4, at 231.

⁵⁷ *Id.* at 231-33.

⁵⁸ J. LEWICKI, ALEX. HIAM & KAREN W. OLANDER, NEGOTIATION: READINGS, EXERCISES AND CASES, 80-85 (McGraw-Hill, 5th ed. 2007) (explaining that negotiation scholars refer to Best Alternative to a Negotiated Agreement (BATNA) as the plan B or backup plan. The authors explain that BATNA can be difficult to apply in practice because it is difficult for a negotiator to assign an objective score to his BATNA because it is qualitatively different from the deal under negotiation or because it involves risk or uncertainty. Also explaining that a skilled negotiator should pursue the difficult task to try to determine what is the other side's BATNA). [hereinafter NEGOTIATION: READINGS, EXERCISES AND CASES]. See also ROY J. LEICKI, DAVID M SAUNDERS & JOHN W. MINTON, ESSENTIALS OF NEGOTIATION, 58-84 (4th ed. 2007) [hereinafter ESSENTIALS OF NEGOTIATION] (theorizing on strategy and tactics of integrative negotiation. Explaining that win-win negotiation is hard particularly because even well-intentioned negotiators can make the following three mistakes: failing to negotiate when they should, negotiating when they should not, or negotiating when they should but choosing an inappropriate strategy).

competitive-based bargaining strategies and tactics is far from a simple task.⁵⁹ Using offensive and competitive strategies in negotiation such as MPP,⁶⁰ Good-cop and Bad-cop, the simple principle of never saying yes to the first offer,⁶¹ etc., also require a great deal of practice and skills.⁶²

MMA Negotiation does not encourage negotiators to think in a linear manner like the Western philosophy of the two-world paradigm as the benchmark for the negotiator's conception of objectivity.⁶³ MMA negotiators know that there are too many situational and personal variables for a single strategy to work in all cases.⁶⁴ Moreover, a recent data-driven study in cross-cultural management demonstrated that the dual-concern model of conflict management theory is not a good candidate for predicting negotiation behaviors during cross-border and cross-cultural negotiations.⁶⁵ If the dual-concern theory is overly simplistic, how should negotiators approach the process of negotiating? They should perceive the process as an interplay of the three fundamental approaches to negotiating and resolving disputes:⁶⁶

1) **Right-based**⁶⁷ (*i.e.*, legally binding litigation and arbitration and non-binding right-based mediation such as mini-trial.⁶⁸ In dispute resolution, the right-based method can

⁵⁹ ESSENTIALS OF NEGOTIATION, *supra* note 58, at 27-57 (theorizing on strategy and tactics of distributive negotiation and explaining that they can also backfire, and there evidence that very adversarial negotiators are not effective negotiators. Explain the fundamental importance to recognize and understand distributive tactics if they are used against you in negotiation.); NEGOTIATION: READINGS, EXERCISES AND CASES, *supra* note 20, at 98-108 (theorizing that win-win negotiation is a myth and power negotiation teaches negotiators to win at the negotiation table but leave the other person feeling we won).

⁶⁰ NEGOTIATION: READINGS, EXERCISES AND CASES, *supra* note 20, at 98-99 (explaining that Maximum Plausible Position (MPP) – means the most you can ask for and still appear credible).

⁶¹ ESSENTIALS OF NEGOTIATION, *supra* note 58, at 100-01 (explaining that if you say why to the first offer without a good justification, it triggers two negative thoughts in your counterpart's mind: "I could have done better" and "Something must be wrong").

⁶² *Id.* at 27-28 (explaining that many negotiators are attracted to distributive/competitive negotiation and look forward to learning and sharpening an array of hard-bargaining skills; others are repelled by distributive/competitive negotiation and would rather walk away than negotiate this way. They argue that distributive/competitive negotiation is old-fashioned, needlessly confrontational and destructive. The discussion aims to understand the dynamic of distributive/competitive negotiation for negotiators to obtain better deal, allow negotiators who are by nature uncomfortable with distributive/competitive negotiation to manage distributive/competitive situations proactively, and help negotiator understanding distributive/competitive strategies and tactics at the claiming value stage of any negotiation).

⁶³ Kahn, *supra* note 4, at 225-26.

⁶⁴ SHELL, *supra* note 7.

⁶⁵ Zhenzhong Ma, *Chinese Conflict Management Styles and Negotiations Behaviours: An Empirical Approach*, 7 INT'L JOURNAL OF CROSS CULTURAL MGMT. 101, 114 (2007).

⁶⁶ See on three approaches of resolving disputes: WILLIAM URY, JEANNE M. BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED 3-19 (1988) [Hereinafter URY](discussing the three approaches to resolving disputes: Interests, Rights, and Power). See also Garrick Apollon, *The Importance of an ADR Program For The Effective Enforcement of International Human Rights Under The Free Trade Agreement Hope II Between The United States and Haiti*, 25 Fla. J. Int'l L. 117, 121-22 (discussing the there are three main ways to get what you want in life or to resolve a dispute (*i.e.* right-based, power-based and interest-based). Explaining that the correlation between bargaining and dispute resolution in international commercial and human rights disputes is evident; in all instances, the power-based and interest-based approaches are viewed as more effective than the rights-based approach).

⁶⁷ URY, BRETT & GOLDBERG, *supra* note 66.

⁶⁸ The ADR method of mini-trial has certain features that permit the accommodation in international business transactions, especially with regard to cross-cultural disputes such as Chinese or Japanese preference for non-judicial dispute resolution and the American preference for arbitration or for face-to-face negotiations within the

also be associated with the power-based method because in litigation and arbitration, there is a winner and loser. In negotiation, the right-based method means that the negotiator will advocate his rights based on case law and legislation, but also social proof⁶⁹);

2) **Interest-based**⁷⁰ (*i.e.*, non-binding negotiation, reconciliation, mediation or conciliation where interests are considered and considerations are offered to reach an agreement or settlement between the parties); and

3) **Power-based**⁷¹ (*i.e.*, the ability to coerce the other party with the law, power and/or force).

These three approaches are the common ways people attempt to negotiate and resolve their disputes.⁷² However, in a cross-border or/and cross-cultural negotiation these three approaches are influenced by the cultural differences between the parties.⁷³ Finally, the MMA Negotiator must realize that the American society is one of the most legalistic and litigious societies in the world.⁷⁴ Therefore, negotiation in the United States is culturally oriented towards a more right-based orientation.⁷⁵ The approaches mentioned above are subject to legal risk management to avoid legal risks.⁷⁶ This leads us to the Legal discipline as the second discipline of MMA Negotiation.

b) Legal discipline (Fire);

Acting within the boundaries of the law is the main concern of Americans and people living in societies where the Rule of Law prevails.⁷⁷ This premise does not necessarily mean that all negotiators embrace the natural virtue of the law and ethics.⁷⁸ This article argues that the famous Prediction Theory of the Law of Holmes presenting the “Bad Man” applies to negotiation, meaning that negotiators may care little for ethics or lofty conceptions of natural law; instead

context of judicial dispute resolution. See Leo Kanowitz, *Using the Mini-Trial in U.S.- Japan Business Disputes*, 39 Mercer L. Rev. 641 (1988) (defining the mini-trial is voluntary, confidential, and nonbinding simulated trial (with flexible procedural rules) and very useful in cross-cultural dispute like Japanese-American legal disputes).

⁶⁹ For instance in 1907, Brandeis was also the first American jurist at the U.S. Supreme Court and pioneer in citing social research and data to demonstrate the public interest in his briefs.

⁷⁰ URY, BRETT & GOLDBERG, *supra* note 66.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Trompenaars & Hampden-Turner, *supra* note 39, at 20-24 (discussing that there is limited debate in the scholarship related to international business that the single most influential factor is culture).

⁷⁴ See LARRY A. DIMATTEO AND LUCIEN J. DHOOGHE, *INTERNATIONAL BUSINESS LAW: A TRANSACTIONAL APPROACH* 123 (Thomson-West eds., 2nd ed. 2006) (discussing the preference for litigation for Americans versus the cultural preference for ADR for many cultures such as East Asian business cultures).

⁷⁵ *Id.*

⁷⁶ Susskind, *supra* note 47 (discussing that the future of the law is a shift from a reactive to a proactive practice of the law. This means the rise of legal risk management).

⁷⁷ Fletcher, *supra* note 35 (theorizing that American law is based on the Constitutional principle of separation of powers among the legislative, executive, and judicial branches of government. The three branches of government are of equal power. There is no rule of law for resolving conflicts among them).

⁷⁸ See Alvin B. Rubin, *A Causerie of Lawyers' Ethics in Negotiation*, 35 LA. L. REV. 577 (1975) (discussing ethics in negotiation, particularly ethics for the lawyer negotiating with other lawyers or with laymen. Theorizing on the lack of legal and ethical rules for bargaining).

they may care simply about staying out of jail and avoiding paying damages.⁷⁹ In Holmes's mind, therefore, it was most useful to define "the law" as a prediction of what will bring punishment or other consequences from a court.⁸⁰ This theory based on legal realism may mean that a lawyer will correctly advise his client to avoid the consequences of disobeying the law. Not all negotiators will want to obey the law just for the sake of obeying it.⁸¹ This means in the practice of negotiation and dispute resolution, the Rule of Law and importance of contractual liability, tort liability or even criminal liability may have relative importance in defining the rights and obligations of the parties for a negotiator.⁸² This goes back to the analysis that negotiation is the interplay of power-based, right-based and interest-based approaches.⁸³ For example, following a power-based approach, a negotiator may illegally coerce another party to do something. On the basis of the right-based approach, a negotiator may have the right to launch a lawsuit and to enforce a legal award. On the basis of the interest-based approach, a negotiator may sometimes prefer to settle a dispute amicably in order preserve the relationship and his reputation.

The theory of the Prediction of Law demonstrates the interaction between the law (fire) and ethics (air) in negotiation and dispute resolution. Like Holmes states, even the "Bad Man" can have as much reason as a "Good Man" to avoid the reputational risk of being perceived as evil, and therefore will see the practical distinction between morality and law.⁸⁴ Most importantly, Holmes's Prediction of Law theory is based on legal realism and the fact that humankind while aspiring to virtue is far from perfect.⁸⁵ President Abraham Lincoln once stated that "it has been

⁷⁹ See Sanford Levinson and J.M. Balkin, *The "Bad Man," The Good, And The Self-Reliant*, 78 B.U. L. REV. 885 (1998) [hereinafter *The "Bad Man," The Good, And The Self-Reliant*] (theorizing on the famous ideas associated with Justice Oliver Wendell Holmes--and with The Path of the Law in particular. One of the first that comes to mind is his famous image of the "bad man." Although this metaphor has been one of Holmes's most lasting legacies, it has also been one of his most troubling as well, for it suggests that the deepest truths about the law can be found by adopting the perspective of someone who is "bad."). see also Marco Jimenez, *Finding The Good In Holmes's Bad Man*, 79 FORDHAM L. REV. 2069 (2011) [hereinafter *The Good In Holmes's Bad Man*] (discussing Holmes's theory, despite its extraordinary influence, has been widely misunderstood and can be more profitably understood-by both supporters and critics alike--not as supporting the bad man but the good, by providing an effective counterpart to the traditional positivist theory of law for which Holmes's bad man theory has so often been associated. Holmes's theory supports the idea that only by recognizing the differences between the concepts of law and justice, rather than by stressing their similarities, can the two be brought together and integrated into the social fabric upon which law must necessarily rest).

⁸⁰ Levinson & Balkin, *supra* note 79, at 893.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Ury et al., *supra* note 66.

⁸⁴ Levinson & Balkin, *supra* note 79, at 888 (theorizing on the fact that the "good man" versus "bad man," Holmes tells us, is motivated by conscience. Adherence to conscience, rather than fear of some predicted misfortune, offers the good person a "reason for conduct." Presumably, the good person would not violate a just or morally binding law even if public authorities stopped punishing its violation or the courts were closed. Hence Holmes's definition also seems to imply that for the good person, law is something other than predictions of official behavior; instead, law is a norm that generates a feeling of obligation to obey it, regardless of the probability of state-enforced sanctions resulting from disobedience. This, we take it, is the point of Holmes's statement that the good person "finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience").

⁸⁵ Levinson & Balkin, *supra* note 35, at 900 (explaining this instrumental conception is entirely familiar to American legal scholars, especially those living in the generations after Legal Realism. It is the conception that Holmes promoted and announced as the wave of the future in *The Path of the Law*. Indeed, *The Path of the Law* stands as one of the first programmatic statements of the instrumental conception).

my experience that folks who have no vices have very few virtues.”⁸⁶ This could mean that the definition of virtue under the Holmes Prediction of Law, Confucian Rule of Men (Ren-Zhi) and in the jurisprudential development of the American constitution with *Marbury* and the institution of judicial review,⁸⁷ all appear to have a lot in common with the concept of Virtù notably theorized by Niccolò Machiavelli, centered on the survival and martial spirit of a country or leader to retain and gain power.⁸⁸ Virtù for Machiavelli extends the study of classical virtue in the sense of skill, valor and leadership, to encompass the individual prince or war-leader as well.⁸⁹ As a result, the Machiavellian conception of Virtù is fascinating for MMA Negotiation.⁹⁰

⁸⁶ See Stefan K. Estreicher, *Defect Theory: Elusive State-of-the-art*, MATERIALS TODAY 6.6, 2003, at 26-35 (applying the famous reflection of Abraham Lincoln when he once said “it has been my experience that folks who have no vices have very few virtues” to physics. The physicist notes that his wit and wisdom apply equally well to the analysis of defects in materials for physics. By ‘defect,’ the physicist means a native defect or an impurity. The physicist emphasizes that words ‘defect’ and ‘impurity’ have an intrinsically negative connotation, but defects are often desirable. They affect or even control the optical, mechanical, and electrical properties of materials).

⁸⁷ This article argues another interesting and controversial comparative legal argument to demonstrate the validity of this theory and the similarity between the jurisprudential development of the American Rule of Law under Holmes’s Prediction of Law and the Chinese Rule of Men under Confucian philosophy. Under the Confucian Rule of Men, martial arts leaders, political leaders, and business leaders have to lead by virtue, like benevolent autocrats or good fathers (see Hofstede et al., CULTURES AND ORGANIZATIONS, SOFTWARE OF THE MIND, INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL 76-80 (McGraw Hill eds., 3rd ed. 2005) [hereinafter Hofstede’s Five Cultural Dimensions]). The Confucian Rule of Men may appear to be a strange Eastern legal philosophy only applicable to the practice of martial arts for Westerners, incompatible with our Western conceptions of democratic society based on the Rule of Law. However, this article argues that this Confucian legal principle is deeply rooted in the jurisprudential development of the American legal system by the historic institution of judicial review in American constitutional law. Chief Justice Marshall paradoxically states in *Marbury* (see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) that, “the government of the United States has been emphatically termed a government of laws, and not of men.” However, the Chief Justice arguably created—either intentionally or accidentally—a “government des juges” (see Édouard Lambert, *Le Gouvernement Des Juges* (avec Préface de Frank Moderne 2004) by instituting the doctrine of judicial review which follows a similar philosophical thinking to the Confucian Rule of Men under which legislative and executive actions of American elected officials, public officials, and leaders can subject to review (and also invalidation) by the American judiciary elite that must lead them with virtue as stated in *Marbury*. See also on the Rule of Men Teemu Ruskola, *Law Without Law, or Is “Chinese Law” an Oxymoron?*, 11 WM. & MARY BILL OF RTS. J. 655, 659-60 (2003) [hereinafter Ruskola Law Without Law] (explaining that Chief Justice John Marshall said “the government of the United States has been emphatically termed a government of laws, and not of men.” Although there is much debate over just what the rule of law means, there is a resounding consensus about what it is not: it is not the “rule of men.” However, the author states that the rule-of-law/rule-of-men distinction should not be based on a philosophy of law comparison that is too moralistic and too black and white in order to keep its practical analytic utility). See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) (theorizing on the legal pragmatism behind the prediction of law theory).

⁸⁸ See Russell Price, *The Senses of Virtù in Machiavelli*, EUROPEAN HISTORY QUARTERLY 3, no. 4, 1973, at 315-45 [hereinafter *The Senses of Virtù in Machiavelli*] (theorizing that the conception of virtue encompasses a broader collection of traits necessary for maintenance of the state and “the achievement of great things”).

⁸⁹ See Power, *Niccolò Machiavelli, Virtù, and Fortune*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/machiavelli/> (last visited Aug. 13, 2013) (explaining that Machiavelli employs the concept of virtù to refer to the range of personal qualities that the prince will find it necessary to acquire in order to “maintain his state” and to “achieve great things,” the two standard markers of power for him. This makes it brutally clear there can be no equivalence between the conventional virtues and Machiavellian virtù. Machiavelli expects princes of the highest virtù to be capable, as the situation requires, of behaving in a completely evil fashion. For the circumstances of political rule are such that moral viciousness can never be excluded from the realm of possible actions in which the prince may have to engage).

⁹⁰ For instance, MMA fighter Canadian champion GSP stated that he has a “dark side” as his main pre-fight psychological battle against his opponent Diaz for the UFC 158 (see *St-Pierre vs. Diaz* championship on March 16, 2013 at the Bell Centre in Montréal). This statement illustrates an attempt for GSP (usually showing exemplary

MMA Negotiation challenges the negotiator to develop a “thoughtful set of personal values that they could, if necessary, explain and defend to others.”⁹¹ Far from being amoral, MMA Negotiation defends the Rule of Law (true MMA fighters see fighting not just as a game but an honorable way to live), but if necessary, the MMA negotiator will be able to explain a breach to a contract because the contract was unconscionable in the first place as a moral action.⁹² In sum, the philosophical examples demonstrate that MMA Negotiation cannot be approached in a manner that is too linear, too moralistic or based too much on the black and white distinctions between law (fire) and ethics (air) to remain of practical analytic utility.⁹³

c) Ethical discipline (Air);

In *Bargaining for Advantage*, Richard Shell contributed to the world of negotiation by helping negotiators practically identify their own ethical beliefs.⁹⁴ This article invites MMA Negotiators to do the same by being self-aware and aware of other negotiators’ ethical orientation in negotiation on the basis of Shell’s three schools of bargaining ethics: (1) “It’s a game!” (the poker school); (2) “Do the right thing, even if it hurts!” (the idealist school); and (3) “What goes around, comes around!” (the pragmatist school).⁹⁵ Shell stresses that a negotiator’s attitudes about ethics are preliminary to every negotiating strategy, tactic, and activity.⁹⁶ This perspective particularly reinforces the fact that strategy (earth) is dependent on the natural interplay between the element of fire (law) and air (ethics) in MMA Negotiation. In other words, something may be legal but immoral according to the values of the negotiator (*e.g.*, terminating a contract for a minor breach). On the other hand, something might be illegal but moral for a negotiator (*e.g.*, justifying a breach of a contract on the basis of the theory of efficient breach⁹⁷).

sportsmanship and ethics to his opponents and fans) to be feared and make it brutally clear that he also has an internal battle between conventional virtues and Machiavellian virtù. See Georges St-Pierre, *Interview on Diaz, Pulling Out from the Fight, and Must Finish Diaz*, YOUTUBE, <http://www.youtube.com/watch?v=iDE1r4yHaM> (last visited Aug. 13, 2013). An in-depth discussion of the Machiavellian conception of Virtù for the MMA Negotiation theory is beyond the scope of this article and is currently under research.

⁹¹ Russell, *supra* note 88, at 315-45 (meaning that based on Machiavellian conceptions an MMA fighter or MMA Negotiator cannot only aspire to be loved but also needs to be feared and respected).

⁹² Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STANFORD LAW REVIEW 869, 870 (2011) (discussing that various doctrines of contract and consumer protection law allow courts to strike down unfair contract terms. The formation of unconscionable contracts occurs when a party with more bargaining power and more sophistication understands the terms of the contract; the less powerful and naive party does not. Theorizing on the forms of interventions for a judge in unconscionable contracts when the sophisticated party takes advantage of this asymmetry and drafts a term that its counterpart fails to appreciate or conceals some of the implications of the contract).

⁹³ Ruskola, *supra* note 87, at 656 [hereinafter Ruskola Law Without Law] (discussing that comparisons between Sino-American legal and ethical values are often too linear, too moralistic or too black and white to remain of practical analytic utility).

⁹⁴ Shell, *supra* note 7, at Chapter 11 (theorizing on ethics for negotiation).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Ronald J. Scalise Jr., *Why no “Efficient Breach” in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 721-66 (2007) (discussing the American theory of “efficient breach” of contract, long heralded by the proponents of the law and economics movement, as a civil law scholar would do in his own jurisdiction. Because a number of cultural and doctrinal hurdles that stand in the way of judicial and scholarly recognition of the theory, civil law jurisdictions are less favorable for the existence and development of the doctrine of efficient breach than American law).

The Second World War provides an historic lesson for distinguishing legality from legitimacy. Nazi Laws were legal but were immoral and evil.⁹⁸

A negotiator also needs to have a holistic view of the interaction between the Four Core Disciplines of MMA Negotiation. A negotiator needs to realize that if any strategy (earth) in negotiation is dependent on the interaction between morality (air) and law (fire), all these elements are influenced by the powerful element of the cross-border and cross-cultural differences (water). In negotiation, strategies, laws and ethics are defined by the boundaries of legal jurisdiction and national culture.⁹⁹ The natural interplay of the Four Core Disciplines of MMA Negotiation encourage the negotiator to not oversimplify the world by espousing any particular ethical school, but instead challenges the MMA Negotiator to defend his own virtue to others without falling in the trap of ethical relativism and not be able to distinguish good from evil.¹⁰⁰ For instance, for Americans, a trustworthy negotiator honors the contract (American business people will commonly say “a deal is a deal, a contract is a contract”).¹⁰¹ In contrast, for the Chinese, a trustworthy negotiator honors a changing circumstance. A contract must be capable of adapting to a changing business relationship.¹⁰² For Particularistic cultures like in East Asia, South Asia, Africa, the Middle East, the Caribbean or Latin America, the contract only marks the beginning of a business relationship and preserving the harmony of the relationship comes before the terms and conditions of a contract.¹⁰³ These different legal and ethical orientations often cause Universalist American negotiators and negotiators from more Particularistic cultures like Brazil or China to distrust each other.¹⁰⁴ MMA Negotiators

⁹⁸ This reflection is based on the teachings of my Professor Harry Reicher at Penn Law in the field of international human rights. In his efforts to make us understand the power of the law, Professor Reicher taught us that the most powerful weapon of the Nazis to achieve the Holocaust was their laws and decrees that deprived Jews of rights and ultimately subjected them to extermination. This reflection goes back to the fact that the right-based method in negotiation is mainly utilized to legitimize an action. See Shell, *supra* note 7.

⁹⁹ K. Zweigert & H. Kötz, INTRODUCTION TO COMPARATIVE LAW 3 (Oxford University Press, 3rd ed. 1998) (explaining that the laws of people from cultural, economic, political, moral (philosophical and theological) social and historical accident or to temporary or contingent circumstances).

¹⁰⁰ Shell, *supra* note 7, at 205. See also Joseph Desjardins, AN INTRODUCTION TO BUSINESS ETHICS 22 (McGraw-Hill, 3rd ed. 2009) (explaining ethics is not like math, science, or accounting. One cannot look up the right answer or calculate the answer with mathematical precision. People differ about ethical judgments, and this seems based in personal feelings and emotions. Relativism represents a serious challenge to ethics, including business ethics, because if it is correct there is no reason to continue to study ethics. If all opinions are equally valid, then it makes little sense for us to attempt to evaluate ethical judgment in business. Philosophical ethics, from the relativist perspective, becomes little more than a process of values clarification in which we can clarify and elucidate our values but not justify them. However, while people may be entitled to hold any opinion they wish, not all opinions are equal).

¹⁰¹ Trompenaars & Hampden-Turner, *supra* note 39, at 29-51 (demonstrating empirically that cross-cultural formation of relationships and rules is based on Universalism for Americans (respect for the contract and rules) v. Particularism (*i.e.*, relationships and chaining/evolving situations) for Chinese).

¹⁰² *Id.*

¹⁰³ Trompenaars & Hampden-Turner, *supra* note 39, at 29-51.

¹⁰⁴ See Fons Trompenaars, DID THE PEDESTRIAN DIE?: INSIGHTS FROM THE GREATEST CULTURE GURU (Capstone Publ'g Ltd. 2003). This empirical research is an accumulation of a decade of research into cultural diversity across the globe with a wide range of client organisations as a globe-trotting consultant for the firm he runs with Charles Hampden-Turner - THT consulting. The title is taken from a hypothetical dilemma Trompenaars presents to managers - so far to about 70,000 managers in over 65 countries. He asks them to consider the situation in which they are a passenger in a car driven by a close friend. That friend knocks down a pedestrian. The friend was travelling well above the speed limit - say 35 miles an hour in a 20-mile-an-hour-zone. There are no witnesses. The friend's lawyer suggests that testifying under oath on the friend's behalf that he was only doing 20 miles an hour

understand that ethical (*i.e.*, moral, doctrinal, ideological, religious, political, social and aesthetic) values vary across cultures, and are in many ways aligned with belief systems in a particular society.¹⁰⁵ This leads us to study the cross-border and cross-cultural discipline (water).

d) Cross-border and cross-cultural discipline (Water);

Bruce Lee refers to the idea of a “mind like water” in order to make the mind calm; like the surface of undisturbed water.¹⁰⁶ Japanese Karate also refers to the idea that “water reflects accurately the image of all objects within its range, and if the mind is kept in this state, apprehension of the opponent’s movements, both psychological and physical, will be immediate and accurate.”¹⁰⁷ In today’s world marked by globalization, this means that the MMA negotiator should be able to adapt to his opponent like water and particularly to cross-border and cross-cultural situations.

MMA negotiators realize that someone might be a great negotiator within his own familiar style of negotiation (own national culture, with his own people) but could be a poor or average negotiator with foreign counterparts from a different style and culture.¹⁰⁸ Operating in a new economic, cultural, legal and/or political environment, there are great challenges facing the international negotiator.¹⁰⁹ Dealing with cultural differences remains the single most influential and challenging task for the international negotiator.¹¹⁰ If culture matters, an historical MMA

may save him from serious consequences. Trompenaars asks whether the friend has a definite right, some right or no right at all to expect someone (the manager being asked the question) to testify to the lower figure. He also asks whether - irrespective of such right - the manager would testify to the lower figure. The answers received have varied around the world and, to some extent, comply with existing stereotypes. The Swiss almost unanimously feel that the friend has no right to expect his friend to perjure him/herself, and that in no circumstances should this be considered. However, in Venezuela and, interestingly, in China, less than 35 per cent of people agree with this line. The point is that culture is not uniform but it is often a major determinant of attitude and of action. It is rich, varied and, at times, problematic. American negotiators may tend to be seen as corrupted and evil foreign negotiators embracing a more particularistic view on ethics. MMA Negotiation invited American negotiators to realize that this particularistic ethical orientation of protecting relationships above the law is incorporated in American law with the Spousal privilege (also called marital privilege or husband-wife privilege) preventing spouses from having to condemn, or be condemned by, their spouses.

¹⁰⁵ *Id.*

¹⁰⁶ “Bruce Lee Refers to the idea a Mind Like Water,” YOUTUBE, <http://www.youtube.com/watch?v=lzLhiWd9Efw> (last visited Aug. 14, 2013).

¹⁰⁷ Kahn, *supra* note 4, at 226-27.

¹⁰⁸ Jeswald W. Salacuse, *Ten Ways that Culture Affects Negotiating Style: Some Survey Results*, 14 NEGOTIATION JOURNAL 221, 221-40 (1998) (explaining empirical research report on ten ways that culture affects negotiating style. In a survey of 310 persons from 12 countries and 8 occupations, the author asked participants to rate their negotiating style covering ten negotiation process factors. The countries that were represented in the survey were Spain, France, Brazil, Japan, the U.S, Germany, the U.K., Nigeria, Argentina, China, Mexico and India. The occupational specialties included law, military, engineering, diplomacy/public sector, students, accounting, teaching, and management/marketing. Overall, the research shows that culture has a profound impact on negotiations and profoundly influences how people think, communicate and behave. The great diversity of the world’s cultures makes it impossible for any negotiator, no matter how skilled and experienced, to understand fully all the cultures that may be considered).

¹⁰⁹ Claude Cellich & Subhash C. Jain, GLOBAL BUSINESS NEGOTIATIONS: A PRACTICAL GUIDE 4-13 (Thomson South-Western eds., 2004) (presenting an overview of challenges that an international business negotiator is facing in the global business environment).

¹¹⁰ Trompenaars & Hampden-Turner, *supra* note 39, at 29-50 (discussing that there is limited debate in the scholarship related to international business that the single most influential factor is culture).

fight between two legends (Matt Hughes v. Gracie) demonstrates that there is no superior style of fighting: in this fight American wrestling and fighting style happened to be more effective than the Brazilian jujitsu because of the fighter and the situation surrounding the fight.¹¹¹ As a result, a MMA Negotiator understands that sometimes cultural differences matter a lot, and sometimes not at all.¹¹² A MMA Negotiator also understands that if Jujitsu Negotiation based on principled negotiation is a core discipline to master the art of negotiation, it also needs to be adapted to cultural differences between the negotiators and the totality of the situation.¹¹³

A MMA Negotiator considers it necessary to blend different styles of negotiation by studying comparative law¹¹⁴ and comparative management¹¹⁵ to achieve a superior holistic style of negotiation.¹¹⁶ A MMA Negotiator also understands that no negotiator can adapt to all styles of negotiating based on the plurality of cultures in the world, and that becoming a universal or global negotiator who can negotiate efficiently in all cultures is a myth.¹¹⁷ While trying to adapt to all styles and cultures, a MMA Negotiator is self-aware of his strengths and weaknesses in the face of other negotiation styles and cultures.¹¹⁸ A MMA Negotiator embraces the thinking of Robert Greene, author of the *48 Laws of Power*, who states that, “every individual is like an alien culture. You must get inside his or her way of thinking, not as an exercise in sensitivity but out of strategic necessity.”¹¹⁹ Meanwhile a MMA Negotiator understands that in certain situations where the negotiator has a choice of adapting to a discriminatory foreign law or a cultural norm, choosing to adapt to such law or norm may be interpreted as a sign of weakness and

¹¹¹ On UFC 60: Hughes vs. Gracie was a mixed martial arts event held by the Ultimate Fighting Championship on May 27, 2006, Hughes wins by TKO (punches) at 4:39 of round one. See *UFC 112: Matt Hughes KOs Renzo Gracie*, YOUTUBE, <http://www.mmfighting.com/2010/04/10/ufc-112-matt-hughes-kos-renzo-gracie> (last visited Aug. 12, 2013).

¹¹² HARVARD LAW SCHOOL, *International Business Negotiations: Cross-Cultural Communications for International Business Executives*, PROGRAM ON NEGOTIATION, 2010, at 2, available at <http://www.pon.harvard.edu/freemium/international-negotiations-cross-cultural-communication-skills-for-international-business-executives/> (last visited Aug. 26, 2012).

¹¹³ John Barkai, *What's a Cross-Cultural Mediator to do? A Low-Context Solution for a High-Context Problem*, 10 CARDOZO J. CONFLICT RESOL. 43, 50 (2008) [hereinafter Barkai's Cross-Cultural Mediator] (theorizing that the concepts of principled negotiation in Getting to Yes must be adapted to cultural differences).

¹¹⁴ Ewald, *supra* note 30, at 2111 (discussing Ewald's proposal for comparative lawyers to transcend the simple dichotomy between law-in-books and law-in-action, or law in economical or sociological statics, and constructively focus on what he calls “law-in-minds”).

¹¹⁵ Comparative management (or cross-cultural management) theories are studies in virtually all undergrad and MBA programs in North America through the mandatory course of Organizational Behavior. This course is usually mandatory for all undergraduate and MBA students all Canadian and American business schools. I have been teaching Organizational behavior at the undergraduate level at the University of Ottawa's Telfer School of Management since 2006.

¹¹⁶ See John Chu, *The Art of War and East Asian Negotiation Styles*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 161 *passim* (2002) [hereinafter Chu, *The Art of War and East Asian Negotiation Styles*] (discussing East Asian negotiation styles).

¹¹⁷ Salacuse, *supra* note 108, at 221-40 (demonstrating that the great diversity of the world's cultures makes it impossible for any negotiator, no matter how skilled and experienced, to understand fully all the cultures that may be considered).

¹¹⁸ Chu, *supra* note 116.

¹¹⁹ Robert Greene, *THE 33 STRATEGIES OF WAR* 169 (Penguin Grp. eds., 2007) (discussing the importance to view adaptation not as an exercise of sensitivity but as an exercise of strategic necessity for winning wars).

abandonment to his moral character and that fighting for principles is what makes strong leaders.¹²⁰

IV. How MMA Negotiation works in practice:

There are three sequences (pre-fight, the fight and post-fight) to apply this model in practice: **I. Pre-fight:** First and foremost, as stated previously, since a MMA Negotiator “displays great concern for the relationships and his reputation,¹²¹ he will make sure to evaluate the importance of the relationship prior to determining his strategies and tactics. For instance, international strategic alliances such as international joint-venture or mergers and acquisitions will probably require the elaboration of more relational strategies to ensure to leverage the synergic forces to build a solid corporate marriage.¹²² On the other hand, a single negotiation for a house or car will usually not require the same level of consideration for a long term relationship.¹²³ The same idea applies if a negotiator needs to negotiate a legal dispute in the context of a franchise agreement where the relationship is vital versus a legal dispute in a purchase agreement with a buyer that could be easily replaced.¹²⁴ After having assessed the importance of the relationship for the negotiation, a MMA Negotiator will prepare his negotiation on the basis of the four disciplines. The disciplines should be used in practice as follows:

a) How to use the Strategic negotiation discipline in practice;

A MMA Negotiator understands that negotiation cannot be defined in a linear manner, as win-win or win-lose, and should aim to transcend the dual-concern theory by embracing a more holistic approach on strategy.¹²⁵ A MMA Negotiator needs to be ready to compete by reading books on war philosophy such as Robert Greene’s *The 48 Laws of Power*, *The 33 Strategies of*

¹²⁰ See generally Sean T. Hannah, Bruce J. Avolio & Fred O. Walumbwa, *Relationships between Authentic Leadership, Moral Courage, Ethical and Pro-social Behaviors*, 21 BUS. ETHICS QUARTERLY 555, 555-78 (2011) (discussing that organizations constitute morally-complex environments, requiring organization leaders to possess levels of moral courage sufficient to promote their ethical action, while refraining from unethical actions when faced with temptations or pressures. Using a sample drawn from a military context, this article explores the antecedents and consequences of moral courage for leaders and followers).

¹²¹ Shell, *supra* note 7. See also Lewicki & Al, *supra* note 20 (explaining seven factors to evaluate the importance of the relationship between the parties).

¹²² Christiane Demers, Nicole Giroux & Samia Chreim, *Merger and acquisition announcements as corporate wedding narratives*, 16 JOURNAL OF ORGANIZATIONAL CHANGE MANAGEMENT 223, 223-42 (1998) (analyzing mergers in financial sector in Canada as corporate marriages. This article demonstrates that approaching a merger as a corporate marriage can influence the foundations of legitimacy for the merger and the contribution of the various corporate actors). See also Sue Cartwright, Cary L. Cooper, *Organizational marriage: “hard” versus “soft” issues?*, 24 PERSONNEL REVIEW 32, 32-42 (1995) (discussing the substantial increase in merger and acquisition (M & A) activity both domestically and internationally during the 1980s which, in contrast to previous waves of M & A activity, involved organizational marriages between organizations in the same area of business activity. As a result, merger synergy has become increasingly dependent on the wide-scale integration of people and their organizational cultures).

¹²³ Lewicki & Al, *supra* note 20 (explaining seven factors to evaluate the importance of the relationship between the parties).

¹²⁴ *Id.*

¹²⁵ Shell, *supra* note 7.

War, The Art of Seduction and Mastery,¹²⁶ Sun Tzu's *The Art of War*,¹²⁷ *On War* from Clausewitz,¹²⁸ negotiation books on the competitive strategies and tactics that can be applied to negotiation and dispute resolution,¹²⁹ and scholarship articles on the limitations of principled negotiation in practice.¹³⁰ Most importantly, a MMA Negotiator should never undermine the importance of embracing principled negotiation as a core strategy and review the concepts associated with *Getting to Yes* and other similar books.¹³¹

b) How to use cross-border and cross-cultural negotiation disciplines in practice;

The author has developed a toolbox to help MMA Negotiators to compare, understand and adapt to the cross-cultural differences of the parties and use different approaches from those in American domestic negotiations to leverage the cultural diversity as a competitive advantage. This Toolbox is composed of four indispensable tools. The first tool is Edward T. Hall's comparative model with the notion of high and low cultural contexts.¹³² The second tool is the

¹²⁶ Robert Greene is an American best-selling author and speaker known for his modern books on strategy, power and seduction. He has written four international bestsellers: ROBERT GREENE, *THE 48 LAWS OF POWER* (Penguin Books eds., 2000); ROBERT GREENE, *THE ART OF SEDUCTION* (Profile Books eds., 2001); ROBERT GREENE, *THE 33 STRATEGIES OF WAR* (Penguin Books eds., 2007); ROBERT GREENE, *THE 50TH LAW* (HarperCollins eds., 2009) (with rapper 50 Cent).

¹²⁷ SUN TZU, *THE ART OF WAR* (Samuel B. Griffith ed., Oxford Univ. Press 1963) (500 B.C.E.) (The Art of War is one of the oldest and most successful books on military strategy and conflict management philosophy in both the Eastern and Western worlds. For more than two thousand years it remained the most important military treatise in Asia. The universal admiration for Sun Tzu largely comes from the teaching that, "the best way to accomplish more is to do the least." The Art of War promotes the use of powerful psychological tools to outwit, outsmart and deceive opponents in order to turn weakness into strength and achieve the desired outcome without shedding blood and fighting).

¹²⁸ See BERNARD BRODIE, *A GUIDE TO THE READING OF "ON WAR"* (Princeton Univ. Press 1976) (discussing the military and political treatise of the Prussian general Carl von Clausewitz stating for instance that war is a political instrument but that in the course of war will tend to favor the party with the stronger emotional and political motivations, but especially the defender. This analysis was contrary to the common prejudice that soldiers generally endorse aggressive warfare. On the basis of this theory, an MMA Negotiator will never underestimate an "underdog").

¹²⁹ G. BELLOW & B. MOULTON, *supra* note 1.

¹³⁰ Kuttner, *supra* note 6, at 352 (discussing the claim of negotiation scholarship that the business world of the new millennium is much more complex and in need of development of negotiation theory different than the principled negotiation model of Harvard). See also L. L. Putnam, *Challenging the Assumptions of Traditional Approaches to Negotiation*, 10 NEGOTIATION JOURNAL 337, 337-46 (1994); John K. Butler, *Trust expectations, information sharing, climate of trust, and negotiation effectiveness and efficiency*, 24.2 GROUP & ORGANIZATION MANAGEMENT 217, 217-38 (1999) (discussing empirical evidence that sharing information and transparency in negotiation does not always result in trust-building).

¹³¹ J.M. Senger, *Tales of the Bazaar: Interest-Based Negotiation Across Cultures*, 18 NEGOTIATION JOURNAL 233, 233-49 (2002) (discussing interest-based negotiation, as popularized by Fisher, Ury, and Patton (FISHER, URY & PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Houghton Mifflin Harcourt eds., 1991)), as a favored negotiation style of many people in the United States and other parts of the developed world. The authors, one of whom is an American attorney who has traveled widely, assesses how that approach works in different cultural contexts. Using illustrations from his own experiences, the author shows how interest-based techniques work successfully, as well as the limitations of this approach in some situations).

¹³² See E.T. HALL, *THE SILENT LANGUAGE* (Doubleday eds., 1959) (influential concept of high/low context communication); E.T. HALL, *THE HIDDEN DIMENSION* (Doubleday eds., 1966); E.T. HALL, *BEYOND CULTURE* (Doubleday eds., 1976); E.T. HALL, *THE DANCE OF LIFE, THE OTHER DIMENSION OF TIME* (Doubleday eds., 1983); GRUNDER, JAHR & HALL, *HIDDEN DIFFERENCES: STUDIES IN INTERNATIONAL COMMUNICATION* (1985); E.T. HALL,

comparative model of Hofstede's Six Cultural Dimensions as he recently added a sixth dimension.¹³³ This cross-cultural management tool based on extensive empirical research is probably the most utilized tool in international business.¹³⁴ The third tool is the comparative model of Trompenaars' and Hampden-Turner's seven cultural dimensions.¹³⁵ This cross-cultural management tool complements Hofstede's six cultural dimensions and is also based on extensive empirical research.¹³⁶ The fourth tool is the comparative model of Barkai's Cultural Dimension Interests.¹³⁷ Barkai argues that effective cross-cultural negotiations and dispute resolution requires an understanding of Cultural Dimension Interests (CDIs).¹³⁸ As a legal scholar, his theory reviews many of the cultural interests that impact negotiation and dispute resolution by: 1) specifically reviewing the cultural theories of Edward T. Hall, Geert Hofstede, Fons Trompenaars and Charles M. Hampden-Turner, and Richard D. Lewis; 2) considering country-specific anecdotal accounts of national negotiating behaviors; and 3) reviewing some specific beliefs, behaviors, and practices that impact national negotiation styles and approaches.¹³⁹ Barkai also encourages negotiators (especially when engaging in Sino-American negotiations) to study the 36 Chinese strategies.¹⁴⁰ As a legal scholar, John Barkai's CDI theory is particularly important for MMA Negotiation for two reasons. Firstly, John Barkai explains that the concept of principled negotiation from Harvard is consistent with effective cross-cultural negotiation as long the negotiator is able to identify interests that seem to have a basis in cultural differences.¹⁴¹ Secondly, CDI focuses mainly on cross-cultural differences between American and Asian negotiation styles and behaviors and since martial arts philosophy emerges from Eastern philosophy, this is a fundamental comparison to be studied.¹⁴²

c) How to use legal negotiation discipline in practice;

First, MMA Negotiation stresses the importance for the lawyer and his client to understand that legal risk management is a shared responsibility, where the intake management of the client is fundamental for the lawyer to fulfil his role successfully.¹⁴³ This means that the client is often best suited to determine the negative non-legal impacts (*e.g.*, corporate, financial, political, reputational, etc.) of a legal adverse outcome.¹⁴⁴ Too many lawyers and businessmen forget that

HIDDEN DIFFERENCES: DOING BUSINESS WITH THE JAPANESE (Anchor Press & Doubleday eds., 1990); E.T. HALL, UNDERSTANDING CULTURAL DIFFERENCES, GERMANS, FRENCH AND AMERICANS (Intercultural Press eds., 1990).

¹³³ See Hofstede, *Dimensions of National Cultures*, GEERTHOFSTEDE.COM, <http://geerthofstede.com/dimensions-of-national-cultures> (last visited Sep. 15, 2013) (explaining the sixth dimensions: Indulgence versus Restraint. Based on Minkov's World Values Survey data analysis (empirical research) for 93 countries, has been added, called Indulgence versus Restraint. Indulgence stands for a society that allows relatively free gratification of basic and natural human drives related to enjoying life and having fun. Restraint stands for a society that suppresses gratification of needs and regulates it by means of strict social norms).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Barkai, *supra* note 113, at 83.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 44.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Susskind, *supra* note 47.

¹⁴⁴ *Id.* (legal risk management should be practiced in a holistic manner and should be related to the organizational and financial consequences. Therefore, the intake management and feedback of corporate clients to the lawyer in his

legal risk management is a shared responsibility and that an advisory or transactional lawyer (unlike a litigator) is often more like a MMA coach and does not always get to fight for his client.¹⁴⁵ The success of the lawyer is often dependent on the ability of his client to provide the necessary information and intake management for him to formulate an adequate strategy and legal risk management plan to be implemented.¹⁴⁶

Second, MMA Negotiation means the ability to work domestically but also internationally as today's business world requires. A MMA Negotiator should use Ewald's "law-in-minds" comparative law theory in practice.¹⁴⁷ This theory helps American lawyers working globally on international business transactions to focus on the synthesis of comparative jurisprudence.¹⁴⁸ For instance, based on this theory, an American MMA negotiator/lawyer will understand that the most effective way to resolve a legal dispute with a Chinese party may not be arbitration, but negotiation or mediation; not just because of the cultural preference of the Chinese for ADR, but also because of judicial corruption issues in China. The Convention of New York for the enforcement of arbitral awards has limited effect in practice.¹⁴⁹

d) Ethical negotiation discipline in practice;

A MMA Negotiator should be self-aware and aware of other negotiators' ethical orientations in negotiation on the basis of Shell's three schools of bargaining ethics¹⁵⁰ and remember that ethics is also largely influenced by the context/situation and cultural differences.¹⁵¹ For instance, a MMA Negotiator knows that empirical researchers have shown that given the importance of building and maintaining relationships and saving face in a collectivist culture like China, it is expected that the propensity to lie may be greater and more adaptive for collectivist negotiators and lawyers.¹⁵² Therefore, a MMA Negotiator astutely understands that ethics is linked with the concept of "saving face" and managing reputational risks for a negotiator.¹⁵³

determination of the potential consequences/impacts of an adverse outcome is vital to generate relevant risk information).

¹⁴⁵ Joel F. Henning, *The Lawyer as Mentor and Supervisor*, 10 LEGAL ECON. 19, 20 (1984) (explaining that the lawyer should realize that he or she is not the main actor but more a mentor, coach or supervisor with an expertise in law that must be offered with wisdom to his client).

¹⁴⁶ *Id.*

¹⁴⁷ Ewald, *supra* note 30.

¹⁴⁸ *Id.*

¹⁴⁹ John H. Matheson, *Convergence, Culture and Contract Law in China*, 15 MINN. J. INT'L. L. 329, 381 (2006) (distinguished professor of law at the University of Minnesota Law School).

¹⁵⁰ Shell, *supra* note 7.

¹⁵¹ *Id.* at 87 (discussing the importance of the context in negotiations). See also Michael E. Brown & Linda K. Treviño, *Ethical Leadership: A Review And Future Directions*, 17 THE LEADERSHIP QUARTERLY 596, 596-616 (2006) (theorizing on the emerging construct of ethical leadership and compares this construct with related concepts that share a common concern for a moral dimension of leadership (e.g., spiritual, authentic, and transformational leadership). In a post-Enron world, practitioners have strong incentives to select for and develop ethical leadership in their organizations and researchers want to study ethical leadership in order to understand its origins and outcomes)).

¹⁵² Harry C. Triandis et al., *Culture and Deception in Business Negotiations: A Multilevel Analysis*, 1 INT'L JOURNAL OF CROSS CULTURAL MGMT. 73, 75 (2001) (discussing the impact of culture on deception in business negotiations).

¹⁵³ *Id.*

II. The fight: During the negotiation, a MMA Negotiator will remain aware of himself and of his opponent, and most importantly the totality of the situation.¹⁵⁴ This means a MMA Negotiator espouses the teaching of Sun-Tzu that, “if you know your enemies and know yourself, you will not be imperiled in a hundred battles; if you do not know your enemies but do know yourself, you will win one and lose one; if you do not know your enemies nor yourself, you will be imperiled in every single battle.”¹⁵⁵ The MMA Negotiator’s game plan must be crafted based on a full awareness of oneself and the totality of the situation and, most importantly, the game plan cannot be static and must evolve with changing circumstances.¹⁵⁶ This means that a MMA Negotiator understands that the interaction of the Four Core Disciplines of MMA Negotiation is not just part of the pre-fight/preparation to a negotiation, but on-going throughout the fight/negotiation and that his spirit as the fifth transcendental element will always remain his greatest asset.

III. Post-fight: After each negotiation, a MMA Negotiator, like any athlete, will make sure to reflect on his performance and get feedback from coaches/observers to learn from his mistakes and successes.¹⁵⁷ Despite his mistakes and losses, a MMA Negotiator will not get discouraged easily and demonstrate courage and determination.¹⁵⁸ As well, despite his successes and victories, a MMA Negotiator will remain humble and understand that a position of advantage or glory is not permanent.¹⁵⁹

V. Conclusion:

MMA Negotiation reveals a more sophisticated and holistic philosophy of negotiation and dispute resolution.¹⁶⁰ MMA Negotiation focuses primarily on self-awareness, awareness of the other side, and the totality of the situation.¹⁶¹ The main objective of MMA Negotiation is to create a better flow, increase creativity, improve synchronicity, and enhance bonding and trust-building.¹⁶² MMA Negotiation does not necessitate war and also aims to enhance trust-building and peaceful negotiation because it understands that, to have peace, a negotiator must be ready for war. For example, the great Canadian world UFC champion, GSP, started martial arts as a kid

¹⁵⁴ Kuttner, *supra* note 6.

¹⁵⁵ See SUN TZU, *THE ART OF WAR* (Lionel Giles trans., Thrifty Books 2009) (500 B.C.E.). See also Chu, *supra* note 116, at 163 (2002).

¹⁵⁶ *Id.*

¹⁵⁷ See Jean Côté & Wade Gilbert, *An integrative definition of coaching effectiveness and expertise*, 4.3 INT’L JOURNAL OF SPORTS SCI. AND COACHING 307, 307-23 (2009) (theorizing on an integrative definition of coaching effectiveness and expertise that is both specific and conceptually grounded in the coaching, teaching, positive psychology, and athletes’ development literature).

¹⁵⁸ Joseph L. Badaracco Jr., *The Discipline Of Building Character*, HARVARD BUS. REVIEW 114, 114-24 (2009) (theorizing on leadership and that character is forged at those defining moments. Explaining that to become leaders, managers need to translate their personal values into calculated action. This article theorizes that defining moments force leaders to find a balance between their hearts in all their idealism and their jobs in all their messy reality).

¹⁵⁹ Kuttner, *supra* note 6.

¹⁶⁰ *Id.* at 363 (explaining that more work is needed in negotiation scholarship in order to frame incorporation of mindfulness-based philosophy and practices into negotiation pedagogy so that negotiators methodically cultivate the mindset and approach of wave-like negotiation interactions as presented in this article).

¹⁶¹ Kahn, *supra* note 4, at 225-26 (theorizing on the importance for a negotiator of aspiring to full self-awareness and full awareness of the situation like for the martial arts combatant).

¹⁶² *Id.* at 357.

to be able to defend himself against bullies.¹⁶³ GSP created a foundation to help kids who get bullied.¹⁶⁴ Unfortunately, humankind tends to only respect power,¹⁶⁵ and many negotiators are like the bully in the schoolyards; until you show them that you're not afraid and can strike back, they will keep coming at you and encourage other bullies to do the same. Ultimately, MMA Negotiation wants to empower negotiators and prevent negotiators from being bullied, or feeling powerless or alienated.¹⁶⁶ MMA Negotiation embraces the complexity of negotiation by understanding the basic contradictory and dynamic human tensions between choosing adversarial and collaborative approaches to negotiation and dispute resolution.¹⁶⁷

¹⁶³ See Georges St. Pierre, <http://www.gspofficial.com/gsp-anti-bullying>, GEORGES ST. PIERRE FOUNDATION (last visited Aug. 24, 2013) (the goal of Georges St-Pierre Foundation is very simple: help youth, stop bullying and promote physical activity in schools).

¹⁶⁴ *Id.* (the author would like to dedicate this article to GSP. Like GSP the author is proud to be French-speaking and born in the Province of Québec in Canada. As a kid he was also bullied like GSP and decided to empower himself by doing boxing classes, but the author later played college football and won the first Vanier Cup in 1999 with the Rouge & Or of Laval University currently respected as one of the best football teams in the history of Canadian football. Therefore, the author sees himself through GSP for his inflexible determination and courage in his quest for winning, but also for his sportsmanship and humanitarian work with his foundation to help kids who are victims of bullying because this is a growing social problem all around the world).

¹⁶⁵ For instance many lawyers forget that the formation of the law in a society is largely determined and influenced by the power, violence and revolutions. See HARNOLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 18-19 (Harvard Univ. Press, 1983) (discussing law and revolution in the formation of the Western and American legal traditions). See also Lytle, Brett & Shapiro, *The strategic use of interests, rights, and power to resolve disputes*, 15.1 *NEGOTIATION JOURNAL* 31, 31-51 (1999) (discussing choosing an opening strategy, breaking conflict spirals of reciprocated rights and power communications, and when and how to use rights and power communications effectively in negotiations); Gerald R. Williams, *Style and effectiveness in negotiation*, *NEGOTIATION: STRATEGIES FOR MUTUAL GAIN: THE BASIC SEMINAR OF THE HARVARD PROGRAM ON NEGOTIATION* 156-69 (Sage Publications ed., 1993) (affirming that effective negotiators were not all cooperative in their approach (contrary to the common belief based on Getting to Yes) and neither adversarial and collaborative approach to negotiation and dispute resolution can claim a monopoly on effectiveness. Effectiveness as a negotiator depends not on which approach he or she decides to adopt but on what he or she does within that particular strategy. Therefore, both have the potential to be used effectively).

¹⁶⁶ See Kahn, *supra* note 4, at 225-26 (theorizing that martial arts can promote peace).

¹⁶⁷ Kuttner, *supra* note 6, at 364 (arguing that negotiation must be theorized and practiced in a more holistic manner following the wave-like approach).

Amateurism Interplay Between Olympic Excellence and NCAA Eligibility

Tyler Dumler*

*Tyler M. Dumler, J.D., University of Kansas School of Law, 2013. My sincerest appreciation goes out to Phillip E. DeLaTorre, University of Kansas School of Law, for the wealth of feedback, critique, and advice he provided during the drafting this article. I would also like to thank the University of Denver Sports & Entertainment Law Journal staff and editorial board for all of their hard work and assistance in revising this work.

I. INTRODUCTION

Student-athletes are amateurs in an intercollegiate sport, and their participation should be primarily motivated by education and the physical, mental and social benefits. Student participation in intercollegiate athletics is an avocation and student-athletes should be protected from exploitation by professional and commercial enterprises.¹

The National Collegiate Athletic Association (NCAA) goes to great lengths to protect the amateur status of collegiate athletics. The true motivation behind the NCAA's adherence to amateurism has often been questioned and criticized.² However, the demarcation between collegiate athletics and professional sports remains.³ For some elite athletes, this demarcation can pose serious risks to NCAA eligibility. This article aims to address the NCAA's diverging perspectives regarding how Olympic activities and NCAA activities impact amateurism and examine the implications such a divergence in treatment by the NCAA has on current and prospective student-athletes.

Qualifying to compete in an Olympic capacity is undoubtedly an unparalleled and exciting opportunity. For many athletes, the Olympics represent a chance to enshrine themselves in history within a sport that may only be displayed before a global audience once every four years. However, this opportunity is wrought with obstacles that may interfere with another important aspect of these athletes' lives: the possibility of participating in collegiate athletics. The age demographic of many top athletes in their respective fields of Olympic competition often overlaps with the general age of NCAA student-athletes. For example, at the London 2012

¹ NCAA, 2012-13 Division I Manual art. 2.9 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>

² See, e.g., Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009); David Warta, *Personal Foul: Unnecessary Restriction of Endorsement and Recruitment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419 (2003).

³ See NCAA, 2012-13 Division I Manual art. 12 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

Olympic Games, over fifty-five percent of the medalists were below the age of twenty-six.⁴ While there are many Olympic athletes who qualify as current and prospective student-athletes, David Boudia,⁵ Diamond Dixon,⁶ and Missy Franklin⁷ will serve as useful illustrations for the purposes of this article. These athletes competed in the London 2012 Olympic Games and represent the full spectrum of graduating, returning, and prospective NCAA student-athletes.

NCAA dilemmas created by Olympic involvement are certainly not going away any time soon. Olympic Games, be it Summer or Winter, occur every two-years and are continuing to feature prominent young athletes, especially in aquatic, track and field, and gymnastic competitions.⁸ Because issues presented by the Olympic involvement of current and prospective student-athletes show no signs of disappearing in the near future, this area of regulation deserves attention.

The overarching concerns that will be discussed in in this paper include stipends in the form of free merchandise from national team sponsors, United States Olympic Committee (USOC) results-based compensation via the Operation Gold Grant, endorsement opportunities, family travel expenditures, and a remaining catch-all category of perks that will simply be referred to as other incentives and covered expenditures. Each of these issues will be dealt with in turn.

⁴ *London 2012: The Games in Numbers*, BBC.COM, <http://www.bbc.co.uk/sport/olympics/2012/games-so-far>, tbl. Age demographics (last updated Aug. 13, 2012).

⁵ *David Boudia*, USADIVING, available at www.usadiving.org/bios/david-boudia/.

⁶ *Women's Track and Field*, KANSAS JAYHAWKS, <http://www.kuathletics.com/index.aspx> (follow "Sports" dropdown menu, then follow "Track & Field" hyperlink, then follow "Roster (W)" hyperlink, then follow "Diamond Dixon" hyperlink).

⁷ *National Team Bios*, USASWIMMING, www.usaswimming.org (follow "National Team" drop down menu; then follow "National Team Roster" hyperlink; then follow "Franklin, Missy" hyperlink).

⁸ See Jaye L. Atkinson, *Age Matters in Sport Communication*, 13 ELECTRONIC J. OF COMM. 3-4 (2009), available at <http://www.cios.org/EJCPUBLIC/019/2/019341.html>; *Olympic Anthropometry*, TOP END SPORTS, <http://www.topendsports.com/events/summer/science/anthropometry.htm>, tbl. Breakdown per Sport (last modified Dec. 18, 2013) [albeit track & field can be classified as "younger" to a lesser degree].

II. DISCUSSION

A. *Merchandise Stipends*

It should come as no surprise that U.S. Olympic athletes are privy to certain merchandise perks as part of being members of the Olympic squad. These nonmonetary benefits may include uniforms, apparel, equipment, clothing, phone services, and other similar items. The NCAA bylaws appear to resolve this issue in a rather direct manner, providing that such nonmonetary benefits and awards are permitted without consequence to amateur status so long as “it can be demonstrated that the same benefit is available to all members of that nation’s Olympic team or the specific sport Olympic team in question.”⁹ In addition, commemorative items are also permitted under the NCAA bylaws and do not impact the amateur status of student-athletes.¹⁰

Before glossing over merchandise perks as a non-issue, a point of comparison should be drawn with similar allowances of merchandise retention in a traditional NCAA context. While the NCAA permits prospective student-athletes to retain all merchandise perks provided in the Olympic context, so long as the benefits are received by the entire team, prospective student-athletes at an NCAA certified basketball event are not permitted such leniency.¹¹ At these events, including summer basketball camps, retention of any athletics equipment or apparel provided for his or her use at the event, other than a T-shirt, without paying the normal retail value of the merchandise, can lead to serious interference with the potential student-athlete’s

⁹ NCAA, 2012-2013 Division I Manual art. 12.1.2.1.4.3.2 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

¹⁰ NCAA, 2012-13 Division I Manual art. 12.1.2.4.15 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

¹¹ See NCAA, 2012-13 Division I Manual art. 13.18-.19 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

amateur status.¹² Why does this divergence in standards exist? This is one example of seemingly arbitrary line-drawing by the NCAA regarding preferential treatment for Olympic involvement.

An argument could be made that the exemption for Olympic sponsorship equipment is justified because it resembles merchandise related to a specific, championship-level event while ‘basketball camp’ equipment is merely a perk of training exercises. Perhaps this argument, that the grand nature of the Olympics justifies a distinction from ordinary NCAA events, could successfully illustrate the Olympics as a crowning achievement that should be recognized as such. However, this distinction seems invalid when compared with the exemption for Olympic training equipment. Many expenses, including equipment and apparel, that are related to Olympic *training and development* are allowed without jeopardizing the athlete’s eligibility for intercollegiate athletics, with the caveat that the expenses are paid for by the USOC.¹³ The equipment and apparel acquired during Olympic training and development are similarly perks of training exercises, so the preceding attempt to justify the NCAA’s differential treatment falls flat. This parallel, or lack thereof, between regulation of Olympic and NCAA basketball camp merchandise perks illustrates a clear divergence from standard practices with regard to Olympic competition with minimal explanation by the NCAA.¹⁴

¹² NCAA, 2012-13 Division I Manual art. 13.18(c), 13.19(c) (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

¹³ NCAA, 2012-13 Division I Manual art. 12.1.2.4.9 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

¹⁴ See NCAA, 2012-13 Division I Manual art. 13.18-19, 12.1.2.4.9 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

B. Operation Gold Grant

Success under the Olympic spotlight earns U.S. athletes more than pride and a sense of accomplishment. It also earns athletes stipends under the Operation Gold Grant.¹⁵ Operation Gold Grants reward athletic success at the Olympic Games and qualifying events.¹⁶ Placement in the top eight in a qualifying event will earn an athlete a stipend.¹⁷ Medaling at the Olympics will earn an athlete a stipend of \$10,000 for bronze, \$15,000 for silver, and \$25,000 for gold.¹⁸ Current and prospective student-athletes are permitted to accept Operation Gold Grant funds under the NCAA bylaws.¹⁹

At first glance, this allowance seems at odds with NCAA bylaw §12.2.3.2.5, permitting current and prospective student-athletes to participate in Olympic competition for compensation so long as “the student athlete does not accept prize money or any other compensation (other than actual and necessary expenses).”²⁰ This restriction, however, refers to compensation provided by “the governing body” while other sections of the bylaws referring to the Operation Gold Grant specify the USOC as the compensating party.²¹ This distinction illustrates the NCAA’s allowance of established compensation principles provided by the USOC, while prizes and compensation by “the governing body” retain the effect of destroying an individual’s

¹⁵ *Operation Gold Grants*, USA TRACK & FIELD,

<http://www.usatf.org/groups/Elite/supportPrograms/OperationGoldGrants.asp>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ NCAA, 2012-13 Division I Manual art. 12.1.2.1.4.1.2, 12.1.2.1.4.3.3, 12.1.2.1.5.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

²⁰ NCAA, 2012-13 Division I Manual art. 12.2.3.2.5 (2012), available at

<http://www.ncaapublications.com/productdownloads/D113.pdf>.

²¹ Thus, student-athletes are granted a special allowance when compensation is provided by the USOC rather than the IOC or host of the particular Olympic competition.

amateur status.²² While Operation Gold Grants are allowed under NCAA bylaws, this exemption still creates an unexplained preferential treatment by the NCAA favoring Olympic participation over other forms of non-NCAA activities by current and prospective student-athletes. For example, “the NCAA allows Olympic athletes to be compensated during their collegiate careers, but international basketball players cannot be compensated before their collegiate careers commence.”²³

However, it is important to note that Operation Gold Grant funds, explicitly permitted under NCAA bylaws,²⁴ are still not allowed to go directly to current or prospective student-athletes who wish to retain their amateur status. Instead, this USOC funding is permitted to be used only for the current or prospective student-athlete’s educational expenses.²⁵ NCAA bylaws note that Operation Gold Grant funds may not even limit the amount of financial aid a student-athlete may receive, suggesting a potential excess that may serve to advantage the student-athletes.²⁶ This suggestion, however, is quickly negated by NCAA bylaw §15.2.6.4, establishing more specific principles on how Operation Gold Grant funds may be used without jeopardizing amateurism and their impact on limiting financial aid.²⁷

Additionally, this financial-aid-limitation quality of Operation Gold Grant funds raises an interesting scenario for the rare athlete who earns a multitude of medals at an Olympic competition. Take Michael Phelps at the 2008 Beijing Games, as an example, when he won

²² “[T]he governing body” used in this context seems to represent the International Olympic Committee (IOC) or host of the competition.

²³ Mike Salerno, *Traveling Violation: A Legal Analysis of the Restrictions on the International Mobility of Athletes*, N.Y. INT’L L. REV. 1, 33 (2012).

²⁴ See NCAA, 2012-13 Division I Manual art. 12.1.2.1.4.1.2, 12.1.2.1.4.3.3, 12.1.2.1.5.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

²⁵ NCAA, 2012-13 Division I Manual art. 12.1.2.1.3.2.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

²⁶ NCAA, 2012-13 Division I Manual art. 15.1.2(e) (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

²⁷ NCAA, 2012-13 Division I Manual art. 15.2.6.4 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (thus prohibiting a windfall for student-athletes already receiving a full-ride scholarship and requiring such funds to be considered a “counter” as per 15.5).

eight gold medals at the age of nineteen.²⁸ For the purposes of this article, imagine a scenario in which this nineteen-year-old Phelps also desired to retain an amateur status and forewent endorsement opportunities in order to continue collegiate athletic involvement. In this hypothetical, Phelps would have accumulated \$200,000 in Operation Gold Grant funds from the 2008 Summer Games alone.²⁹ This amount substantially exceeds the average four year full scholarship of approximately \$60,000.³⁰ This serves as a minimal to non-existent dilemma regarding the Operation Gold Grant stipends presumably covering the full educational expenses incurred by the hypothetical Phelps.³¹ Additionally, such stipends *appear* to free up scholarship funds that would otherwise have been spent on Phelps and can now serve to benefit an alternative student-athlete and the university with additional scholarship funds. However, this is not the case. Under NCAA bylaws, the USOC funds distributed to the student-athlete for educational expenses must still be “counted” against the institution’s financial aid limit in that particular sport.³² The vexing question that remains is, “what happens to the excess Operation Gold Grant funds after educational expenses have been covered and Phelps has completed college?”

²⁸ *Olympic Moments: Michael Phelps’ Historic Eight Golds at Beijing 2008*, BBB SPORT, <http://www.bbc.co.uk/sport/0/olympics/17658866> (last updated Aug. 31, 2012, 22:59 GMT).

²⁹ Eight gold medals, generating a stipend of \$25,000 each, accumulate to \$200,000. For simplicity, this article will forego the discussion of possible tax exemption of such funds due to the educational nature of their pending use. The contemplation of whether this limited control over the funds alters the taxable income status of Operation Gold Grant funds is best saved for another discussion.

³⁰ David Warta, *Personal Foul: Unnecessary Restrictions of Endorsement and Employment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419, 425 (2003) (citing Caleb Langston, U. of Wyo., Dept. of Commun. & Journalism, *Colleges Debate Whether to Compensate Athletes*, <http://uwadmnweb.uwyo.edu/cmjr/WILTSE/4100/Story3/caleb.htm> (accessed Sept. 7, 2003) (noting value of full athletic scholarship for out-of-state resident at the University of Wyoming)).

³¹ NCAA, 2012-13 Division I Manual art. 15.2.6.4 (2012), *available at* <http://www.ncaapublications.com/productdownloads/D113.pdf>.

³² NCAA, 2012-13 Division I Manual art. 15.5.1(b) (2012), *available at* www.ncaapublications.com/productdownloads/D113.pdf.

Are the funds held in a trust fund, serving an educational fund capacity during Phelps's student-athlete tenure before converting into a typical compensation fund after graduation? This solution has been suggested as an alternative to the existing system.³³ This avenue, however, is not a viable alternative, because the trust fund would essentially amount to an anticipatory contract. Much like the other prong of the amateurism principle, the no-agent rule, accepting a promise of future pay (even after college) amounts to a violation of the amateurism principles.³⁴ The counterargument could be made, of course, that the Andrew Oliver decision by a trial court in Ohio invalidating the NCAA's no-agent rule has major implications on this front.³⁵ If this ruling were to gain traction, the erosion of the no-agent rule would, in turn, eliminate the anticipatory contract regulations. The consequence could be an allowance of anticipatory compensation agreements as a mirror image of the altered no-agent rule. This article is reluctant to suggest this will happen, and it definitely will not happen without adamant protest on behalf of the NCAA. In application, the allowance of anticipatory arrangements would potentially eliminate amateurism from college athletics.³⁶

³³ Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 708 (2003) (citing Vladimir P. Belo, *The Shirts off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 154 (1996)).

³⁴ See Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 563-64 (2009).

³⁵ See *id.* at 557 (invalidating the no-agent rule in a case where Oliver was stripped of his amateur status for post-season baseball eligibility at Oklahoma State for retaining an agent-attorney as a high school senior to assist him in a complex financial arrangement). See also, Aaron Fitt, *Baseball's Agent Quagmire: Oliver Case Dredges up Agent-NCAA Questions*, BASEBALL AM., Sept. 8-21, 2008, at 8; *Oliver v. NCAA*, No. 2008-CV-0762, slip op. (Ohio Ct. Com. Pl., Feb. 12, 2009).

³⁶ Student-athletes would be able to form anticipatory contracts for compensation, and the only remaining pseudo-amateurism that NCAA athletics would retain is the brief stint *during* actual NCAA involvement, during which time the student-athlete would be forced to sit on their money until deciding to conclude their college career. This approach would incentivize student-athletes to focus on compensation opportunities and marketing their name/likeness during their college years, thus further undermining the fleeting notion of amateurism in intercollegiate athletics. See also NCAA, 2012-13 Division I Manual art. 12.1.2(b) (2012), available at www.ncaapublications.com/productdownloads/D113.pdf (prohibiting individuals from retaining their amateur status if they accept a promise of future payment, even if such pay is to be received following completion of intercollegiate athletics participation).

So, how does the current system operate? The existing system is relatively unclear at this time on what happens to Operation Gold Grant funds that exceed educational expenses.³⁷ This is likely due to no known examples of student-athletes being faced with such a dilemma.³⁸ With the continuing steady increase of college educational expenses, especially at institutions with major athletics programs where these elite student-athletes would be likely to attend, it is probable that this issue may never be faced in the future. However, if such a rare situation were to present itself, then the excess funds would likely be returned to the USOC or contributed to an NCAA fund.³⁹ The excess funds would presumably be prohibited from being distributed to the student-athlete upon graduation lest the funds be regarded as anticipatory compensation as described in the preceding paragraph.

C. Endorsement Opportunities

Endorsement offers typically provide the most promising avenue for financial gain in the context of Olympic competition. These same opportunities also present the greatest threat to an individual's amateur status. It is almost impossible to discuss endorsements and NCAA amateurism, especially when dealing with Olympic sports, without at least making reference to Jeremy Bloom.⁴⁰ Jeremy Bloom was a world-class freestyle moguls skier and an NCAA

³⁷ Dino Bell, Director of Eligibility at the University of Kansas Athletics Compliance office, and Warren K. Zola, contributing editor to the *Sports Law Blog*, were likewise uncertain about what becomes of such excess Operation Gold Grant funds upon graduation. Zola shares this article's reservations about the student-athlete ever recovering/receiving the funds and likewise presumes the remaining excess funds will return/remain with the USOC. An identical query was directed at Sariyu Suggs, U.S.A. Track & Field High Performance Programs Manager, but no immediate response has been received at the time of this article's submission.

³⁸ The author was unable to discover any such occurrences and the University of Hawaii NCAA Compliance office was similarly unfamiliar with any such instances.

³⁹ Although directing the excess Operation Gold Grant funds to an NCAA fund (scholarship, academic enhancement, disability relief, etc.) does not appear to run afoul of NCAA bylaws, there is a lack of incentive for the USOC to voluntarily turn the funds over to this sort of NCAA fund. The USOC, in all likelihood, would retain the funds for its own future use (future Operation Gold Grants or funds similar to those of the NCAA).

⁴⁰ For a more detailed overview of Jeremy Bloom's circumstances, See Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2003) (discussing *Bloom v. Nat'l Collegiate Athletics Ass'n*, No. 02-CV-1249 (20th Dist. Ct. Colo. Aug. 15, 2002));

Division I football player.⁴¹ After competing for the U.S. Olympic Team in the 2002 Winter Games and earning the U.S. National and World Cup championship titles in mogul skiing, Bloom received multiple modeling and entertainment offers.⁴² NCAA bylaws do not permit student-athletes to endorse any commercial product, even during time outside of the student-athlete's playing season.⁴³ As a consequence, Bloom was forced to abandon these lucrative endorsement offers, which he relied on to fund his skiing season, in order to remain eligible to play football on scholarship at the University of Colorado.⁴⁴

This rule creates unfair, inexact parallels based on the particular sports in which the student-athlete happens to excel. For example, customary salary compensation for a professional baseball player is allowed under NCAA bylaws and does not eliminate the student-athlete's amateur status in a different sport.⁴⁵ However, athletes who compete professionally in a sport that is largely compensated through endorsement income and appearance fees, like that of Jeremy Bloom and most other Olympians, are not permitted to enjoy the same financial benefits as an athlete who happens to partake in a salary-based professional sport.⁴⁶

Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An elite Athlete's Guide to NCAA Amateurism Regulations*, 56 CASE W. RES. L. REV. 687, 687 (2006).

⁴¹ Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An elite Athlete's Guide to NCAA Amateurism Regulations*, 56 CASE W. RES. L. REV. 687, 687 (2006).

⁴² Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 674 (2003).

⁴³ NCAA, 2012-13 Division I Manual art. 12.5.3 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁴⁴ Freedman, *supra* note 33, at 680.

⁴⁵ NCAA, 2012-13 Division I Manual art. 12.1.3 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (allowing student-athletes to retain an amateur status if participating professionally in a different sport); see also David Warta, *Personal Foul: Unnecessary Restriction of Endorsement and Employment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419, 439 (2003).

⁴⁶ David Warta, Comment, *Personal Foul: Unnecessary Restriction of Endorsement and Employment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419, 440 (2003).

Out of the Olympic athletes mentioned at the beginning of this article, the most similar resemblance of a commercial endorsement like Jeremy Bloom's is David Boudia⁴⁷ and his involvement in a Visa commercial narrated by Morgan Freeman.⁴⁸ This would have been a clear violation of NCAA bylaw §12.5.1.3(d) if Boudia had returned to Purdue for the 2012-2013 season.⁴⁹ David Boudia's name, likeness, and appearance in the advertisement were all to endorse and support Visa, a commercial product. Fortunately for Boudia, and certainly by no means a coincidence, he had already completed his tenure as a student-athlete for Purdue and no longer faced the arduous NCAA amateurism restrictions on such endorsement activity.⁵⁰

Imagine, instead, a hypothetical scenario where Olympic sprinter Diamond Dixon fills a role similar to David Boudia's Visa endeavor. Unlike Boudia, Dixon had reached only the halfway point in her collegiate tenure.⁵¹ Would a commercial endorsement such as this destroy Dixon's amateur status and lead to her disqualification from NCAA competition? The answer still might be no, even though Visa would be using Dixon's name, likeness, and appearance to endorse and support a commercial product.⁵² Current and prospective student-athletes are permitted to receive payment for the display of their athletic skills in a commercial advertisement, so long as they do not keep the money and instead pass it on to the USOC or

⁴⁷ Boudia is a world-class diver, excelling in 10-meter events, that attended college at Purdue. Information regarding his diving accolades can be found at <http://www.usadiving.org/divers/david-boudia/> and <http://www.teamusa.org/Athletes/BO/David-Boudia>.

⁴⁸ Visa, *Visa Olympics London 2012: David Boudia Team Visa Athlete Commercial: A Very High Dive*, YOUTUBE (Jun. 29, 2012), available at <http://www.youtube.com/watch?v=cQBNmpFH8I> (featuring David Boudia simulating a dive off the Burj Khalifa, the tallest building in the world).

⁴⁹ NCAA, 2012-13 Division I Manual art. 12.5.1.3 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (prohibiting student-athletes from endorsing commercial products).

⁵⁰ See *David Boudia*, PURDUE MEN'S SWIMMING & DIVING, http://www.purduesports.com/sports/m-swim/mtt/boudia_david00.html (referencing Boudia's decision to forego his senior year of eligibility and go pro in 2011).

⁵¹ *Diamond Dixon*, USA T&F, <http://www.usatf.org/Athlete-Bios/Diamond-Dixon.aspx> (listing Dixon's graduation date as 2014).

⁵² NCAA, 2012-13 Division I Manual art. 12.5.1.2 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

applicable national governing body.⁵³ While this exception appears to have been created as a way for the USCO and national governing bodies to use student-athletes in self-promotional materials, the plain language of the bylaw does nothing to prevent similar usage of student-athletes by commercial enterprises like this hypothetical Dixon/Visa relationship.⁵⁴ As long as the commercial advertisement has been approved, the USOC and national governing body are seemingly allowed to reap the benefits of student-athlete commercial endorsements.

The next step could be to dismiss this possibility as something that will never happen, because it eliminates the financial incentive of commercial endorsements for current and prospective student-athletes. However, establishing a recognizable and marketable name for yourself, even when you are not able to immediately collect the direct compensation, can lead to future lucrative endorsement opportunities upon completion of your collegiate tenure. Thus, this exception could arguably be exploited by student-athletes in a way that benefits the USOC and national governing body in the short term and the student-athlete in the long term. Meanwhile, similar compensation leniency is not extended by the NCAA bylaws to student-athletes beyond those involved in Olympic competition.

Furthermore, out of the Olympic athletes mentioned earlier, Missy Franklin presents an illustration of the challenges an elite *prospective* student-athlete must face in the endorsement realm. Missy Franklin represents a class of prospective student-athletes with a more-than-adequate skillset to perform at an elite level in the NCAA. However, NCAA amateurism bylaws related to endorsement deals force prospective student-athletes, like Franklin, to decide whether

⁵³ See *id.*

⁵⁴ Thus, in theory, current and prospective student-athletes could perhaps endorse these types of commercial products so long as they do not keep the money.

they wish to retain an amateur status or accept an array of lucrative endorsements.⁵⁵ This decision requires a consideration of the true value of competing and being involved in collegiate athletics. Individuals serving as the face of their respective Olympic sport will likely accumulate an amount of wealth vastly exceeding the amount of scholarship funds they would receive from an NCAA institution.⁵⁶ This money could both easily pay for a college education and be used freely as the athlete desires, so *the value of a college education* is not truly the relevant issue. Instead, each prospective student-athlete must decide how much the ability to compete at an intercollegiate level is worth to them, irrespective of the value of the college education. Endorsement opportunities for these elite athletes are fleeting offers, operating in a small window where age, skillset, and international limelight all align to make the commercial endorsement lucrative.⁵⁷ In turn, prospective student-athletes are forced to decide the future of their competition status in an abrupt manner during a limited timeframe.⁵⁸ Individuals who are still minors are expected to expertly contemplate the value of competing in an intercollegiate capacity.

⁵⁵ See e.g. Christopher A. Callanan, *Advice for the Next Jeremy Bloom: An elite Athlete's Guide to NCAA Amateurism Regulations*, 56 CASE W. RES. L. REV. 687, 687-88 (2006); NCAA, 2012-13 Division I Manual art. 12.01.3, 12.1.2 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁵⁶ Warta, *supra* note 30, at 425 (noting the average approximate value of a four-year full scholarship in 2003 to only be \$60,000). Meanwhile, estimates of the amount of money Franklin would have generated by accepting endorsements in lieu of maintaining NCAA eligibility range in the millions of dollars. *Missy Franklin: Amateur Rockstar*, SPORTS ON EARTH, <http://www.sportsonearth.com/article/42033238/>; *Missy Franklin Prefers Friends, School to Money*, USATODAY, <http://usatoday30.usatoday.com/sports/olympics/london/swimming/story/2012/09/14/missy-franklin-prefers-friends-school-to-money/57782292/1>.

⁵⁷ See e.g., *Missy Franklin and the Cost of being an Amateur*, DAILY MESSENGER, <http://www.mpnnow.com/x2095086551/Missy-Franklin-and-the-cost-of-being-an-amateur> (noting the fact that these sorts of endorsement offers exist only in very limited windows of time).

⁵⁸ On account of these endorsement offers being extended in very short windows and the potential risks on the prospective student-athlete's amateur status accepting such endorsements may have.

D. *Travel Expenditures*

Perhaps the most profound divergence in the NCAA's treatment between NCAA athletics and Olympic participation pertains to allowance of travel expenditures for friends and relatives of the athlete. Commercial companies, other than professional sports organizations, are allowed to cover all actual and necessary expenses for a student-athlete's relatives to attend the Olympic Games in which the student-athlete will participate.⁵⁹ It is worth noting that these bylaws specify "commercial companies" and do not limit such funding to being provided by the USOC or national governing bodies.⁶⁰ Meanwhile, NCAA restriction of similar travel expenses in the typical intercollegiate context is rife with prohibitions and stingy limitations.⁶¹

NCAA bylaws permit "an outside organization (other than a professional sports organization) to provide actual and necessary expenses for. . ." travel expenses of prospective student-athletes and his or her relatives to an awards ceremony.⁶² On its face, this NCAA permission of "outside organizations" to pay for the travel expenses of a prospective student-athlete and his or her relatives to an awards ceremony seems generous. Institutions are even allowed to pay automobile transportation expenses for a prospective student-athlete's campus visit, which includes friends and relatives accompanying the prospect.⁶³ Slush funds, however, cannot be used to pay for transportation or entertainment of a prospective student-athlete.⁶⁴ These slush funds consist of pooled resources for recruiting purposes by two or more people.⁶⁵

⁵⁹ NCAA, 2012-2013 Division I Manual art. 12.1.2.4.9, 16.6.1.4 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁶⁰ See *id.*

⁶¹ See e.g. NCAA, 2012-13 Division I Manual art. 13.4.4, 13.18, 16.6.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁶² NCAA, 2012-13 Division I Manual art. 12.1.2.1.4.1.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁶³ NCAA, 2012-13 Division I Manual art. 13.5.2.2, 13.5.2.2.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁶⁴ NCAA, 2012-13 Division I Manual art. 13.4.4 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

⁶⁵ NCAA, 2012-13 Division I Manual art. 13.14.4.1 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

The “use of a company funds” constitutes the use of pooled resources.⁶⁶ Ergo, transportation expenses of prospective student-athletes may not be covered by commercial companies the same way as they may in the context of Olympic competition, illustrating yet another arbitrary favoritism in the NCAA bylaws for student-athletes involved in Olympic competition.

While the previous example deals with prospective student-athletes and the attempts by institutions to encourage these individuals to attend their universities, a more pertinent comparison between commercial companies paying expenses for student-athletes and relatives to attend the Olympic Games and typical NCAA treatment may be found in the restrictions dealing with covering expenditures of family travel to typical intercollegiate competitions. There is an inexact parallel between these two sets of travel expenditures, and the regulatory distinctions seem arbitrary.⁶⁷ Institutions are serving roles very similar to the USOC in respect to the relationships with student-athletes. Still, unless there is a life-threatening injury,⁶⁸ institutions are generally not permitted to pay for the travel expenses of family members to intercollegiate competitions.⁶⁹ Additionally, an institution may not even reimburse a student-athlete for expenses incurred while driving to a competition site if he or she is accompanied by friends or family members.⁷⁰

Admittedly, most regular season intercollegiate competitions are not as momentous of occasions as the Olympic Games. However, some intercollegiate competitions can still arguably rise to this level. Perhaps the best correlation to draw between the excitement, intensity, skillset,

⁶⁶ NCAA, 2012-13 Division I Manual art. 13.14.4.2 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁶⁷ See e.g., NCAA, 2012-13 Division I Manual art. 12.1.2.4.9, 13.4.4, 13.18, 16.6.1, 16.8.2.4 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁶⁸ NCAA, 2012-13 Division I Manual art. 16.6.1.3 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁶⁹ NCAA, 2012-13 Division I Manual art. 16.6.1 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁷⁰ NCAA, 2012-13 Division I Manual art. 16.8.2.4 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

and media coverage would be a BCS postseason Division I college football bowl game.⁷¹ Even in these rare instances, which most college football players will never experience, expenses for relatives of the student-athletes are highly restricted. For example, travel expenses to a postseason football game or NCAA championship in other sports are allowed to be provided by *the institution* for only the student-athlete's *spouse and children*.⁷² This exception still excludes expenditures for parents, guardians, siblings, and other direct relatives of the student-athlete and continues the prohibition of commercial companies from financing the travel. Institutions are able to reserve lodging to post-season events for immediate family members of the student-athlete at a discounted rate, but the institution cannot cover any portion of the cost of lodging *or* reserving/securing the lodging.⁷³ This exclusion basically limits the benefit to be conferred by institutions to piggybacking deals off of discounts offered to the university by the lodging entity, since the discount is not a conferment of a benefit from the institute itself under the plain language of the statute. The end result is a more extensively regulated competition of relatively similar excitement and rarity (in terms of opportunity to be involved) as an Olympic competition with minimal explanation of reasoning on the part of the NCAA.

Another example of such a difference in treatment by the NCAA is similar to the merchandise perks discussed earlier. Transportation expenses for student-athletes, coaches, and relatives are not allowed to be covered in the context of summer basketball camp⁷⁴ while such

⁷¹ See e.g. *The BCS Title Game is Bigger than the Super Bowl*, FORBES, available at <http://www.forbes.com/sites/mikeozanian/2011/01/10/the-bcs-title-game-is-bigger-than-the-super-bowl/>; Michael Humes, "BCS Megacast" Coverage of National Championship Takes Over ESPN Platforms, ESPN MEDIA ZONE, <http://espnmediazone.com/us/press-releases/2013/12/bcs-megacast-coverage-of-national-championship-takes-over-espn-platforms/>.

⁷² NCAA, 2012-13 Division I Manual art. 16.6.1.1 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf (emphasis added).

⁷³ NCAA, 2012-13 Division I Manual art. 16.6.1.2 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁷⁴ NCAA, 2012-13 Division I Manual art. 13.18 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

expenses and more are permitted to be covered by the USOC in the context of training for the Olympics.⁷⁵

E. Other Incentives and Covered Expenditures

Training expenses related to Olympic preparation and competition also receive preferential treatment compared to those incurred during NCAA preparation.⁷⁶ The USOC or an appropriate governing body is permitted to cover expenses for developmental training, coaching, facility usage, equipment, apparel, supplies, comprehensive health insurance, travel, room and board without consequence.⁷⁷ While the NCAA similarly allows the institutional provision of medical insurance,⁷⁸ additional limitations are placed on outside consultants;⁷⁹ student-athlete facility usage;⁸⁰ transportation, equipment, and apparel;⁸¹ and year-round practicing.⁸²

⁷⁵ NCAA, 2012-13 Division I Manual art. 12.1.2.4.9 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁷⁶ See *id.*

⁷⁷ NCAA, 2012-13 Division I Manual art. 12.1.2.4.9 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁷⁸ NCAA, 2012-13 Division I Manual art. 16.4.1(a) (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁷⁹ See NCAA, 2012-13 Division I Manual §11.7.1.1.1.4 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf. This bylaw, prohibiting outside consultants from interacting with student-athletes without being counted against applicable coaching limits, can be used to draw a comparison with individual trainers and coaches that are necessary for Olympic training. These outside consultants can be paid by the USOC under NCAA bylaw §12.1.2.4.9, but such coaches/trainers fulfilling identical roles outside of Olympic preparation are not allowed (if paid for by an institution) unless they are considered part of the program's coaching staff.

⁸⁰ See NCAA, 2012-13 Division I Manual art. 11.7.1.1.1.4 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (prohibiting outside consultants from interacting with student-athletes without being counted against applicable coaching limits, can be used to draw a comparison with individual trainers and coaches that are necessary for Olympic training. These outside consultants can be paid by the USOC under NCAA art. 12.1.2.4.9, but such coaches/trainers fulfilling identical roles outside of Olympic preparation are not allowed (if paid for by an institution) unless they are considered part of the program's coaching staff).

⁸¹ See NCAA, 2012-13 Division I Manual art. 13.15.1.6.1 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (prohibiting donation of athletic equipment to high schools of prospective student-athletes); NCAA, *supra* note 12, art. 13.18(b), (c) (prohibiting transportation expenses related to summer basketball camp for student-athletes, coaches, and relatives, & prohibiting prospective student-athletes from retaining equipment or apparel provided at summer basketball camp).

Media activities are a large part of the Olympics. The buzz surrounding Olympic Games gives rise to an insatiable desire for media outlets to book as many Olympic athletes for interviews and appearances as they possibly can during the Olympics and as part of the post-Olympics process.⁸³ This media craze undoubtedly presents the opportunity for inducements and perks that can run afoul of NCAA regulations for current and potential student-athletes. In these instances, current and prospective student-athletes are permitted to participate in media activities related to their athletic skill and notoriety and receive actual and necessary expenses from the media service related to such an appearance.⁸⁴ Institutions are allowed to pay for these actual and necessary expenses *only if* the appearance is in connection with a conference-sponsored media activity or is during the playing season and results in no missed class-time.⁸⁵

Olympic success also earns athletes a medal in addition to the Operation Gold Grant stipend. Gold, silver, and bronze medals possess intrinsic value for their contextual significance as well as an inherent value for their composition of valuable elements.⁸⁶ This type of valuable, non-monetary Olympic award is permitted without jeopardizing an athlete's amateur status.⁸⁷

⁸² See e.g., NCAA, 2012-13 Division I Manual art. 17.15.2 (2012), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> (prohibiting an institutions from commencing practice sessions in rowing prior to a certain date).

⁸³ See e.g. Tim McGhee, *The Rise and Rise of Athlete Brand Endorsements*, 1.1 JOURNAL OF BRAND STRATEGY 79, 81 (Jun. 2012); Kelly Whiteside, *Olympic Athletes Stay in Spotlight after London*, USATODAY, <http://usatoday30.usatoday.com/sports/olympics/story/2012/09/11/olympic-athletes-stay-in-spotlight-after-london/57751470/1>.

⁸⁴ NCAA, 2012-13 Division I Manual art. 12.5.3 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁸⁵ NCAA, 2012-13 Division I Manual art. 16.9.1(b) (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

⁸⁶ See e.g., *How Much are Olympic Medals Actually Worth?*, DEADSPIN, <http://deadspin.com/5930095/how-much-are-olympic-medals-actually-worth>.

⁸⁷ NCAA, 2012-13 Division I Manual art. 16.1.1.3.2 (2012), available at www.ncaapublications.com/productdownloads/D113.pdf.

III. CONCLUSION

As this article illustrates, there are clearly differences in the NCAA's treatment of NCAA events compared with Olympic participation vis-à-vis the impact such involvement has on the amateur status of current and prospective student-athletes. The existence of a divergence, however, does not qualify as a justification of such differential treatment. Upon review of the inexact parallels between the NCAA's treatment of NCAA athletics and Olympic participation, there does not seem to be a justification for such a divergence. While parallels exist between the activities taking place in both Olympic and non-Olympic settings (i.e. professional basketball in Europe, summer basketball camp, BCS Bowl Games, etc.), these activities are not extended equal treatment by the NCAA. Explicit reasoning for the NCAA's divergence in treatment is lacking in the NCAA bylaws. While there are some arguments that can be made on the NCAA's behalf, the entire divergence in treatment by the NCAA regarding preferential treatment for Olympic involvement remains arbitrary. An advocate for the existing policies might try to justify the NCAA's distinction between NCAA activities and Olympic activities by illustrating the uniquely grand essence of the Olympics or claiming the promotion of a national identity by fostering Olympic involvement by student-athletes, but in reality these arguments are merely excuses aimed to mask the capricious divergence in treatment by the NCAA.

Perhaps the difference in treatments by the NCAA is the result of a voluntary retreat by the NCAA's amateurism restrictions regarding Olympic participation in order to avoid casting the public's glare on the more restrictive nature of general NCAA regulations. Society, and the media outlets catering to such masses, will be more familiar with Olympic competitions and the implications such activities may have on NCAA amateurism status than the day-to-day dealings of a typical NCAA student-athlete. Olympic athletes are the elite performers in their respective

fields. NCAA rules prohibiting elite performers like Missy Franklin from participating in intercollegiate athletics are more likely to draw the ire of the public. By avoiding this kind of attention with more lenient NCAA restrictions on Olympic involvement, the NCAA is able to sidestep the public spotlight and continue enforcing more stringent regulations throughout the year during ordinary NCAA activities. This misdirection, however, is not a long-term solution for the NCAA.

In order to resolve this arbitrary distinction, the NCAA could relax its bylaws governing NCAA activities to reflect those currently governing the Olympic involvement of current and prospective student-athletes. The obvious push-back will be the NCAA's argument that, if the difference in treatment between NCAA athletics and Olympic participation is going to be eliminated, the rules that should prevail are those currently governing ordinary NCAA activities. Thus, the NCAA would likely push for an elimination of the current leniencies extended to Olympic participation.

The long-term impact of aligning NCAA bylaws to parallel treatment in these two contexts should be beneficial, regardless of whether this alignment shifts towards the lenient side of current NCAA treatment of Olympic participation or conversely towards the stringent side of current NCAA treatment of ordinary NCAA athletics. If the bylaws are relaxed, then the treatment will more accurately reflect the existing nature of NCAA athletics. Modern amateurism should reflect the profit motive of the student-athlete and recognize the corporate nature of NCAA athletics as they exist in reality, rather than cling to the strict regulations that have been used to protect amateurism which is no longer an accurate portrayal of NCAA athletics.⁸⁸ If the bylaws are adjusted to align in a more restrictive manner, then the NCAA's

⁸⁸ See Fitt, *supra* note 34, at 555.

treatment of amateurism will be pushed in front of the public and primed for a potential challenge by student-athletes that may threaten the NCAA's adherence to amateurism in general.

Maryland Sports Law

Adam Epstein*

* J.D., M.B.A., Professor, Department of Finance and Law, Central Michigan University. A draft of this paper was originally presented at the 2012 Mid-Atlantic ALSB (Academy of Legal Studies in Business) Conference in Baltimore at Johns Hopkins University's Inner Harbor campus. Thank you to all the attendees who provided invaluable input and insight.

Introduction

The purpose of this article is to explore cases and to provide a perspective on how individuals, universities and professional teams associated with the state of Maryland have had a varied impact on sports law in general emanating from this state found in the Mid-Atlantic region of the United States.¹ This article also serves as a primer for anyone studying sports law in general—particularly for those interested in intellectual property or disability issues—though legal disputes from a variety of subjects have impacted Marylanders and others from the Chesapeake Bay and Potomac River region and beyond.² Maryland played an important role in shaping sports law nationally and continues as part of the discussion.³

Maryland, also known as the *Old Line State* and the *Free State*, is the 19th most populous American state with almost six million residents.⁴ The ninth smallest state in terms of geography with only 10,460 square miles of land and water, the state of Maryland houses many prominent professional sports teams and individuals.⁵ Maryland also boasts a long-list of transient, defunct

¹ The research demonstrated that many of the significant cases and events came from the Beltway area though the article did not originally intend to be so Baltimore-centric.

² This article attempts to focus on law from Maryland rather than the District of Columbia. For the latter, one might explore, e.g., *DeFrantz v. United States Olympic Comm.*, 492 F. Supp. 1181 (D.D.C. 1980), *aff'd* 701 F.2d 221 (D.C. Cir. 1980) (Holding that the requested injunction against President Carter for alleged violation of the Amateur Sports Act of 1978 by not sending a team to the 1980 Moscow Olympics is improper and unjustified).

³ See, e.g., Michael McCann, *Issues Raised About Pre-Draft Questions Likely to Spur Reforms*, SPORTS ILLUSTRATED (May 7, 2010, 4:03PM), http://sportsillustrated.cnn.com/2010/writers/michael_mccann/05/07/questions/index.html (noting that Maryland is one of 21 states that prohibit discrimination based upon sexual orientation, which could lead to controversy if a player is asked about his sexual orientation during a pre-draft interview with the NFL); see also Claire Williams, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 J. LEGAL ASPECTS SPORT 253, 271-72 (2007) (citing *Yost v. Bd. of Regents, Univ. of Md.*, 1993 U.S. Dist. LEXIS 17648 (D. Md. Nov. 19, 1993), in which plaintiff field hockey player Vicki Yost claimed that she was forced to keep her sexual orientation to herself or lose her athletic scholarship, though the District Court decided she lacked standing because she was no longer a student-athlete there anymore thereby never addressing her First Amendment claim).

⁴ See VISIT MARYLAND, *Maryland Facts*, <http://www.visitmaryland.org/Students/Pages/MarylandFacts.aspx> (last visited May 20, 2013); see also Greg Latshaw, *Diversity Grows with Population in Maryland*, USA TODAY (Feb. 17, 2011, 4:29 PM), http://usatoday30.usatoday.com/news/nation/census/2011-02-09-maryland-census_N.htm.

⁵ VISIT MARYLAND, *supra* note 4; see also Frank Deford, *Jousting Anyone?*, SPORTS ILLUSTRATED (Sept. 1, 2003), <http://sportsillustrated.cnn.com/magazine/features/si50/states/maryland/essay/> (discussing prominent events in

or rebranded professional teams.⁶ Maryland and the surrounding region (including D.C.) had one of the greatest sports years in 2012-2013.⁷

Not surprisingly, most of the significant sports law cases emanate from the Baltimore area. This city, Maryland's largest, had been the home to the Baltimore Colts of the National Football League (NFL), which moved to Indianapolis in 1984, and is currently home to both the NFL's Baltimore Ravens and Major League Baseball's (MLB) Baltimore Orioles.⁸ Baltimore should not be confused with the Washington, D.C. area, however, even though they are a mere forty miles apart.⁹ Interestingly, the NFL's Washington Redskins play their home games at FedEx Field in Landover, Maryland, but actually practice and have their business operations in neighboring Virginia.¹⁰ Meanwhile, the Washington Nationals (MLB) play in Washington, D.C. along with the Washington Capitals of the National Hockey League (NHL) and Washington

Maryland sports history including the Pimlico Race Course (*Preakness Stakes*), the University of Maryland national championships in football, NFL star Johnny Unitas of the Baltimore Colts, and the Baltimore Ravens having won the Super Bowl in 2001 [they also won in 2013]; see also Jean Marbella, *Michael Phelps Throws Water on Reports that He'll Return to Olympic Pool*, BALT. SUN (May 17, 2013), http://articles.baltimoresun.com/2013-05-17/sports/bs-sp-michael-phelps-return-rumors-0518-20130517_1_haney-project-michael-phelps-bob-bowman (noting that Michael Phelps is a Baltimore native).

⁶ See, e.g., Pasquale Prezioso, *Your Baltimore Bullets History Primer*, WIZARDSXTRA.COM (Oct. 13, 2013), <http://www.wizardsxtra.com/2013/10/15/your-baltimore-bullets-history-primer>; see also WIKIPEDIA, *Sports in Maryland*, http://en.wikipedia.org/wiki/Sports_in_Maryland (last visited May 20, 2013).

⁷ See Kevin James Shay, *Playoff Fever Grips Baltimore-Washington Region*, GAZETTE.NET (Oct. 5, 2012), <http://www.gazette.net/article/20121005/NEWS/710059702/1009/playoff-fever-grips-baltimore-washington-region&template=gazette>; see also Jill Rosen, *Hailing the Redskins and Ravens (Plus Nats and O's, too)*, BALT. SUN (Jan. 4, 2013), http://articles.baltimoresun.com/2013-01-04/features/bs-ae-fan-dream-20130104_1_ravens-fan-ravens-flags-rgiii; see also Adam Vingan, *Washington, Baltimore "Unlikely Sports Capital," According To Sports Illustrated Cover*, NBC WASHINGTON (Sept. 26, 2012, 4:44 PM), <http://www.nbcwashington.com/blogs/capital-games/Washington-Baltimore-Unlikely-Sports-Capital-According-To-Sports-Illustrated-Cover-171364991.html>. In 2012-2013, the Washington Redskins, Baltimore Ravens, Baltimore Orioles, Washington Nationals, and Washington Capitals all played in the post-season with the Ravens winning the Super Bowl in 2013.

⁸ See Keith Eggener, *The Demolition and Afterlife of Baltimore Memorial Stadium*, DESIGN OBSERVER (Oct. 22, 2012), <http://places.designobserver.com/feature/demolition-and-afterlife-baltimore-memorial-stadium/36278/>.

⁹ See Mike Frandsen, *Nationals Fans Should Never Root For Orioles, Period*, CBS DC (Oct. 8, 2012, 10:00AM), <http://washington.cbslocal.com/2012/10/08/washington-nationals-fans-should-never-root-for-baltimore-orioles-period/> (discussing how despite their geographic proximity, "Baltimore is a totally different place than D.C."); see also Ken Rosenthal, *Baltimore was Meant to Hate Washington, and its Redskins, Too*, BALT. SUN (Jan. 10, 1992), http://articles.baltimoresun.com/1992-01-10/sports/1992010189_1_washington-redskins-bandwagon-falcons-fan.

¹⁰ See, e.g., Michael David Smith, *D.C. Mayor Wants Redskins to Consider Changing Their Name*, NBC SPORTS (Jan. 9, 2013, 2:07PM), <http://profootballtalk.nbcsports.com/2013/01/09/d-c-mayor-wants-the-redskins-to-consider-changing-their-name/>.

Wizards of the National Basketball Association (NBA).¹¹ What follows is a summary of some of the more noteworthy Maryland sports law cases and laws.

Federal Baseball

One of the most debated and discussed cases in sports law involved a professional baseball team from Baltimore known as the Baltimore Terrapins.¹² Students of sports law recognize that professional baseball has held a unique exemption from antitrust laws in accordance with the controversial interpretation by the Supreme Court in *Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Baseball Clubs*.¹³ The Terrapins played at Terrapin Park, later known as Oriole Park, a ballpark that was eventually consumed by a fire.¹⁴

Attempting to create a third major baseball league, the Federal League of Base Ball Clubs (the Federal League) only lasted from 1914-1915 and had eight teams.¹⁵ The owners of the American and National Leagues eventually bought out the Federal League, but the Terrapins'

¹¹ See, e.g., Ben Fischer, *Verizon Center Promises Increased Security after Boston Marathon Bombing*, WASH. BUS. J. (Apr. 17, 2013, 3:07PM), <http://www.bizjournals.com/washington/blog/2013/04/verizon-center-promises-increased.html?page=all>; see also, Adam Vingan, *Nationals, Capitals Lead Respective Divisions On Same Day For First Time Ever*, NBC WASHINGTON, (Apr. 5, 2013, 10:43AM), <http://www.nbcwashington.com/blogs/capital-games/Nationals-Capitals-Lead-Respective-Divisions-On-Same-Day-For-First-Time-Ever-201615531.html>.

¹² *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922) (asserting that baseball did not involve interstate commerce and, instead, "[t]he business is giving exhibitions of base ball [sic], which are purely state affairs."); see also *State v. Milwaukee Braves, Inc.* 144 N.W.2d 1, 12 (Wis. 1966) (holding that state antitrust laws were not applicable to the sport of baseball).

¹³ *Federal Baseball Club of Baltimore, Inc.*, 259 U.S. 200; see also Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557 (2010); see also Samuel G. Mann, *In Name Only: How Major League Baseball's Reliance on Its Antitrust Exemption is Hurting the Game*, 54 WM. & MARY L. REV. 587, 591-97 (2012) (discussing the history of the impact of the decision in *Federal Baseball*); see also ADAM EPSTEIN, *SPORTS LAW* 349-50 (1st ed., Cengage Learning 2002) (discussing the Federal Baseball decision and its progeny).

¹⁴ See Byron Bennett, *Baltimore's Other Major League Ballfield-Terrapin Park/Oriole Park*, DEADBALL BASEBALL (Dec. 16, 2012), <http://deadballbaseball.com/?p=1805>.

¹⁵ See *Baseball Reference, Federal League*, BASEBALL-REFERENCE.COM, http://www.baseball-reference.com/bullpen/Federal_League (last visited May 24, 2013).

owners were not part of that buyout.¹⁶ As a result, the Terrapins sued the team owners of both the American and National Leagues, including the Federal League itself, claiming that this violated the federal Sherman Antitrust Act by conspiring to monopolize professional baseball by undermining the Federal League which had been trying to compete with the other two.¹⁷

The Supreme Court of the United States held that antitrust laws do not apply to professional baseball because the game was merely an exhibition and did not affect interstate commerce.¹⁸ In a unanimous decision in 1922, Justice Oliver Wendell Holmes noted that even though teams and players traveled across state lines, such activity was perceived as only incidental to the game and that baseball was merely a form of entertainment and not subject to commerce.¹⁹ The unique *Federal Baseball* decision has caused legal controversy and criticism for almost 100 years regarding baseball's antitrust exemption under federal law while other sporting activities, leagues or organizations are not.²⁰ *Federal Baseball* was subsequently affirmed by the unsuccessful legal challenge by George Toolson, a minor league pitcher who

¹⁶ See *Baltimore Terrapins, History*, SPORTS HISTORY, <http://sportshistory.wikidot.com/baltimore-terrapins> (providing that Major League Baseball did not return to Baltimore until 1954 when the St. Louis Browns moved to Baltimore and became the Baltimore Orioles) (last visited June 10, 2013).

¹⁷ See Grow, *supra* note 13, at 566-68 (2010) (noting that Baltimore won in district court, but that decision was overturned on appeal); see also Nathaniel Grow, *Today in Sports Law History*, SPORTS LAW BLOG (May 29, 2012, 9:30AM), <http://sports-law.blogspot.com/2012/05/today-in-sports-law-history.html> (discussing that in 1919, a jury awarded Baltimore an \$80,000 verdict (trebled to \$240,000), but organized baseball prevailed on appeal, and the Supreme Court affirmed on May 29, 1922).

¹⁸ *Federal Baseball Club of Baltimore, Inc.*, 259 U.S. at 208-09. Justice Oliver Wendell Holmes stated that baseball was "purely state affairs." This was not the first professional baseball case to emanate from Maryland, however. See *Baltimore Base Ball & Exhibition Co. v. Pickett*, 78 Md. 375, 28 A. 279 (1894) (discussing what degree of skill was required of a professional baseball player-employee. John Pickett played second base for the team but he was discharged because he did not exercise the degree and efficiency required of a professional baseball player in the National League).

¹⁹ *Federal Baseball Club of Baltimore, Inc.*, 259 U.S. at 208-09.

²⁰ See, e.g., Jonathan D. Gillerman, Comment, *Calling Their Shots: Miffed Minor Leaguers, the Steroid Scandal, and Examining the Use of Section 1 of the Sherman Act to Hold MLB Accountable*, 73 ALB. L. REV. 541, 565-570 (2010); see also *Toolson v. New York Yankees*, 346 U.S. 356 (1953) (holding by the majority that Congress did not intend it to include baseball under the federal antitrust laws); *Gardella v. Chandler*, 172 F.2d 402, 408-09 (2d Cir. 1949) (discussing violation of reserve clause by player who commenced employment in the Mexican League); see also Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2440-41 (1997) (noting that though ultimately settled out of court, Danny Gardella demonstrated MLB violated antitrust laws and that he was blacklisted due to his breach of a contract with New York Giants in order to play professional baseball in Mexico); but see *U.S. v. Int'l Boxing Club of New York, Inc.* 348 U.S. 236 (1955) (denying antitrust exemption to professional boxing).

remained stagnant at the AAA level in the New York Yankees' organization.²¹ *Federal Baseball* remains intact despite the enactment of *The Curt Flood Act of 1998* which was an attempt by Congress to legislatively override the antitrust ruling, though its impact appears to be minimal.²²

When studying antitrust issues related to Maryland, one might also explore the antitrust case that sparked *The Merger* in which the American Football League (AFL) sued the NFL in the 1960s for violation of section 2 of the Sherman Act.²³ The AFL alleged that the NFL had established a market monopoly, but the Fourth Circuit Court of Appeals ruled in favor of the NFL on the basis of insufficient evidence of the NFL's intent to monopolize though it was a natural monopoly.²⁴ The Washington Redskins were a member of the NFL, one of 13 teams at the time, and the two leagues merged in 1968.²⁵

Baltimore Colts

In 1984, the NFL did not stand in the way when the Baltimore Colts moved to Indianapolis where the team was renamed the Indianapolis Colts.²⁶ Nine years later, the

²¹ *Toolson*, 346 U.S. at 356-57 (determining in a 7-2 decision that Congress did not intend to include the business of baseball within the scope of federal antitrust laws and reaffirming the *Federal Baseball* decision with a one-paragraph majority opinion).

²² Curt Flood Act of 1998, 15 U.S.C. § 26b (2013); see also Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 751-58 (2009) (discussing the Act and the risks associated with the process of union decertification. Grow also notes that the Act amended the Clayton Act of 1914 and gives baseball players, like those in the NBA and NFL, the right to sue under antitrust laws provided they first decertify as a union). The Washington Senators was the team that MLB player Curt Flood eventually played for (briefly) after refusing to be traded to the Philadelphia Phillies. Flood sat out the 1970 season and was traded to the Senators the next year, though his career ended when he retired after playing only 13 games for the Senators in 1971. See *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (referencing Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Baseball Clubs, 259 U.S. 200 (1922)).

²³ *Am. Football League v. Nat'l Football League*, 205 F.Supp. 60 (D. Md. 1962), *aff'd* 323 F.2d 124 (3rd Cir. 1963).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Steven R. Hobson II, *Preventing Franchise Flight: Could Cleveland have Kept the Browns by Exercising its Eminent Domain Power?*, 29 AKRON L. REV. 665, 681-84 (1996) (citing *Baltimore v. Balt. Football Club, Inc.*, 624 F. Supp. 278 (D. Md. 1985), and discussing how Robert Irsay, the owner of the Baltimore Colts, moved his team to Indianapolis after his attempts to reach a new leasing agreement with Memorial Stadium in Baltimore failed, and the

Canadian Football League (CFL) granted a team franchise to a Baltimore-based team making it one of four American teams in the CFL.²⁷ The CFL named this new team the *Baltimore Colts*.²⁸ After the NFL threatened to sue over the use of the word *Colts*, the CFL changed the team's name to the *Baltimore CFL Colts*, and launched media advertisements, licensed merchandise, and took steps in preparation for the beginning of the football season.²⁹

Still, the Indianapolis Colts and the NFL sued Baltimore's new team in federal court for trademark infringement based on misappropriation and consumer confusion.³⁰ The United States District Court for the Southern District of Indiana issued an order preventing the new team from using the name *Colts*, *Baltimore Colts* or *Baltimore CFL Colts* in connection with the playing of professional football, football game broadcasts, or the sale of merchandise.³¹ The court reasoned that purchasers of *Baltimore CFL Colts* merchandise would likely think that the new team was related to the Indianapolis Colts thereby violating the federal Lanham Act, 15 U.S.C.S. §§ 1051 et seq., because consumers would have been likely to mistakenly think that new team *Baltimore Colts* was related to the *Indianapolis Colts* thereby causing a trademark infringement.³² The new CFL team and its owner appealed the court's decision.³³

unsuccessful attempt by the Mayor and City Council of Baltimore to condemn this professional football team through the use of its eminent domain powers); see also Ashby Jones, *Maryland's Run for the Preakness: Would it Be Constitutional?*, WALL ST. J. (Apr. 9, 2009, 6:08PM), <http://blogs.wsj.com/law/2009/04/09/marylands-run-for-the-prekness-would-it-be-constitutional/> (discussing Maryland's governor, Martin O'Malley's plan to exercise eminent domain powers over the Pimlico Race Course, where the Preakness is held every May, to keep it in Baltimore because of federal bankruptcy filings by the race's current owner, Magna Entertainment Corp., of Canada).

²⁷ *Indianapolis Colts v. Metro. Balt. Football Club Ltd. P'ship*, 34 F.3d 410 (7th Cir. 1994).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 413.

³¹ *Id.* at 411.

³² *Id.*

³³ *Id.*

On appeal, the new CFL team argued to the Seventh Circuit Court of Appeals that the Indianapolis Colts had abandoned the Baltimore Colts trademark.³⁴ Still, this court held that the Colts' abandonment of the old mark did not entitle the CFL to use the Colts' name and could possibly confuse fans regarding the identity, sponsorship or league affiliation of the new team.³⁵ After reviewing survey evidence offered by both parties, the court ultimately concluded that the use of the name *Baltimore CFL Colts* for its team and merchandise would likely confuse a substantial number of consumers.³⁶ In sum, the Seventh Circuit Court of Appeals affirmed the district court order that prevented the CFL from using the *Colts* name. The team then renamed itself the *Baltimore Stallions* though the club only lasted three years before moving to Montreal, Quebec.³⁷

As demonstrated by the *Federal Baseball* and *Baltimore Colts* cases, the city of Baltimore has had legal issues related to its professional sports teams including the actual names of the teams themselves. However, this has not been anything new for Baltimore or Maryland-based teams as the next several cases illustrate.

Washington Redskins

If there is a current professional team name that has sparked legal controversy over the issue of politically incorrect nicknames it is the Washington Redskins football team.³⁸ Given the

³⁴ *Id.* at 412.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Ben Jacobs, *Baltimore's Greatest Canadian Sports Team: A Brief History of the CFL Colts*, THE CLASSICAL (Dec. 15, 2011, 1:54PM), <http://theclassical.org/articles/baltimores-greatest-canadian-sports-team-a-brief-history-of-the-cfl-colts>.

³⁸ See Associated Press, *'Redskins' Deemed Racial Slur at Washington Museum*, USA TODAY (Feb. 8, 2013, 7:30AM), <http://www.usatoday.com/story/sports/nfl/redskins/2013/02/07/washington-redskins-racial-slur-racist-smithsonian/1900941/>.

evolution of controversy related to utilization and promotion of negative images and stereotypes related to groups of people, it is highly unlikely that any new professional or amateur team today would adopt a team name, nickname, moniker or a mascot that would appear to be so culturally insensitive as Redskins, particularly to those with Native American ancestry.³⁹ While the Redskins' organization has been involved in various high-profile disputes, none have lasted as long as the attempt to declare the team's name to be an actual violation of federal law and to be removed by lead plaintiff Suzan Shown Harjo, president of the advocacy group Morning Star Institute.⁴⁰

The mark *Redskins* was first registered in 1967.⁴¹ In 2013, however, several members of the U.S. House of Representatives supported a bill entitled the *Non-Disparagement of American Indians in Trademark Registrations Act of 2013*, which would effectively cancel all existing federal trademarks using *Redskins*.⁴² Recently, a three-judge panel on the federal Trademark Trial and Appeal Board (TTAB) considered arguments about whether the term *Redskins* should be considered a slur and therefore not worthy of trademark protection under federal law.⁴³ Still, the Washington Redskins' owner Daniel Snyder, who bought the team in 1999, has made it clear that he has no intention of changing the team's name or logo.⁴⁴

³⁹ Other professional sports teams that still use a Native American moniker including the Kansas City Chiefs (NFL), Cleveland Indians (MLB), Atlanta Braves (MLB), and Chicago Blackhawks (NHL).

⁴⁰ See Erik Brady, *Redskins' owner Snyder: 'We'll never change the name'*, DELMARVA NOW (May 10, 2013), <http://www.delmarvanow.com/article/20130510/SPORTS/305100030/Redskins-owner-Snyder-We-ll-never-change-the-name->.

⁴¹ See Associated Press, *Challenge to Redskins Name Begins*, ESPN (Mar. 7, 2013, 6:44 AM), http://espn.go.com/nfl/story/_/id/9029154/challenge-washington-redskins-team-name-begins-trademark-hearing (noting that the team was actually of its trademark protection in 1999, but the ruling was overturned on appeal in part because the courts decided that the plaintiffs had waited too long to make their complaint).

⁴² See Ben Pershing, *Lawmakers Offer Bill to Ban 'Redskins' Trademark*, WASH. POST (Mar. 20, 2013), http://articles.washingtonpost.com/2013-03-20/local/37865987_1_federal-trademarks-redskins-trademark-protection.

⁴³ *Id.*

⁴⁴ See Erik Brady, *New Generation of American Indians Challenges Redskins*, USA TODAY (May 10, 2013), <http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/native-americans-washington-mascot-fight/2148877/>.

During the interim, in 1994 and then 1999, several Native American petitioners filed a complaint with the TTAB seeking the cancellation of the trademark *Redskins* under Section 2(a) of the Lanham Act, often referred to as the federal trademark law.⁴⁵ The federal Court of Appeals for the District of Columbia considered whether canceling the registration of the Washington Redskins football team was appropriate (the club's official name is *Pro-Football, Inc.*) based upon the assertion that its name is a racial slur and is disparaging to Native Americans.⁴⁶

In *Pro-Football, Inc. v. Harjo*, after years of litigation involving procedural issues involving the doctrine of laches, whether the name is in violation of the Lanham Act (i.e., the name is immoral, deceptive, scandalous) remains uncertain.⁴⁷ The U.S. Supreme Court in 2009 did not grant certiorari, but it appears that the legal battle continues today.⁴⁸ In fact, Washington, D.C. mayor Vincent C. Gray mentioned that if the team were to move back to D.C. that there would need to be a discussion of the name change.⁴⁹ Amanda Blackhorse has now taken the lead in a new case, *Blackhorse v. Pro-Football, Inc.*, and is attempting to demonstrate again that under Lanham Act 15 U.S.C. §1052(a), that trademarks which depict “immoral, deceptive, or scandalous matter” or “matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols” should not be registered, and therefore the term *Redskins* should be

⁴⁵ See *Harjo v. Pro-Football, Inc.*, 30 U.S.P.Q.2d (BNA) 1828 (T.T.A.B. 1994), *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705, 1727 (T.T.A.B. 1999); *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 125 (D.D.C. 2003); see also John R. Wallace, *Discriminatory & Disparaging Team Names, Logos, & Mascots: Workable Challenges & the Misapplication of the Doctrine of Laches*, 12 RUTGERS RACE & L. REV. 203 (2011).

⁴⁶ *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705, 1738 (T.T.A.B. 1999), *rev'd*, 284 F. Supp. 2d 96 (D.D.C. 2003).

⁴⁷ *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 367 U.S. App. D.C. 276, 2005 U.S. App. LEXIS 14312, 75 U.S.P.Q.2d (BNA) 1525 (2005); see also ADAM EPSTEIN (SPORTS LAW) 386 (discussing the Lanham Act and trademark prohibitions under that act).

⁴⁸ *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 385 U.S. App. D.C. 417, 2009 U.S. App. LEXIS 10295 (D.C. Cir. 2009).

⁴⁹ See Mike DeBonis, *Redskins Name Change Should be Discussed, Vincent Gray Says*, WASH. POST (Jan. 9, 2013), <http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/01/09/redskins-name-change-should-be-discussed-vincent-gray-says/>.

disqualified, just as was attempted to be demonstrated in the decade-long litigation involving *Harjo*.⁵⁰

Baltimore Ravens

In 1996, owner Art Modell moved his Cleveland Browns football team to Baltimore where they play now as the *Baltimore Ravens*.⁵¹ The movement from the shores of Lake Erie to the Chesapeake Bay area sparked much controversy, including national discussion as to how to finance the building of newer and better public stadiums.⁵² However, arguably the most controversial issue to follow the move from Cleveland to Baltimore was yet another intellectual property dispute involving a Baltimore team.⁵³ In particular, the question revolved around who owns the rights to the design of the Baltimore Ravens' logo, the NFL team itself or a man named Frederick Bouchat, a security guard and amateur artist who is credited with the drawing that was used by the Ravens as their original logo for their first three seasons from 1996 to 1998.⁵⁴

⁵⁰ See Tamlin H. Bason, *House Bill Would Amend Trademark Act to Clarify That 'Redskin' a Disparaging Term*, BLOOMBERG BNA (Mar. 27, 2013), <http://www.bna.com/house-bill-amend-n17179873066/> (noting that §1064(3) of the Lanham Act allows for the cancellation of a trademark which violates §1052(a)).

⁵¹ See Ross Todd, *Ravens Logo IP Case Splits Down the Middle*, CORPORATE COUNSEL (Mar. 22, 2013), <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1363868999732&thepage=1>; see also Baltimore Ravens Football, VISIT BALTIMORE, <http://baltimore.org/sports/baltimore-ravens/> (last visited May 26, 2013) (noting that Baltimore native Fred Bouchat sketched ideas for the team's logo and faxed the drawings to an official at the Maryland Stadium Authority. Todd characterizes Bouchat as Baltimore's "peskiest rival" and as a "doodler.").

⁵² See, e.g., Todd Senkiewicz, *Stadium and Arena Financing: Who Should Pay?*, 8 SETON HALL J. SPORTS L. 575 (1998). The state of Maryland provides lottery ticket revenue to help pay for M&T Stadium at Camden Yards (Baltimore Ravens) and Oriole Park at Camden Yards (Baltimore Orioles). See Matthew J. Parlow, *Equitable Fiscal Regionalism*, 85 TEMP. L. REV. 49, 89 (2012) (citing Shane Mecham, *The House that Consensus Built: Consensus Building in Stadium Construction*, 38 URB. LAW. 1087, 1115 (2006)); see also Paul M. Anderson & W.S. Miller, *Sonic Bust: Trying to Retain Major League Franchises in Challenging Financial Times*, 21 J. LEGAL ASPECTS OF SPORT 117, 153 (2011) (noting that the Baltimore Ravens lease for M&T Bank Stadium contains a provision stating, "No Relocation: Maintenance of Franchise: During the Term, the Team will not relocate nor, permit any of its home games, during the regular season or otherwise, to be played in any location other than the Football Stadium.").

⁵³ See, e.g., John Imhoff, *Bouchat v. Baltimore Ravens Ltd. Partnership*, 56 N.Y.L. SCH. L. REV. 1619 (2011).

⁵⁴ *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350 (4th Cir. 2000) (discussing that apparently Bouchat had faxed a copy of his design to then chairman of the Maryland Stadium Authority John Moag, but the Ravens claimed the Shield B (B Shield) logo was independently created); see also *Baltimore Orioles, Inc. v. Major League Baseball*

Bouchat apparently created the basis for the original team's primary logo in 1995 prior to the team's arrival from Cleveland, and in 1996 he sent a fax to the Ravens' organization asking for a letter of recognition and an autographed football helmet after the team started using his logo.⁵⁵ In June of 1996, the NFL licensed the logo for merchandise sales.⁵⁶ A month later, and inefficiently late, Bouchat registered his sketch with the U.S. Copyright Office.⁵⁷ In 1998, a jury ruled that the Ravens actually stole the logo from a Bouchat, but a jury did not award monetary damages.⁵⁸

Then, in *Bouchat v. Baltimore Ravens, Inc.*, a federal judge from the District of Maryland ruled that Bouchat was not entitled to an injunction preventing the logo's further use.⁵⁹ The court also ruled, however, that the Ravens pay him "reasonable compensation for such use."⁶⁰ The design dispute between Bouchat and the Ravens sparked over ten years of litigation surrounding the rights to the old logo design known as the *Flying B*.⁶¹ The length of the dispute by Frederick

Players Ass'n, 805 F.2d 663 (7th Cir. 1986) *cert. denied*, 480 U.S. 941 (1987) (holding that the Baltimore Orioles' copyright in telecasts of major league baseball games preempted the players' rights of publicity in their baseball game performances, and thus any state law right of publicity claims were generally preempted by the federal Copyright Act).

⁵⁵ Bouchat v. Baltimore Ravens Football Club, 346 F.3d 514, 516-17 (4th Cir. 2003).

⁵⁶ *Id.*

⁵⁷ Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301, 322 (4th Cir. 2010).

⁵⁸ *Id.* at 319.

⁵⁹ *Id.*

⁶⁰ Bouchat v. Balt. Ravens L.P., 2011 U.S. Dist. LEXIS 129530, *10 (D. Md. Nov. 9, 2011).

⁶¹ Bouchat v. Balt. Ravens L.P., 2011 U.S. Dist. LEXIS 129530, *1 (D. Md. Nov. 9, 2011) (noting that for the 1996 through 1998 seasons, the Baltimore Ravens used as the team's primary symbol, the "Flying B Logo" though it had been copied from a drawing, "the Flying B Drawing" by Bouchat. The Bouchat case saga's history includes Bouchat v. Baltimore Ravens, Inc., 228 F.3d 489, 56 USPQ2d 1422 (4th Cir. 2000), *cert. denied* (U.S. May 21, 2001) (No. 00-1494); Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350 (4th Cir. 2000); Bouchat v. Baltimore Ravens Football Club Inc., 346 F.3d 514 (4th Cir. 2003); Bouchat v. Bon-Ton Dep't Stores Inc., 506 F.3d 315 (4th Cir. 2007); Bouchat v. Baltimore Ravens Ltd. P'ship, 587 F.Supp. 2d 686 (D. Md. 2008), *aff'd in part, rev'd in part by* Bouchat v. Baltimore Ravens Ltd. P'ship, 619 F.3d 301 (4th Cir. 2010) (hearing the case for the fourth time and ruled that the commercial use of game and highlight films from the first three seasons violated Bouchat's copyright); Bouchat v. Baltimore Ravens L.P., 2011 U.S. Dist. LEXIS 129530, 100 U.S.P.Q.2d (BNA) 1719 (D. Md. Nov. 9, 2011) (allowing the Ravens to use the original team logo in highlight films, but ordered the sides to try to agree on compensation). Apparently Bouchat had faxed a copy of his design to then chairman of the Maryland Stadium Authority John Moag, but the Ravens claimed the winged Shield B logo was independently created. From 1996-1998, the Ravens used this logo with raven wings flanking a shield with the letter "B." 228 F.3d 489, 56 USPQ2d 1422 (4th Cir. 2000), *cert. denied* (U.S. May 21, 2001) (No. 00-1494). The district court and subsequently the Fourth Circuit Court of Appeals affirmed, holding that Bouchat was barred from obtaining damages under the

Bouchat rivals that of any in the history of sports law, including the *Harjo* litigation involving the Washington Redskins' team name.⁶² It did not end there.

In 2010, a federal appeals court heard the case for the fourth time and ruled that the commercial use of game and highlight films from the first three seasons (1996-1998) violated Bouchat's copyright, and that he should *not* be prevented from seeking an injunction.⁶³ However, in 2011, a judge allowed the Ravens to use the original team logo in highlight films, but ordered the sides to try to agree on compensation.⁶⁴ The case continued further, and Bouchat demonstrated that a video game manufacturer's use of the Ravens' original logo in its 2010, 2011 and 2012 versions of the *Madden NFL* video game series as part of the throwback uniforms was not a *fair use* even if it had nostalgic value.⁶⁵

In 2013, a federal judge dismissed Bouchat's copyright infringement case against National Football League Properties, but held that he could pursue his claim against Electronic Arts Inc. (EA Sports), the California-based video game maker.⁶⁶ District Court Judge Marvin J. Garbis held for *fair use* for NFL Films, that Bouchat presented "not a scintilla of evidence" that NFL Properties had licensed the use of the logo to EA Sports and financially benefited from that

doctrine of claim preclusion, and that he was ineligible to receive statutory damages because of his failure to register his copyright before the infringement began.

⁶² See Todd, *supra* note 51 (noting that even though the Ravens have won two Super Bowls in their 17 year history, the Bouchat litigation remains unresolved); see also *Cmtys. for Equity v. Mich. High Sch. Ath. Ass'n*, 2008 U.S. Dist. LEXIS 25640 (W.D. Mich. Mar. 31, 2008) (noting the decades-long defense counsel's egregious tactics of harassment, intimidation, and rude, uncooperative, dilatory, and hostile litigation methods, Judge Richard Alan Enslin began his opinion with in bold face type font, "When the game is complete, the loser should not complain about the rules.").

⁶³ *Bouchat v. Baltimore Ravens Ltd. P'ship*, 587 F.Supp. 2d 686 (D. Md. 2008), *aff'd in part, rev'd in part by Bouchat v. Baltimore Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010).

⁶⁴ *Bouchat v. Baltimore Ravens L.P.*, 2011 U.S. Dist. LEXIS 129530, 100 U.S.P.Q.2d (BNA) 1719 (D. Md. Nov. 9, 2011).

⁶⁵ *Bouchat v. Nat'l Football League Props., LLC*, 910 F. Supp. 2d 798 (D. Md. Nov. 19, 2012). The court analyzed and applied the four *fair use doctrine* factors listed in 17 U.S.C. § 107: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use on the potential market for the original work.

⁶⁶ See Stewart Bishop, *NFL Released From Ravens Logo Copyright Dispute*, LAW 360 (Apr. 4, 2013), <http://www.law360.com/articles/430376/nfl-released-from-ravens-logo-copyright-dispute>.

license, but *no fair use* for EA Sports itself.⁶⁷ The *Bouchat* case appears to have finally held that the use of the *Flying B* logo in *stadium* picture displays, photos, film and video documentaries is *substantially transformative* and minimally commercial in nature (and is therefore essentially fair use), while use of the logo in a *video game* is commercial and *non-transformative* (therefore not fair use).⁶⁸ The case may continue against EA Sports, though one wonders what the real point to this case is anymore and why it just has not settled out of court.⁶⁹

Washington Wizards

Though they play in D.C., just outside the Maryland state border, today's Washington Wizards NBA team also faced an intellectual property legal challenge in the late 1990s from a team from New York City who also used the name *Wizards*.⁷⁰ In *Harlem Wizards Entm't Basketball, Inc. v. NBA Props.*, the Harlem Wizards, a theatrical basketball team since 1962, had their injunction request denied against this use of the mark *Wizards* by the NBA team, though they argued using the term *Wizards* amounted to trademark infringement.⁷¹ Although the court

⁶⁷ *Id.*; see also Todd, *supra* note 51 (noting that U.S. District Judge Marvin Garbis still presides over the same litigation day and bifurcated Bouchat's lawsuit into trials on infringement and damages, and while one jury ruled in favor of infringement, another jury ruled that the NFL did not owe Bouchat any damages because any profits involving the original Flying B logo were due to the Ravens' marketing efforts, not Bouchat.).

⁶⁸ See Brian Wm. Higgins, *Maryland Court Denies Electronic Arts' Fair Use Defense in Bouchat's Latest Copyright Infringement Case*, MARYLAND IP LAW (Dec. 23, 2012), <http://www.marylandiplaw.com/2012/12/articles/copyrights/maryland-court-denies-electronic-arts-fair-use-defense-in-bouchats-latest-copyright-infringement-case/>.

⁶⁹ See Alison Matas, *Federal Judge Throws Out Case Against NFL over Ravens Logo*, BALT. SUN (Apr. 8, 2013), http://articles.baltimoresun.com/2013-04-08/business/bs-bz-nfl-logo-20130408_1_flying-b-logo-madden-nfl-garbis; see also Todd, *supra* note 51, noting that Bouchat hired Baltimore lawyer Howard Schulman to file the infringement lawsuit in 1997, and that Bouchat's never-ending case is due to Schulman's own "lack of business judgment." Todd notes that despite the jury awarding Bouchat no monetary damages, Judge Garbis revealed that he would have given Bouchat slightly less than \$25,000, representing 1 percent of the team's merchandise and souvenir profit, and that the timeless lawsuit represents "another decade of Schulman's litigation crusade...").

⁷⁰ See *Harlem Wizards Entm't Basketball, Inc. v. NBA Props.*, 952 F. Supp. 1084, 1088-89 (D.N.J. 1997) (summarizing history of the professional NBA basketball team nickname).

⁷¹ *Id.* at 1093.

found that the Harlem Wizards did have a legally protectable interest in the mark *Wizards*, the court found that there was no likelihood of confusion because of the differences in the services offered by the parties since the Harlem Wizards performed entertainment basketball shows at high schools, colleges, summer camps, and charitable events.⁷² The court stated, "...under these circumstances, a wizard is not a wizard."⁷³

The aforementioned cases demonstrate that the Baltimore and Washington, D.C. area has been a hotbed for sports law-related lawsuits. Whether one explores the seminal antitrust *Federal Baseball* decision involving the Baltimore Terrapins of the defunct Federal League, or the various intellectual property challenges involving team names and logos for the Baltimore Colts, Baltimore Ravens, Washington Redskins and Washington Wizards, one can see that the Chesapeake Bay region has had an impressive showing in American legal history. In addition to the aforementioned antitrust and intellectual property cases, several sports law disputes related to disability issues have moved to the forefront of national prominence emerging from the state of Maryland as well.

Feldman

Three hearing-impaired Redskins fans, Shane Feldman, Brian M. Kelly, and Paul Singleton, filed a lawsuit against the team and FedEx Field in August, 2006.⁷⁴ They alleged

⁷² *Id.* at 1087.

⁷³ *Id.* at 1099.

⁷⁴ See Associated Press, *Deaf Advocates Sue Redskins Seeking Closed-Captioning*, ESPN (Sept. 20, 2006), <http://sports.espn.go.com/espn/wire?section=nfl&id=2596132> (noting that there was assistance for the class-action lawsuit with the help of the National Association of the Deaf); see also *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697 (D. Md. 2008) (demonstrating that the lawsuit was against Pro Football, Inc., the corporation that owns and operates the Redskins, and WFI Stadium, the corporation that owns and operates FedEx Field).

violations of Title III of the Americans with Disabilities Act (ADA) at the Landover, Maryland stadium by not captioning the Jumbotron and other video monitors at the facility.⁷⁵ Almost immediately after filing the lawsuit, FedEx Field made some changes to accommodate the hearing impaired, but the lawsuit continued.⁷⁶

The Redskins contended that patrons could fully enjoy a football game by observing the action on the field.⁷⁷ However, the federal District Court for the District of Maryland held that the ADA required the Redskins to provide auxiliary aids for the aural content broadcast over the public address system, including music lyrics.⁷⁸ In 2011, the Fourth Circuit Court of Appeals agreed that attending Redskins' football games was actually more than a football game: it was an entertainment experience of which the music plays a significant role.⁷⁹ After several years of litigation, the Redskins had to make all information, including song lyrics, accessible to patrons with hearing loss.⁸⁰

⁷⁵ See Hamil R. Harris, *Hearing-Impaired Fans Sue for Access to Closed-Captioning*, Wash. Post, Sept. 20, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/19/AR2006091901403.html> (noting that a growing number of university stadium Jumbotrons were beginning to offer closed-captioning already, including the University of Texas Longhorns); see also Gabe Feldman, *The Redskins and the ADA*, Sports L. Blog (Nov. 3, 2008, 6:55 PM), <http://sports-law.blogspot.com/2008/11/redskins-and-ada.html> (offering that Title III of the ADA states that: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation." 42 U.S.C. § 12182(a). The regulations also state that: "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. § 36.03(c)).

⁷⁶ See John F. Waldo, J.D., *A Perspective on the Feldman Case and the ADA-What it Means*, Sports Litigation Alert, Dec. 30, 2011, <http://www.ruderware.com/attorneys/SLAvolume8issue24.html>. (mentioning that shortly after the lawsuit was filed, the Redskins installed two ribbon boards to display captions costing in total about \$5,000, and the per-game cost of a captioner of about \$550).

⁷⁷ *Id.*

⁷⁸ Feldman v. Pro Football, Inc., 579 F. Supp. 2d 697, 703 (D. Md. 2008), *aff'd* 419 F. App'x 381 (4th Cir. 2011).

⁷⁹ Feldman v. Pro Football, Inc., 419 F. App'x 381, 391-92 (4th Cir. 2011).

⁸⁰ See Washington Redskins, *Disabled Access*, <http://www.redskins.com/fedexfield/disabled-access.html> (last visited May 26, 2013) (according to the Redskins' website, "The stadium also provides assisted listening devices as well as captioning for the hearing impaired for all in-stadium announcements, including play-by-play announcements, on ribbon boards located at the 50-yard lines on both sides of the stadium. Lyrics to the songs to which the Redskins cheerleaders perform during games are available via email by sending a request prior to each game (or if you are a season ticketholder, prior to the season) to accommodations@redskins.com.").

The *Feldman* decision had a national impact.⁸¹ For example, in 2011 a hearing-impaired season ticket holder at the University of Kentucky (UK) sued the university on the same grounds so that closed-captioning would be placed on the scoreboards at UK's Commonwealth Stadium.⁸² The case settled in 2012.⁸³ A similar lawsuit filed against The Ohio State University (OSU) resulted in a settlement in which OSU posts captions to announcements on the scoreboards and on television screens in the concourse areas.⁸⁴ The University of Oregon also modified its policy relating to captioning thereafter.⁸⁵

McFadden

In 2006, Atholton High School (Columbia, Maryland) student Tatyana McFadden competed as a wheelchair competitor in track and field.⁸⁶ She has spina bifida and is paralyzed from the waist down.⁸⁷ McFadden, an elite, world class Paralympian, had recently won a silver and bronze medal at the 2004 Paralympics in Athens, Greece, where she was the youngest member of the team at 15-years-old.⁸⁸ She sued Howard County Public Schools for disability

⁸¹ See, e.g., Client Alert, *Fourth Circuit Holds ADA Requires Expanded Access to Aural Content in Stadiums*, PROSKAUER.COM (Apr. 4, 2011), <http://www.proskauer.com/publications/client-alert/fourth-circuit-holds-ada-requires-expanded-access/>

⁸² See Associated Press, *Deaf UK Fan Suing School; Wants Captions on Scoreboards*, HERALD-DISPATCH (May 5, 2011), <http://www.herald-dispatch.com/news/briefs/x1471243575/Deaf-UK-fan-suing-school-wants-captions-on-scoreboards>.

⁸³ See Brett Barrouquere, *UK, Deaf Fan Settle Suit*, USA TODAY (Feb. 15, 2012), http://usatoday30.usatoday.com/news/nation/states/kentucky/2012-02-15-1089021597_x.htm; see also ADAM EPSTEIN (SPORTS LAW) 272.

⁸⁴ *Id.*

⁸⁵ See Press Release, *UO Captioning for Fans at Autzen Stadium*, UNIV. OF OREGON (Sept. 13, 2011), <http://uonews.uoregon.edu/archive/news-release/2011/9/uo-captioning-fans-autzen-stadium>.

⁸⁶ *McFadden v. Grasmick*, 485 F.Supp.2d 642, 651-52 (D. Md. 2007) (holding that Tatyana McFadden could participate as a wheelchair competitor (i.e., a wheeler), not earn points, and that this did not amount to discrimination under the ADA).

⁸⁷ *Id.*; see also ADAM EPSTEIN (SPORTS LAW) 258-65.

⁸⁸ See Tatyana McFadden (last visited June 10, 2013), <http://www.tatyanamcfadden.com/biography.html>.

discrimination because her school would only allow her to compete in an exhibition race.⁸⁹ As a result, McFadden raced able-bodied competitors, but she would only be scored against other female athletes using wheelchairs.⁹⁰

However, the Maryland Public Secondary Schools Athletic Association (MPSSAA), the governing body for interscholastic athletics in Maryland, established a scoring policy under which team points for wheelchair race events would not be awarded.⁹¹ Since very few schools competed in wheelchair racing, the MPSSAA decided that it would be an unfair competitive advantage for the athlete's school to earn points.⁹² Ultimately, in 2007 a federal judge ruled that while McFadden could participate, she could not earn points.⁹³ The court noted that the MPSSAA had a legitimate 40% rule that only allowed the awarding of team points in an event in which schools representing at least 40% of the students in a certain class participate.⁹⁴ There were only three wheelers in the state at that time, and her event did not meet the requirement for team points.⁹⁵

Still, as a direct result of McFadden's efforts, the assistance of the Maryland Department of Disabilities, the Maryland State Department of Education, and members of the Maryland disabilities community, Maryland passed the 2008 Maryland Fitness and Athletic Equity Act for Students with Disabilities, the first of its kind in the nation requiring equal athletic opportunities for disabled students, and to work with local school districts to improve adapted physical education and interscholastic athletic participation.⁹⁶ McFadden represented the U.S. in the

⁸⁹ *McFadden*, 485 F.Supp.2d at 645-47.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See Michael Popke, *Maryland Becomes First State Requiring Equal Athletic Opportunities for Disabled Students*, ATHLETIC BUS. (June, 2008), <http://www.athleticbusiness.com/articles/article.aspx?articleid=1786&zoneid=0>.

Beijing and London Paralympic Games, winning medals at both Games including three gold medals in London.⁹⁷

Additional Examples

Clearly Maryland cases have influenced national perspectives among antitrust, intellectual property, and disability issues in the context of sports law, but there are other categories worth exploring including hazing, discrimination, freedom of speech and homeschooling issues.⁹⁸ Maryland has had its host of sport and recreation law cases in various tort claims involving negligence.⁹⁹ This includes classic cases involving invasion of privacy

⁹⁷ In Beijing she won four medals, winning silver in the 200m, 400m and 800m, and a bronze in the 4x100m relay. Interestingly, Tatyana's adopted sister Hannah (from Albania) was named in 2010 on the U.S. Paralympic 'first ever High School All-American Track and Field Team. Hannah competed for the U.S. in London as well in the 100m as a 16-year-old junior in high school, performed admirably but did not medal in the finals. See <http://www.pbs.org/wgbb/medal-quest/video/detail/mcfadden-v-mcfadden-100m/>

⁹⁸ See Associated Press, *Freshman Made to Sit in Own Vomit, Urine*, ESPN (Sept. 12, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2159738> (reporting that six women pleaded guilty to hazing for college field hockey hazing at Frostburg State University); see also Barbara Osborne, *Gender, Employment, and Sexual Harassment Issues in the Golf Industry*, 16 J. LEGAL ASPECTS OF SPORT 25, 51-52 (2006) (discussing *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817, 1985 Md. LEXIS 895 (1985), exploring the issue whether Maryland Code, Article 81, Section 19(e)(4), which conditionally gave preferential tax assessment to private country clubs operated with the primary purpose of serving or benefiting members of a particular sex, violated the Equal Rights Amendment of the Maryland Declaration of Rights (Article 46). The court held that the private men's club's primary purpose provision was unconstitutional under the Equal Rights Amendment and therefore preferential tax assessment could not be given to private country clubs that discriminate on the basis of sex); see also Louis M. Benedict & John D. McMillen, *Free Expression versus Prohibited Speech: The First Amendment and College Student Sports Fans*, 15 J. LEGAL ASPECTS OF SPORT 5, 5-7 (2005) (offering that the University of Maryland spent \$ 30,000 in the 2002-2003 school year on a campus-wide sportsmanship program, but continued student fan misbehavior the following year caused UMD to request the Maryland Attorney General's office to research whether it could eject spectators for vulgar speech at sporting events); Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. LEGAL ASPECTS OF SPORT 213, 247 (2005) (mentioning that in 2003, a bill was submitted in the Maryland legislature that would have allowed homeschool students to participate in public school extracurricular activities, but it was defeated in the House Ways and Means Committee).

⁹⁹ Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. Legal Aspects of Sport 213, 247 (2005) (mentioning that in 2003, a bill was submitted in the Maryland legislature that would have allowed homeschool students to participate in public school extracurricular activities, but it was defeated in the House Ways and Means Committee); see Associated Press, *Freshman Made to Sit in Own Vomit, Urine*, Espn (Sept. 12, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2159738> (reporting that six

among public universities within the state.¹⁰⁰ What follows are a few additional claims or controversies of note.

Workers Compensation

Recently, the state of Maryland became a focus for discussion related to tort law in the context of workers' compensation issues.¹⁰¹ For example, in 2012 the Maryland Court of Appeals found that former Washington Redskins player Darnerien McCants was considered a *covered employee*, upholding a Court of Special Appeals decision and therefore entitling him to workers' compensation even though the football-related injuries occurred outside of the state of Maryland.¹⁰² The Redskins asserted that the majority of McCants' job took place in Virginia, not

women pleaded guilty to hazing for college field hockey hazing at Frostburg State University); *see also* Barbara Osborne, *Gender, Employment, and Sexual Harassment Issues in the Golf Industry*, 16 J. Legal Aspects of Sport 25, 51-52 (2006) (discussing *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 501 A.2d 817, 1985 Md. LEXIS 895 (1985), exploring the issue whether Maryland Code, Article 81, Section 19(e)(4), which conditionally gave preferential tax assessment to private country clubs operated with the primary purpose of serving or benefiting members of a particular sex, violated the Equal Rights Amendment of the Maryland Declaration of Rights (Article 46). The court held that the private men's club's primary purpose provision was unconstitutional under the Equal Rights Amendment and therefore preferential tax assessment could not be given to private country clubs that discriminate on the basis of sex); *see also* Louis M. Benedict & John D. McMillen, *Free Expression versus Prohibited Speech: The First Amendment and College Student Sports Fans*, 15 J. Legal Aspects of Sport 5, 5-7 (2005) (offering that the University of Maryland spent \$ 30,000 in the 2002-2003 school year on a campus-wide sportsmanship program, but continued student fan misbehavior the following year caused UMD to request the Maryland Attorney General's office to research whether it could eject spectators for vulgar speech at sporting events).

¹⁰⁰ *Bilney v. The Evening Star Newspaper*, 406 A.2d 652, 660 (Md. Ct. Spec. App. 1979) (denying privacy claims of six UMD scholarship basketball players who sued after their identification-through the process of elimination-regarding academic eligibility status were published to the community by several newspaper publications though they were public figures and therefore was a matter of legitimate public interest); *see also* *Univ. Sys. of Maryland v. Baltimore Sun Co.*, 381 Md. 79, 88-90 (2004) (publishing the salary information of coaches at public schools and universities is public information and must be made available).

¹⁰¹ *Rowe v. Baltimore Colts*, 454 A.2d 872 (Md. Ct. Spec. App. 1983) (denying a football player benefits under the state workers' compensation statute because an occupation requiring physical contact cannot give rise to accidental injuries).

¹⁰² *See* Andrea F. Siegel, *Ex-Redskin McCants Wins Workers' Compensation Ruling*, *Balt. Sun* (Aug. 23, 2012), http://articles.baltimoresun.com/2012-08-23/news/bs-md-ar-mccants-ruling-20120823_1_football-games-nfl-teams-and-players-fedex-field. McCants, a wide receiver, played in 29 regular season games for the Redskins between 2002 and 2004. On April 18, 2007, McCants filed six workers' compensation claims with the Maryland Workers Compensation Commission for various injuries sustained at games in Philadelphia, Buffalo, Landover, and in in

Maryland, and the team's argument was successful at the trial court level.¹⁰³ However, McCants ultimately prevailed at the state court of appeals in which the court held that he was employed primarily for games played in Maryland.¹⁰⁴ By finding that McCants was a covered employee under Maryland law, McCants could continue to pursue his claims before the Maryland Workers Compensation Commission.¹⁰⁵

University of Maryland

The University of Maryland (UMD) itself, whose flagship campus resides in College Park, has had various prominent sport-related issues. For example, UMD was one of the first universities to recognize competitive cheer as a varsity sport, causing national discussion as to whether or not the sport should be considered a varsity sport for Title IX compliance purposes.¹⁰⁶

Ashburn, Virginia (the team's practice facility). See also Colleen K. O'Brien, *Redskins Wide Receiver "Covered Employee" for Purposes of Maryland Workers' Compensation Claim Due to Home Games at FedEx Field in Maryland, and in Spite of Practice Time in Virginia*, Semmes (Aug. 2012), <http://www.semmes.com/publications/cases/2012/08/pro-football-v-mccants.asp> (noting that Sec. 9-203(a)(2) of the Maryland workers' compensation states that an individual qualifies as a covered employee when working for an employer outside of the state on a "casual, incidental, or occasional basis" if the employer regularly employs the individual within Maryland).

¹⁰³ *Pro-Football, Inc. v. McCants*, 428 Md. 270, 288 (2012) (reversing the Circuit Court which had held for the Redskins based on the substantial time spent in Virginia, but determining that the time in Virginia was spent on practicing for football games which was "incidental to the main purpose" of being employed to play in football games).

¹⁰⁴ *Id.* at 286-87 ("The nature of a football player's employment, then, is defined by the games in which he participates..."). The Court of Appeals based its opinion on another Maryland case involving workers compensation and the Redskins in *Pro-Football, Inc. v. Tupa*, 197 Md. App. 463 (2011), *aff'd* 428 Md. 198 (2012) (holding that Redskins player Tom Tupa, a 17-year NFL veteran, was entitled to workers' compensation benefits after injuring his back during pregame warm-ups at FedEx Field in 2005 and the Redskins had to pay partial disability and medical expenses to Tupa).

¹⁰⁵ *Pro-Football, Inc. v. McCants*, 428 Md. 270 at 275.

¹⁰⁶ Terry Zeigler, *Is Competitive Cheer a Sport? Key Title IX Case Goes to Court*, Sports MD (June 21, 2010), http://www.sportsmd.com/SportsMD_Articles/id/373.aspx (discussing the lawsuit filed by five athletes and one coach from the Quinnipiac University women's volleyball team after they were notified that their team had been cut in favor of a less costly competitive cheer team, and noting that several universities have granted varsity status to their competitive cheer squads (University of Maryland and Seton Hall University), but at the time there has not been a test case to determine whether competitive cheer can be defined as a "sport" based on Title IX compliance); Liz Clarke, *Title IX Anniversary: Maryland Cuts Cheerleading, But was it Ever a Sport?*, Wash. Post (Apr. 13, 2012), http://articles.washingtonpost.com/2012-04-13/sports/35453053_1_neena-chaudhry-female-athletes-title-ix;

This is not surprising, however, given that UMD is also one of the only universities in the NCAA the Football Bowl Subdivision (“FBS,” formerly known as “Division I-A”) to have had a woman (Deborah Yow) as its athletic director; from 1994 to 2010.¹⁰⁷ In 2012, UMD announced that it was leaving the Atlantic Coast Conference (ACC) to move to the Big 10 instead, though the ACC then filed a lawsuit in return and demanding to be paid the ACC exit fee by contract.¹⁰⁸ The outcome of the litigation is still to be determined, but UMD is set to begin participation in the Big 10 Conference in 2013.¹⁰⁹

When studying Maryland sports law, one might consider exploring the life of former UMD star basketball player and first team All-American Len Bias.¹¹⁰ Having grown up in Landover, Bias was drafted by the Boston Celtics as the second overall pick in the 1986 NBA draft but died two days later from a cocaine overdose.¹¹¹ As a direct result, Congress passed a stricter federal law, the Anti-Drug Abuse Act (also known as *The Len Bias Law*) the same year, a controversial law that offered tougher penalties for drugs which included mandatory sentences

see No Longer on the Sidelines, Wash. Times, (Feb. 16, 2005), <http://www.washingtontimes.com/news/2005/feb/16/20050216-123423-7025r/?page=1> (noting that at the time, UMD was the only university in the country that counts competitive cheer as a scholarship sport to satisfy the requirements of Title IX, and the all-female competitive cheer team at Maryland is fully funded, having 12 scholarships and a \$357,000 budget the program is completely phased in for the 2005-06 school year). The NCAA still does not yet recognize competitive cheer as a sport, and in 2012, UMD planned to drop the team (renamed “acrobatics and tumbling”) along with seven other varsity sports. *See also* Mary Virginia Moore Johnson & Beth A. Easter, *Legal Liability for Cheerleading Injuries: Implications for Universities and Coaches*, 17 J. Legal Aspects of Sport 213, 216-17 (2007).

¹⁰⁷ *See* Alex Prewitt, *Debbie Yow on Maryland’s Big Ten Move: ‘Hope that Money’s Really Good’*, WASH. POST (Dec. 6, 2012), <http://www.washingtonpost.com/blogs/terrapins-insider/wp/2012/12/06/debbie-yow-on-marylands-big-ten-move-hope-that-moneys-really-good/>.

¹⁰⁸ *See* Associated Press, *Lawsuit Over Md.’s ACC Exit Goes Before Md. Court*, WBALTV.COM. (May 24, 2013), <http://www.wbaltv.com/news/sports/lawsuit-over-mds-acc-exit-goes-before-md-court/-/9379464/20290050/-/a3272y/-/index.html>. The Atlantic Coast Conference filed a lawsuit in North Carolina state court on seeking to enforce a \$52M exit fee against the University of Maryland following the news that UMD was leaving to join the Big 10.

¹⁰⁹ *See* Jeff Barker, *Maryland Deal Included Multimillion-Dollar Travel Subsidy from Big Ten*, BALT. SUN (Mar. 15, 2013), <http://www.baltimoresun.com/sports/terps/bs-sp-terps-big-ten-travel-0315-20130314,0,1297978.story>.

¹¹⁰ *See* Adam M. Acosta, *Len Bias’ Death Still Haunts Crack-Cocaine Offenders After Twenty Years: Failing to Reduce Disproportionate Crack-Cocaine Sentences Under*, 53 HOW. L.J. 825 (2010).

¹¹¹ *Id.*

for cocaine.¹¹² UMD's athletic department then became the target of accusations of various improprieties including academic and recruiting violations, and the chaos and scrutiny resulted in the subsequent resignations of both athletics director Dick Dull and head basketball coach Charles *Lefty* Driesell, a coach with Maryland for 17 years.¹¹³

Fantasy Sports

Finally, one might consider exploring the impact of the state of Maryland's decision to enact a law to exempt certain online fantasy sports games from gambling prohibitions.¹¹⁴ Maryland defines *fantasy sports* similarly to how the U.S. Congress did when it passed the 2006 Unlawful Internet Gambling and Enforcement Act (UIGEA) in that fantasy sports must be based upon skill rather than chance, have predetermined prize amounts made known to participants in advance, and derive results from the performance of multiple players from multiple teams in real-world sporting events, not solely on any single performance of an individual athlete in any single event or game.¹¹⁵ When *Yahoo!* launched its *Yahoo! Pro Leagues* in 2012 which offered up to \$500 in cash prizes to fantasy football winners, the *Yahoo! Sports Terms of Service*

¹¹² *Id.*

¹¹³ See Sally Jenkins & Mark Asher, *Driesell Ousted as Maryland Coach*, WASH. POST (Oct. 30, 1986), <http://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/driel1.htm>; see also Kevin Mulligan, *Under a Cloud Maryland Still Reeling After Bias Tragedy*, PHILLY.COM (Oct. 21, 1986), http://articles.philly.com/1986-10-21/sports/26061284_1_bias-investigation-long-and-gregg-cocaine-overdose.

¹¹⁴ See Gaming Law Center, *Update: Maryland Law Exempting Fantasy Sports from Gambling Prohibition Goes Into Effect*, (2012), <http://gaminglawcenter.com/fantasy-sports.html>.

¹¹⁵ See Brian Hughes, *Maryland Exempts Fantasy Sports from Gambling Prohibitions*, EXAMINER (Apr. 7, 2012), <http://washingtonexaminer.com/maryland-exempts-fantasy-sports-from-gambling-prohibitions/article/454811>; see also Greg Masters, *Fantasy Football Joins Md. Legislature's Late-session Frenzy*, WASH. POST (Mar. 16, 2012), http://www.washingtonpost.com/blogs/maryland-politics/post/fantasy-football-joins-md-legislatures-late-session-frenzy/2012/03/16/gIQApYnIHS_blog.html (noting that a 2006 opinion on poker tournaments issued by the state of Maryland's attorney general's office opined that *gambling* includes any game that requires decisions, the element of chance and a prize, one reason why fantasy football league organizers such as CBS and ESPN exclude Marylanders from winning prizes if they participate).

disallowed prizes in eight states, including Maryland, due to the lack of clarity, interpretation and enforcement of state and federal gaming laws.¹¹⁶

Conclusion

The purpose of this article was to review some of the more prominent Maryland-related cases, incidents and laws that have impacted the study of sports law. It is apparent that Maryland is a leader when it comes to intellectual property issues with regard to team names. Disability-related decisions have harbored the forefront of national discussion as well. From the infamous 1922 *Federal Baseball* antitrust decision to the ad nauseam litigation involving ownership rights to the Ravens' logo to whether or not the term *Redskins* violates federal law, there is no reason to believe that the Chesapeake Bay area will not continue to affect sports law, drawing considerable attention to the Mid-Atlantic U.S., no matter what conference the University of Maryland ends up competing in.

¹¹⁶ See Marc Edelman, *Legal Issues in Fantasy Sports: Yahoo! More Risk Averse than CBS Sports*, Sports L. Blog (Aug. 27, 2012), <http://sports-law.blogspot.com/2012/08/legal-issues-in-fantasy-sports-yahoo.html> (offering that Illinois, in addition to Maryland, were excluded from the more risk-averse Yahoo! even though the *CBSSports Terms of Service* only prevent the paying of prizes to winners in six states, Arizona, Iowa, Louisiana, Montana, Vermont and Washington. Additionally, however, Maryland now allows the state Comptroller to issue special regulations, but it has yet to do so with regard to fantasy sports thereby creating ambiguity); see also Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 4-11 (2012).

Circumventing the NBA's Salary Cap: The "Summer of Dwight"

Christopher C. Kendall*

*Christopher C. Kendall is an associate at O'Melveny & Myers LLP, in Los Angeles, California.

I. BACKGROUND

In the spring and summer of 2010, the biggest story in the National Basketball Association (“NBA”) did not revolve around championships or MVPs, but the free agency of LeBron James. As he listened to presentations from a number of teams, including the Cleveland Cavaliers, Chicago Bulls, New Jersey Nets, New York Knicks, Los Angeles Clippers, and the Miami Heat—teams which spent years creating clearing salary cap space to sign one, two, or three maximum salaried free agents—the rumor mill was churning.¹ Most famous was the rumor that LeBron James had a bonus in his endorsement deal with Nike if he plays in a large media market like New York City. Of course, not only was that rumor false,² but LeBron took a slight cut in pay to join Dwayne Wade and Chris Bosh in Miami. It was in the context of the 2010 free agency and potential involvement of Nike that I wrote an article entitled, “Circumventing the NBA’s Salary Cap: The ‘Summer of LeBron’ and Beyond.”³ It was worth asking what legal implications would arise if a third party introduced itself into free agency, and how the NBA’s collective bargaining agreement (“CBA”) limited such involvement.

After the “Summer of LeBron,” came the lockout of 2011, when the previous CBA expired. Although salary cap circumvention took a backseat to the mechanism that controls how the total basketball-related income splits between owners and players, it is all interrelated. As the players’ share of revenue has decreased from 57% to between 49% and 51%,⁴ maximum salary players gained significantly more motivation to supplement their income. And as luxury taxes for perennially big spending teams increased, NBA franchises were forced to become more

¹ See *Cavs, Bulls cap LeBron’s meetings*, ESPN.COM NEWS SERVICES (July 4, 2010), <http://sports.espn.go.com/nba/news/story?id=5351794>.

² Darren Rovell, *LeBron James Has No New York Nike Bonus*, CNBC.COM (Nov. 26, 2008), http://www.cnbc.com/id/27925375/LeBron_James_Has_No_New_York_Nike_Bonus.

³ 28 ENT. & SPORTS LAW. 11 (2010).

⁴ Larry Coon, *Breaking down changes in new CBA*, ESPN.COM (Nov. 28, 2011), http://espn.go.com/nba/story/_page/CBA-111128/how-new-nba-deal-compares-last-one.

creative. It is the 2011 CBA that provided the backdrop for the 2013 free agency of Dwight Howard.

This article examines what issues related to salary cap circumvention have arisen during this “Summer of Dwight,” and how these issues will affect the league moving forward. Section II explores how the changes from the 2005 CBA to the 2011 CBA create incentives for salary cap circumvention. Section III lays out the rules against salary cap circumvention established in the 2011 CBA. Section IV then investigates how Dwight Howard’s free agency has implicated salary cap circumvention under this new framework. Section V concludes that the NBA needs to consider expanding the definition of compensation and take a hard look at team co-ownership of broadcasters as the motivation and opportunity for salary cap circumvention has increased.

II. HOW THE 2011 CBA AFFECTED BIG MARKET TEAMS

The salary cap “means the maximum allowable Team Salary for each Team for a Salary Cap Year, subject to the rules and exceptions set forth in [the CBA].”⁵ Although the 2005 CBA’s soft salary cap always provided some controls on the spending of the wealthiest teams, the 2011 CBA contains many provisions that aim to provide a more competitive balance. The biggest change for big market teams came in the form of luxuries taxes. The 2005 CBA required teams to pay \$1 for every \$1 their salary was above the luxury-tax threshold.⁶ After allowing teams to pay \$1 for every \$1 their salary is above the luxury-tax threshold in 2011-12 and 2012-13, starting this last season, the 2011 CBA required teams to pay an incremental tax that increases with every \$5 million above the tax threshold (\$1.50, \$1.75, \$2.50, \$3.25, etc.).⁷ In addition, repeat offenders (teams that pay the luxury tax at least four out of the previous five

⁵ National Basketball Association Collective Bargaining Agreement, art. I.1(ddd) (2011).

⁶ Coon *supra* note 4.

⁷ *Id.*

seasons) must pay an additional \$1 more at each increment (\$2.50, \$2.75, \$3.50, \$4.25, etc.).⁸

This steep increase in luxury taxes dramatically impacts the bottom line for perennial taxpayers like the Los Angeles Lakers.

In addition, with respect to revenue sharing, the 2005 CBA allowed some of the undistributed funds from the luxury tax to be given to teams in competitively disadvantaged markets, whereas the 2011 CBA approximately tripled the amount of money that is to be revenue-shared. Whereas teams like the Los Angeles Lakers will be perennial payers into this system, teams like the Charlotte Bobcats will be the likely beneficiaries.

III. SALARY CAP CIRCUMVENTION UNDER THE 2011 CBA

Salary cap circumvention is covered under Article XIII of the 2011 CBA.⁹ Interestingly, Article XIII remains largely unchanged from the 2005 version of the CBA.

a. General Prohibitions

Article XIII begins by laying out the general prohibitions relating to salary cap circumvention: “It is the intention of the parties that the provisions agreed to herein, including . . . those relating to the Salary Cap . . . be interpreted so as to preserve the essential benefits achieved by both parties to this Agreement.”¹⁰ This initial clause is followed by the general prohibition against Salary Cap circumvention:

Neither the Players Association, the NBA, nor any Team (or Team Affiliate) or player (or person or entity acting with authority on behalf of such player), shall enter into any agreement, including, without limitation, any Player Contract (including any Renegotiation, Extension, or amendment of a Player Contract), or undertake any action or transaction, including, without limitation, the assignment or termination of a

⁸ *Id.*

⁹ See National Basketball Association Collective Bargaining Agreement, art. XIII (2011).

¹⁰ *Id.* at art. XII § 1(a).

Player Contract, which is, or which includes any term that is, designed to serve the purpose of defeating or *circumventing* the intention of the parties as reflected by all of the provisions of this Agreement.¹¹

Section 1(b) of Article XIII then lays out exactly what qualifies as Salary Cap circumvention as follows:

It shall constitute a violation of Section 1(a) above for a Team (or Team Affiliate) to enter into an *agreement or understanding* with any sponsor or business partner or third-party under which such sponsor, business partner or third-party pays or agrees to pay compensation for basketball services (even if such compensation is ostensibly designated as being for non-basketball services) to a player under Contract to the Team.¹²

Compensation is defined in Article I as the “compensation that is or could be earned by, or is paid or payable to, an NBA player . . . in accordance with a Player Contract (whether such payment is sent to the player directly or to a person or entity designated by a player).”¹³

Therefore, it is a violation for Teams or Team Affiliates to enter agreements, or even just an implicit “understanding,” to circumvent the Salary Cap via third party compensation.

Furthermore, a violation of this section may be inferred by the NBA when:

(i) such compensation from the sponsor or business partner or third-party is *substantially in excess of the fair market value* of any services to be rendered by the player for such sponsor or business partner or third-party; and (ii) the Compensation

¹¹ *Id.* (emphasis added). Note that this section may be violated by either a Team or a Team Affiliate—a Team Affiliate being (i) any individual or entity that holds an ownership interest in the Team less than 5%; (ii) any individual or entity which controls any individual or entity affiliated with the Team; (iii) any individual or entity that is controlled by those described in (i) and (ii) above; or (iv) any entity which holds 10% or more of the ownership interests in a Team or entity described in (ii) above. *Id.* at art. X § 1(III).

¹² *Id.* at art. XIII § 1(b) (emphasis added).

¹³ *Id.* at art. I § 1(j).

in the Player Contract between the player and the Team is *substantially below the fair market value* of such Contract.¹⁴

The “compensation” discussed in Section 1(b)(i) is not the player’s contract with the team; rather, it is the compensation to be received for the sponsorship or business opportunities. If it is “substantially in excess of the fair market value” of a typical endorsement deal, then a violation may be inferred. By contrast, the “Compensation” described in Section 1(b)(ii) refers to the Compensation in the Player Contract from the team. If it is “substantially below the fair market value” of a typical Contract, then, again, the NBA may infer a violation.

b. Unauthorized Agreements

In addition, Section 2 of Article III disallows any Unauthorized Agreements, whether “express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kind” between a player and a Team.¹⁵ This section works with the General Prohibitions described above to prevent the player for reaching a deal with the Team to receive Compensation from a third party or sponsor. A violation of this section “may be proven by direct or circumstantial evidence, including, but not limited to, evidence that a Player Contract or any term or provision thereof *cannot rationally be explained* in the absence of conduct violative of Section 2(a).”¹⁶

c. Penalties for Violations

Although the 2011 CBA did not alter the basic rules of salary cap circumvention, Section 3 of Article XIII laid out stiffer penalties for violating the General Prohibitions or engaging in

¹⁴ *Id.* at art. XIII § 1(b) (emphasis added).

¹⁵ *Id.* at art. XIII § 2(a).

¹⁶ *Id.* at art. XIII § 2(c).

Unauthorized Agreements.¹⁷ Suspected violations of Article XIII go before a System Arbitrator, who retains exclusive jurisdiction and authority to resolve disputes arising under Article XIII granted by Article XXXII of the CBA.¹⁸

It is the level of punishment, however, that differs the 2011 CBA from the 2005 CBA. Under the 2011 CBA, if a System Arbitrator found a violation of Section 1 occurred, he may (i) impose a fine of up to \$3,000,000 on any Team found to have committed such violation for the first time; (ii) impose a fine of up to \$4,500,000 on any Team found to have committed such violation for at least the second time; (iii) direct the forfeiture of one first round draft pick; (iv) void the contract between the player and Team; and/or (v) void any other transaction or agreement found to have violated Section 1 above.¹⁹ These punishments have increased from \$2,500,000 for first time offenders and \$3,000,000 for second time offenders.

As for violations of Section 2, the System Arbitrator may (i) impose a fine of up to \$6,000,000 on any Team found to have committed such violation; (ii) direct the forfeiture of draft picks; (iii) when both the and the Team are found to have committed such violation, (A) void the contract, (B) impose a fine of up to \$250,000 on any player, and/or (C) prohibit any future contracts between such player and such Team; (iv) suspend for up to one (1) year any Team personnel found to have willfully engaged in such violation; and/or (v) void any other transaction or agreement found to have violated Section 2 above.²⁰ These punishments have increased from \$6,000,000 and \$100,000 per player.

IV. THE FREE AGENCY OF DWIGHT HOWARD

¹⁷ *Id.* at art. XIII §3.

¹⁸ *Id.* at art. XXXII (describing, in detail, the many procedures required for such arbitration).

¹⁹ *Id.* at art. XIII(3)(a).

²⁰ *Id.* at art. XIII § 3(b).

After a frustrating season with the Los Angeles Lakers, Dwight Howard did what no star basketball player had ever done before; he left the NBA's glamour franchise as a free agent. Announcing via Twitter on July 5, 2013, and officially signing a new contract on July 13, 2013, Dwight Howard joined the Houston Rockets. However, much like LeBron in 2010, Dwight Howard gave each suitor—the Los Angeles Lakers, Houston Rockets, Dallas Mavericks, Golden State Warriors, and Atlanta Hawks—a chance to make their pitch.²¹

By all accounts, the delegation from the Los Angeles Lakers met with Dwight Howard in three separate groups: players Steve Nash and Kobe Bryant, along with Coach Mike D'Antoni; general manager Mitch Kupchak and executive vice president of player personnel Jim Buss; and Lakers vice president of business operations Tim Harris and the representatives from Time Warner Cable and AEG.²² This is the same Time Warner Cable that, in 2012, provided the Lakers with a record television deal that could be worth \$5 billion over 25 years.²³ According to a source, the NBA did not have a problem with a representative of Time Warner Cable being involved in the pitch, albeit noting that if Time Warner were to offer further compensation, it would be in violation of league rules.²⁴ According to one league source, "They could simply be presenting ideas about how they plan to cover Howard and the Lakers in the future. That is allowed."²⁵

Of course, nothing ever became of this conversation as the Los Angeles Lakers lost their pursuit of their prized free agent. But the Lakers were not the only organization to pitch their

²¹ Dave McMenamin & Ramona Shelburne, *Lakers, Mavs meet with Howard*, ESPN.COM (July 3, 2013), http://espn.go.com/los-angeles/nba/story/_/id/9445741/dwight-howard-meets-los-angeles-lakers-dallas-mavericks.

²² *Id.*

²³ Dave McMenamin & Ramona Shelburne, *Source: Lakers got jump on Rockets*, ESPNLOSANGELES.COM (July 1, 2013), http://espn.go.com/los-angeles/nba/story/_/id/9440466/source-dwight-howard-met-lakers-gm-meeting-houston-rockets.

²⁴ *Id.*

²⁵ *Id.*

team with the help of a broadcaster. According to a source, the Houston Rockets, the eventual winners of the Dwight Howard sweepstakes, also presented Howard with television opportunities with Comcast SportsNet Houston.²⁶ If Comcast SportsNet Houston and the Houston Rockets have an agreement to provide Dwight Howard with his own television show, such an agreement would seem to be in clear violation of Section 1(a) of Article XIII, as it seems to be “designed to serve the purpose of defeating or *circumventing* the intention of the parties as reflected by all of the provisions” of the CBA as an “agreement or understanding” for a sponsor, business partner or third-party to pay Compensation for basketball services (even if such compensation is ostensibly designated as being for non-basketball services).

However, what might get the Rockets off the hook is the definition of compensation. After all, compensation by a third party would only be inferred to be in violation of Section 1(a) if either the deal was “*substantially in excess of the fair market value* of any services to be rendered by the player for such sponsor or business partner or third-party” or the “Compensation in the Player Contract between the player and the Team is *substantially below the fair market value* of such Contract.” Given that it is unknown how much money (if any) Dwight Howard is being compensated, it is impossible to know whether he is being paid at all, let alone the fair market value for being on a television show. And, given that he signed a maximum contract, he certainly is not being paid below the fair market value of his services. Therefore, there would be no burden shifting or inferences to be made suggesting circumvention. Although there would be interference by a third party in terms of player movement, it does not qualify under the CBA’s predetermined inferences.

²⁶ Dave McMenamin & Ramona Shelburne, *Sources: Dwight Howard, Hawks meet*, ESPNLANGELES.COM (July 2, 2013), http://espn.go.com/los-angeles/nba/story/_/id/9443188/dwight-howard-meets-atlanta-hawks-los-angeles-lakers-finalize-pitch-according-sources.

But what makes this pitch so fascinating (and troubling from the perspective of salary cap circumvention) is the fact that the Houston Rockets own more than 30 percent of Comcast SportsNet Houston.²⁷ Dwight Howard's potential compensation is not even from a "sponsor, business partner, or third-party," but an entity *partially owned* by the team itself. Therefore, he would be receiving compensation for his basketball related services from the same source as his television activities. Although he might be getting fair market value for both services, there would simply be too much intermingling of funds.

V. CONCLUSION

Unless Dwight Howard actually obtains *financial* compensation for a television deal with Comcast SportsNet Houston, which would certainly seem to be in violation of the CBA, the Houston Rockets are probably in the clear. But moving forward, the league must reconsider its definition of "compensation." Even without the direct transfer of money, in this multimedia era of the Twitterverse, increased exposure in itself adds value. Every time Dwight Howard appears on television through some sort of reality show on Comcast SportsNet Houston, his brand gains more exposure and his indirect compensation increases. Failure to address all forms of compensation, be they financial or otherwise, will only encourage teams, broadcasters, and players to develop these mutually beneficial relationships in the age of higher luxury taxes. Although the league might want the increased exposure it would gain from a Dwight Howard television show, such an arrangement certainly is contrary to the spirit of Article XIII.

²⁷ *Id.* In this way, the battle over Howard's services was not merely between the Lakers and Rockets, but also between Time Warner Cable and Comcast. The day after Howard announced his decision, Comcast SportsNet Houston announced, "The Rockets have landed the biggest free agent in the world... Dwight Howard is coming to Houston." Alex Sherman, *Dwight Howard Houston Move Boosts Comcast Over Time Warner Cable*, BLOOMBERG.COM (July 5, 2013), <http://www.bloomberg.com/news/2013-07-06/dwight-howard-houston-move-boosts-comcast-over-time-warner-cable.html>. Just as Comcast will likely see a rise in ratings and advertising revenue, Time Warner may very well lose some viewers.

**Legal Liability for Sports Referees
in Today's Litigious World - If You Can't Kill The Ump Then Sue Him**

Marc T. Wolin & Robert D. Lang*

*Marc T. Wolin is President and Chief Executive Officer of Seneca Insurance Company. He is also a Football Referee for Semipro and High School football for over 30 years. Robert D. Lang – B.A., City College of New York (1970); J.D., Cornell Law School (1973) He is a member of the firm of D'Amato & Lynch, LLP in New York City where he is the head of the casualty defense department.

Introduction:

In today's environment, people continuously look to blame others for misfortune regardless of the cause. We read about legal cases every day where we question why people are suing, and the inherent equity of what is being alleged. This is no different in the field of officiating sports contests.

The sports official plays an unusual role. There are thousands of officials in the United States, ranging from pickup leagues to professional sports. The vast majority of officials receive nominal pay, and do this predominantly as an avocation. They are motivated by their love of the sport, the physical activity and thrill of athletic competition, community service, a motivation toward perfection, and so forth. When the contestants take the field, they might not like the officials, but all respect the necessity of their presence to fairly control the contest, and rule on the play. Leagues can easily supply players or coaches not participating in the contest to officiate, but instead rely on the necessary evil of an impartial third party official.

Thus, it can be argued that an official is in effect a quasi-governmental official. In essence they are a Judge, or a Traffic Policeman, or an administrative hearing officer, etc. Government officials under the law are given superior protection or immunities since it is recognized that they need to do their jobs without undue exposure or recrimination. In the current legal environment under the vast majority of cases, officials are given the benefit of the doubt when misfortune occurs.

What is the role of the official? Is it to create a "safety bubble" over the participants so nothing bad happens even in numerous sports with hazardous activity? Is the role of the official to maintain some sort of Orwellian control of the game so people's innate aggressive behavior is minimized so there are no "cheap shots" or dangerous behavior on behalf of the participants?

Are the officials (in conjunction with the league and school authorities) simply liable when bad things happen, notwithstanding the assumption of risk of the participants and the behavior of the participants?

What the vast preponderance of case law details is that the world has not gone mad. While people always can and will sue for anything, the official has not assumed the responsibility of making sure bad things do not happen, nor is the official responsible for the irresponsible conduct of participants under a broad theory that had they controlled the game better they would have prevented a participant from using a danger and illegal conduct. The official under controlling law is held to a standard of gross negligence. While not of the immunity caliber of governmental officials, it is of course a preferable standard to negligence.

As noted, in today's world people are increasingly looking to shift self-responsibility on others. An underlying hypocrisy is that players and coaches do not hold up themselves to a standard of perfection, but do hold up the official to a standard of perfection. A coach can call a bad play, a player can drop the ball or take a third strike not swinging, but if there is a close call that went against a team then sometimes it seems that the onset of WWII is at hand. Superior coaches and players know that it is hard work, preparation and honing of skills that decide the contest, and the various calls of the official have little bearing on their ability to compete.

Fortunately, self-responsibility and common sense is the current state in today's world. Hopefully, this is not a slippery slope of expanding liability of those individuals who provide a selfless service predominantly out of the love of the particular sport.

Case Law:

To be sure, no one goes to a sporting event for the purpose of watching the referees. Except in rare circumstances, for example, when the National Football League (NFL) replaced the replacement referees,¹ or when referees make a favorable, although perhaps dubious, call in their team's favor,² fans tend not to cheer for referees.³

Yet, referees in sports have perhaps a unique role — they are usually the only persons participating in the event, not invested in which team prevails, acting simultaneously as both participant and spectator, “active when they run up and down the field alongside players, yet detached when they make swift, impartial decisions in the midst of intense competition.”⁴

Referees in sport are often placed in difficult situations, needing to react immediately without time to contemplate their action. Although taking one's time is usually considered a virtue in certain circumstances, in the context of sports, hesitancy by referee in making a decision can be construed as an indication of uncertainty, resulting in increased questioning of on-field decisions.⁵

Few people will volunteer to referee sporting events if, in addition to accepting the risk of being criticized by opposing players, coaches and their fans, they also risk potential legal liability actions not of their own making. In this regard, efforts to protect athletes from concussions can

¹ Joseph White, *'That Kind of Chokes You Up': Referees Cheered at First NFL Game Following End of Lockout*, MINN. STAR TRIBUNE, Sept. 28, 2012, <http://www.startribune.com/sports/vikings/171517041.html>.

² Consider the reaction by the Kansas City Royals fans when Umpire Don Denkinger called Jorge Orta safe at first base in the 8th inning of Game 6 of the 1985 World Series, even though television replays and photographs clearly showed that Orta was out by half a step. Kansas City went on to win the World Series and Denkinger was blamed for their victory. Ron Fimrite, *In the Eye of the Storm: Vilified for a World Series Call, Ump Don Denkinger has Remained Calm*, SPORTS ILLUSTRATED, Jan. 6, 1986, available at <http://si.com/vault/article/magazine/MAG1064414/index.htm>.

³ Notably, after Umpire Jim Joyce publicly admitted making an incorrect call, costing Detroit pitcher Armando Galarraga a perfect game, Detroit Tiger fans cheered Joyce the following day when he returned to umpire another game. ““When I walked down that tunnel and I got the reception I did from the Tiger fans---I had to wipe the eyes,” Joyce said.” *Umpire Back in the Game after Bad Call*, CBNNEWS.COM (June 3, 2010), <http://www.cbn.com/cbnnews/us/2010/June/Umpires-Bad-Call-Upsets-Baseball-History/>.

⁴ Erin E. McMurray, *“I Expected Common Sense to Prevail”*: *Vowles v. Evans, Amateur Rugby, and Referee Negligence in the U.K.*, 29 BROOK. J. INT’L L. 1307, 1342 (2004).

⁵ Shlomi Feiner, *The Personal Liability of Sports Officials: Don't Take the Game Into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW. J. 213, 220 (1997).

potentially place officials at risk for legal liability when a player, who suffers a concussion, files a claim, not only against a coach and team physician, but also the referee of the sporting event on the theory that the referee knew, or should have known, that the player was dazed and confused and should have not been allowed to re-enter the athletic contest. Legislation that is designed to protect players from concussions can have the effect of drawing referees directly into the line of fire.

For example, last year in Ohio, a bill intended to protect athletes from concussions required coaches or officials to remove a player from a game or practice if the athlete showed signs of a concussion or suspected of suffering from a concussion. Although the proposed legislation contains some immunity for coaches, Association of Coaches objected to the legislation, concerned that the net effect of the bill would be to increase legal liability for volunteers in youth sport organizations.⁶ A number of states have already passed legislation that limits the liability of referees and/or defines assaults on sports officials as crimes.⁷

Although it has been argued that there should be a way to sue sports officials for “referee malpractice,”⁸ courts are generally loathe to substitute their judgment for that of sports officials, and, in practice, exercise judicial intervention only when a referee’s conduct constitutes gross negligence, substantially departing from the necessary standard of officiating.

The requirement of gross negligence by a sports official, rather than mere negligence, makes all the more sense when considering that few individuals would be willing to officiate if their mere negligence would result in personal liability for injuries sustained by players.⁹ There is no disputing that the acts of sports officials can cause serious injuries, especially to players. In

⁶ *YMCA Expresses Concern with Ohio Concussion Bill*, YMCA OF CENTRAL OHIO (April 21, 2012), http://www.ymacolumbus.org/news-media/news/ymca_fights_concussion_bill_governing_coaches_refs.

⁷ See, e.g. Cal. Penal. Code § 243.8; Miss. Code Ann. § 95-9; Okla. Stat. Ann. tit. 21, § 650.1; W. Va. § 61-2-15a.

⁸ Jason Loomis, *The Emerging Law of Referee Malpractice*, 11 SETON HALL J. SPORT L. 73, 88 (2001).

⁹ Kenneth W. Biedzynski, *Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS. L. REV. 375, 408 (1994).

a well-publicized incident from the NFL in 1972, All-Pro linebacker Charles “Bubba” Smith¹⁰ was playing for the Baltimore Colts against the Pittsburgh Steelers in a pre-season game. While running towards the sidelines after an interception, seeking to block, Bubba Smith leaped over fallen players and struck the aluminum sideline marker, which was still stuck in the ground rather than having been allowed to fall. Bubba Smith sued the NFL and the game official.¹¹ After a mistrial, a second jury found for the defendant. However, the case is significant as it was the first time that a sports official could possibly have been found liable for negligence during an athletic event as the case was not dismissed against the game officials and the case was allowed to go to the jury.

The court found that any standard that would allow referees and umpires to be liable on a mere negligence approach would undoubtedly discourage those who volunteer or participate as referees, as they would be putting themselves at a greater legal and financial risk without receiving substantial, if any, monetary benefit.¹²

Thirty-six years later, in an analogous situation, University of Houston wide receiver Patrick Edwards broke his leg during a 2008 football game against Marshall University when he ran into a metal cart used by the Marshall University band, just after half time. The cart was a few feet behind the south end zone and Edwards ran into the cart while trying to catch a long pass.¹³ In addition to the pain and suffering and \$30,000 in medical bills, Edwards faced the possibility that the compound fracture, which included having a rod inserted into his lower right leg, jeopardized his potential NFL career.

¹⁰ When he playing at Michigan State University, students sometimes chanted “Kill, Bubba, Kill” in an effort to encourage Bubba to sack the quarterback, something for which Bubba needed little encouragement. Matt Sheehan, *‘Kill, Bubba, Kill’: Remembering a Michigan State Legend*, BleacherReport.com (Aug. 4, 2011), <http://bleacherreport.com/articles/791521-kill-bubba-kill-remembering-a-michigan-state-legend>.

¹¹ Smith v. National Football League, No. 74-418 Civ. T-K (US D. Fla.).

¹² Michael Mayer, *Stepping In To Step Out of Liability: The Proper Standard of Liability for Referees in Foreseeable Judgment-Call Situations*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 54, 83 (2005).

¹³ *Houston Wide Receiver Breaks Leg*, YOUTUBE (Oct. 29, 2008), <http://www.youtube.com/watch?v=wMB0oNzWSwM>.

Edwards sued Marshall University, Conference USA and the game referee, citing the NCAA football rules requiring that “all markers and obstructions within the playing enclosure shall be placed or constructed in such a manner as to avoid any possible hazard to players.” The case settled for \$250,300.¹⁴

The requirement that officials see to it that the playing field is in safe condition is long standing. For example, in *Forkash v. The City of New York*,¹⁵ plaintiff was injured during the semi-final game of a softball tournament for the championship of the Bronx, sponsored by the City Department of Parks and a newspaper, the New York Daily Mirror.

All players testified that the outfield contained shards of glass from numerous broken bottles and that, prior to the game, they had told a uniformed New York City Parks Department supervisor, who was also acting as umpire, that the field was not in suitable playing condition. The supervisor thereafter had the infield, not the outfield, cleared with a large broom. At the end of the first inning, players again complained to the supervisor/umpire that the outfield was not in playing condition but were told that the brooms had already been put away and that it was getting dark and that they should “just get out there and play.”¹⁶ The two outfielders (both 18 years old) did what they were told and continued to play.

In the fifth inning, when it had already grown quite dark, a ball was lined to the outfield. Plaintiff, running towards the ball, trying to make a play, tripped on a piece of glass in the field and collided with a second outfielder, who was also trying to catch the ball.

In the litigation that ensued, defendant The City of New York successfully moved to dismiss the complaint, stating there were no questions of fact for the jury. On appeal, a

¹⁴ *Former Houston Receiver Patrick Edwards Settles Lawsuit Against Marshall, C-USA*, SPORTINGNEWS.COM, (March 20, 2012), <http://www.sportingnews.com/ncaa-football/story/2012-03-20/former-houston-receiver-patrick-edwards-settles-lawsuit-against-marshall-c-usa>; *MU's Tab \$250,300 in Houston WR Suit*, THE CHARLESTON GAZETTE, April 27, 2012, <http://www.wvgazette.com/Sports/201204270163>.

¹⁵ *Forkash v. City of New York*, 277 N.Y.S. 2d 827 (N.Y. App. Div. 1967).

¹⁶ *Id.*

unanimous First Department reversed, stating that the jury should decide the questions. The court noted that the plaintiffs were of “impressionable years” and that their obedience to the umpire, which the court noted was “in baseball proverbially a dominating and inflexible figure,”¹⁷ created an issue of fact for the jury to decide finding that the players may not have had pre-choice “when they knew that this obedience might disturb a sporting event sponsored and planned by the City and already in progress, might perhaps prejudice their team, perhaps harm their own reputations.”¹⁸

For an example of the courts applying a reasonableness standard when reviewing the decisions of a referee consider *Santopietro v. City of New Haven*,¹⁹ where a softball game in an organized league in New Haven, Connecticut, went out of control. Players started cursing, taunting members of the other team, kicked a garbage can, threw bats on the ground, threw their gloves on the pitcher’s mound and engaged in other ungentlemanly behavior. Two defendants served as umpires for the game.

In the sixth inning, after hitting a fly ball to the outfield, one of the players intentionally flung his bat towards the backstop. The bat passed through the backstop and struck plaintiff, a spectator, in the head, fracturing his skull and causing other serious injuries. Plaintiff was not on the field of play and was seeing his son play another game being played on an adjacent field.

The two umpire defendants moved for a directed verdict in their favor, which was granted. On appeal, the dismissals were sustained. In affirming the dismissal, the appellate court noted that umpires have considerable discretion in how to deal with unruly behavior by players:

Shepard testified that, as an umpire, he had the duty to maintain control of the game to prevent harm to spectators, and that

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Santopietro v. City of New Haven*, 682 A.3d 106, 113-14 (Conn. 1996).

warnings constitute the primary means by which to maintain that control. Moreover, Brennan testified that umpires have the authority to suspend the game if necessary to keep order or to prevent harm to spectators.

Brennan and Shepard also testified that the decision of whether to impose discipline in any given instances of unruly behavior is a discretionary matter for the umpire. Brennan testified that the rule against unsportsmanlike conduct gives the umpire authority 'at his discretion, to disqualify any player who exhibits unsportsmanlike conduct in the judgment of the umpire.' He further testified that decision whether to take disciplinary action in response to loud swearing, throwing a glove or kicking dirt 'are umpire judgment or umpire discretion calls.' Shepard testified that the question of whether unruly behavior, such as using loud and abusive language, throwing a glove or kicking a garbage can, constitutes unsportsmanlike conduct will depend on the particular situation. Shepard further testified that the determination of whether unsportsmanlike conduct has occurred sometimes depends upon 'the whole tenor of what is going on, the language, plus the gloves, plus whether it's considered taunting or not.' Similarly, Brennan testified that 'there are a lot of variables that go into' determining whether unsportsmanlike conduct has occurred. Brennan further testified concerning the subjective nature of the decision whether to discipline a player for unsportsmanlike conduct. Specifically, he stated that 'the majority of the time you'll find that umpires are former players, and umpires will use the term unsportsmanlike conducts as some type of action which, had I been a player, I wouldn't like done to me, I wouldn't let another group do it to another player.'

We note that this testimony confirms what is the common understanding of the umpire's task. In the absence of exceptional circumstances, a softball umpire, when confronted with unruly behavior by a player that arguably constitutes unsportsmanlike conduct, faces a spectrum of discretionary options. At one end of the spectrum is taking no action; at the other end is ejection of the player or suspension of the game. In between are warnings and other appropriate disciplinary action. The umpire has discretion, within the spectrum, to respond to the offensive behavior in the manner that the umpire finds to be most appropriate in the given circumstances.

The trial court directed a verdict in favor of Brennan and Shepard reasoning, in part, that if a duty exists, expert testimony was required to establish a breach of that duty and that such a breach caused the harm to the plaintiffs. The trial court concluded further that the standard of care applicable to an umpire, whether that standard was breached, and whether that breach caused the

plaintiffs' injuries are not matters of common knowledge. We conclude that the plaintiffs were required to establish by expert testimony that the failure of Brennan and Shepard to act in the present case constituted a breach of duty, and that the plaintiffs' evidence did not satisfy that burden.²⁰

The court noted that plaintiff had failed to produce expert testimony to establish that the applicable standard of care was breached by either or both of the two umpires. The court further found that the fact that the two umpires had improperly failed to act in response to two earlier incidents in the game (tossing a bat towards other bats and taunting) was insufficient to allow a jury to decide whether the umpires breached a duty to plaintiff.²¹

Similarly, in *Zajackowski v. Connecticut State Soccer Association, Inc.*,²² plaintiff was playing in an adult soccer game in Stamford, Connecticut, as a member of the Polonia Stamford Soccer Team. While scoring a goal, plaintiff collided with the goalkeeper from the opposing team and sustained personal injuries. Plaintiff sued the Connecticut State Soccer Association, Inc. and the Amateur Soccer League of Connecticut but failed to sue the referee who supervised play. Nor did plaintiff sue the City of Stamford, which owned the playing field, or the goalkeeper who injured plaintiff.

Among the claims made by plaintiff was that defendants failed to properly supervise the officials provided to referee the game, failed to train the officials and permitted the game to continue while knowing it was not being properly officiated to prevent violent behavior and to prevent violation of the rules. In granting defendant's motion for summary judgment, the court noted that neither plaintiff, nor his manager, nor members of his team, complained to the referee regarding the condition of the playing field or any violent level of play. Nor did any player or

²⁰ *Id.* at 114-15.

²¹ *Id.* at 117-18.

²² *Zajackowski v. Conn. Soccer Ass'n, Inc.*, 2010 WL 1052937.

coach request a referee stop the game. Accordingly, the court found that there was insufficient evidence of negligence regarding the acts taken, or not taken, by the referee during the game.

Where a referee acts reasonably, liability will not be imposed when a player suffers a personal injury in the course of an officiated contest. In *Pape v. State*,²³ claimant sustained personal injuries playing an intramural floor hockey game played in the gym of the State University of New York at Albany. After stealing the puck from an opposing player, a second player from the opposing team knocked the puck away from claimant. Thereafter, claimant grabbed the second player by the legs, just above the knees, and attempted to tackle him. In so doing, the second player lifted and fell on claimant's neck, fracturing claimant's cervical spine. At trial, the court found that the incident occurred when claimant attacked the second player and was not attributable to a lack of supervision and training by the referees. On appeal, a unanimous Third Department sustained the verdict below, finding that there was no basis to disturb the finding that the referees had committed a lapse of duty "and, in any event, concluded that the referee's officiating was not a proximate cause of the injury."²⁴

When umpires seek to reduce the risk to participants, they often place themselves at risk to a lawsuit. One such example occurred in May 1995 during a Little League game in Colorado. A player was running from third to home. The umpire picked up a bat, which was lying in the path and tossed it away, striking 10 year-old Austin Wright, who was standing in the on-deck circle, waiting his turn to bat. The bat struck the boy in the face, shattering five of his permanent teeth and cutting his upper lip.

Nine years later, now an adult, Wright filed a lawsuit against the umpire who tossed the bat. The junior baseball league and the umpire argued that there was no liability because Wright's father had signed a waiver releasing the league from any claims of negligence or injury

²³ 456 N.Y.S. 2d 863, 864 (3d Dep't 1982).

²⁴ *Id.*

to his son. Jefferson County District Judge Margie Enquist agreed, and dismissed the lawsuit prior to trial. In 2006, the Colorado Court of Appeals reversed the dismissal and stated that the case should proceed to trial since the waiver did not exempt those who acted grossly negligent, willfully or wantonly. Appellate Judge Daniel Taubman ruled that “[i]f a base runner had been approaching home plate, Doe’s conduct may have been negligent because he might have simply thrown the bat in a manner that a reasonably careful person under the same pressure to prevent an injury would not have done”²⁵. The appellate court also noted that the conduct of an umpire may rise to legal liability if the umpire grabbed the bat and consciously decided to throw the bat into the on-deck circle.²⁶

A noteworthy case involving a direct injury to a player caused by a referee occurred in 1999, during an NFL game between the Cleveland Browns and the Jacksonville Jaguars. Orlando “Zeus” Brown, a 6’7”, 350-pound offensive tackle for the Browns, suffered a significant, career-ending eye injury after being hit by the tossing of a referee’s weighted penalty flag. Although the NFL allegedly instructed its referees to weight penalty flags with popcorn kernels, the official in question instead weighted his with BBs.²⁷ In 2001, Brown sued the NFL for his personal injuries, seeking \$200 million and stating that the flag incident prematurely ended his career, but did not sue the referee who threw the flag. A claim could certainly be fashioned against the referee; instead, Brown sued the NFL for alleged negligently training of its

²⁵ Howard Pankratz, *Lawsuit Against Umpire Back in Play*, THE DENVER POST, April 21, 2006, http://www.denverpost.com/ci_3733210?source=rss.

²⁶ *Id.*

²⁷ Adam Rubin, *Ref Blamed for Eye Injury*, N.Y. DAILY NEWS, March 30, 2001, <http://www.nydailynews.com/archives/sports/ref-blamed-eye-injury-article-1.915989..>

officials”.²⁸ According to reports, Brown settled in 2002 for between \$15 million and \$25 million.²⁹

Nor are situations where referees will be held accountable for personal injuries sustained in games they officiate limited to adult sports. As the New York Times reported last year in a front-page article, a Pop Warner pee wee game in Massachusetts between two teams, with players as young as 10 years old and none weighing more than 120 pounds resulted in so many injuries that one team no longer had the required number of players to participate, with 5 pre-adolescent boys sustaining head injuries.³⁰ The officials did not intervene. Some parents accused the other team’s players of deliberately trying to hurt their sons and one coach accused the other coach of not properly training his team and jeopardizing them by not forfeiting. The league officials suspended both coaches for the rest of the season and the referees who oversaw the game were barred from officiating any more contests in the league.

An October 2009 high school soccer match in Michigan resulted in a 14-year-old player nearly losing his leg as a result of injuries sustained from being kicked by an opposing player. Suit was filed against the two referees on the theory that they had failed to control overly aggressive play. Close to forty depositions were taken, including testimony from teammates and spectators. The referees contended that they did not see the player (who was also a defendant) who kicked plaintiff engage in aggressive behavior and that with only two referees, they could not cover the entire the field. Ultimately, the case settled, on confidential terms, for \$300,000.³¹

²⁸ Darryll M. Halcomb Lewis, *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L.J. 263, 264-65 (2002).

²⁹ Daniel E. Slotnik, *Orlando Brown, Who Sued N.F.J. Over Errant Flag, Dies at 40*, N.Y. TIMES, Sept. 23, 2011, http://www.nytimes.com/2011/09/24/sports/football/orlando-brown-who-sued-nfl-over-errant-flag-dies-at-40.html?_r=0.

³⁰ Ken Belson, *A 5-Concussion Pee Wee Game Leads to Penalties for the Adults*, N.Y. TIMES, Oct. 23, 2012, <http://www.nytimes.com/2012/10/23/sports/football/pee-wee-football-game-with-concussions-brings-penalties-for-adults.html>.

³¹ Douglas Levy, *Suit Over Soccer Injuries Settled for \$300K, Saginaw Attorney Uses Referee Rules for Argument*, MICH. LAW. WEEKLY, May 2013.

In *Aboubakr v. Metropolitan Park District*,³² a baseball game between two teams of eighteen-year olds, while highly competitive, also included taunts and cursing. At one point, the home plate umpire warned the teams to calm down and to stop cursing or he would end the game. Nevertheless, the verbal exchanges continued. An assistant coach for one team allegedly enticed his players to engage in taunting; one player was ejected directly after a comment to the other team's bench; and another player (a pitcher) who argued against balls and strikes was also ejected.

The game ended, the teams engaged in the traditional handshake, which, while well intended, turned out to be a bad idea since, during the handshake, a fight broke out between two opposing players. After the fight was quickly broken up, one manager took his team off to left field (literally) for a customary after-game talk.

At the end of that meeting, the opposing teams started fighting and one player picked up a baseball bat and threw it towards the opposing team, striking plaintiff in the eye, causing serious injuries. By that time, the game had concluded and the field had been cleared for approximately 15 minutes before the incident occurred. The two umpires assigned to the game had already collected the bases and were standing safely across the street, out of harm's way.

The injured player filed a lawsuit against the park district, the umpires, coaches and the player who threw the bat. The defendants, other than the player responsible for the accident, moved for summary judgment, and the trial court dismissed the claim. On appeal, the court affirmed.

With respect to the umpires, plaintiff argued that they had breached their duty to adequately control the game, specifically the verbal taunting between the teams, thereby allowing the situation to escalate into physical violence. Plaintiff contended that the umpires

³² *Aboubakr v. Metro. Park Dist. of Tacoma*, 94 Wn. App. 1044 (1999).

should have taken greater steps to control the situation, including stopping the game, in order to have prevented the incident from taking place.

The appellate court noted that umpires in athletic events can only be held liable if the player who committed the act had a “known propensity towards violence or there was a total absence of supervision”.³³ The court found no evidence was presented to support plaintiff’s claim that the player in question had a known propensity for violence but that the umpires were aware that he posed any physical harm. Nor was there any evidence to establish that the player had fought with other boys in the past who had a reputation for violence. Although, prior to the bat-throwing incident, the player in question had wrestled with one of the opposing players, the court found that “the evidence reveals nothing about Streets’ behavior to suggest he would throw a baseball bat at someone with malicious intent. Moreover, Aboubakr admitted that he did not anticipate anything more happening once Emerson walked Streets across the field. Thus, Aboubakr failed to show that the umpires or Emerson had any knowledge of any propensity for violence by Streets that should have prompted them to take more stringent precautions.”³⁴

Although plaintiff argued that the umpire should have stopped the game in order to prevent any possible physical fight, the court found that stopping the game during play could have perhaps fanned the flames could have increased the danger of physical harm. The court concluded, “there is simply no way of knowing whether the umpires could have done anything to prevent the bad feelings between Streets and Carter from boiling over. Aboubakr also suggests that the umpires could have stopped the game during play, but such an act may well have increased the tensions rather than diffuse them.”³⁵

³³ *Id.* at 3.

³⁴ *Id.*

³⁵ *Id.*

Regrettably, *Aboubaker* is not the only instance where the post-game handshake resulted in violence, rather than sportsmanship. In *Talasazan v. Northridge Arena Soccer League, Inc.*,³⁶ plaintiff had finished playing a soccer match when he went to shake the hands of his opponent, his opponent punched him and a full-scale brawl broke out where plaintiff was struck in the eye and lost consciousness.

In the lawsuit that was later brought against the soccer league, plaintiff established that security guards were present during most of the games he previously played at the league's arena. On at least three occasions, he saw the security guards intervene when players fought or argued, successfully preventing those situations from escalating. However, on the night in question, plaintiff saw no security guards and records obtained from the soccer club showed that security guards were not paid for the date in question.

In denying the motion for summary judgment, the court pointed out that presence of the security guards often were provided and "that their presence was adequate to stop fights before they got out of hand".³⁷ The court concluded that the absence of security guards on the date in question was a material issue of fact as to whether adequate safeguards were taken which would have prevented the assault from taking place:

The question posed by *Talasazan* is why the guards were not present the night he was injured. Respondents have never addressed that question and we are left to speculate why guards were present some nights and not others. Given the statistical frequency of fights and the absence of any such explanation by the respondents, we believe it was highly foreseeable that fights could occur at any game, making the need for guards at every game just as foreseeable.³⁸

Despite the fact there would appear to be a good idea for referees to be present during the traditional post-game handshake between players, the Massachusetts State Basketball Officials

³⁶ *Talasazan v. Northridge Arena Soccer League, Inc.*, No. B153563, 2002 W.L. 3170287, at 1-2 (Cal. Ct. App. Dec. 4, 2002).

³⁷ *Id.* at 3.

³⁸ *Id.*

Associations filed a lawsuit in 2008 seeking a temporary injunction challenging the ruling by the Massachusetts Interscholastic Council that referees in all team sports remain at the competition site until after the handshake ceremony has concluded.

At a hearing in Worcester Massachusetts, Superior Judge Christen M. Roach rejected the claim by the referees, as being present during the traditional handshake; the referees may be subject to physical harm. At the hearing arguments in a courtroom filled with referees, high school administrators and officials, the court ruled that the referee organization had “not met their burden to demonstrate the required level of imminent, non-speculative, substantial, and irreparable harm to their physical, reputation, or financial interest.”³⁹ The referee organization argued that the rule would put its members in danger of fans and coaches who could be upset at calls during the game. However, the presence of the officials during the handshake might prevent instances such as those in *Aboubaker* and *Talasazan*, discussed above.

The role of a referee in enforcing the rules, especially those related to safety, In *Karas v. Strevell*,⁴⁰ during an ice hockey game, plaintiff was checked from behind by two opposing players and struck his head against the boards, resulting in serious head and neck injuries. Checking from behind was in violation of the Amateur Hockey Association Illinois Inc., of which both teams were members. The hockey association required each player to have the word “STOP” sewn on the back of his jersey in order to enforce the rule against body-checking from behind.

Plaintiff filed a lawsuit against the two opposing players, their team, the hockey association and the officials who refereed the game. With respect to the claim against the referees, the Illinois High Court noted that rules violations are an inherent, anticipated and

³⁹ Dave Nordman, *Referees Lose on Handshake Rule in Court*, BOS. GLOBE (Dec. 12, 2008), http://www.boston.com/sports/schools/football/articles/2008/12/12/referees_lose_on_handshake_rule_in_court/.

⁴⁰ *Karas v. Strevell*, 884 N.E.2d 122, 125 (Ill. 2008).

unavoidable risk in participating in the sport. The court pointed out that plaintiff did not allege that the referees completely failed to enforce the rules against body checking from behind and noted that the requirement that players wear the “STOP” warning showed an enforcement of the rule. Especially since refereeing involves “subjective decision-making that often occurs in the middle of a fast-moving game,” applying a negligence standard to those decisions “would open the door to a surfeit of litigation that would impose an unfair burden on organizational defendants.”⁴¹ The court stated, “It is difficult to observe all the contact that takes place during an ice hockey game, and it is difficult to imagine activities more prone to second-guessing than coaching and officiating.”⁴²

In *Carabba v. Anacortes School District No. 103*,⁴³ plaintiff, a high school student, sued for serious injuries sustained while participating in a high school wrestling match. Specifically, plaintiff alleged that the referee failed to adequately supervise the contestants by permitting his attention to be diverted from the actions of the match, thereby allowing an illegal and dangerous hold to be applied, and failing to cause that hold to be broken, resulting in personal injuries. Specifically, near the end of the third round of the match between two boys wrestling in the 145-pound-weight division, one boy was applying a Half-Nelson, trying to roll plaintiff into a pin position. The referee, noticing a separation between the two mats, moved to close the gap between the mats to protect the contestants so they would not roll off the main mat and onto the bare floor. In so doing, his attention was diverted from the boys when one of the contestants applied what many of the eyewitnesses saw as a Full Nelson. As the round ended, plaintiff was unable to move, as a major portion of his spinal cord had been severed, resulting in permanent paralysis of all voluntary functions below the level of his neck.

⁴¹ *Id.* at 137-38.

⁴² *Id.* at 137.

⁴³ *Carabba v. Anacortes Sch. Dist. No. 103*, 435 P.2d 936, 941-58 (Wash. 1967) (en banc).

The case proceeded to trial and 38 witnesses testified during the 20 days of trial. The case was submitted to the jury solely on the issue of the referee's negligence. The trial court ruled that the referee was acting as the agent of the school districts when he refereed during the match. The jury returned a verdict for defendants and the plaintiff appealed. On appeal, the appellate court reversed the judgment in favor of the school district and remanded the matter for a new trial, finding that the school district, through the actions/inactions of the referee owed a duty to the student participants. Accordingly, any negligence to the referee was imputed to the defendant school district.

Although the allegations against the referee may sound appealing when reading a complaint drafted with passion, they have to be supported by the facts, which may not always be the case. In *Sullivan v. Quiceno*,⁴⁴ plaintiff was severely injured during a youth soccer match when a fight broke out between the teams and one player suddenly, without warning, assaulted plaintiff. In addition to suing the assaulting player, plaintiff also sued the Connecticut Junior Soccer Association, Inc., alleging that plaintiff had, prior to the assault, expressed his concerns to the referee that the player in question was violent and likely to harm plaintiff and that the referee had failed to respond adequately.

In granting the motion to dismiss that complaint, the court specifically found that plaintiff conceded at his deposition that he never told the referee that the player had allegedly assaulted him and did not tell the referee to take steps to control the game. Since the court found that plaintiff's "testimony [was], therefore, inconsistent with his allegations that he 'verbally expressed concern to the referee that [the defendant] is violent and likely to cause harm to the plaintiff or another party.'"⁴⁵

⁴⁴ *Sullivan v. Quiceno*, 44 Conn. L. Rptr. 338 (Conn. Super. Ct. 2007).

⁴⁵ *Id.*

Lawsuits against referees are not restricted to the United States. Earlier this year, a physiotherapist who went onto the field during a rugby match in Australia to tend to an injured player, was struck by other players as play continued while she was still on the pitch. Plaintiff suffered serious injuries, including a crushed vertebra, a \$30,000 medical bill for spine surgery, claimed an 80% loss of her income.⁴⁶ The suit included as a defendant the referee, for allowing play to continue while an “obviously injured” player was lying on the ground nearby. The referee denied that he was under an obligation to stop play by blowing his whistle and stated that he did not regard the condition of the injured player to be serious.⁴⁷ That suit is presently pending.

Rugby is, indeed, a contact sport. In April of this year, a study in South Africa noted the rise of personal injury claims among youth rugby players in that country. The study questioned whether, if a 13-year old plays in a rugby game intended for those under the age of 11 and the older player injures a younger player from the opposing team, the referee could be held liable for allowing the 13-year old to play.⁴⁸

In May of this year, a discussion in Australia concerned the potential liability of a referee for not sending a player off the field in a rugby match after repeated incidents of serious foul play, should that player remain on the field and injure another player. In response to this situation, the director of referees of the National Rugby League (“NRL”) “brushed off questions over on-field official’s liability in cases of serious injuries, “stating “[t]he NRL’s got insurance... the refs are covered.”⁴⁹

⁴⁶ Stephanie Gardiner, *Physio Sues After Collision With Players*, SYDNEY MORNING HERALD (May 30, 2013), <http://www.smh.com.au/nsw/physio-sues-after-collision-with-players-20130530-2ndih.html>.

⁴⁷ *Id.*

⁴⁸ *Personal Liability Claims During Rugby Season*, BIZCOMMUNITY.COM (Apr. 23, 2013), <http://www.bizcommunity.com/Article/196/385/92423.html>.

⁴⁹ Mike Colman, *Allowing a Dangerous Player to Stay on the Field Raises Questions Over Duty of Care Issues for Referees*, DAILYTELEGRAPH.COM.AU (May 3, 2013), <http://www.dailytelegraph.com.au/sport/nrl/allowing-a->

It is hardly the case that referee liability arises only in contact sports. This July, the front page of The New York Times reported that as many as 60 judges in the tasteful sport of rhythmic gymnastics were guilty of cheating when grading contestants in world class competition.⁵⁰ While some may question whether rhythmic gymnastics is truly a sport,⁵¹ the International Gymnastics Federation (“F.I.G.”) and its participants take their “sport” seriously. The alleged evidence of cheating was more typical of a high school examination, with notes written on the palms of the hands, answers on the same test paper written in at least two different handwriting styles, blatant copying, and identical scores which the F.I.G. found to be “not possible.” In Romania, test takers copied answers from one another’s papers, including mistakes; in Moscow, 114 answers were changed on dozens of tests; and in Spain, 257 answers were changed.⁵² Nonetheless, the F.I.G., in August, one month later, cleared dozens of judges’ accused of cheating because there was “no direct evidence of cheating,”⁵³ although the investigation also concluded that some of the scores “would only have occurred by cheating.”⁵⁴ Plainly, problems with referees not following the rules can take place in any sport, ranging from those involving full contact to those where contestants perform with the soundtrack of classical music playing, using hoops, holding balls, sporting ribbons and wearing sequined outfits. In a sport where the

dangerous-player-to-stay-on-the-field-raises-questions-over-duty-of-care-issues-for-referees/story-e6f9t9-1226634274564?from=public_rss.

⁵⁰ Mary Pilon, *Judges of a Elegant Sport, Caught in a Clumsy Cheating Scandal*, N.Y. TIMES, July 17, 2013, at A1, available at http://www.nytimes.com/2013/07/17/sports/olympics/judges-of-a-graceful-sport-caught-in-a-clumsy-cheating-scandal.html?_r=0.

⁵¹ “Rhythmic gymnastics is a much-maligned competition that every four years tends to elicit the same reaction from American viewers — That’s a sport? — as they watch pint-size women swirl acrobatically with hoops and ribbons. With its sparkles and hair scrunchies, rhythmic, as it is called by its followers, can look more like modern dance-meets-small-town circus than a traditional Olympic competition.” *Id.*

⁵² *Id.*

⁵³ Mary Pilon, *Rhythmic Gymnastics Judges Cleared*, N.Y. TIMES, Aug. 27, 2013, at B14, available at <http://www.nytimes.com/2013/08/27/sports/panel-clears-rhythmic-gymnastics-judges-suspected-of-cheating.html>.

⁵⁴ *Id.*

result is dependent on judging, any controversy connected to the legitimacy of the scoring only brings about more questions, and more potential litigation.⁵⁵

Although there is no reported decision yet holding a sports official liable for economic losses resulting from an incorrect application of in-game rules, with the increased use of instant replay technology, the foundation may be laid to allow a court to find that a referee's decision was "grossly negligent."⁵⁶

Non-participants interest in sporting events is high. Consider college basketball. Few sporting events in the United States create as much passion as college basketball. In 1982, during the final seconds of a Big Ten basketball game between the University of Iowa and Purdue, veteran referee Jim Bain called a foul on an Iowa player, awarding two free-throws to Purdue, resulting in a Purdue victory. The loss eliminated Iowa from the Big Ten championship.

A few days after the game, John and Karen Gillespie, who operated "Hawkeye John's Trading Post," a store in Iowa city specializing in University of Iowa sports memorabilia, began marketing T-shirts showing a man with a rope around his neck captioned, "Jim Bain Fan Club." Bain then sued the Gillespies for injunctive relief and damages. Perhaps thinking the best defense is a good offense, or perhaps hoping for a sympathetic view from the "home" Iowa courts, the Gillespies counterclaimed, allegedly that his conduct in officiating the game was below the standard of confidence required of a referee. For money damages, the Gillespies claimed that the misconduct by Bain caused Iowa to lose and, because Iowa was eliminated from the Big Ten championship, the Gillespies lost a potential marketing opportunity for memorabilia, recognizing Iowa as the Big Ten champion.

⁵⁵ Sam Gardner, *Rhythmic Gymnastics Hit with Scandal*, MSN.FOXSPORTS.COM, (July 18, 2013), <http://msn.foxsports.com/olympics/story/rhythmic-gymnastics-officials-cheating-scandal-071813>.

⁵⁶ S. Christopher Szczerwan, *Tackling Instant Replay: A Proposal To Protect The Competitor Judgment Of Sports Officials*, 6 VA. SPORTS & ENT. L.J. 277, 281 (2007).

The trial court granted summary judgment dismissing the counterclaim. On appeal, the dismissal was affirmed by the Iowa appellate court in *Bain v. Gillespie*.⁵⁷ The court held that the referee owed no duty to the Gillespies' business interest:

Referees are in the business of applying rules for the carrying out of athletic contests, not in the work of a marketplace for others. In this instance, the trial court properly ruled that Bain owed no duty. Gillespies has cited no authority, nor have we found any, which recognizes an independent court for 'referee malpractice'. Absence corruption or bad faith, which is not alleged, we held no such tort exists.⁵⁸

If anything, fans have even a greater interest in their teams than those that market their merchandise. After the New England Patriots and coach Bill Belichick were caught in the 2007 "Spygate" scandal, a New York Jets season ticket holder filed a federal lawsuit, *Mayer v. Belichick, et. al.*, against the Patriots, Belichick and the NFL, taking the case all the way to the U.S. Supreme Court. The plaintiff (who was also a lawyer) argued that a class action suit should be allowed on the basis that large sums of money were spent by fans to watch professional football games that were essentially rigged. The suit was dismissed by the United States District Court of New Jersey (Judge Brown), affirmed by the Third Circuit Court of Appeals⁵⁹ and the Supreme Court declined to hear the appeal.⁶⁰ In affirming the dismissal, the third circuit specifically noted:

At the very least, a ruling in favor of Mayer could lead to other disappointed fans filing lawsuits because of 'a blown call' that apparently caused their team to lose or any number of allegedly improper acts committed by teams, coaches, players, referees and *umpires*, and others. This Court refuses to countenance a course of action that would only further burden already limited judicial resources and force professional sports organizations and related individuals to expend money, time, and resources to defend against such litigation *See, e.g., Bickett*, 472 N.Y.S. 2d at 883 ('Buffalo News Sports Editor, Larry Felser, in his column of May 30, 1983

⁵⁷ *Bain v. Gillespie*, 357 N.W.2d 47, 48-50 (Iowa Ct. App. 1984).

⁵⁸ *Id.* at 49.

⁵⁹ *Mayer v. Belichick*, 605 F.3d 223, 225 (3d Cir. 2010).

⁶⁰ *Supreme Court Won't Hear 'Spygate'*, ESPN.COM, Mar. 7, 2011, <http://sports.espn.go.com/nfl/news/story?id=6189497&src=mobile>.

warned of the dire consequences of permitting such a theory of recovery to exist, ‘If the fan (plaintiff) wins against the Bills, every lawyer in Western New York could use the Precedent to finance a vacation to the Riviera’). Under the circumstances, public policy considerations evidently weigh against Mayer and his various claims. See, *Garifine*, 461 A.2d at 1137-38 (Emphasis added).⁶¹

⁶¹ Mayer v. Belichick, 605 F.3d 223 (3d Cir. 2010).

Conclusion:

Let's take a historical perspective: In 1940, during a football game between Cornell, entering the game with an 18 game unbeaten streak, Dartmouth, the home-team underdog, led 3-0 and field conditions made it difficult for either team to move the ball.⁶² Late in the fourth quarter, Cornell had a first down at the Dartmouth six-yard line. Cornell failed to score on four downs. Nevertheless, the linesmen signaled Cornell still had possession, and the referee agreed. On the next play, with nine seconds on the clock, Cornell scored on a touchdown pass and won the game 7-3 with the benefit of a "fifth down." The loss cost Cornell a possible national title.

After the game was over, officials discovered their error after reviewing the game film.⁶³ The following day, the Cornell players, football coach acting athletic director and president agreed that Cornell should send a telegram to Dartmouth offering to forfeit the game. Dartmouth accepted the forfeit.⁶⁴

In 1990, fifty years later, during a football game between Colorado University and Missouri University, underdog Missouri led 31-27 late in the fourth quarter. As Colorado drove near the Missouri goal line, the officiating crew failed to flip the down marker following second down. Colorado was again stopped short of the end zone on third down. On the following play (it was actually fourth down but it was marked by the officials as third down), Colorado was again stopped short of the goal line. The quarterback spiked the ball, stopping the clock with

⁶² 1940 Dartmouth v. Cornell—The Five Down Game, COLLECTIBLEIVY.WORDPRESS.COM (Jan. 4, 2009, 1:26 AM), <http://collectableivy.wordpress.com/2009/01/04/1940-dartmouth-v-cornell-the-five-down-game/>.

⁶³ To view footage of the "fifth down", see: CBS, *The Infamous 5th Down: Cornell v. Dartmouth*, YOUTUBE (Oct. 25, 2006) (video originally from CBS).

⁶⁴ Interestingly, the Cornell president, Edmund Ezra Day, was a Dartmouth alumnus. He confidently told the Cornell team, "Fellas, I'm a Dartmouth graduate. I know Dartmouth and it won't be long before we get a return telegram saying 'no Cornell, you won it on the field, and that's the way it should be.'" Dartmouth never sent that telegram, choosing instead to accept the forfeit. ROBERT J. SCOTT & MYLES A. POCTA, HONOR ON THE LINE: THE FIFTH DOWN AND THE SPECTACULAR 1940 COLLEGE FOOTBALL SEASON (2010).

two seconds remaining. The referees failed to award the ball to Missouri and, on the final play of the game, Missouri scored, “winning” the game.⁶⁵

For twenty minutes thereafter, the Big Eight officiating crew conferred as to whether the score counted. During that delay, radio and television announcers noted that Colorado had scored with the help of the additional play and the referee was so advised. Nevertheless, the referee ruled that the touchdown would stand.

In contrast with the reaction at Cornell following the Cornell-Dartmouth game of 1940, Colorado football coach Bill McCartney⁶⁶ stated that he had considered forfeiting the game but decided against it because “the field was lousy,” thereby blaming the home team Missouri for the condition of the field, linking those conditions to accepting the fifth down.⁶⁷

Colorado went on to claim the 1990 National Championship. The seven-man Big Eight Conference officiating team was suspended indefinitely. The reaction in Missouri was predictable.⁶⁸ It was not until 1998, eight years after the game and four years after McCartney retired as Colorado head football coach, that he admitted making mistakes and being “saddened” by the fifth down fiasco.⁶⁹

We may not have to wait another 50 years for another “fifth down” situation. Should it occur, it remains to be seen whether the reaction of the participants will be closer to those of a

⁶⁵ To view the final series of plays between Colorado and Missouri, including this “fifth down”, see: [Title of video as it appears on Youtube], YOUTUBE [(DATE POSTED TO YOUTUBE)]

⁶⁶ In an interesting parallel to Cornell’s Edmund Day, a graduate of Dartmouth, Colorado’s coach Bill McCartney was a graduate of Missouri. David Plati, *Bill McCartney to Enter College Football Hall of Fame* (May 7, 2013), CU BUFFS, <http://www.cubuffs.com/ViewArticle.dbml?ATCLID=207574760>

⁶⁷ Stewart Whitehair, *Colorado Football: CU vs. Missouri 1990 (The Fifth Down Game)* BLEACHER REPORT (June 23, 2008), <http://bleacherreport.com/articles/31980-colorado-football-cu-vs-missouri-1990-the-fifth-down-game>. This is another parallel to the 1940 Cornell-Dartmouth game since, in both instances, the field conditions of the home team affected the outcome.

⁶⁸ Dave Matter, *Fifth Down is a Play That Will Live In Infamy*, COLUM. DAILY TRIB., Oct. 6, 2010, available at http://www.columbiatribune.com/sports/ mu_football/fifth-down-is-a-play-that-will-live-in-infamy/article_1e26bb97-96a9-5be8-b658-e51dedd73f89.html.

⁶⁹ : “‘The single biggest problem was me’, McCartney said in a recent interview. ‘There’s an old rule of thumb whenever you’re competing. When you win, be humble. In all candor, I wasn’t humble in victory . . . I stood on the sidelines during the game and said to myself-not to anyone else-if we win this game, I’m going to talk about the field, but if we lose, I’m not going to say anything.’” John Henderson, *No Downplaying CU’s Fifth Down at Missouri*, DENVER POST, Oct. 6, 2010, available at http://www.denverpost.com/ci_16263692.

1940 Cornell-Dartmouth game or the 1990 Colorado-Missouri game. It would hardly be surprising if lawsuits are filed by the universities (think of the lost revenue from bowl games which the school lost with a lower BCS standing), players (who, not playing in that bowl game, will miss out on the opportunity to showcase their talent for the NFL), fans (who need little reason to sue other than the belief that their school has been wronged) and possibly even mascots and cheerleaders who again will miss out on television exposure because their team is either not “bowling” or is going to a less prominent bowl. Indeed, matters might not even proceed to that point since fans, athletes watching the game on TV or checking their Smartphones in the stadium, would immediately text, email and call in efforts to notify the officials and their team of the mistake, much like viewers at home sought to contact tour officials to complain that Tiger Woods had taken an illegal drop in a golf tournament.⁷⁰

The fifth down example is illustrative of the change in the interpretation of equity, fairness and self-responsibility over the many of the past decades. The standard of gross negligence is consistent with the concept that the sports official has an elevated status of an impartial arbiter to be insulated from liability. Additionally, current case law has not put an obligation upon the sports official of being a “safety bubble.” Lastly, the sports official is not being held liable for the control of the game whereby plaintiffs will fashion their case after the fact with self serving and manipulated facts that minimize the poor behavior of participants who in fact are the ones who have performed the tortious behavior that run afoul of proper behavior in the first instance, and the rules of the game in the second instance.

It is in everyone’s interest that referees and umpires may fully focus on the actions on the field, without having their attention and concentration diverted by concerns over future lawsuits. For the most part, service as a referee is more a labor of love than a full time profession. As has

⁷⁰ Tony Manfred, *Tiger Woods is in Another Illegal Drop Controversy After Winning the Players Championship*, BUSINESS INSIDER, May 13, 2013.

been observed, these are men and women who love their sport and usually once were athletes themselves and want to stay connected and active in sports. They may be without the ball, but they are still running up and down the court, and are both integral and necessary to the game and to the fabric of sport.⁷¹

It is therefore important that the law continue to allow referees to do their job, with the players performing, the fans rooting, and the referees officiating without the unsettling prospect of potential litigation changing the basic fabric of sporting events. This can best be done by protecting referees by permitting liability only for intentional or gross wanton actions; negligence in refereeing a sporting event should not be allowed to give rise to legal liability. As the old saying goes, “Let’s just play ball.”

⁷¹ Earl Gustkey, *Taking Aim At The Stripes: Referees Lately Are Becoming The Target Of Many More Suits*, L.A. TIMES, Mar. 4, 1986, available at http://articles.latimes.com/1986-03-04/sports/sp-15133_1_sports-officials.