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Timothy Davis

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WHAT IS SPORTS LAW?

TIMOTHY DAVIS

I. INTRODUCTION

What is "sports law" is a question often asked by students, academics, lawyers and lay persons. The person attempting to respond often searches in vain for a response that is cogent and demonstrates some modicum of understanding of "sports law." Perhaps the difficulty in articulating a response is, in part, a result of uncertainty related to what information is being sought. Is the "what is sports law" query intended to focus our attention on the content of the practice of sports law? In other words, which substantive areas of practice fall under the rubric of sports law? Specifically, is the role of the sports lawyer intended as the principal focus of the question? In this regard, perhaps what is sought is information concerning the range of services provided by the attorney who practices in the sports law context. Finally, perhaps the person who asks "what is sports law" seeks an answer to a more fundamental consideration — does such a thing as sports law exist? In other words, is sports law recognized as an independent substantive area of the law such as torts, contracts or employment law?

I will attempt to focus on each of these questions beginning with the last inquiry first: does sports law represent an independent corpus of law? I will also explore the relevance of attempts to resolve the issue. Is determining whether sports law is a field of law merely a matter of academic curiosity or a matter imbued with broader implications?

II. "SPORTS LAW" OR "SPORTS AND THE LAW?"

A. The Debate

Those engaged in the debate concerning whether sports law constitutes a substantive area of law tend to adopt one of three positions: 1) no separately identifiable body of law exists that can be designated as sports law and the possibility that such a corpus of law will ever develop is extremely remote; 2) although sports law does not presently represent a separately identifiable substantive area of law, recent developments suggest that in the near future it will warrant such recognition; or 3) a body

of law presently exists that can appropriately be designated as sports law. I turn initially to a discussion of the views of those who adhere to the first of these three positions.

1. The Traditional View: "Sports Law" Does Not Exist

The traditional view is that sports law represents nothing more than an amalgamation of various substantive areas of the law that are relevant in the sports context. According to this perspective, the term sports law is a misnomer given that sport represents a form of activity and entertainment that is governed by the legal system in its entirety.[1] Notes one commentator, "I have often said there is no such thing as sports law. Instead it is the application to sport situations of disciplines such as contract law, administrative law . . . , competition law, intellectual property law, defamation and employment law. . . [R]emember there is no such thing as sports law."[2] Adopting this sentiment, the authors of a leading "sports law" textbook propose that "the term 'sports law' is somewhat misleading. In reality, sports law is nothing more or less than law as applied to the sports industry."[3] In elaborating, these authors state that "the study of 'sports law' does not involve an entirely unique or discrete body of special principles divorced from traditional legal concepts."[4] In sum, adherents to the traditional perspective argue that "sports law simply entails the application of basic legal precepts to a specific industry" that are drawn from other substantive areas of the law.[5] Consequently, no separately identifiable body of law exists that can be characterized as sports law.

2. The Moderate Position: "Sports Law" May Develop Into a Field of Law

Other commentators have begun increasingly to question the traditional view that no corpus of law exists that can be characterized as an independent field of law called sports law. Amongst the critics of the traditional view, are those who have staked out what represents a middle ground. Professor Kenneth Shropshire acknowledges that developments, such as state and federal legislation impacting sports (for example, state statutes regulating sports agents, and federal statutes such as

1. PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW (1993).
2. SIMON GARDINER, ET AL., SPORTS LAW 71 (1998) (quoting C. Woodhouse, *The Lawyer in Sport: Some Reflections*, 4 (3) SPORT AND THE LAW J. 14 (1996)).
3. MICHAEL J. COZZILLIO & MARK S. LEVINSTEIN, SPORTS LAW 5 (1997).
4. *Id.* at 7.
5. *Id.*

Title IX), suggest a "growing sports-only corpus" of law.[6] Professor Shropshire concludes, however, that the body of sports-only law has not reached a point of maturation such that a "unique substantive corpus" exists that can be categorized as sports law.[7] Consequently, he believes it is more appropriate to apply the "sports and the law" rather than the "sports law" designation to legal matters that arise in the sports context.[8]

Another adherent to the moderate position is Professor Burlette Carter who argues that sports law is in the midst of an exciting, yet challenging, transformative process.[9] According to Professor Carter, this process parallels the increased focus by law schools on sports, and the growing significance of sports regulation to participants, organizations and communities.[10] She believes that these developments will better shape the contours of this emerging field of study.[11] This in turn, will eventually transform sports law from "a course without a corpus" to a widely recognized independent substantive area of law.[12]

Similar sentiments were expressed in the groundbreaking treatise authored by John Weistart and Cym Lowell — *The Law of Sports*.[13] Therein, the authors addressed the following question: "Is there really any such thing as 'the law of sports?'"[14] At the outset, they noted the hypothesis expressed by traditionalists that no such thing exists as sports law since there is no body of law unique to sports.[15] Writing in late 1970s, they observed, however, that based upon their research

> it soon became clear that there were many areas in which sports-related problems required a specially focused analysis. On some matters, there are legal doctrines which apply in the sports area and nowhere else. This is the case, for example, with respect to such diverse matters as baseball's antitrust exemption and some of the tax rules to be applied to the recapture of depreciation on player contracts.[16]

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6. Kenneth L. Shropshire, *Introduction: Sports Law?*, 35 AM. BUS. L.J. 181, 182 (1998).

7. *Id.*

8. *Id.*

9. Burlette Carter, *Introduction: What Makes a "Field" a Field?*, 1 VA. J. SPORTS & L. 234, 245 (1999).

10. *Id.*

11. *Id.*

12. *Id.*

13. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS (1979).

14. *Id.* at xviii.

15. *Id.*

16. *Id.*

Weistart and Lowell also identified another phenomenon that might lend credence to the notion of the existence of sports law as a field of study. They noted factual peculiarities residing in sports that require the unique application of generally applicable legal doctrine and thus produce results that would not occur in other contexts. They provide examples drawn from amateur and professional sports:

> In the area of amateur sports, for example, the proscription against sex discrimination is based on the same political and sociological notions which have led to statutes and court decisions outlawing sex discrimination in employment, housing, and public benefits. However, none of these areas raise the issues (and tensions) which are posed by the significant differences in the revenue-generating potentials of traditional men's and women's sports. . . . Sections 1 and 2 of the Sherman Act do not contain different language to be applied in sports cases. In that sense, then, the law relevant to the sports industry is the same as will be applied to other areas of commerce. A glance at the cases, however, will suggest that there is a good deal of judicial reasoning in the sports areas which is not very conventional.[17]

Weistart and Lowell conclude their analysis by emphasizing areas in which the factual uniqueness of sports problems require specialized analysis. In this regard, they caution courts to take care in drawing analogies. Thus, while not expressly adopting the position that recognizes the existence of a course of study called sports law, Weistart and Lowell strongly suggest that two phenomena, the unique application of legal doctrine to the sports context and the factual uniqueness of sports problems that require the need for specialized analysis, support the notion that a body of law called sports law might exist.[18]

3. "Sports Law": A Separate Field of Law

Finally, I examine the views of those who argue that sports law currently exists as a field of law. Adherents to this view emphasize the growing body of case and statutory law specific to the sports industry as evidence of the existence of a separately identifiable body of law.[19] A leading advocate of this perspective is a British scholar, Simon Gardiner, who also demonstrates that the "sports law" or "sports and the law" debate has not been confined to the United States. Pointing to the increas-

17. *Id.* at xviii-xix.
18. *Id.* at xix.
19. Martin Greenberg, *Foreword* to GARDINER, *supra* note 2, at vii.

ing body of judicial and legislative law specific to sports, Professor Gardiner argues that

> [I]t is true to say that [sports law] is largely an amalgam of interrelated legal disciplines involving such areas as contract, taxation, employment, competition and criminal law but dedicated legislation and case law has developed and will continue to do so. As an area of academic study and extensive practitioner involvement, the time is right to accept that a new legal area has been born — sports law.[20]

Commentators also propose that references to sports law as merely an amalgamation of various other substantive areas of the law ignores an important present day reality – very few substantive areas of the law fit into separate categories that are divorced from and independent of other substantive areas of the law.[21] Doctrinal overlap exists not only within sports law, but within other areas of law as well. According to Professor Carter, "the field of sports law has moved beyond the traditional antitrust and labor law boundaries into sports representation and legal ethics, sports and corporate structure, sports and disability, sports and race, sports and gender, sports and taxation, international issues in sports law and numerous other permutations."[22]

Proponents of the sports law designation and those sympathetic to the view, also argue that reticence to recognize sports law as a specific body of law may reflect attitudes regarding the intellectual seriousness of sports. In this regard, they emphasize the tendency to marginalize the study of sports rather than treat it as any other form of business.[23] The intellectual marginalization of sport has been attributed, in part, to the belief that social relations extant in sports were not deemed proper subjects for reconstruction into legal relationships.[24] Thus, private and public law were considered "inappropriate [mechanisms for] controlling the social norms of sport."[25] The competing and increasingly predominant

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20. GARDINER, *supra* note 2, at 74.

21. Carter, *supra* note 9, at 243.

22. *Id.* at 239. *See also id.* at 239-40 n.21. Professor Carter adds that the interdisciplinary character of sports law has, in part, triggered the ongoing debate over the proper characterization of the field. *Id.* at 239.

23. *Id.* at 241 (noting that such inaccurate characterizations of sports underlie the majority opinion in Federal Baseball Club v. National League, 259 U.S. 200 (1922), in which the Supreme Court concluded that baseball was entertainment rather than business and, therefore, was neither commerce nor subject to antitrust laws).

24. GARDINER, *supra* note 2, at 45.

25. *Id.* (quoting K. Foster, *Developments in Sporting Law*, *in* THE CHANGING POLITICS OF SPORT (L. Allison ed., 1993)). Professor Gardiner adds that "in the past, sport has been seen

view, however, casts sports as a significant economic activity suitable, like other big businesses, to regulation whether it be self or external.[26] Notes Professor Carter:

> The historical conception of sports law within the general realm of legal matters – the treatment of this field as not on par with other forms of legal practice – derives from our general assumptions about the nature of sport itself and the athletes who participate in it. The notion is that sport is not like business; it is merely entertainment.[27]

Professor Carter's conclusion that sport, notwithstanding such earlier assumptions, "is now a business,"[28] finds validation in numerous ways. For example, a 1998 issue of *The Nation*, the first issue in the magazine's history to focus on sports, assigned a figure of $350 billion to what the editor characterized as the gross national sports product.[29]

B. Factors for Evaluating What Constitutes a Field of Law

The debate concerning sports is not extraordinary given that questions regarding the substantive legitimacy of new fields of law are quite common.[30] For instance, similar controversy has accompanied the development of other new fields of law such as computer law.[31] In a treatise on computer law, its author acknowledges that computer law is not a body of law, like contract or tort law, but rather is comprised of a collection of legal doctrine.[32] Nevertheless, the author argues that it should be recognized as a specific body of law given that this collection of legal doctrine shares a common feature – "they have all been created or altered by the emergence of computer technology."[33] He gives two additional reasons for recognizing computer law as a field of law: first, computers have unique characteristics that substantive areas such as contracts have not addressed, and second, computers have "far-reaching effects" on society.[34]

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as an area of social life that was removed from normal everyday life and as such should be treated as a separate area largely excluded from legal intervention." *Id.* at 66.

26. *Id.* at 45.

27. Carter, *supra* note 9, at 241.

28. *Id.* at 242.

29. *Why Sports?*, NATION, Aug. 10, 1998, *available at* 1998 WL 11637697.

30. GARDINER, *supra* note 2, at 73.

31. *See, e.g.*, Peter W. Hohenhaus, *An Introductory Perspective on Computer Law: Is It, Should It Be, and How Do We Best Develop It As, Separate Discipline?*, 1991 WL 330761 (addressing whether computer law is a separate discipline within the law).

32. MICHAEL D. SCOTT, SCOTT ON COMPUTER LAW § 1.01 (2d ed. 2001).

33. *Id.*

34. *Id.*

Likewise, before they gained recognition as specific fields of study, bodies of law as diverse as labor law,[35] health law,[36] and environmental law[37] endured similar fates. Indeed, the process of recognizing a new legal category has been characterized as slow moving because it signifies the occurrence of a fundamental change in society.[38] Inherent in this transformative process is the development of new patterns of behavior and cooperation that seek common acceptance.[39]

Several academic and practical factors may provide indicia that an area has matured to the point of common acceptance. These include the following:

1. Unique application by courts of law from other disciplines to a specific context;[40]
2. factual peculiarities within a specific context that produce problems requiring specialized analysis;[41]
3. "issues involving the proposed discipline's subject matter must arise in multiple, existing, common law or statutory areas;"[42]
4. "within the proposed discipline, [the] elements of its subject matter must connect, interact, or interrelate;"[43]
5. decisions within the proposed discipline conflict with decisions in other areas of the law and decisions regarding a matter within the proposed discipline impact another matter within the discipline;[44]

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35. Thomas C. Kohler, *The Disintegration of Labor Law: Some Notes for a Comparative Study of Legal Transformation*, 73 NOTRE DAME L. REV. 1311, 1318-20 (1998) (noting how in the 1920s, labor law struggled as a new legal order to come into its own); Gail Crummie Washington, *Entertainment Law: Is There Such an Animal and Could There Be One in Alabama?*, 53 ALA. LAW. 400 (Nov. 1992) (examining the question: what is entertainment law?).

36. CLARK C. HAVIGHURST, HEALTH CARE LAW AND POLICY 1-2 (1988) (arguing that health care qualifies as a separate body of law notwithstanding the fact that larger bodies of law and statutes not exclusive to health "impinges upon health care providers and patients [so as to] warrant separate study." Indeed, the author argues that the various sources of law that govern health care law, rather than from its status as a field of law, makes it an excellent forum within which to view the law in action).

37. SIMON BALL & STUART BELL, ENVIRONMENTAL LAW 5 (1991) (arguing in 1991 that environmental law in Britain was beginning to develop as an independent area of law because it began to "acquire its own conceptual apparatus, in the sense that there is being built up a set of principles and concepts which can be said to exist across the range of subjects covered").

38. Kohler, *supra* note 35, at 1322.

39. *Id.*

40. WEISTART & LOWELL, *supra* note 13, at xix.

41. *Id.*

42. Hohenhaus, *supra* note 31, at pt. D.

43. *Id.*

44. *Id.*

6. "the proposed discipline must significantly affect the nation's (or the world's) business, economy, culture, or society;"[45]
7. the development of interventionist legislation to regulate specific relationships;[46]
8. publication of legal casebooks that focus on the proposed discipline;[47]
9. development of law journals and other publications specifically devoted to publishing writings that fall within the parameters of the proposed field;[48]
10. acceptance of the proposed field by law schools; and,
11. recognition by legal associations, such as bar associations, of the proposed field as a separately identifiable substantive area of the law.

Although these factors provide guidance, meticulous analysis of them may not yield a definitive answer to the question under consideration — is sports law a field of study? Whether a specific body of law should be recognized as such is an inexact science. Notes Professor Gardiner,

> [t]he process by which legal areas are identified, constituted and named is a complex one and often to some extent arbitrary. There is no official recognition procedure. It is a process of legal practitioners and academics recognizing the growing application of the law to a new area of social life.[49]

In the end, whether sports law is recognized as an independent field of law may turn on the perceptions of those who practice, teach and engage in scholarship related to sports law. Professor Carter asks that we consider the following:

> But what makes a field a field? The answer is that a field becomes a field not because it is inherently so but because in our public legal dealings we shape it as such, defining the concepts and legal norms that will prevail uniquely in that context. It becomes a field because enough people with power on all sides are so affected by it to require some special treatment of it in the law. For many years, sports law has been somewhat removed from the things that make a field a field – the litigation that establishes a

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45. *Id.*

46. Kohler, *supra* note 35, at 1319.

47. *Id.* at 1320 (noting the publication of a casebook on labor law was one of the clearest signs of its emergence as a legal field). Part VI., *infra*, contains a list of sports law casebooks.

48. Part VI., *infra*, contains a listing of journals specifically geared towards publishing commentary regarding sports related legal matters.

49. GARDINER, *supra* note 2, at 73.

common law specific to the concerns of the participants, the scholarship that provides conceptual and theoretical guidance (and sometimes misguidance), and the legislative and administrative action that creates a statutory and regulatory base.[50]

III. Substantive Areas of Law Implicated by Sports

Whether or not sports law represents a separate corpus of law, few would deny that it touches diverse substantive areas of law. Indeed, the challenge and the opportunity for the attorney who handles sports related matters are derived in large measure from the diverse substantive areas that sports law encompasses. As cogently expressed by one scholar, "[s]ports law, with its wide variety of legal aspects, probably encompasses more areas of the law than any other legal discipline."[51] The following discussion attempts to illustrate how the "sports industry intersects the law at every cross."[52] It also provides illustrations of and citations to cases that may someday be considered historically significant in the emergence of sports law as a field of law even though subsequent developments may have lessened their precedential value.

A. Contract Law

Despite having been displaced considerably by antitrust and labor law as it relates to defining relationships, contract law retains a vitally important role in the business of sports.[53] Collective bargaining agreements (CBAs) are largely governed by labor law principles. Nevertheless, contract law principles retain their importance with respect to the interpretation and application of the terms of CBAs.[54] Moreover, freedom of contract is one of the fundamental premises underlying the justification for CBAs.[55]

In addition, contract principles remain relevant with respect to terms of player/team contracts that are open to individualized negotiation, not-

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50. Carter, *supra* note 9, at 244-45.

51. Robert P. Garbarino, *So You Want to Be a Sports Lawyer, or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?*, 1 Vill. Sports & Ent. L. Forum 14 (1994); *see also* Cozzillio & Levinstein, *supra* note 3, at 5; Weistart & Lowell, *supra* note 13, at xix; Greenberg, *supra* note 19, at vii.

52. Greenberg, *supra* note 19, at vii.

53. Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. Tex. L. Rev. 1115, 1134-35 (1997).

54. *Id.* at 1135-36.

55. Wood v. National Basketball Association, 809 F.2d 954, 961 (1987) ("Freedom of contract is an important cornerstone of national labor policy. . .)

withstanding uniform player contracts in the major team sports.[56] For example, in professional football the following are provisions that are subject to individualized negotiation:

a. The amount of a signing or reporting bonus.
b. The time of payment of bonus.
c. The desirability of a loan.
d. The length of the contractual relationship.
e. Skill or injury guarantees.
f. Function of initial-year salary and annual increments.
g. The importance of final year salary.
h. Option clauses.
i. Salary adjustment agreements.
j. Roster bonuses.
k. Individual and team incentives.[57]

Beyond player/team agreements, principles of contract law are relevant to the creation, formation and enforcement of a wide variety of agreements that are struck in the sports world. These include endorsement contracts, coach/team contracts, arena lease agreements, and student-athlete/university scholarship agreements and letters of intent.[58]

The vast array of sports related matters to which contract principles are relevant produces an equally vast array of disputes, the outcome of which often turns on the application of general contract principles. Thus, courts have relied upon familiar contract law concepts such as the doctrine of consideration, the parol evidence rule, the statute of frauds, and the implied duty of good faith and fair dealing in resolving disputes related to the forgoing types of sports related contracts. Set forth below are several illustrations, gleaned from countless examples, of key cases in the development of a jurisprudence of sports law that apply contract law principles to the sports context.

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56. 1 MARTIN J. GREENBERG & JAMES T. GRAY, SPORTS LAW PRACTICE 333 (2d. ed. 1998).

57. *Id.* at 333-34 (quoting Steinberg, *Negotiating Contracts in the National Football League, in* LAW OF PROFESSIONAL AND AMATEUR SPORTS 6-4 (G. Uberstein ed., release #2 (1991))).

58. *See generally* GREENBERG & GRAY, *supra* note 56.

1. Player Contracts

a. Interpretation

Sample v. Gotham Football Club, Inc.:[59] A former professional football player sought to recover, *inter alia*, for breach of a personal services contract.[60] The parties requested the court to determine "whether the simultaneous execution of several instruments result[ed] in one contract or several separate agreements."[61] Applying contractual rules of interpretation, the court found that the proper characterization of the document must be "ascertained from a reading of the several instruments, and [examining] the facts and circumstances at the time of execution of the contract.[62]

b. Breach and Remedy

Boston Celtics Ltd. Partnership. v. Shaw:[63] The Boston Celtics, a professional basketball team, sought enforcement of an arbitrator's decision that a player be required to fulfill his promise to exercise his contractual right to cancel the second year of his contract with an Italian team.[64] The cancellation of his contract with the Italian team would have allowed Shaw to compete for the Celtics.[65] Finding that the arbitrator acted within the scope of his authority, the First Circuit upheld the district court's granting of a preliminary injunction.[66] It upheld the arbitrator's decision that the player's promise was proper under the terms of the National Basketball Association (NBA) CBA and had a plausible basis.[67] Finally, the court rejected the player's argument that the unclean hands and unconscionability doctrines precluded the court from granting injunctive relief on behalf of the team.[68]

2. Coaching Contracts

Deli v. University of Minnesota:[69] Deli, a former University of Minnesota gymnastics coach sued the institution seeking recovery based, *inter*

59. 59 F.R.D. 160 (S.D.N.Y. 1973).
60. *Id.* at 162.
61. *Id.* at 164
62. *Id.*
63. 908 F.2d 1041 (1st Cir. 1990).
64. *Id.* at 1043.
65. *Id.* at 1047.
66. *Id.* at 1049.
67. *Id.* at 1045.
68. 908 F.2d at 1049.
69. 578 N.W.2d 779 (Minn. Ct. App. 1998).

alia, upon promissory estoppel regarding certain oral promises made by the athletic director.[70] The court defined promissory estoppel as sounding in contract.[71] Consequently, extra-contractual damages such as those arising from emotional distress were held to be non-recoverable under promissory estoppel absent a specific statutory provision permitting such recovery or the existence of an independent tort.[72]

Rodgers v. Georgia Tech Athletic Association:[73] In a former head football coach's "breach of contract action against [an athletic association] to recover the value of certain perquisites that had been made available to him as the head coach,"[74] a state appellate court applied several fundamental principles of contract law, including: 1) an employee may be entitled to damages for breach of contract, but ordinarily "has no right to recover [his] position and title;"[75] 2) upon a wrongful termination, an employer is obligated to pay an employee the amount set forth in the contract that the employee was to receive as compensation for his services;[76] 3) the perquisites to which a discharged employee is entitled to recover requires a determination of the intention of the parties to the employment contract;[77] 4) where a contract is "susceptible of two constructions, that interpretation which is least favorable to the author should generally be accepted;"[78] 5) upon breach of an employment contract, damages should be measured by the "actual loss sustained by the breach, and not the gross amount due under the contract;"[79] and 6) "a party is entitled to recover profits that would have resulted from a breach of a contract . . . where the breach is the result of the other party's fault," and where the profits were within the contemplation of the parties at the time they entered into the contract.[80] Applying the foregoing principles, the court concluded that the coach was entitled to recover certain perquisites, namely those to which he was entitled by virtue of his position as head football coach.

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70. *Id.* at 781.
71. *Id.* at 782.
72. *Id.* at 782-83.
73. 303 S.E.2d 467 (Ga. Ct. App. 1983).
74. *Id.* at 469.
75. *Id.* at 470.
76. *Id.* at 471 (quoting South Cotton Oil Co. v. Yarborough, 107 S.E. 366, 368 (Ga. Ct. App. 1921)).
77. *Id.*
78. 303 S.E.2d at 471 (quoting Bridges v. Home Guano Co., 125 S.E. 872, 873 (Ga. Ct. App. 1924)).
79. *Id.* at 472 (quoting *South Cotton Oil Co.*, 107 S.E. at 368).
80. *Id.* at 473.

Vanderbilt University. v. DiNardo:[81] The university brought a breach of contract action against its former head football coach when he resigned to become football coach for Louisiana State University.[82] Vanderbilt sought monetary relief pursuant to a clause providing that the university was entitled to damages in the event the defendant left the university to become coach at another school before the expiration of his contract term.[83] The district court awarded damages, pursuant to the clause, in the amount of $281,886.43.[84] Applying contract analysis regarding liquidated damages provisions, the Sixth Circuit upheld the clause as an enforceable liquidated damages provision.[85] In so doing, it rejected defendant's characterization of the clause as a penalty or as a "disguised overly broad non-compete provision."[86] The court found that the district court's use of "a formula based on DiNardo's salary to calculate liquidated damages was reasonable given the nature of the unquantifiable damages in the case."[87] The court noted that "Vanderbilt hired DiNardo for a unique and specialized position, and the parties understood that the amount of damages could not be easily ascertained should a breach occur."[88]

3. Individual Sports

Rooney v. Tyson:[89] The Court of Appeals of New York was requested upon certification of a question from the Second Circuit Court of Appeals to determine whether an oral professional services contract pursuant to which a boxer promised to retain his trainer "for as long as the boxer fights professionally" might constitute a contract for a definite duration and thus avoid the strictures of the employment at-will doctrine.[90] The court ruled that the pertinent language created a contract for a definite duration, the length of which would be defined by the commencement and conclusion of the boxer's career.[91]

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81. 174 F.3d 751 (6th Cir. 1999).
82. *Id.* at 753.
83. *Id.*
84. *Id.*
85. *Id.* at 755-57.
86. 174 F.3d at 755, 757.
87. *Id.* at 755.
88. *Id.* at 757.
89. 697 N.E.2d 571 (N.Y. 1998).
90. *Id.* at 572.
91. *Id.* at 575.

4. Student-Athlete/University Relationship

Jackson v. Drake University:[92] A former student-athlete sued Drake University alleging, among other things, breach of contract in that the school failed to provide him with an opportunity to develop his athletic skills through participation in intercollegiate competition. The court rejected the breach of contract claim as a consequence of its refusal to imply a right to play basketball into the agreement.[93] The court's ruling was premised on the classical contract rule, which provides that "where the language of a contract is clear and unambiguous," the express terms control and additional obligations will not be imposed pursuant to implication.[94]

Waldrep v. Texas Employers Insurance Ass'n:[95] A former student-athlete sought workers compensation benefits from Texas Christian University (TCU) for a spinal cord injury that he incurred during a football game in which he played for TCU.[96] In affirming a jury's verdict in favor of TCU, the court held as a matter of law that the plaintiff was not an employee of the college when he played football.[97] The court rejected Waldrep's argument that the Letter of Intent and Financial Aid Agreement he signed constituted an express contract of hire.[98] In rejecting plaintiff's contention, the court relied on the contract principle that "the most basic policy of contract law . . . is the protection of the justified expectations of the parties."[99] Analyzing these documents in the context of "the background of circumstances surrounding [their] execution,"[100] the court concluded the facts revealed the intent of the parties was that Waldrep was an amateur and not a professional.[101]

5. Agent/Player Relationship

Zinn v. Parrish:[102] In a dispute between an agent and a player, the court found that the contract established the standard for assessing the

92. 778 F. Supp. 1490 (S.D. Iowa 1991).
93. *Id.* at 1493.
94. *Id.*
95. 21 S.W.3d 692 (Tex. App. 2000).
96. *Id.* at 696.
97. *Id.* at 702.
98. *Id.* at 698.
99. *Id.* at 699 (quoting DeSantis v. Wakenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990)).
100. 21 S.W.3d at 699 (quoting Travelers Ins. Co. v. Brown, 395 S.W.2d 701, 702 (Tex. Civ. App. 1965)).
101. *Id.*
102. 644 F.2d 360 (7th Cir. 1981).

agent's competency as one of reasonable effort.[103] The court also applied a good faith standard to agent services not governed by the contractually established standard of care.[104]

B. Labor Law

With the exception of soccer, players in all of the major team sports in the United States are represented by labor unions. Because of this, labor law and antitrust law have emerged to impact significantly the law that governs teams sports in the United States. Two commentators note, "[i]n the three decades of active union representation in professional sports, this process has produced decisions that illustrate virtually all the important doctrinal spheres in contemporary labor law."[105] These authors further note the development of a "distinctive jurisprudence that has evolved for sports labor relations."[106] This distinct jurisprudence is an outgrowth of judicial resolution of disputes ranging from certification of player's bargaining units, to the exclusivity of a union's bargaining authority, to whether parties governed by a CBA have bargained in good faith.

Delineated below are illustrations of disputes in sports that have implicated general labor law principles so as to contribute to the development of a labor law jurisprudence for sports.

1. Intersection of Labor and Antitrust

Brown v. Pro Football, Inc.:[107] Professional football players, who were assigned to developmental squads of substitute players, brought an antitrust suit against football club owners challenging the latter's unilateral imposition of a fixed salary after a good faith impasse in contract negotiations.[108] The Supreme Court rejected plaintiffs' antitrust claims inasmuch as the owners' conduct fell within the scope of the "non-statutory" labor exemption to antitrust liability.[109] Specifically, the Court held that given that the owners' action occurred "during and immediately after a collective bargaining negotiation," and was an integral part of the

103. *Id.* at 366.
104. *Id.*
105. PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 240 (2d. ed. 1998).
106. *Id.*
107. 518 U.S. 231 (1996).
108. *Id.* at 233-35.
109. *Id.* at 235.

bargaining process, the "non-statutory" labor exemption was applicable.[110]

2. Good Faith Bargaining

Silverman v. Major League Baseball Player Relations Committee, Inc.:[111] A federal district court refused to impute statements regarding an inability to pay higher salaries made by Major League Baseball's commissioner and club officials to the clubs' bargaining committee, which had the exclusive authority to engage in collective bargaining on behalf of clubs. The refusal to impute such statements rendered inapplicable the general principle that employers cannot in good faith claim financial inability to pay higher salaries and then refuse to produce financial data to support such assertions.

3. Exclusive Bargaining

North American Soccer League v. NLRB:[112] "Professional soccer league sought review of NLRB finding of unfair labor practice[s]."[113] The court held that the soccer clubs and the league were joint employers.[114] The collective bargaining unit was appropriate and did not deprive the clubs of due process.[115]

4. Grievance Arbitration

Sharpe v. National Football League Players Ass'n:[116] Former professional football player sought recovery from players union alleging breach of fair representation by the union.[117] The contract between the player and club stipulated that any contractual disputes between the parties would be submitted to binding arbitration according to the terms of the National Football League (NFL) CBA.[118] Due to this contract language and the inextricably interdependent relationship between claims alleging an employer's breach of a CBA and a union's breach of fair representation, the court granted the union's motion to dismiss.[119] It

110. *Id.* at 250.
111. 516 F. Supp. 588 (S.D. N.Y. 1981).
112. 613 F.2d 1379 (5th Cir. 1980).
113. *Id.*
114. *Id.* at 1382-83.
115. *Id.* at 1384.
116. 941 F. Supp. 8 (D.C. 1996).
117. *Id.* at 9.
118. *Id.*
119. *Id.* at 10.

specifically found that a player must have received an adverse decision from an arbitrator before the court could entertain the player's breach of fair representation claim.[120]

Morris v. New York Football Giants, Inc.:[121] Professional football players brought actions against teams claiming they were entitled to compensation of 10% of the contract amount when the players were released before the season began.[122] The court held that the CBA had expired.[123] Nevertheless it held that pursuant to the players' individual contracts, they were required to submit disputes to arbitration.[124] In reaching this result, the court rejected the players' assertion that the arbitration clause should be deemed an unenforceable adhesion contract due to the players' inability to negotiate any terms other than those involving compensation and duration.[125] The court found that the arbitration clause was not an adhesion contract for the following reasons: 1) plaintiffs' status as highly paid, sophisticated professional athletes with considerable bargaining power; 2) plaintiffs' representation by experienced agents and/or counsel; 3) the lack of evidence of attempts by plaintiffs to negotiate regarding the arbitration provision; 4) the conspicuousness of the arbitration clause; and, 5) the lack of evidence unreasonably favorable to the defendants.[126]

C. *Antitrust Law*

Since 1970, antitrust law and in particular, the Sherman Act, have severely impacted the structure of relationships in professional sports.[127] Notwithstanding baseball, which was deemed exempt from antitrust laws, antitrust emerged as a force that weakened the restrictive rules and regulations that afforded team owners greater leverage in their relationships with players. Set forth below are illustrations of several instances in which antitrust law has impacted legal relationships in sports.

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120. *Id.*
121. 575 N.Y.S.2d 1013 (1991).
122. *Id.*
123. *Id.* at 1015.
124. *Id.*
125. *Id.*
126. 575 N.Y.S.2d at 1015-16.
127. GREENBERG & GRAY, *supra* note 56, at 3.

1. Professional Sports

a. Reserve System

Flood v. Kuhn:[128] A professional baseball player alleged that Major League Baseball's player reserve system violated federal antitrust laws.[129] Applying the judicially constructed baseball exemption to antitrust laws, the Court rejected the player's claim.[130] The Court also concluded that due to Congressional acquiescence in the longstanding exemption, Congress, not the Court, was the proper body to change the exemption and to remedy any "inconsistency and illogic" that it produces.[131]

b. Free Agency

Mackey v. NFL:[132] Players challenged the National Football League's rule requiring a club to compensate a player's former club for acquiring the player as a free agent.[133] The court found that the league's constraint on player mobility constituted an unreasonable restraint of trade in violation of the Sherman Act.[134] The court refused to apply the nonstatutory labor exemption to antitrust laws notwithstanding the existence of a CBA.[135] The court created a three-prong test for determining when federal labor policy should be given preeminence over antitrust laws: 1) where the restraint primarily affects only parties to the collective bargaining relationship; 2) the subject restraint concerns matters that are mandatory subjects of collective bargaining; and 3) the agreement is a product of bona fide arm's length bargaining.[136] Applying the test to the facts before it, the court rendered the exemption inapplicable since the league and its players did not engage in arm's length negotiations regarding the restraint (known as the Rozelle Rule which required compensation for signing of free agents).[137]

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128. 407 U.S. 258 (1972).
129. *Id.* at 265.
130. *Id.* at 285.
131. *Id.* at 284.
132. 543 F.2d 606 (8th Cir. 1976).
133. *Id.* at 609.
134. *Id.* at 623.
135. *Id.* at 616, 623.
136. *Id.* at 614.
137. 543 F.2d at 616.

c. Franchise Relocation

Los Angeles Memorial Coliseum Commission v. NFL (Raiders I):[138] An NFL rule requiring three-fourths of its member teams to approve a franchise's moving into another team's territory was challenged as an unreasonable restraint of trade in violation of the Sherman Act.[139] In holding that the NFL was subject to antitrust liability, the court found that the league was not a single entity and therefore could be found to have conspired in restraint of trade.[140]

d. Television Contracts

Chicago Professional Sports Ltd. Partnership. v. NBA:[141] The Chicago Bulls professional basketball team and television superstation WGN, challenged, as a violation of the Sherman Act, an NBA rule that limited the number of games that the station could carry.[142] The court held that the Sports Broadcasting Act did not preclude the 20-game rule from violating the Sherman Act.[143] Concluding that the NBA constitutes a joint venture rather than a single entity, the court adopted the Rule of Reason as the framework within which to assess the legality of the 20-game rule which limited output.[144] In finding a violation of the Sherman Act, the court was unswayed by NBA proffered justifications that the restriction prevents clubs from misappropriating the NBA's property right to exploit its symbols and success, and that it prevented "free-riding."[145]

2. College Sports

National Collegiate Athletic Ass'n v. Board of Regents[146] Members of the College Football Association brought an antitrust action challenging the National Collegiate Athletic Association's (NCAA) plan for televising college football games as violating Section 1 of the Sherman Act.[147] The Court held that the plan constituted a restraint of trade in that it limited the "members' freedom to negotiate and enter into their own

138. 726 F.2d 1381 (9th Cir. 1984).
139. *Id.* at 1385.
140. *Id.* at 1401.
141. 961 F.2d 667 (7th Cir. 1992).
142. *Id.* at 669.
143. *Id.* at 667.
144. *Id.* at 673.
145. *Id.* at 675-76.
146. 468 U.S. 85 (1984).
147. *Id.* at 88.

television contracts."[148] The Court further held, however, that the plan would violate the Sherman Act only if it constituted an unreasonable restraint of trade.[149] Rejecting the application of a per se rule of analysis, the Court nevertheless found the restraint unreasonable pursuant to a Rule of Reason analysis.[150] In often cited dictum, the Court also stated "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[151]

Law v. NCAA:[152] This class action suit brought by college basketball coaches with "restricted earnings" status challenged an NCAA rule that capped their annual compensation at $12,000 during the academic term and $4,000 during the summer.[153] Applying a "quick look rule of reason" analysis, the court concluded that the limitation on compensation had "obvious anticompetitive" effects and thus violated the Sherman Act since it artificially lowered the price of coaching services.[154] The court was not persuaded by the three justifications offered by the NCAA: cost reduction, maintaining competitive equity and providing opportunities for younger coaches.[155]

D. Tort Law

Generally, tort principles applicable in other contexts are equally applicable in sports settings. Nevertheless, because of the unique characteristics of sports, the application of certain tort doctrine is imbued with difficulty such as in cases of tort liability stemming from on-the-field conduct. In this regard, Weiler and Roberts state:

> Sports, however, pose a unique problem to the law of personal injury. The aim of a sporting event is to produce spirited athletic competition on the field or floor. In sports such as boxing, football, and hockey, a central feature of the contest is the infliction of violent contact on the opponent. In other sports, such as basketball and baseball, such contact is an expected risk, if not a desired outcome, of intense competition. Even sports such as golf that are intrinsically non-violent for their participants may inflict

148. *Id.* at 98.
149. *Id.*
150. *Id.* at 113.
151. 468 U.S. at 117.
152. 134 F.3d 1010 (10th Cir. 1998).
153. *Id.* at 1014-15.
154. *Id.* at 1020.
155. *Id.* at 1021-24.

> harmful contacts upon the spectators. This characteristic feature of sports requires the law to undertake a delicate balancing act when it tailors for use in sports litigation the standards of liability developed to govern relationships in very different aspects of life.[156]

This quote reveals that tort represents another area in which a distinctive jurisprudence is developing in the sports context. Illustrations of the jurisprudence of personal injury in sports include:

1. Liability for Player-to-Player Conduct[157]

Hackbart v. Cincinnati Bengals, Inc.:[158] A professional football player sought recovery for injuries sustained when a player intentionally struck him during a game.[159] The court was asked to consider whether general principles of law that govern liability for the infliction of injuries were inapplicable in instances where the injury occurs in the course of a game.[160] Rejecting the lower court's reasoning, the Tenth Circuit concluded that "there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."[161] It adopted recklessness as the proper standard for measuring liability in this context.[162]

Nabozny v. Barnhill:[163] A goaltender of a soccer team brought a tort action for an injury sustained during a soccer match.[164] The court articulated the general rule that "in the sports context, a player is liable in a tort action for injury if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player."[165] It also held on the facts before it that where a safety rule is contained in a set of rules governing conduct of an athletic activity, a participant who is trained and coached by knowledgeable personnel is charged with a duty to refrain from engaging in the activities proscribed by the rule.[166]

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156. WEILER & ROBERTS, *supra* note 105, at 934-35.

157. In addition to cases cited in this section, *see* discussion of Lilley v. Elk Grove Unified School District, *infra* Part III. D.2.

158. 601 F.2d 516 (10th Cir. 1979).

159. *Id.* at 518.

160. *Id.* at 519.

161. *Id.* at 520.

162. *Id.* at 524.

163. 334 N.E.2d 258 (Ill. App. Ct. 1975).

164. *Id.* at 259.

165. *Id.* at 261.

166. *Id.* at 260-61.

2. Assumption of the Risk

Lilley v. Elk Grove Unified School District:[167] A student, who broke an arm while participating in extracurricular wrestling, sued his middle school for negligence.[168] Finding that the lower court had granted summary judgment based upon the principle that primary assumption of the risk operated as a complete defense to a negligence claim, the court held that injury is an inherent risk of wrestling.[169] The court reasoned "[i]mposition of a duty to protect student athletes from any risk inherent in a sport like wrestling would fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether because the threat of liability would make schools reluctant to offer sports as an extracurricular activity."[170] In reaching the foregoing conclusion, the court found that the following facts did not preclude application of the primary assumption of the risk doctrine: injury to the plaintiff while participating in a demonstration with an instructor, and the existence of a statutorily mandated duty imposed upon teachers to protect students.[171] The court stated that the question of primary assumption of the risk turns on the nature of the activity and the relationship of the parties to the activity.[172] It further stated the general rule that in a sports setting "a co-participant may be held liable only for intentional injuries or for conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport."[173]

Everett v. Bucky Warren, Inc.:[174] In this tort action, the plaintiff alleged that the manufacturer, retailer, and school were negligent in supplying a defectively designed hockey helmet and that the manufacturer and retailer were strictly liable.[175] The court held that the defendants were not liable on the negligence counts because the plaintiff assumed the risk.[176] The evidence was sufficient to find the manufacturer and the retailer strictly liable for defective design.[177]

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167. 80 Cal. Rptr. 2d 638 (Cal. Ct. App. 1998).
168. *Id.* at 639.
169. *Id.* at 641.
170. *Id.*
171. *Id.* at 640.
172. 80 Cal. Rptr. 2d at 640-41.
173. *Id.* at 643.
174. 380 N.E.2d 653 (Mass. 1978).
175. *Id.*
176. *Id.* at 653, 662.
177. *Id.* at 660.

3. Defective Equipment

See *Everett v. Bucky Warren, Inc.*,[178] discussed in Part 2, *supra.*

4. Medical Malpractice

Krueger v. San Francisco Forty Niners:[179] A professional football player brought an action against the team and physicians for fraudulent concealment of medical information.[180] Applying the "informed consent doctrine," the court concluded that facts which demonstrated the team physician failed to inform the player of the continuing risks associated with his injuries established the requisite intent for finding of fraudulent concealment by the team.[181]

5. Educational Malpractice

Ross v. Creighton University:[182] A former student-athlete sued Creighton University alleging, *inter alia*, that the institution was negligent in recruiting him despite knowledge that he was unable to adequately perform college work and in failing to provide him with the support services necessary to allow him an educational opportunity.[183] The Seventh Circuit predicted that Illinois courts would follow the rule adopted by the majority of other courts in refusing to recognize causes of action sounding in negligent admissions and educational malpractice.[184] The Seventh Circuit adopted policy considerations advanced in other courts in reaching this result, including: difficulties in developing a satisfactory standard of care; inherent difficulties involved in determining the cause and nature of damages; potential financial burden placed on educational institutions arising from a flood of educational malpractice lawsuits; and problems related to judicial oversight of the day-to-day operations of schools.[185]

6. University Liability to Student-Athletes

Kleinknecht v. Gettysburg College:[186] A negligence action was brought against a college by the parents of a former lacrosse player who

178. 380 N.E.2d 653 (Mass. 1978).
179. 234 Cal. Rptr. 579 (Cal. Ct. App. 1987) (Op. withdrawn by order of court).
180. *Id.*
181. *Id.* at 584.
182. 957 F.2d 410 (7th Cir. 1992).
183. *Id.* at 412.
184. *Id.* at 414-15.
185. *Id.* at 414.
186. 989 F.2d 1360 (3d. Cir. 1993).

suffered a fatal heart attack during practice.[187] The court held that the college owed a duty of care to take preventative measures so as to provide treatment to student-athletes in the event of an emergency.[188] The imposition of a duty was premised largely on the special relationship between the college and the student that arises from the student-athlete participating in a school-sponsored activity for which he has been recruited by the college to play.[189]

7. Liability to Fans

Hayden v. University of Notre Dame:[190] A fan, who was seated near a football goal post, was injured following a scramble by other fans for a ball that landed near her seat.[191] The net behind the uprights failed to prevent the ball from sailing into the seats.[192] Plaintiff alleged that the university owed her a duty of care to protect her under these circumstances due to her status as an invitee.[193] Defendant did not contest plaintiff's invitee status. Rather the university argued that it owed no duty to protect plaintiff from the criminal acts of third parties.[194] Applying a totality of the circumstances approach, the Indiana Court of Appeals found that the defendant possessed a duty to protect plaintiff from the misconduct of other fans and reversed the trial court's summary judgment in favor of defendant.[195]

E. Constitutional and Statutory Law

Traditionally, private law was viewed as providing the principal legal mechanism for regulating the sports industries. As noted *supra*, labor and antitrust law represented public law incursions into a realm deemed best governed and regulated by private agreement. However, public law concepts, in addition to labor and antitrust law, play an increasingly important role in governing legal relationships in sports. For example, federal legislation, such as the Americans with Disabilities Act (ADA), Title IX and Title VI, holds potential to drastically reshape relationships in sports. Moreover, constitutional principles have been called upon to

187. *Id.*
188. *Id.* at 1369, 1372.
189. *Id.* at 1366-69.
190. 716 N.E.2d 603 (Ind. Ct. App. 1999).
191. *Id.* at 604.
192. *Id.*
193. *Id.* at 605.
194. *Id.*
195. 716 N.E.2d at 607.

adjudicate the respective rights of parties involved in the sports world, such as assertions that mandatory drug testing programs violate First and Fourth Amendment rights. Constitutional law doctrines have also been invoked to challenge NCAA eligibility rules and assertions that due process protections have not been afforded to athletes. Illustrations of cases in which constitutional and statutory law has been relevant include:

1. Drug Testing

Veronia School District 47J v. Acton:[196] A drug policy adopted by a school district authorized random urinalysis of students participating in interscholastic athletics.[197] A student athletics participant and his parents sought declaratory and injunctive relief from the district's enforcement of its drug testing program on grounds that it violated the Fourth Amendment of the U.S. Constitution and the State of Oregon's constitution.[198] The United States Supreme Court initially found that drug testing programs such as that adopted by the district constituted a search subject to the strictures of the Fourth Amendment. In finding that the drug testing policy did not violate the Fourth Amendment, the Court focused on the lessened privacy expectation of student-athletes.[199] This lessened expectation could be derived from the "'communal undress' inherent in athletic participation" and from the fact that athletes voluntarily subject themselves to a higher degree of regulation than students generally.[200] This, coupled with the unobtrusive nature of the drug testing program and the importance of the governmental interest at stake, led the Court to conclude that the invasion of privacy was not significant enough to violate the Fourth Amendment.[201]

2. Due Process

NCAA v. Tarkanian:[202] Jerry Tarkanian sued the University of Nevada-Las Vegas and the NCAA alleging, among other things, that his suspension for various recruiting and other NCAA violations abridged his Fourteenth Amendment rights.[203] With respect to the NCAA, the

196. 515 U.S. 646 (1995).
197. *Id.* at 649-51.
198. *Id.* at 651-52.
199. *Id.* at 654-57.
200. *Id.* at 657.
201. 515 U.S. at 664-65.
202. 488 U.S. 179 (1988).
203. *Id.* at 187-88.

Court dismissed the plaintiff's claim holding that the NCAA, by virtue of developing standards and rules, did not engage in state action.[204]

3. Racial Discrimination

Cureton v. NCAA:[205] A federal district court granted summary judgment on behalf of African-American student athletes who filed suit against the NCAA.[206] The students alleged that the minimum standardized test component of "Proposition 16" initial eligibility rules violated Title VI of the Civil Rights laws.[207] The Third Circuit reversed the district court's ruling that the NCAA is subject to Title VI.[208] The Third Circuit rejected the lower court's reasoning that the NCAA is a recipient of federal funds because it administered the National Youth Sports Programs, which receives federal funds, and because NCAA member institutions, many of which receive federal funds, have delegated control of their athletic programs to the NCAA.[209]

4. Gender Discrimination (Title IX)

Cohen v. Brown University:[210] Women student-athletes filed a class action against Brown University alleging sexual discrimination in the school's athletics programs in violation of Title IX.[211] In imposing liability on the university, the court held that a Title IX violation occurs if an institution "ineffectively accommodates its students' interests and abilities in athletics, regardless of its performance with respect to other Title IX areas."[212]

Communities for Equity v. Michigan High School Athletic Ass'n:[213] Plaintiffs, consisting of female student-athletes and their parents, filed a class action suit alleging discrimination by the Michigan High School Athletic Association.[214] The discrimination allegedly consisted, *inter alia*, of providing more participation opportunities for boys than for girls, requiring girls to play in non-traditional seasons, operating shorter seasons for girls than for boys, and providing inferior athletic facilities for

204. *Id.* at 196-99.
205. 198 F.3d 107 (3d Cir. 1999).
206. Cureton v. NCAA, 37 F. Supp. 2d 687, 714 (E.D. Pa. 1999).
207. 198 F.3d at 111.
208. *Id.* at 118.
209. *Id.* at 114.
210. 101 F.3d 155 (1st Cir. 1996).
211. *Id.* at 161.
212. *Id.*
213. 80 F. Supp. 2d 729 (W. D. Mich. 2000).
214. *Id.* at 731.

girls athletic tournaments in comparison to boys athletic tournaments.[215] Plaintiffs claims were based on Title IX, the Equal Protection Clause of the Fourteenth Amendment and provisions of the Michigan Civil Rights Act.[216] The court considered whether exercising controlling authority over a federally funded program is sufficient to trigger Title IX even if the defendant is not a direct recipient of federal funding.[217] Answering this question in the affirmative, the court found that the evidence presented a "genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics."[218] With respect to the plaintiffs' Equal Protection claim, the court held that the Athletic Association is a state actor, in part, because it found that the actions of the Association may be "fairly attributed to the state."[219]

Mercer v. Duke University:[220] Plaintiff asserted that Duke University discriminated against her in its intercollegiate football program in violation of Title IX.[221] In claiming a violation of Title IX, plaintiff argued that the statute does not provide a blanket exemption for contact sports.[222] The Fourth Circuit validates the notion that single sex teams are permitted in "contact sports" such as football.[223] Nevertheless, it held that a university may waive the exemption.[224] Thus "where a university has allowed a member of the opposite sex to try out for a single-sex team in a contact sport, the university is . . . , subject to Title IX and therefore prohibited from discriminating against that individual on the basis of his or her sex."[225]

Neal v. Board of Trustees:[226] The court of appeals reversed a district court's issuance of a preliminary injunction in favor of male athletes, who alleged that the institution's decision to eliminate spots in the men's wrestling program violated Title IX and the Equal Protection Clause.[227] Relying on *Cohen v. Brown University*, the court recognized the notion of institutional control as it relates to granting institutions considerable

215. *Id.*
216. *Id.*
217. *Id.* at 732.
218. 80 F.Supp.2d at 738.
219. *Id.* at 742.
220. 190 F.3d 643 (4th Cir. 1999).
221. *Id.* at 644.
222. *Id.*
223. *Id.* at 647.
224. *Id.* at 647-48.
225. 190 F.3d at 644.
226. 198 F.3d 763 (9th Cir. 1999).
227. *Id.* at 765.

deference in determining how to achieve gender proportionality, including reducing men's athletic opportunities. After reviewing existing precedent, the court noted that

> [e]very [court of appeals], in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) *or* by decreasing athletic opportunities for the over-represented gender (men in this case). . . ."[228]

5. Disability

Knapp v. Northwestern University:[229] Northwestern University declared a student-athlete permanently medically ineligible to play on or practice with its intercollegiate basketball team because of a cardiac condition that could be exacerbated by such participation.[230] The athlete sued the university alleging that its refusal to permit him to play violated § 504 of the Rehabilitation Act of 1973.[231] Reversing the district court, the Court of Appeals held, as a matter of law, that plaintiff's cardiovascular impairment did not render him "disabled" within the Rehabilitation Act. According to the court, "[a]n impairment that interferes with an individual's ability to obtain a satisfactory education otherwise, does not *substantially* limit the major life activity of learning. . . Because learning through playing intercollegiate basketball is only one part of the education available to Knapp at Northwestern, even under a subjective standard, Knapp's ability to learn is not substantially limited."[232] In so ruling, the court emphasized that Northwestern would permit Knapp to have access to all of the academic and nonacademic services and activities it offered with the exception of basketball.

F. Other Substantive Areas

In addition to the forgoing, legal practice in the sports context may require familiarity with additional substantive areas of the law including: agency, criminal law, tax, real estate, intellectual property, professional responsibility, entertainment and communications law.

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228. *Id.* at 769-770.
229. 101 F.3d 473 (7th Cir. 1996).
230. *Id.* at 476-77.
231. *Id.* at 477-78.
232. *Id.* at 481.

IV. PRACTICING LAW IN THE SPORTS CONTEXT[233]

Practice for the attorney involved in the business of sports can be varied and substantively rich. As discussed above, the practice of law in the sports realm encompasses virtually every substantive area of the law. Thus the sports law attorney can be viewed as the "ultimate general practitioner" given the broad array of legal subjects that must be mastered.[234] In addition, the functions that can be served by the sports lawyer are likely to vary. "The sports lawyer may serve a transactional function,[235] a litigation function,[236] or some hybrid combination of both. In all capacities, an intimate knowledge of the idiosyncrasies of this relatively new enterprise is essential."[237] This certainly belies the idea of many law students, novice practitioners and lay persons who equate the practice of sports law to the representation of players in their contract negotiations. Agent representation of players, though perceived as glamorous, exciting and fast paced, represents a negligible part of the functions and opportunities that attorneys may be called upon to perform in the business of sports.[238] Nevertheless, I begin with a discussion of the various services that the athlete agent may perform for his or her client.

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233. Useful discussions of the nature of sports law practice may be found in the following: Walter T. Champion, Jr., *Attorneys Qua Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L.J. 349, 351-52 (1997); Garbarino, *supra* note 51, at 14; KENNETH L. SHROPSHIRE, CAREERS IN SPORTS LAW (1990); and Tulane Law School, *What Do Sports Lawyers Do?*, *at* http://www.law.tulane.edu/admit/brochure/sports/page2.htm (last visited Jan. 31, 2001).

234. Greenberg, *supra* note 19, at vii; GARY A. UBERSTINE, *Preface to* 1 LAW OF PROFESSIONAL AND AMATEUR SPORTS, at xv (Gary A. Uberstine ed. 1997).

235. Elaborating on the transactional capacity in which the sports lawyer may serve, the authors state: "sports counsel are often called upon not only to advise clients regarding the legal sufficiency of a particular contract, plan of action, or other non-litigation strategy, but also to provide insights and guidance regarding the business ramifications of a particular course of action." COZZILLIO & LEVINSTEIN, *supra* note 3, at 8.

236. In regard to the litigation function of the sports lawyer, the authors state: "the sports litigator who is well-versed in the most subtle aspects of a client's operation will be able to draw effectively on that experience to highlight similarities or distinctions between the case at bar and other precedent. The probability of success in a particular case will be substantially enhanced if the litigator is able to share with the court special knowledge of the factual settings in which a dispute arose or unique facets of the controversy that justify the relief sought or defenses offered." *Id.* at 7.

237. *Id.*

238. TIMOTHY DAVIS, ET AL., SPORTS AND THE LAW: A MODERN ANTHOLOGY 145 (Timothy Davis et al., eds., 1999).

A. Representing Athletes

The role of agents extends beyond the commonly held belief that their job is to negotiate a contract with a club. These functions were recently described as including the following:

> contract negotiations, tax planing, financial planning, money management, investments, estate planning, income tax preparation, incorporating the client, endorsements, sports medicine consultations, physical health consultations, post-career development, career and personal development counseling, legal consultations and insurance matters.[239]

The diverse nature of the services that athlete agents perform is indicative of the broad array of professional services and substantive expertise required of attorneys who represent others involved in the sports industry. A brief summary of services that might be performed on behalf of certain participants in the business of sports is provided below.

B. Representing Coaches

Increasingly, coaches seek professional representation. In this context, the lawyer may be called upon to perform numerous tasks, including: negotiating and drafting employment contracts on behalf of coaches with their teams, both professional and collegiate; negotiating and drafting endorsement contracts with merchandisers such as shoe and apparel manufacturers, as well as with television and radio stations; and, representing coaches in team and league related disputes.[240]

C. Acting as Counsel for a Major or Minor League Sports League or an Individual Team

Apart from negotiating contracts with individual players, the lawyer who acts as counsel for a team or league will need to negotiate contracts with employees including coaches and administrative staff. The attorney who acts in this capacity may serve multiple other functions including: negotiating lease agreements relating to sports venues and construction related contracts; negotiating endorsement contracts with sports merchandisers; negotiating television and radio contracts; supervising labor, tort, antitrust, breach of contract and other types of litigation; interpreting and applying collective bargaining agreements; managing player

239. Champion, *supra* note 233, at 351-52.
240. Tulane Law School, *supra* note 233.

grievances relating to collective bargaining agreements; and, representing teams in legal matters involving leagues and vice-versa.[241]

D. Representing Educational Institutions

Attorneys working within this aspect of the sports industry will also be called upon to represent their clients in broad and varied ways, including: representing colleges and universities in negotiating and enforcing employment contracts with coaches, athletic directors and other athletic related administrators and personnel; representing colleges and universities in lawsuits addressing such matters as compliance with NCAA rules and regulations and Title IX compliance; representing a university with respect to facility agreements and negotiating marketing related contracts; developing, protecting and enforcing intellectual property rights; acting as a compliance officer within a university's athletic department; representing secondary school districts in litigation related matters such as those involving tort liability, Title IX, and the American with Disabilities Act; and, developing and providing risk management advice to school districts.[242]

E. Representing Sports Facilities

The attorney who represents a sports facility may be called upon to perform a range of services, including: negotiating and monitoring contracts with teams, concessionaires, governmental authorities and contractors; and representing or supervising outside counsel in litigation relating to matters such as tort liability stemming from injury to spectators, ADA disputes and breach of contract.[243]

F. Other Areas of Representation

Apart from the areas identified above, the attorney who practices in the sports law context may provide services including: representing athletes engaged in individual sports; representing promoters of various types of sports related events including boxing, tennis and golf tournaments and college football bowl games; representing national and international federations and other bodies that govern sports such as the PGA, and the International or US Olympic Committees; and representing media interests (for example, television and radio networks, sports

241. *Id.*
242. *Id.*
243. *Id.*

journalists and broadcasters, as well as their employers) and organizations that seek commercial endorsements from sports figures.[244]

V. Conclusion

At the beginning of this paper, I asked if the question regarding sports law's character as a separate discipline is merely a matter of academic curiosity. No doubt, some will say the debate is only relevant to academics. Such a conclusion, however, may be too myopic. As alluded to above, such an attitude fails to recognize that the development of sports law can be viewed as evidence of the transformation of relationships in the sports context.

In a more fundamental sense, however, perhaps the significance of whether sports law is a field of practice may lie in the perceptions of those of us who practice, study or write in the area. Do we perceive ourselves as engaged in an important, rigorous, intellectually stimulating area of practice and study? Moreover, do we view our endeavors as worthy of the respect of our colleagues who are engaged in other fields of practice? In short, perhaps the relevance of the question resides in whether we feel that we can take pride in working in an area that is respected as having substantive value and is considered a vital part of the legal community.

VI. Bibliography of Select Sports Related Legal Resources

A. Textbooks, Treatises and Select Resource Books

- Herb Appenzeller, Risk Management in Sport: Issues and Strategies (Carolina Academic Press 1998).
- Walter T. Champion, Jr., Sports Law in a Nutshell (West Group 1993).
- Walter T. Champion, Jr., Fundamentals of Sports (Clark Boardman Callaghan 1990).
- Phyllis Coleman & Robert M. Jarvis, Sports Law: Cases and Materials (West Group 1999).
- J. Doyce Cotten, & Jesse T. Wilde, Sports Law: For Sports Manager (Kendall/Hunt Publishing Co. 1997).
- Michael J. Cozzillio & Mark S. Levinstein, Sports Law: Cases and Materials (Carolina Academic Press 1997).

244. *Id.*

- TIMOTHY DAVIS, ALFRED D. MATHEWSON & KENNETH L. SHROPSHIRE, SPORTS AND THE LAW: A MODERN ANTHOLOGY (Carolina Academic Press 1999).
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- MICHAEL JONES, SPORTS LAW (Prentice Hall 1999).
- LISA PIKE MASTERALEXIS, ET AL., PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT (Aspen Publishers 1998).
- MATTHEW C. MCKINNON, ET AL., SPORTS LAW (Lupus Publications 2000 ed.).
- JAMES A. R. NAFZIGER, INTERNATIONAL SPORTS LAW (Transnational Publishers 1988).
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- JOHN C. WEISTART, & CYM H. LOWELL, THE LAW OF SPORTS (West Group 2d ed. 1979).
- GLENN M. WONG, ESSENTIALS OF AMATEUR SPORTS LAW (2d ed. 1994).
- GLENN M. WONG & JESSE WILDE, THE SPORTS LAWYERS GUIDE TO LEGAL PERIODICALS (1994).
- RAY YASSER, ET AL., SPORTS LAW: CASES AND MATERIALS (Anderson Publishing 3d ed. 1997).

B. Sports and Entertainment Law Journals and Newsletters

- CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL
- COLUMBIA-VLA JOURNAL OF LAW AND THE ARTS
- COMM/ENT (HASTINGS COMMUNICATIONS AND ENTERTAINMENT LAW JOURNAL)
- DEPAUL-LCA JOURNAL OF ART AND ENTERTAINMENT LAW
- DETROIT COLLEGE OF LAW AT MICHIGAN STATE UNIV. ENTERTAINMENT AND SPORTS LAW JOURNAL
- ENTERTAINMENT AND SPORTS LAWYER ABA FORUM ON THE ENTERTAINMENT AND SPORTS INDUSTRIES
- FLORIDA ENTERTAINMENT, ART & SPORT LAW JOURNAL
- FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT LAW JOURNAL

- JOURNAL OF THE LEGAL ASPECTS OF SPORTS (Publication of SSLASPA)
- LAW JOURNAL EXTRA — SPORTS AND ENTERTAINMENT LAW (on line)
- LOYOLA OF LOS ANGELES ENTERTAINMENT LAW JOURNAL
- MARQUETTE SPORTS LAW REVIEW (formerly JOURNAL)
- ON THE RECORD (Newsletter of National Sports Law Institute)
- SETON HALL JOURNAL OF SPORT LAW
- SOUTHERN CALIFORNIA SPORTS & ENTERTAINMENT LAW JOURNAL
- SPORTS LAWYERS JOURNAL
- SSLASPA (SOCIETY FOR THE STUDY OF LEGAL ASPECTS OF SPORTS AND PHYSICAL ACTIVITY) NEWSLETTER
- THE SPORTS LAWYER (Newsletter of Sports Lawyers Association)
- UCLA ENTERTAINMENT LAW REVIEW
- UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW
- VILLANOVA SPORTS & ENTERTAINMENT LAW JOURNAL
- VIRGINIA JOURNAL OF SPORTS & THE LAW

C. Other Helpful Publications

- NCAA NEWS
- SPORTS BUSINESS DAILY
- STREET & SMITH'S SPORTS BUSINESS JOURNAL
- THE SPORTS MARKETPLACE