Texas Entertainment and Sports Law Journal

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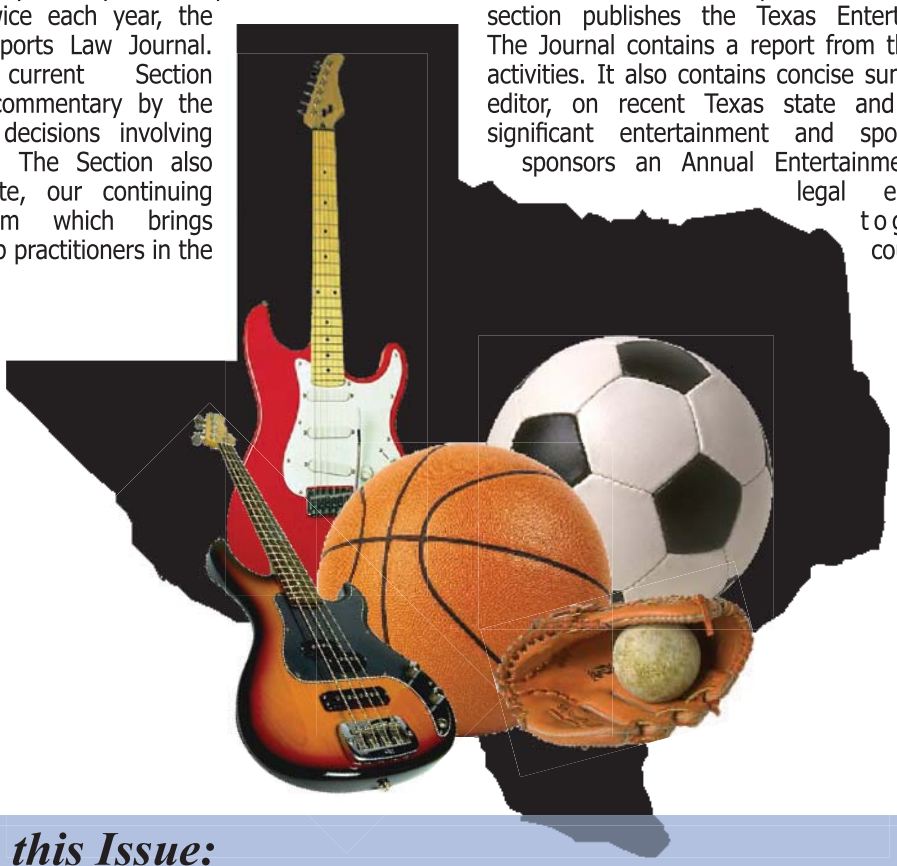
Welcome to the State Bar of Texas Entertainment and Sports Law Section Website!

The Entertainment and Sports Law Section is a voluntary organization within the State Bar of Texas and consists of more than 500 licensed attorneys throughout the state who practice entertainment and sports law. Section members represent a wide variety of clients including employers, employees and entertainment and sports organizations, in both the private and public sectors.

The purpose of the Entertainment and Sports Law Section is to promote and enhance the practice of law by all lawyers who specialize or have an interest in entertainment and sports law.

Twice each year, the section publishes the Texas Entertainment and Sports Law Journal. The Journal contains a report from the Chair on current Section activities. It also contains concise summaries, with commentary by the editor, on recent Texas state and federal court decisions involving significant entertainment and sports law issues. The Section also sponsors an Annual Entertainment Law Institute, our continuing legal education program which brings together the top practitioners in the country.



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CHAIRMAN'S REPORT

The Council has been working like the dickens on several projects, including the new web site, list serve, establishing working committees, the fall Entertainment Law Institute, and the Entertainment & Sports Law Journal.

Our web site is up and running. You can find us by going to the web site of our host, the South Texas College of Law, at www.stcl.edu and clicking on our link. The actual address is **stcl.edu/txeslj/index.htm**. The site now includes the current Journal, an archive of past journals, the Section's by-laws, a history of the Section, and links to entertainment and sports-related web sites. But there's still a lot to do. Our goal is also to include biographical information on our Council and section members, as well as their areas of practice, so that people looking for the best entertainment and sports law practitioners in Texas will know how to find you. When you get a chance, please look into our site and submit your information as soon as this service becomes available.

Thanks to Ken Pajak and Donna Rene Johnston, our Section now has its very own on-line list service. You can find us at **EandSLawSection@yahoogroups.com.** It's easy to join and you'll not only be able to receive information on the Section's meeting and activities but also share practice information with other members.

We're in the initial stages of planning our Entertainment Law Institute, which will take place in Austin in the fall. Under Mike Tolleson's leadership, last year's Institute was a terrific success and we're hoping to top that success this year, if that's possible. Please stay tuned for more information on the Institute.

In our fall, 2004 meeting, the Council set up new working committees, including a Membership Committee headed by Ken Pajak, a Legislative Committee under Tamera Bennett, and a By-Laws Committee chaired by Hal Gordon, in addition to the established Journal and Entertainment Law Institute committees. In this regard, Hal, Steven Ellinger, and David Garcia, Jr. are in the process of updating the by-laws. If you're interested in getting involved in the Section by joining one of our committees, please give me or any Council member a call.

I want to also thank Syl Jaime for once again putting the Journal together. Year after year, the Journal has served as an "open forum" for our members to exchange insights and useful information. With the Journal, Entertainment Law Institute, and now the web site and list serve, we're hopeful that the Section will continue to meet the needs of entertainment and sports law practitioners in Texas.

Finally, please plan on joining us during the State Bar Convention in Dallas on Friday, June 24. The Council meeting will be at 1:30 p.m. and the Section meeting immediately follows at 2:00 p.m. See ya there!

Un abrazo,

Yocel Alonso

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At last ... the Section has a Website!

Check it out at http://stcl.edu/txeslj/index.htm. Thanks to Section Chair Yocel Alonso and his helpers for finally getting our Section online. Should you have any comments or suggestions to improve the site please feel free to e-mail Yocel at Yocelaw@aol.com or the editor at srjaimelaw@pdq.net …

FOR THE LEGAL RECORD ...

Refs in on the Outcome …

Can the fans even trust the referees? On the international scene: Referee Robert Hoyzer admitted taking money to fix the outcome of at least three professional soccer games. Hoyzer implicated players and other referees in the Berlin-located Croatian run betting scandal. Hoyzer confessed to receiving at least $65,000 to fix the games. Berlin prosecutors suspected at least 25 people, including players and other referees, of fixing at least ten games.

And college basketball is not immune, as the West Coast Conference suspended three of its men's basketball officials for waiting four minutes after a 3-point basket was made to review and ultimately overturn the shot. Because officials are permitted to review video only on shots at the end of the half or end of a game to see if such shots beat the buzzer, referees Thomas Wood, Tom Sptiznagel and Chad Johnson each received a one game suspension by Jack Ditty the conference's coordinator of men's basketball officials ...

Coaches in the Courtroom …

Former University of Washington football coach Rick Neuheisel has been in front of twelve King County Superior Court jurors in Seattle, Washington, trying to convince them that the University wrongfully discharged him after four seasons with the Huskies. Former athletic director Barbara Hedges fired Neuheisel claiming that he lied about interviewing for a coaching job with the San Francisco 49ers and about participating in neighborhood NCAA men's basketball pools.

Neuheisel is relying on former compliance offer Dana Richardson's memo justifying his betting $6,400 in the 2002 and 2003 NCAA men's basketball pools in which he won $17,619. The former compliance director also was let go by the University in the wake of Neuheisel's fight with the University of Washington. While arguing that Neuheisel did lie to Hedges about the 49ers job but only to maintain his promise to keep the interview confidential, Neuheisel's lawyer Bob Sulkin said that taking part in the pools was O. K. even though "It turned out the memo was wrong." Sulkin stated. "Rather than stand by him and say, 'Sorry, our mistake,' they blamed Rick Neuheisel."

Also taking the witness stand, Memphis former head coach Rip Scherer was a defense witness for University of Alabama supporter Logan Young. Young is charged with bribery for allegedly paying $150,000 to the former high school coach for defensive lineman Albert Means. Means' former high school coach Lynn Lang plead guilty to racketeering and conspiracy charges and testified that Young bribed him with cash payments and that Scherer offered to get Lang's wife admitted to law school. Scherer denied the allegations. Lang also testified that eight other schools recruiting Means offered inducements. Georgia coach Jim Donnan took the stand and denied giving Lang any money. Lang testified that Donnan gave him $700 and that Alabama and Kentucky also offered cash. Labeling Lang a "liar" and despite bank records showing Lang making deposits of more than $47,000, defense lawyers also argued that Memphis public school policy did not prohibit a teacher from taking money to influence a student in selecting a college. School system's personnel manual now makes such conduct a violation of ethical standards...

Times are a Chang'N:

Transsexual golfers will be permitted to play in the British Open. Danish golfer Mianne Bagger was born a male but had a sex change, The Ladies Golf Union has adopted the new rule in time for the Ladies British Amateur, June 7-11 and the British Open on Jul 28-31. Bagger has played on the Ladies European Tour and is expected to enter the women's British Open. Unlike the Ladies Golf Union, the Ladies Professional Golf Association permits only women who are female at birth to play in its tournaments, However, the LPGA is considering adopting a rule change similar to the LGU because other golf associations, including the International Olympic Committee, permits transsexual golfers to participate in women's tournaments…

After Co-owner and CEO Sally Anthony fired Nashville Rhythm coach Ashley McElhiney during the third quarter of the ABA team's game versus the Kansas City Knights, team general manager Daniel Bucher announced that the coach had been reinstated. Anthony fired the first female to coach a men's professional basketball team for refusing to bench Rhythm player Matt Freije. The co-owner was escorted off the court by the team's security guards following Anthony walking onto the court and saying, "I'm your boss and [you] need to bench him." Ignoring Anthony and playing Freije, Anthony fired the coach on the spot and during the game. Anthony reportedly called McElhiney prior to the game and told her that she did not want Freije playing in the Rhythm's game against the Kansas City Knights. The Rhythm, with McElhiney as coach, had a record of 17-7 at the time and beat the Knights 110-99 despite the firing…

Does anyone care that the 2004-2005 NHL season was cancelled? Following the lead of baseball, basketball and football, NHL players and owners engaged in a labor dispute. However unlike MLB (which lost the 1994 World Series), NBA players lock-out of 1997 (leading to a 50 game season) and the 1982 NFL players' strike (canceling only 98 games) the hockey dispute resulted in the National Hockey League being the first major professional sport in North America to have entire season wiped away. Owners had locked out players for 154 days prior to Commissioner Gary Bettman announcing that the season was cancelled. Following the owners' directive, Bettman said "this is a sad regrettable day that all of us wish could have been avoided." NHL Players' Association executive director Bob Goodenow said, "I had hoped we would never see the NHL and their owners do the unthinkable and cancel an entire season." The NHL had lost an estimated $225 MM in 2003-2004 and $1.8 billion over the past ten years. The major sticking point was the salary cap. The union was willing to go no lower than $49 million per team and the owners would go no higher than $42.5 million. Despite all the concessions made by the parties over the 5 months of negotiation, the $6.5 million dollar difference would have cost the 30 teams an extra $195 million, which the owners were unwilling pay. The average salary in the league in 2003-2004 was $1.8 million; in comparison the league average salary in 1995 was $572,000…

The jury awarded $75 million in punitive damages to the family of a seven year-old girl paralyzed in a car wreck. The family was awarded $60 million in compensatory damages against truck driver Daniel Lanzaro and Aramark Corp, the New York Giants Stadium concessionaire that sold beer to Lanzaro at a football game. With a blood alcohol level more than twice the legal limit, Lanzaro was convicted of vehicular assault and is serving a five year prison sentence. Aramark was held liable for the punitive award following the jury finding that vendors sold beers to Lanzaro even though he was clearly drunk and that Aramark "fostered an atmosphere in which intoxicated patrons were served." Charges against the National Football League, the Giants and the Sports Exposition Authority were dismissed. Brian Harris, a lawyer for Aramark, suggested during trial "… that ventdors were not irresponsible because Lanzaro is an admitted alcoholic who did not show signs of intoxication or was able to fool the servers." ….

The Journal can be accessed on-line at
The Entertainment and Sports Law Section's website
http://stcl.edu/txeslj/index.htm.

Sylvester R. Jaime—Editor

CHALLENGING THE NFL'S ELIGIBILITY RULE: CLARETT TACKLED FOR A LOSS

Leni Dylan Battaglia

Ms. Battaglia is a 2005 J. D. Candidate at the University of Connecticut School of Law. Ms. Batagglia is a graduate of Old Dominion University honors college, where she graduated with a B.A. in International Studies. The author wishes to thank Professor Lewis Kurlantzick for his comments and assistance during the writing of her note.

I. Introduction

At the beginning of the 2002-2003 Division I-A football season, Maurice Clarett started at running back for perennial powerhouse Ohio State University (OSU), the first time a freshman had started at the position for OSU since 1943. Nearly five months later, Clarett dove into the end-zone on a five-yard run, providing the winning score in a double overtime victory over Miami to give Ohio State its first national title in thirty-four years. During the 2002 season, Clarett rushed for 1,237 yards and scored eighteen touchdowns. He was voted the best running back in college football by the Sporting News, named to the first-team All-Big Ten, and named Big Ten Freshman of the Year. Based on projected performance during the upcoming year, Clarett was named to several 2003 preseason All-American teams. The 2003 season, however, ran away from Maurice Clarett as he never set foot on any collegiate playing field.

It has been said of Clarett's position that, "running back, after all, is just a Faustian bargain: The devil only gives you so many years before he demands your knee cartilage."[1] Perhaps that is why Clarett decided to challenge the National Football League eligibility rule that precludes players from joining the NFL's draft until three years removed from high school.[2] Under the eligibility rule, Maurice Clarett would be ineligible to enter the NFL draft until after the conclusion of the 2004 season. Clarett believes that the eligibility rule unjustifiably keeps him from realizing his dream of playing in the NFL and, more importantly, impedes his ability to profit from his talent.[3] On September 23, 2003, after months of meeting with NFL executives, Clarett filed suit against the League in the Southern District of New York challenging the legality of the eligibility rule.[4] The suit contends that the eligibility rule constitutes a group boycott and a concerted refusal to deal in violation of the federal antitrust laws.[5]

Mike Martz, head coach of the NFL's St. Louis Rams, stated, "I'd rather that issue go away. I want it to be the way it's always been . . . . We all came up through college . . . . I think ultimately it will destroy college football."[6] Martz's opinion is one that is shared by both players and coaches in the NFL.[7] The NFL contends that younger players may be harmed if the League's eligibility rule were not in place.[8] The League has stated that younger players are not physically ready to play professional football and may harm themselves by over-training or resorting to steroid use.[9] League attorney Gregg Levy stated, "From the NFL's perspective, this was never really about Maurice Clarett. It was about a rule that has served the NFL well, served fans well and served players well for many years."[10]

This article's primary purpose is to examine whether the NFL's draft eligibility rules should be immune from antitrust inquiry as protected by the non-statutory labor exemption.[11] The NFL's draft eligibility rule has, arguably, been made part of the collective bargaining contract between the owners and the players' union. In order to accommodate goals which are central to national labor policy, the labor exemption to the antitrust laws accords immunity to many collectively bargained terms which otherwise would violate the antitrust laws. If the exemption is applicable, no further inquiry into the anticompetitive restraints imposed by the rule is necessary. If, however, the exemption is not applicable, the eligibility rule would be subject to antitrust scrutiny. Since the eligibility rule would not likely survive such antitrust scrutiny, this note will concentrate on whether the labor exemption should be applicable or not.[12]

Part II of this note will provide an overview of the players and motivations involved in this historical attempt to challenge the NFL's eligibility rule, providing background on Clarett, the NFL, the other major professional sports leagues, and the concept of developmental leagues. The development of the non-statutory labor exemption from antitrust law will be discussed in Part III, beginning with congressional enactment and continuing to present day judicial application. Part IV details the procedure of the case and analyzes the strengths and shortcomings of the arguments made. Finally, Part V concludes that the Supreme Court's precedent regarding application of the labor exemption should foreclose any challenges against the present NFL eligibility rule.

II. Background: Challenging the Eligibility Rule

The non-statutory labor exemption to the antitrust laws has been a significant issue in virtually all antitrust challenges to the player restraint systems of the last three decades.[13] More importantly, the labor exemption has been invoked by sports leagues to successfully defend attack by players on player restraint schemes otherwise violative of the antitrust laws.[14] Commentators have stated that exploration of the labor exemption in the present situation is critical because, if the exemption is available to the league here, inquiry into the potentially severe anticompetitive economic effects of the restraint or harm suffered by excluded players is avoided.[15] Conversely, if the anticompetitive effects of the rule are taken into account, a ruling against the legality of the NFL's eligibility rule could have drastic repercussions for practices addressing the minimum age of players in all professional sports leagues. Thus difficult questions about the nature and scope of the doctrine are implicated and in-depth analysis of the exemption is necessary for full appreciation of the case.

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a. Clarett Becomes First to Challenge Eligibility Rule

i. Legal and Academic Troubles

Clarett's NFL eligibility challenge would not have been brought had Clarett not foreclosed his potentially promising collegiate career through academic and legal misconduct. On July 12, 2003, the New York Times quoted a teaching assistant at Ohio State who said Clarett received "preferential treatment" in passing a class.[16] Later that month, Clarett's problems continued as the NCAA began investigating Clarett's claim that more than $10,000 in personal property was stolen from a car he had borrowed from a local dealership. On September 9, 2003, Clarett was charged with misdemeanor falsification of a police report he made regarding the alleged theft.[17] On September 10, 2003, OSU Academic Director Andy Geiger announced Clarett's suspension for the 2003-2004 football season, stating that Clarett had received special benefits worth thousands of dollars from a family friend and repeatedly mislead investigators. Banned from college football, and unable to enter the NFL draft because he was not yet three seasons removed from high school, Clarett brought suit against the NFL. Clarett's complaint alleges that the eligibility rule constitutes an illegal group boycott and refusal to deal in violation of the Sherman Act. Clarett further contends that the eligibility rule keeps him from pursuing and profiting from his chosen career.

ii. Ability to Profit

Clarett's concern that the League eligibility rule impedes his ability to profit from his talent is not unfounded. Running backs arguably endure the most physical abuse of any position and retire earlier than players at other positions. On July 25, 2004, Ricky Williams, starting running back for the Miami Dolphins, former Heismen Trophy winner, and all-time collegiate rushing leader, retired at the peak of his career.[18] Williams did so after only five years in the NFL.[19] His agent stated that the physical and emotional toll of being the NFL's leading rusher for two consecutive seasons caused him to retire.[20] Williams was not the first star running back to call it quits early into his career, although at age 27 he was one of the youngest. Other running backs who exited the game at the peak of their careers, such as Robert Smith of the Minnesota Vikings, made it clear that fear of injury at their position lead to the early departure.[21] Smith retired following one of his best years in which he lead the National Football Conference in rushing and was selected to his second Pro Bowl.[22] Smith was only 28 years old and had played only eight years in the NFL before his early departure from the game. Ricky Williams conferred with Smith before he made his decision to depart early as well.[23] Williams also did not want to end his career by limping out of the NFL the way his role model Earl Campbell did.[24] Campbell, an NFL Hall of Famer and fellow former University of Texas running back, also retired at age 27.[25]

iii. An Unsuspecting Friend

The catalyst for Maurice Clarett's challenge was not solely his tainted background, but also the legal advice of Michigan State School of Law Professor Robert A. McCormick. Following the investigations by OSU and the NCAA, but before Clarett's eventual suspension, McCormick published an open letter to Clarett in the New York Times.[26] Directing his comments at Clarett, McCormick attacked the League's purported paternal interests for the eligibility rule and suggested instead unreasonable self-serving and illegal motivations.[27] McCormick stated, "[t]he Supreme Court has made it abundantly clear [ ] that although business and unions, like the NFL and the players association, may restrain themselves, they cannot primarily restrain others, like you, who are not part of their relationship . . . . In short, if you challenge the NFL's agreement not to draft you, you would have an excellent chance of ultimately prevailing."[28] McCormick later joined Clarett's legal team and entered an appearance on his behalf in each of the procedural stages of the case.

b. The NFL and the Eligibility Rule

i. Inclusion of Eligibility Rule in CBA

The terms and conditions of player employment in the NFL are governed by the CBA originally entered into on May 6, 1993 between the NFL Management Council and the NFLPA The NFL contends that the CBA incorporates by reference certain provisions of the NFL Constitution and Bylaws, including the provision governing draft eligibility rules. Article III of the CBA provides in relevant part that the NFLPA waives "all rights to bargain" over "provisions of the NFL Constitution and Bylaws."[29] Article IV provides in relevant part that:

Neither the NFLPA nor any of its members, agents acting on its behalf, nor any members of its bargaining unit will sue, or support financially or administratively any suit against, the NFL or any Club relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered (except any provisions relating to the 1982 CBA, which have been superceded by this Agreement.)[30]

The same day that the CBA was signed, the respective counsels for the NFL and NFLPA executed a letter identifying the provisions of the NFL Constitution and Bylaws referred to in Articles III and IV above, including the eligibility rule. Clarett argues, that the above referenced letter is not part of the CBA, and is not the subject of arms-length negotiations since it was not originally included. Arguing that the eligibility rule was not included in the CBA is, however, without merit. The eligibility rule was clearly included in the Bylaws as an amendment executed on the same day of the CBA. Had the CBA contained no reference to the Bylaws, then Clarett could sucessfully argue that the eligibility rule was not included in the CBA and not protected by the labor exemption, but that is clearly not the case.

Although the NFL contends that the eligibility rule is already included in the CBA, it has taken efforts to make sure there is absolutely no confusion in the future. In March of 2004, it was reported that the NFL and NFLPA were involved in discussions to insert language in the current CBA that would explicitly require all draft-eligible players to be three years removed from their high school graduation.[31] Tulane Law Professor Gary Roberts indicated that the inclusion of such language "would not

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be enough to prevent lawsuits" in the future, but a player "would have a much more difficult time winning a case."[32]

ii. Purpose of the Rule: Promoting Legitimate Objectives?

The NFL's purported legitimate purposes of the eligibility rule center around the paternal desire to protect young athletes from themselves and from older, more physically mature players. The NFL's first eligibility rule, also known as "The Grange Rule," was adopted in response to collegiate star running-back Harold "Red" Grange who stunned the sports world in 1925 by leaving college early for the NFL.[33] Grange's professional career with the Chicago Bears was decimated after suffering a crippling knee injury during his second season in the league.[34] Since then the eligibility rule has been modified, most significantly in 1990 when the four-year limit was replaced by a three year one.[35] But its purpose remains the same: to prevent youngsters from chasing false hopes of quick riches before their minds and bodies are mature enough to survive the violent sport of professional football.[36]

As stated in its brief, the NFL's specific, legitimate objectives for enacting the rule include: (1) protecting younger and less experienced players, those less physically and psychologically mature, from the heightened risks of injury in NFL games; (2) protecting the NFL's entertainment product from adverse consequences associated with such injuries; (3) protecting the NFL clubs from the costs and potential liability of such injuries; (4) and protecting from injury and self-abuse adolescents who would over-train and use steroids in the misguided hope of developing prematurely the strength and speed required to play in the NFL.[37]

If physical toughness can be learned through academic instruction, it appears Clarett may be at a disadvantage: at the height of his legal troubles, OSU's attorney stated that Clarett was also flunking a course in the Principles of Physical Conditioning.[38] Yet, in his first full-scale audition for NFL scouts, Clarett put forth a solid performance that addressed some of the lingering questions about his maturity, physical conditioning, and overall quickness in football-related drills.[39] Cincinnati Bengals head coach Marvin Lewis stated, "He is a good football player and he demonstrated that." More importantly, the general feeling was that Clarett was more focused than some scouts anticipated and his performance showed that he understood the significance of satisfying some of the doubts surrounding him.[40]

Should Clarett be allowed to enter the League, his conditioning will be important beyond his own personal health—it would likely have great influence on the decisions of high school students and NFL scouts in years to come. "Certainly there have been examples of high school players opting for the NBA draft and then going unselected. Such misjudgments haven't stopped others from trying to take the same risky route. But after all the attention Clarett has received, for him to succeed in the courts and then prove a bust will send a pretty strong message."[41]

Yet, the League does routinely draft athletes of the same age as Clarett: "the [ ] nominal rule is not the real operative rule."[42] Following the 2004 NFL Draft, Clarett's attorney, Alan Milstein filed a supplemental brief with the Second Circuit, contending that the League violated the spirit of its draft eligibility rule by drafting four 20 year-olds in the first round—Larry Fitzgerald, DeAngelo Hall, Reggie Williams and Ahmad Carroll.[43] The NFL all-time leading rusher, Emmit Smith, was 20 years old when he was drafted. Smith is shorter than Clarett and has weighed less than Clarett throughout his career.[44] Clarett is taller and heavier than such other NFL running back legends as Walter Payton and Barry Sanders.[45] Thus it appears that an eligibility rule in terms of age, rather than years removed from high school, would be more in line with the NFL's asserted paternal interests.[46] Accordingly, the League's eligibility rule would not likely survive antitrust scrutiny because of the existence of a less restrictive alternative that achieves the same legitimate objectives of the challenged restraint.[47]

The NFL also has not consistently enforced the eligibility rule by making exceptions for certain players throughout its history. "Economic forces in the form of individual teams' interest in particular quality players, combined with the threat of lawsuits, have lead periodically to the grant of ad hoc exemptions."[48] For example, in 1964, Andy Livingston, a nineteen-year-old running back, signed a contract with the Chicago Bears after only one season removed from high school.[49] Thus, while the NFL has compelling reasons for imposing an eligibility rule, its inconsistent application has diminished the rule's legitimacy.

c. Other Leagues and Eligibility

The NFL is the only major sports organization that prohibits players from entering its league until a prescribed period after high school graduation. The other major sports leagues—the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL)—have no such restrictions. The Women's National Basketball Association (WNBA), however, has an age restriction that requires athletes to be at least twenty-two years old before they are eligible for play. Other smaller leagues, such as the Ontario Hockey League (OHL), do have prescribed post high school eligibility rules as well.[50] In November 2002, a federal court used the OHL's eligibility rule to enjoin Dallas Stars' draft pick Anthony Aquino from playing for the Oshawa Generals.[51]

Whether or not the NFL's eligibility rule is protected by the non-statutory labor exemption has significant implications for these other leagues as their less stringent eligibility rules would then come under antitrust scrutiny. The eventual outcome if eligibility rules are not protected by the labor exemption, players could potentially enter the draft even before graduating from high school. While the purported objective of protecting young players from physical harm may be more evident, and thus more legitimate, in the punishing sport of football, that line of argument is much more ambiguous in sports such as baseball and basketball. Not surprisingly then, the NHL and the NBA filed amicus briefs in support of the NFL's position.

The NBA only requires that a player's high school class have graduated before he enter the draft.[52] During the 2004 NBA Draft, a record thirteen (13) high school players made themselves eligible[53] and a record number of them, eight (8), were taken in the first round.[54] In addition, thirty-eight (38) international players

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aged eighteen and nineteen years old joined the draft.[55] This rush of young players has many of the NBA coaches and management distraught. Larry Brown, coach of the 2004 Champion Detroit Pistons, stated, "I wish we had an age limit. I get sick to my stomach."[56] Commissioner David Stern has followed the Clarett case closely and is currently working on imposing an age-limit in the NBA.[57] The NBA Players Association has fought against such an eligibility clause. Its position, similar to Clarett's, is that an age limit would interfere with their ability to compete.[58] Specifically, entering the league at an early age allows players the opportunity to sign as many as two maximum-salary, long-term contacts.[59] The League's Collective Bargaining Agreement expires after next season and the inclusion of an age limit is sure to be a point of contention.

Even if Clarett wins his case, it is unclear that abandonment of the three-year eligibility rule would change football as much as the free market in youthful talent has transformed pro and college basketball.[60] The sport of football is protected from drastic change because there are many more players on a pro football team than there are on a pro basketball team.[61] Thus the impact of any single new player is unlikely to significantly alter a team's success.[62]

d. Developmental Leagues

The United States has embraced a not-wholly-logical notion that if a young athlete exhibits certain unusual physical skills and wants to secure refinement of his talent, he must also be both motivated and qualified to go to college.[63] If this athlete is a young man who wants to secure refinement of his talent in football or basketball, he must also be academically inclined if he desires to secure further high level pre-professional training.[64] Otherwise, without college athletics, there are no other viable options as football and basketball are the only two major professional sports without developmental leagues.

Yet, in basketball, players are permitted to enter the league directly after high school. These players then develop their professional skills in the NBA, if at all. Commentators, NBA coaches, and former players have repeatedly criticized the younger NBA players as lacking sufficient fundamental knowledge of the game.[65] Following Team USA's recent loss to Puerto Rico in the Olympics, the increased youth of NBA players has been cited as the reason they have fallen so far behind internationally. Former Providence College Coach Dave Gavitt stated, "That's the hard thing, many of these guys played just one year of college ball, or none at all. In terms of playing games where the ball moves, where players move—they're not used to that."[66]

By forcing prospective players to wait until three seasons have elapsed before becoming eligible for its draft, the NFL is able to maintain a free developmental league for its players.[67] College football acts as a minor league farm system for which the NFL incurs no expense.[68] Major League Baseball teams each spend an average of nine million dollars annually to maintain their minor league system.[69] The only costs incurred by NFL teams are for their scouts who are usually granted ready access by the NCAA and NCAA schools. The NFL also bears no financial risk in players—if a players suffers an injury in college, or does not reach expectations, the NFL loses nothing.

The NCAA also derives a substantial benefit from the eligibility rule in this sense. Since there are no equal or comparable leagues for potential NFL players to play in before they become eligible, the NCAA is virtually guaranteed the best football athletes in the country for three years. While serving their time in the NCAA, players work for nothing. At the same time, these players generate millions of dollars for the colleges without their having to incur the substantial expense of player salaries.

Under current NCAA rules, players are not only foreclosed from earning a salary for three season, but they are also prevented from reaping other financial rewards associated with professional athleticism, such as endorsement and appearance income. These figures are quite substantial, especially for new entrants into the professional leagues.

If the eligibility rule is struck down, it is quite possible that the NFL may have to create its own development system. NCAA President Myles Brand stated, "It may be time for those two sports to provide another option than intercollegiate athletics as the route for young men whose primary interest is turning professional as quickly as possible."[70] National Football League agent and former Jacksonville Jaguars official, Michael Huyghue, stated, "The NFL will not draft on potential. If you look at the size of rosters today, they need rookie players who can actually play. Stashing players isn't an avenue you can do today. NFL rosters are not designed to be a developmental option."[71] The annual college draft has never been exact in evaluating players, but when underclassmen are added to the mix, it becomes more of a crapshoot. If the NFL were forced to accept younger players into the draft, the League may find itself forced to create a farm system. Since the NFL's present eligibility rule will likely survive any legal challenges, providing avenues for training talented high school football players other than the NCAA must be approached by other means.

e. National College Athletic Association

On April 12, 2004, the NCAA joined with the NFL also filed an amicus brief in support of the NFL's appeal. Brand stated that the NCAA was supporting the NFL not because of its economic interests, but rather because elimination of the eligibility rule would lead more college athletes to make poor decisions. Brand had earlier shared his disappointment with the district court's ruling, saying, "From an educational perspective, I am very concerned with this decision. Those who stand the most to lose educationally if the decision is upheld are the football student-athletes who leave without their degrees."[72] Brand made similar remarks in April, "If not reversed, this decision is likely to unrealistically raise expectations and hopes that a professional football career awaits graduation from high school and that education can therefore be abandoned. The result could be a growing group of young men who end with neither a professional football career nor an education that will support their life plans."[73]

The NCAA is also concerned that there would be no way to effectively recruit potential players without an eligibility limitation. College recruits conceivably could decide to enter the draft even after signing a National Letter of Intent, thus tossing a wrench into a school's scholarship count.[74] "When you're in the business of working to recruit and sign someone on a certain date and know those decisions could be for naught, [eliminating the eligibility rule] makes a recruiter's job much more difficult," said Chris Plonsky, chair of the NCAA Division I Management Council.[75] Plonsky said the ruling would heighten the attention that athletics administrators give to counseling prospective student athletes. "You hope that we can continue to provide good counsel and to ensure that if a youngster does make that decision to go pro that they're doing it with full knowledge and preparation as to what it really means to step across that line from playing on behalf of their institution to literally playing for pay.[76]

If Clarett wins his case, the potential damage to the NCAA appears significant: the creation of developmental leagues may

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then be imminent and the NCAA would lose millions of dollars. Still, the potential damage to the NCAA could be mitigated if it were to relax its rules regarding a players ability to profit while in college.[77] For instance, the NCAA could relax its rule eliminating the college eligibility of any player who takes steps to turn pro, such as hiring an agent.[78] Also, the NCAA could allow collegiate football players to sign endorsement deals with corporate sponsors, thus permitting them to profit from their ability.

III. The Labor Exemption from Antitrust Law

a. Congressional Evolution of the Labor Exemption

The labor exemption from federal antitrust laws seeks to reconcile the interests of economic competition and healthy labor relations by shielding unions and certain union-employer practices from scrutiny that usually attends potential restraints on trade.[79] Congress created the federal antitrust laws, embodied in the Sherman Act of 1890, to further economic competition.[80] As interpreted by the Supreme Court, the Act prohibits unreasonable restraints of trade, or ones that suppress or destroy competition rather than promote it.[81] The original Sherman Act contained no language specifically exempting union activities, which are by their very nature combinations of individuals seeking to restrain an employer's ability to negotiate.[82] Thus the Act considered most union activities unlawful.[83] In response, union and employee groups vigorously fought against the application of the Sherman Act to enjoin conventional union weapons such as strikes and boycotts.[84] Congress reacted by passing two important pieces of legislation—the Clayton Act[85] and the Norris-LaGuardia Act.[86]

Together, the Clayton Act and the Norris-LaGuardia Act create the statutory labor exemption. Contemporary application of the statutes is limited, however, because the acts were created to give immunity to union actions, such as strikes and boycotts, that are less contested in today's labor and employment arena.[87] Moreover, because the acts focus on the adversarial nature of the labor-management relationship, they do not adequately address what has become a keystone in sports employment issues, the collective bargaining agreement.[88] Thus, the courts had been left to resolve many difficult issues when applying the Acts.

Congress created more guidance for the courts in the 1930's, and established a federal policy of promoting the collective bargaining process, through passage of the National Labor Relations Act[89] (NLRA) and the Labor Management Relations Act[90] (LMRA). Congress sought to protect the right of employees to organize and bargain collectively, and thus safeguard the free flow of commerce, by removing sources of industrial strife and unrest.[91] Although Congress failed to specifically outline how the Acts were to mesh with the federal antitrust laws, the courts have recognized that the antitrust laws cannot be applied literally to collective bargaining agreements if the policies of the NLRA and LMRA are to be realized.[92] The courts have accommodated the conflicting policies of the federal labor and antitrust laws—promoting economic competition and healthy labor relations—through creation of the "nonstatutory labor exemption."

b. Judicial Application of Labor Exemption

The Supreme Court has limited the non-statutory labor exemption to parties within the bargaining relationship and matters of fundamental employee interest, such as wages, hours, and terms and conditions of employment.[93] Within these parameters, however, the breadth of the exemption is not well-defined as the exemption—which accommodates the competing concerns of collective bargaining and free competition—is essentially based upon public policy.[94] And since Congress has offered no precise guidance, a particular jurist's political or economic philosophy can greatly dictate the decision.[95] Thus the exemption has been inconsistently applied. This inconsistent application is especially true in the sports context where player restraints are not imposed unilaterally by owners, but are instead part of a collective bargaining agreement between owners and players.[96]

The standard test used to decide labor exemption issues was enumerated by the Eighth Circuit in *Mackey v. NFL*[97] The court laid out a three-pronged test for determining whether the exemption applied: (1) the restraint must primarily affect only parties to the collective bargaining agreement; (2) the agreement must concern a mandatory subject of collective bargaining; and (3) the agreement must be a product of bona fide arm's length negotiation.[98]

Robert McCormick has argued, as early as 1984,[99] that the *Mackey* test is the "standard" and "accepted" test for applying the labor exemption to player restraints in professional sports.[100] Contrary to McCormick's assertion, the *Mackey* test is only primarily relied upon in the Eighth Circuit and has not been accepted as the standard in either the Supreme Court or the Second Circuit in the sports context. Furthermore, the *Mackey* test, he argues, is "the logical starting point for discussion of the application of the labor exemption to the NFL's draft."[101] While it may be a starting point, due to its broad interpretation even within the Eighth Circuit, it would not be definitive even if Clarett had brought his challenge in the Eighth Circuit.

McCormick concludes that the draft eligibility rule clearly fails the first two prongs of the *Mackey* test—the effect of the restraint on trade does not fall primarily on the parties to the relationship but on college football players excluded from the league, and player eligibility is not a mandatory subject of collective bargaining as defined by statute or judicial precedent.[102] In his 1984 article, McCormick concedes that the eligibility rule may, under certain circumstances, be actually bargained for and thus meet the third prong of the test.[103] But, since the test is cumulative, and all three prongs must be met, the fact that the restraint was bargained for would not justify the exemption. However, even McCormick has conceded that application of the *Mackey* test only creates a broad guideline that makes a mechanical application of the test improper.[104] Thus, McCormick's application of the test rests at least in part on his own political and economic orientation.

IV. Analysis

a. Procedure

On February 5, 2004, District Court Judge Shira A. Scheindlin ruled that the League's eligibility rule was not protected by the non-statutory labor exemption.[105] Judge Scheindlin held that the rule "must be sacked" due to anticompetitive effect in violation of the Sherman Act.[106] Judge Scheindlin noted that the case raised serious questions between the competing policies of labor law and antitrust law, ultimately forcing the court to decide whether "Clarett's right to compete for a job in the NFL . . . trump[s] the NFL's right to categorically exclude a class of players that the league has decided is not yet ready to play."[107] In striking down the eligibility rule, the court rejected the NFL's three primary arguments.

First, the League contended that because the rule is the result of collective bargaining between the NFL and the NFLPA, it is immune from antitrust attack under the non-statutory labor exemption.[108] Judge Scheindlin rejected this contention, finding

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that none of the key elements of the exemption were met.[109] Specifically that the eligibility rule "does not concern a mandatory subject of collective bargaining, governs only non-employees, and did not clearly result from arm's length negotiations."[110] Second, the NFL contended that Clarett lacked standing to bring suit.[111] The court disagreed, finding that Clarett has standing "because his injury flows from a policy that excludes all players in his position from selling their services to the only viable buyer—the NFL"[112] Finally, the NFL purported that the eligibility rule could, on its face, withstand antitrust scrutiny.[113] Judge Scheindlin again disagreed, and found the rule violative of the Sherman Act as Clarett failed to illustrate how the eligibility rule promoted competition.[114]

Clarett was then barred from entering the 2004 N.F.L draft by the Second Circuit Court of Appeals, also putting a hold on the Judge Scheindlin's decision. [115] The Second Circuit stated that a stay of the earlier ruling was necessary to safeguard the NFL from harm and to ensure thorough review.[116] The court said that any potential harm to Clarett from the stay is "countermanded" by factors weighing the NFL's favor.[117] Furthermore, a potential Supplemental NFL Draft, if necessary, would mitigate any harm to him should he ultimately prevail.[118] The court also noted that the NFL "has demonstrated a likelihood of success on the merits."[119]

Following the Second Circuit's hold, Clarett filed separate emergency appeals with Justice Ruth Bader Ginsberg and Justice John Paul Stevens of the Supreme Court. Both appeals, however, were rejected.[120] Without ruling on the merits, the justices refused to reconsider the Second Circuit's decision since the NFL agreed to hold a supplemental draft should Clarett prevail in his lawsuit.[121] Alan Milstein, attorney for Clarett, then stated that he was dropping all legal pursuit of clearing Clarett for the draft.[122]

On May 24, 2004, approximately one month after issuing a stay, the Second Circuit Court of Appeals overruled the District Court's decision.[123] A three judge panel[124] found that the NFL's draft eligibility rule should be exempt from antitrust scrutiny because it resulted from collective bargaining between the NFL and the NFLPA.[125] The judges found that federal labor law favors and governs the collective bargaining process, and thus precludes application of the antitrust laws to its eligibility rules.[126] The judges found, in accordance with precedent established in by the Supreme Court and Second Circuit,[127] that the conditions under which a prospective player, like Clarett, will be considered for employment constitute a permissible and mandatory subject of bargaining.[128]

b. Reliance on the Mackey Test

Clarett's argument that the non-statutory labor exemption does not apply to the NFL draft eligibility rule rests on the *Mackey* test,[129] moreover, his interpretation of *Mackey's* application.[130] The crux his their argument relies upon application of the third prong of *Mackey*: that the non-statutory labor exemption cannot, as a matter of law, afford the eligibility rule immunity from antitrust scrutiny because the rule is not the product of arm's length bargaining.[131] According to Clarett, the eligibility rule does not appear in the C.B.A, and is not incorporated by reference into the agreement.[132] Clarett dismisses as a "side letter" the NFL-NFLPA amendment to the CBA in which the NFLPA agreed not to sue the NFL over all issues addressed in the Bylaws.[133] Moreover, the NFLPA could not have considered or approved the eligibility rule as it was implemented nearly fifty years ago when the NFLPA was not in existence.[134] Thus, it is this contention that there could not have been any *actual bargaining.*

Clarett further argues that the rule fails under the first-prong of the *Mackey* test, as it is not a mandatory subject of bargaining within the meaning of the NLRA[135] The NLRA obligates employers to bargain collectively over "wages, hours, and other terms and conditions of employment" with their employees' representative, which has been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . . ."[136] As observed by the Supreme Court in *Local Union No. 189 v. Jewel Tea Co.*, "employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."[137] Under Clarett's literal application, the eligibility rule cannot be deemed a mandatory subject of bargaining as it does not concern wages or hours.[138] Furthermore, he argues that the eligibility rule does not concern working conditions or other terms of employment since Clarett is not currently employed by NFL teams and the NFLPA does not, and cannot, represent him.[139]

Finally, Clarett argues that the eligibility rule fails to meet the second prong of the Mackey test since it primarily affects only outsiders to the NFL-NFLPA collective bargaining relationship. Since the NFL eligibility rule precludes prospective players from entering the NFL draft pool, the primary effect of the rule falls on players like Clarett who are complete strangers to the NFL-NFLPA CBA. Clarett thus contends that the eligibility rule fails all three prongs of the Mackey test, although it only must fail one test for the restraint to be illegal.

c. Failure to Address Rulings Subsequent to *Mackey*

Clarett's arguments, however, fail to address the important fact that substantial judicial attention has been given to the non-statutory labor exemption since the Mackey test was first articulated in 1976. The most important case is the Supreme Court's 1996 decision in *Brown v. Pro-Football, Inc.*[140] In *Brown*, the plaintiffs challenged an NFL rule that fixed the salaries of practice squad players. That agreement, similar to the draft eligibility rule, had not been specifically addressed in the collective bargaining agreement between the NFL and the NFLPA.[141] Nonetheless, because the salary restricting agreement had been implemented *in the context* of a collective bargaining relationship, the Supreme Court held that the restraint was exempt from antitrust challenge.[142] Also of note, the Court found the challenged agreement to concern a mandatory subject of bargaining and to concern parties to the collective-bargaining relationship.[143]

Clarett's argument, which relies exclusively on the Eighth Circuit's holding in *Mackey*, is also severely undermined by several cases decided by the Second Circuit involving alleged group boycotts by professional sports leagues. These cases suggest that the Second Circuit will not follow *Mackey* when applying the labor exemption in the sports context.[144] In *Wood v. NBA*, the Second Circuit held that the non-statutory labor agreement barred an antitrust challenge to the NBA's salary cap and college draft. In *Wood*, the plaintiff was a college player, just as Clarett was, hoping to join the league while still precluded under the league's eligibility rules.[145] The Second Circuit recognized that it is not unique to professional sports leagues that "newcomers in the industrial context routinely find themselves disadvantaged vis-à-vis those already hired."[146] In so finding, the court expressly rejected plaintiff's argument, also made by Clarett, that the labor exemption was inapplicable because it affected employees outside the bargaining unit.[147] Although, unlike Clarett, Wood was drafted by the Philadelphia 76ers, the case is controlling because the collective bargaining agreement affected Wood whether or not he had been drafted—he was always subject to the agreement.

Moreover, at the district court level, Wood, like Clarett, placed emphasis on the fact that he was not within the bargaining unit

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represented by the NBA Players Association.[148] Judge Carter explicitly rejected this argument, stating, "At the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its terms."[149] He remarked, "To adopt plaintiff's principle would turn federal labor policy on its head."[150] After recognizing that prospective employees are routinely disadvantaged vis-à-vis those already employed in the labor market, the Second Circuit affirmed the district court's ruling.[151] The Second Circuit found that established practices, such as seniority clauses, and the language of the NLRA itself, recognize that collective bargaining agreements may include those outside of the bargaining unit.[152] The Second Circuit's ruling is consistent with the decisions of other courts to address the issue of whether prospective players are bound by the terms of a collective bargaining unit.[153]

In *NBA v. Williams*, NBA players challenged the NBA league rules regarding the college draft and salary cap.[154] The plaintiffs in *Williams* characterized the NBA rules as naked restraints between competitors that prevented competition, fixed prices, and suppressed salaries.[155] In a unanimous opinion, the Second Circuit held that the draft and salary cap were protected by the non-statutory labor exemption and could not be challenged under the antitrust laws as the rules were established in the context of a collective bargaining relationship.[156] Thus the Second Circuit adopted the Supreme Court's broad definition of a collective bargaining agreement to include everything agreed upon in the context of a collective bargaining process. The Second Circuit's ruling in *Williams* clearly contradicts Judge Scheindlin's overly literal interpretation of a collective bargaining relationship at the district court level.[157]

In *Caldwell v. A.B.A.*, the plaintiff challenged an alleged group boycott among members of the American Basketball Association not to hire him.[158] The Second Circuit stated that since a collective bargaining relationship existed, the conduct alleged by plaintiff could not state a claim under the Sherman Act.[159] Quoting *Wood*, the court stated that to allow a cause of action would "subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act."[160] The Court concluded that a restraint involving a mandatory subject of bargaining under the NLRA—wages, hours, and working conditions[161]–although significantly and adversely affecting competition, was exempt from the Sherman Act because it was of immediate and direct concern to the union members.[162] Yet, the court's ruling was limited: if the employees' interests were only minimal or indirectly related to the restraint, the protection would be withdrawn.[163]

The Supreme Court's decision in *Brown*, and earlier elucidations of the labor exemption by the Second Circuit in *Wood*, *Williams*, and *Caldwell* all suggest that the alleged group boycott of the NFL is protected by the non-statutory labor exemption. All of these cases found that conduct included within the collective bargaining relationship falls under the congressional and judicial policy that created the exemption. In addition, the court in *Wood* held that the player drafts are classic collectively bargained limitations on the hiring of prospective new employees, which are commonplace in the industrial context,[164] and constitute a mandatory subject of bargaining appropriate for application of the labor exemption.[165]

IV. Conclusion: Clarett Sidelined

If the Second Circuit's decision is upheld, it would keep Clarett out of the league until after the 2004 season when he would be three NFL season removed from high school. Since the Supplemental Draft has already passed, there is almost no chance of Clarett making the NFL before then.[166] Even so, Alan Milstein stated that he would probably file a motion to have the case heard by the entire 12-judge panel of the Second Circuit.[167] Should Clarett lose that battle, he could eventually appeal to the Supreme Court. Since the Supreme Court has arguably never articulated the exact parameters of the non-statutory labor exemption in the sports context,[168] and its application varies to a degree between the Second and Eigth Circuits, it is possible the Supreme Court would take the case.

Still, there is little hope that Clarett's case would be heard and Milstein is yet to file an appeal. First, *Brown* appears controlling in that players represented by a union engaged in bargaining with a league under labor law are precluded from challenging the owners' unilateral restraints on the players' market under antitrust law.[169] *Brown's* broad interpretation of a protected bargaining agreement, which includes negotiations made in the context of the collective bargaining process, rather conclusively disposes of the argument that the eligibility rule was not included in the 1993 CBA. Even so, because the dispute over what was included in the CBA is so central to the dispute, the Supreme Court is not likely take a case that could so easily be limited to its narrow fact scenario.

For now, Clarett is in limbo, unable to enter the NFL and barred from college football by the NCAA Bylaws because he hired an agent and attempted to enter the NFL draft.[170] Ohio State Academic Director Andy Geiger stated, "I cannot envision a scenario where he would be able to play football next fall for Ohio State."[171] Geiger continued, "I think academic progress is an issue and clearly [there are] issues of amateurism and issues of unfinished business as to why there was a suspension in the first place."[172] Clarett was never cleared by Ohio State or the NCAA to play after being suspended last year. Perhaps his best option at this point is moving to Canada: the Montreal Alouettes have bought his rights in the Canadian Football League, which does not have an eligibility rule.[173]

[1] *All Alone in the Open Field*, INSIDE SPORTS, Sept. 1981, at 30.
[2] The eligibility rule is buried in the NFL Constitution and Bylaws, entered into on May 6, 1993 between the NFL Management Council, the collective bargaining representative of the NFL clubs, and the NFL Players Association (NFLPA), the exclusive bargaining representative of present and future NFL players (hereinafter "NFL CONSTITUTION AND BYLAWS"). The paragraph entitled "Special Eligibility" states, "[a]pplications will be accepted for college players for who at least three full college seasons have elapsed since their high school graduation." NFL CONSTITUTION AND BYLAWS.
[3] *The Suit: Clarett v. NFL*, ESPN.COM (Sept. 23, 2003), *at* http://sports.espn.go.com/ espn/print?id=1621954&type=story.
[4] Associated Press, *Suit Claims NFL Rules Restrain Amateurs*, ESPN.COM, *at* http://sports.espn.go.com/espn/print?id=1621822&type=story (last visited Sept. 23, 2003).
[5] *Id.*
[6] Brian Allee-Walsh, *Earlier Entries are Now a Cause for Concern*, THE TIMES-PICAYNNE (Feb. 22, 2004), at C1, C4. "The support of college football coaches for the NFL policy is unsurprising. College coaches rely for their success on athletes who may be good enough to play professionally even before their graduation or end of collegiate eligibility. Thus, these officials welcome league restrictions on the drafting of student-players, for these restrictions provide colleges with exclusive control of preprofessional talent for a four or five-year period and insulate the college programs from competition for their cheap labor." Lewis Kurlantzick, *The Legal View of NFL Draft Policy*, N.Y. TIMES, SUNDAY (Jan. 21, 1990).
[7] *See Subtraction by Addition: NFL & NFLPA Discussing Draft Rule*, SPORTS BUSINESS DAILY, *at* http:www.sportsbusinessdaily.com/index.cfm?fuseaction=sbd.main&storyID= SBD2004031913.
[8] *See* PLAINTIFF'S BRIEF (on file with author).
[9] *Id.*
[10] Allee-Walsh, *supra* note 6.
[11] "Clarett's suit . . . highlights a change in the focus of legal governance of relations between players and owners in professional sports in the past four decades. That shift is a move from antitrust law to labor law and labor relations as the legal centerpiece." Lewis Kurlantzick, *An NFL Policy Is Challenged as a Matter of Labor Law*, N.Y.L.J. (Jan. 22, 2004). For more on the relationship between antitrust law and labor law in the sports context, see William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61.
[12] Kurlantzick, *supra* note 11 ("Were this rule to be assessed on its merits under federal antitrust law, it is highly likely that the NFL practice would be condemned."). For a discussion of the antitrust implications of Clarett v. NFL, see Robert D. Kock, *4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule*, 24 LOY. L.A. ENT. L. REV. 291.
[13] *See, e.g.*, Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1979) (football); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (football); Robertson v. NBA, 556 F.2d 682 (2d Cir. 1977) (basketball); Kapp v. NFL, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (football); Boston Prof'l Hockey Ass'n v. Cheevers, 472 F.2d 127 (1st Cir. 1972) (hockey); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F.Supp. 262 (E.D. Pa. 1972) (hockey).
[14] Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978); McCourt v. California, Inc., 600 F.2d 1193 (6th Cir. 1979).
[15] Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 382-83.
[16] *The Suit: Clarett v. NFL*, ESPN.COM (Sept. 23, 2003), *at* http://sports.espn.go.com/ espn/print?id=1621954&type=story. On December 17, 2003, Ohio State announced that it found no evidence to support allegations of academic misconduct by Clarett.
[17] The original charge carried a penalty ranging form probation to six months in jail and $1,000 fine. On January 14, 2004, Clarett plead guilty to the lesser charge of failure to aid a law enforcement officer, and was required to pay the maximum fine $100.
[18] *See* Associated Press, *Report: Williams tell Press He Will Retire*, ESPN.COM, July 28, 2004, *at* http://sports.espn.go. com/espn/wire?section= nfl&id=1846017.
[19] *Id.*

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[20] Charlie Nobles, *Williams Retired Because of Overuse, Agent Says*, N.Y. TIMES (Sept. 27, 2004), at D5.
[21] Stuart Scott, *Ricky Williams Retires*, ESPN SPORTS CENTER (July 25, 2004) (manuscript requested).
[22] *Id.*
[23] *Willliams Trades Demands of NFL for Travel*, ESPN.COM, July 25, 2004, *at* http://sports.espn.go.com/nfl.news/story?id=1846361.
[24] Charlie Nobles, *Williams Retired Because of Overuse, Agent Says*, N.Y. TIMES (Sept. 27, 2004), at D5.
[25] Id.
[26] Robert A. McCormick, *Open Letter to Maurice Clarett: Why You May Turn Professional Now*, N.Y. TIMES (Aug. 17, 2003), at 8 & 11.
[27] *Id.* As early as 1984, McCormick published an article commenting that the league's eligibility rule creates a "de facto farm system" that "assures well-seasoned players for the draft," yet is "the most restrictive rule of its type in professional sports and is devoid of legally cognizable justification." McCormick & McKinnon, *supra* note 26, at 380.
[28] *Id.*
[29] NFL CBA, Art. III, Sec.1.
[30] *Id.* at Art. IV, Sec 2.
[31] SPORTS BUSINESS DAILY, *supra* note 7.
[32] *Id.*
[33] Charles Lane, *Clarett Case May Alter the Business of Football*, WASH. POST, Jan. 24, 2004.
[34] *Id.*
[35] *Id.*
[36] *See id.*
[37] *See* PLAINTIFF'S BRIEF (on file with author).
[38] *Clarett Caught Sleeping During Class*, ESPN.COM.
[39] Len Pasquarelli, *Scouts Impressed with Moves, Hands in Workout*, ESPN.COM, (Apr. 5, 2004), *at* http://sports.espn.go.com/espn/print?/id=1776078%type=story.
[40] *Id.*
[41] Len Pasquarelli, *Health, Inexperience Could Hurt Clarett*, ESPN.COM (Feb. 5, 2004), *at* http://sports.espn.go.com/espn/print?id=1727991&type=story.
[42] Kurlantzick, *supra* note 6.
[43] Actually there were five 20 year-olds drafted. Milstein's brief left out Tommie Harris.
[44] *See* NFL.COM, *at* http://www.nfl.com/players/playerpage.
[45] Clarett is 6 feet tall and weighs 230 pounds.
[46] *C.f.* Mike Fish, *Bad for Business: Clarett, Williams areLosers as NFL, NCAA Protect Monetary Interest*, (Apr. 23, 2004), *at* http://sportsillustrated.cnn.com/2004/writers/ mike_fish/04/23/clarett.williams/index.html. "Not even a draft genius can assign a standard age to when a player is up to the physical rigors of pro ball. The NHL isn't sissy stuff right? And yet 21-year-old Ilya Kovalchuk and 19-year-old Rick Nash—both selected No. 1 overall in the NHL draft in 2001 and 2002, respectively—tied for the league lead in goals scored [in the 2004] season." *Id.*
[47] *See generally* Kock, *supra* note 12 (discussing the antitrust implications of a less restrictive alternative to the NFL's eligibility rule).
[48] Kurlantzick, *supra* note 6.
[49] EDGE TALENT ADVISORY BOARD MEMBERS, *at* http:www.edgetalent/advisoryboard.
[50] Allee-Walsh, *supra* note 6.
[51] *See* National Hockey League Players Assc. v. Plymouth Whalers Hockey Club, 325 F.3d 712 (6th Cir. 2003).
[52] Mike Fish, *Age-Old Question: NBA Considers Plugging Flood of Teen-Agers with New Eligibility Rule*, SI.COM, *at* http://sportsillustrated.cnn.com/2004/writers/mike_fish/ 06/18/nba.age.limit/index.html (last visited Aug. 11, 2004).
[53] *Id.*
[54] Joe Lago, *Nelson: 'I am the Steal of the Draft,'* ESPN.COM, *at* http://sports.espn.go. com/espn/print?id=1828988&type=story (June 24, 2004).
[55] Fish, *supra* note 46.
[56] *Id.*
[57] *See id.*
[58] *Id.*
[59] *Id.*
[60] Lane, *supra* note 33.
[61] *Id.*
[62] *Id.*
[63] Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213. For more regarding the unique nature of amateurism in the U.S., see *id.*
[64] *Id.*
[65] *See* Oscar Robertson, *Interview Regarding Team USA's Loss to Puerto Rico*, NATIONAL PUBLIC RADIO (AUG. 16, 2004), *available at* http://npr.org; Jim Donaldson, *Gavitt Says U.S. Has a lot to Learn*, THE PROVIDENCE JOURNAL, August 17, 2004, at D5; *but c.f.* Kurlantzick, *supra* note 6 ("Predictions of dire consequences following extinction of the NFL policy should be seriously discounted in light of the recent basketball experience, where the college and pro games have coexisted quite successfully despite the NBA's abandonment of its rule against drafting and signing underclassman.")
[66] Donaldson, *supra* note 65. "The current generation of American players has grown up playing a game in which 1-on-1 skills are paramount; in which dribbling is more valued than passing; in which in-your-face dunks are more valued than 3-point shots. Which becomes a problem when NBA stars are confronted with international-level team-oriented play." *Id.*
[67] For more discussion, see Kurlantzick, *supra* note 6.
[68] ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 192 (Princeton University Press 1999).
[69] *Id.*
[70] Brown, *supra* note 51.
[71] Len Pasquarelli, *Health, Inexperience Could Hurt Clarett*, ESPN.COM (Feb. 5, 2004), *at* http://sports.espn.go.com/espn/print?id=1727991&type=story.
[72] Gary T. Brown, *Administrators Say NFL Ruling Tackles Education for a Loss*, NCAA NEWS (Feb. 16, 2004), *available at* http://www.ncaa.org/news/2004/20040216/awide/ 4104n14.html.
[73] *Brand Suggests Clarifying Antitrust Issue*, ESPN.COM (Apr. 12, 2004), *at* http:sports. espn.go.com/espn?id=1780937=story.
[74] Brown, *supra* note 72.
[75] *Id.*
[76] *Id.*
[77] Lane, *supra* note 33.
[78] *Id.*
[79] Kieren M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1046.
[80] Section 1 forbids any "contract . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. 1 (2004).
[81] *See* Standard Oil Co. v. U.S., 221 U.S. 1, 66 (1911); Paramount Famous Lasky Corp. v. U.S., 282 U.S. 30, 43 (1930).
[82] *See* JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 527-28; *see also* Allen Bradley Co. v. Local Union No. 3, Int'l Bhd of Elec. Workers, 325 U.S. 797, 803-06 (1945) (tracing the struggle between protecting the rights of labor and preserving free market competition).
[83] *See* WEISTART & LOWELL, *supra* note 82, at 528 (1979).
[84] Corcoran, *supra* note 79, at 1049.
[85] Pub. L. No. 212, 38 Stat. 730 (codified as amended at 15 U.S.C. 12-27, 44, 29 U.S.C. 52-53 (2004)). The Act states that labor is not an article of commerce, that the antitrust laws do not prohibit labor organizations, that no injunction can be granted in any case between employers and employees involving or growing out of a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to a property right; and that no injunction may prohibit an employee from terminating employment or persuading others to do so. *See id.* at 15 U.S.C. 17; 15 U.S.C. 52.
[86] Pub. L. No. 64, 47 Stat. 70 (codified as amended at 29 U.S.C. 101-115 (2004)). The Norris-LaGuardia Act expanded the exemption created in the Clayton Act to by declaring a federal policy in favor of the organization of labor and giving special recognition to the process of collective bargaining. *Id.* at 29 U.S.C. 101-102; LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 723 (1977).
[87] Corcoran, *supra* note 79, at 1050.
[88] SULLIVAN, *supra* note 86, at 723.
[89] 29 U.S.C. 151-169 (2004). The Act also established the National Labor Relations Board (NLRB) to protect employees against unfair labor practices, to make rules and regulations regarding collective bargaining, and to serve as an enforcement and investigatory body. *See id. at* 153-169.
[90] 29 U.S.C. 141-144 (2004).
[91] *See* SULLIVAN, *supra* note 86, at 723. Congress sought to encourage practices they believed to be fundamental to the "friendly adjustment of industrial disputes arising out of differences as wages, hours, or other working conditions." 29 U.S.C. 151.
[92] *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975).
[93] *See* Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); Connell Construction, 421 U.S. 616.
[94] Corcoran, *supra* note 79, at 1052.
[95] *Id.*
[96] Application of the exemption in the sports context is further atypical of the traditional industrial context because there exists an inherently unequal bargaining relationship between the owners and players: in professional sports, owners have much more bargaining power. Corcoran, *supra* note 79, at 1057. This inequality makes it easier for owners to get player restraints inserted into a collective bargaining agreement.
[97] 543 F.2d 606 (8th Cir. 1976).
[98] *See id*
[99] McCormick & McKinnon, *supra* note 15, at 392.
[100] *Id.* at 391.
[101] *Id.* at 391-92.
[102] *Id.* at 416.
[103] *Id.* In 1984, however, it was much clearer that the eligibility rule was bargained for. In the 1993 Collective Bargaining Agreement challenged by Clarett, the NFL and NFLPA only agreed not to disagree.
[104] McCormick and McKinnon, *supra* note 15, at 392.
[105] Clarett v. NFL, 2004 U.S. Dist. LEXIS 1396, *3 (S.D.N.Y. 2004).
[106] *Id.* at *2.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at *2-3.
[111] *Id.* at *2.
[112] *Id.* at *3.
[113] *Id.* at *2.
[114] *Id.* at *3.
[115] Mark Hamblett, *NFL Can Keep Young Players Out of its Draft*, N.Y.L.J. (Apr. 20, 2004), at 1. The three judge panel consisted of Second Circuit Judges Sonia Sotomayor and Robert Sack and, sitting by designation, Southern District Judge Lewis A. Kaplan.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] Sal Palantonio, *NFL Still Goal for Clarett and Williams*, ESPN.COM (Apr. 28, 2004), *at* http://sports.espn.go.com/espn/print?id=1791416&type=story.
[121] *Id.* The League has previously held supplemental drafts for players who entered the draft late. Williams was projected as a high first-round pick, while Clarett might not have been taken until the second or third round, despite a relatively weak crop of speed runners in this year's draft class. *Id.*
[122] *Id.*
[123] Clarett v. NFL, 369 F.3d 124 (2nd Cir. 2004).
[124] Judges Sonia Sotomayor, Robert D. Sack, and Lewis A. Kaplan.
[125] Clarett, 369 F.3d 124.
[126] *Id.*
[127] *See infra* Part IV.c.
[128] *Id.*
[129] *See* Plaintiff's brief (on file with author).
[130] *See generally id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] 29 U.S.C. §§ 158(a).
[137] 381. U.S. 676, 689 (1965).
[138] *See* Plaintiff's Brief (on file with author).
[139] *Id.*
[140] 518 U.S. 231 (1996).
[141] *Id.* at 235.
[142] *Id.* at 250.
[143] *Id.*
[144] The Second Circuit has used the Mackey test outside the sports context to find the non-statutory labor exemption nonapplicable to agreements outside the scope of traditionally mandatory subjects of bargaining. *See* Local 210 Laborers' Int'l Union of North Am. V. Assc. Gen. Contractors of Am., 844 F.2d 69, 79-80 (2d. Cir. 1988).
[145] 809 F.2d 954, 957-63 (2d Cir. 1987).
[146] *Id.* at 960.
[147] *Id.*
[148] Wood v. NBA, 602 F.Supp 525, 529 (S.D.N.Y. 1984).
[149] *Id.*
[150] *Id.*
[151] 809 F.2d at 958-63.
[152] *See id*, at 960-61. The court noted that job applicants are employees covered by the N.F.R.A. *Id.* at 960 n.3. In White v. NFL, 836 F.Supp 1458, 1498 (D.Minn. 1993), the court noted that the NFLPA is the exclusive collective bargaining representative of "all present and future NFL players.")
[153] *See e.g.*, Powell v. NFL, 711 F.Supp. 959, 962-64 (D.Minn.) ("fundamental principles of labor law require [plaintiffs not yet members of the collective bargaining unit] to be bound to the terms previously 'traded out.'"), *affirmed*, 930 F.2d 1293 (8th Cir. 1989); Zimmerman v. NFL, 632 F.Supp. 398, 405 (D.D.C. 1986); Smith v. Pro Football, 420 F.Supp. 738, 744 (D.D.C. 1976).
[154] 45 F.3d 684, 685-86 (2d Cir. 1995).
[155] *See id.* at 687.
[156] *See id.* at 693.
[157] *See* Clarett v. NFL, 2004 U.S. Dist. LEXIS 1396 (S.D.N.Y. 2004).
[158] 66 F.3d 523 (2d Cir. 1995).
[159] *Id.* at 525-26.
[160] *Id.* at 530, *quoting* Wood, 809 F.2d at 959.
[161] *See* 29 U.S.C. 158(d).
[162] Jewel Tea, 381 U.S. at 691.
[163] 66 F.3d at 536..
[164] *See e.g.*, Local 357, Int'l Bd. of Teamsters v. N.L.R.B., 365 U.S. 667 (1961); *see also* Intercontinental Container Trans. Corp. v. N.Y. Shipping Ass'n, 426 F.2d 884, 886-88 (2d. Cir. 1970) (holding that collectively bargained limitations on the hiring of new employees are protected from antitrust challenge by the non-statutory labor exemption because the challenged provisions "have as their object the preservation of work traditionally performed by [union members].")
[165] 809 F.2d at 962.
[166] Len Pasquarelli, *Slim Pickings in Supplemental Draft*, ESPN.COM (Jun. 19, 2004), *at* http://sports.espn.go.com/nfl/columns/story?id=1842493.
[167] Mark Maske, *Judges Rule Against Clarett; NFL 'Not at All Surprised' by the Court of Appeals' Decision*. WASH. POST, May 25, 2004, at D03.
[168] *See generally* Kock, *supra* note 12; Weistart & Lowell, *supra* note 82; and SULLIVAN, *supra* note 86.
[169] *See* Kurlantzick, *supra* note 11.
[170] *Id.*
[171] *Buckeyes' AD 'Cannot Envision' Clarett Returning*, ESPN.COM (Apr. 23, 2004), *at* http://sports.espn.go.com/espn/print?idd=1788566&type=story.
[172] *Id.*
[173] *Buckeyes' AD*, *supra* note 171.

Plan to Attend!

15th Annual Entertainment Law Institute
October 21st & 22nd, 2005
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For more information go to:
www.texsbarcle.com

Mike with Section Chair Yocel Alonso

HIGHLIGHTS FROM THE 14th ANNUAL ENTERTAINMENT LAW INSTITUTE

"Distribution and Marketing Strategies for Indie Labels and Artists"
L to R, Cameron Strang, Michael Fitts, Geoff Cline, Patrick Clifford and Yocel Alonso.

"What's Going on at Major Labels"
L to R, Darryl Franklin and Ed Fair

Mike Tolleson, Institute Director

"Music Publishing Basics"
L to R, Steve Winogradsky and Tamera Bennett

LEGISLATIVE NOTES

State of Texas

Texas legislators are trying to assist hunting neighbors by addressing adjoining landowner issues. Attempting to make Texas' 5 month hunting season safer for the more than half million hunters, the legislation addresses the common practice of setting blinds so close to a neighboring property that the practice has become unsafe, unneighborly and unethical" says Rep. Miller and others. "It's a safety issue, for sure. If you're hunting close to a fence, it's easy for a bullet to go onto the other person's property." Miller stated in support of his legislation.

House Bill 185

Would regulate temporary or permanent hunting blinds or wildlife feeders within 150 yards of fence use as property boundaries.

Sponsor: Rep. Scott Campbell, R-San Angelo.

House Bill 560

Would regulate permanent or temporary hunting blind, traps, or wildlife feeders less than 200 feet from property boundaries

Sponsor Rep. Sid Miller, R-Stephenville.

House Bill 505

Would prohibit discharge of firearms across property boundaries and subject a person who knowingly discharges a firearm across a property line to a Class C misdemeanor.

Sponsor Rep. Harvey Hilderbran, R-Kerrville.

Federal

Omnibus Appropriations Bill (H.R. 4818) passed by Congress (on Nov. 20, 2004), inter alia, increases, fees paid to the U.S. Patent and Trademark Office.

The "Pirate Act" (S.2237) approved by the Senate on June 25, 2004. Awaiting House Committee review, the Act would increase the copyright enforcement powers of the Attorney General.

The Fraudulent Online Identity Sanctions Act (H. R. 3754) passed by the House on Sept. 21, 2004. The Act is aimed at revealing the identity of domain name owners, and attempts to address the ever growing capabilities of file sharing in the entertainment business.

2005 ENTERTAINMENT AND SPORTS LAW SECTION ANNUAL MEETING

Friday, June 25, 2005

Wyndham Anatole Hotel, 2201 Stemmons Freeway Dallas, Texas 75207

1:30 PM **Council Meeting (open to all members of the section to attend)**

2:00 PM **Annual Section Meeting Immediately followed by CLE"**

FIGURES IN SPORTS WHO DON'T KNOW HOW GOOD THEY HAVE IT:

Pierre Pierce, charged with burglary, domestic assault, burglary, false imprisonment, assault with intent to commit sexual abuse and criminal mischief. Iowa's leading scorer was booted from the team following confirmation that the charges stemmed from a dispute with an ex-girlfriend.

Dany Heatley, charged with vehicular homicide following the death of NHL Atlanta Thrashers teammate Dan Snyder. Police estimated Heatley's Ferrari convertible was going between 60 and 90 mph on a curved road when it smashed into a brick pillar and iron fence.

Daniel Horton, charged with domestic violence for allegedly choking his girlfriend. A guard on the Michigan basketball team, Horton faces jail and a fine if convicted.

Ricky Williams, ordered to repay the Miami Dolphins the $8.6 million dollar bonus he received prior to his unexpected retirement from the team. U. S. District Judge James Cohn ruled arbitrator Richard Bloc was "well within the scope of his authority" in ruling that Williams had to repay the bonus.

Christopher Bowman, sentenced to 18 months probation for having a gun while drunk. The 1989 and 1992 U. S. skating Champion was ordered to perform community service and undergo substance abuse and mental health counseling following.

Pat Donohoe, arrested on a marijuana possession charge and resigned as University of Alabama-Birmingham assistant coach. Donohoe was arrested while on a recruiting trip and charged with the Class A misdemeanor.

William Scheyer, following a guilty plea in Seattle U. S. District Court to illegally obtaining prescription drugs, the government agreed to a sentencing recommendation of 6 months in prison, 500 hours of community service and 90 days of home monitoring. Scheyer was the softball team doctor and was accused of handing out thousands of pills to softball-team members. In his plea agreement, Scheyer admitted that between August 2001 and May 2003, while the team's doctor, he wrote prescriptions using the names of student athletes, support staff and others without their consent to obtain prescription narcotics such as Vicodin and Oxycodone. He admitted picking up the drugs, paying for them with his own money and then handing them out to student athletes in unmarked brown paper envelopes, with little or no dosage instructions, and without the student athletes having been examined. He also admitted to not keeping records of who received the medication and what type of medication they received.

GOOD THINGS IN SPORTS:

Tiger Woods Foundation donated $100,000 to tsunami relief efforts; the PGA is matching the donation.

Major League Baseball and the players union, adopt steroid-testing program that includes our-of-season random testing and discipline for first-time offenders.

NCAA adopting new rules to keep players in school, academically eligible, and graduating by keeping track of schools with chronically poor academic track records and punishing programs with low graduation rates and rewarding programs that graduate their players.

USEFUL LINKS FOR THE PRACTICE OF ENTERTAINMENT, ART AND INTELLECTUAL PROPERTY LAW

COMPILED BY: TAMERA H. BENNETT - VICE CHAIR, LEGAL ASPECTS OF ART COMMITTEE, BENNETT LAW OFFICE, LEWISVILLE, TEXAS and YOCEL ALONSO - ALONSO, CERSONSKY & GARCIA, P.C., HOUSTON, TEXAS

GOVERNMENT

Federal Circuit
www.fedcir.gov

Federal Trade Commission
www.ftc.gov

Texas Commission on the Arts
http://www.arts.state.tx.us

Texas Film Commission
http://www.governor.state.tx.us/film/index.htm

Texas Music Office
http://www.governor.state.tx.us/music

United States Copyright Office
www.loc.gov/copyright

United States Patent and Trademark Office
www.uspto.gov

United States Trade Representative
www.ustr.gov/sectors/intellectual.shtml

LEGISLATIVE

thomas.loc.gov
www.house.gov/judiciary
www.senate.gov/~judiciary

SCHOLARLY & RESEARCH

Bureau of National Affairs
www.ipcenter.bna.com/

FindLaw
www.findlaw.com/01topics/23intellectprop

Franklin Pierce Intellectual Property Mall
www.ipmall.fplc.edu/

Intellectual Property Law Server
www.intelproplaw.com

IP Law Practice Center
http://www.law.com/jsp/pc/iplaw.jsp

IP News from Questel Orbit
www.questel.orbit.com/EN/Resource/index.htm

Kohn on Music Licensing
www.kohnmusic.com

MegaLaw
www.megalaw.com/top/intellectual.php

QuickLinks: Daily Update on IP and Internet Law
www.qlinks.net/quicklinks/index.shtml

Stanford University Libraries
www.fairuse.stanford.edu/

The Center for Popular Music (MTSU)
http://popmusic.mtsu.edu/research.html#top

The John Marshall Law School -
Review of Intellectual Property Law
www.jmls.edu/ripl

INTERNATIONAL

European Patent Office
www.european-patent-office.org

Japanese Patent Office
www.jpo.go.jp

United Kingdom Copyright Office
www.hmso.gov.uk/copyhome.htm

United Kingdom Patent Office
www.ukpats.org.uk

World Intellectual Property Organization
www.wipo.org

World Trade Organization
www.wto.org/english/tratop_e/trips_e/trips_e.htm

INTEREST GROUPS

American Bar Association –
Section of Intellectual Property Law
www.abanet.org/intelprop/home

American Intellectual Property Law Association
www.aipla.org

American Society of Composers Authors and Publishers: www.ascap.com

Association for Independent Music
http://www.afim.org

Broadcast Music International
www.bmi.com

Computer Law Association
www.cla.org
Film Music (Online Magazine)
http://www.filmmusicmag.com

Intellectual Property Owner's Association
www.ipo.org

International Trademark Association
www.inta.org

Links to music publishers and record labels
http://www.writerswrite.com/songwriting/markets.htm

Motion Picture Association of America
www.mpaa.org

National Music Publisher's Association/Harry Fox
www.nmpa.org

Recording Industry Association of America
www.riaa.org

SESAC
www.sesac.com

Software and Information Industry Association
www.siia.net

Texas Accountants & Lawyers for the Arts (TALA)
www.talarts.org

PERSONAL IMAGES: THE PROFESSIONAL ATHLETE'S RIGHT OF PUBLICITY

By: J. ALEXANDER JOHNSON

Dedicated to Davey O'Brien, TCU -QB, 1938 Heisman Trophy & NFL Philadelphia Eagle who opened the door to the professional athlete's right of publicity.

The author, a basketball cognosente, concentrates on intellectual property licensing and is a member of the Texas, Michigan & Massachusetts Bars.

Now that basketball season is upon us, with a few new rules, so too evolves the rights of publicity. Merchandisers will be scrambling to secure the endorsements of the best of the best, to enhance pecuniary profits from their goods and services. What follows here, is to ensure that the picture or images of the players' jump shot, in combination with merchandisers, entrepreneurs and others, remains—as pure and as soft, as newly fallen snow.

DISTINCTION OF RIGHTS

The right of publicity is a protectible property interest in one's name, identity or persona. Every person, celebrity or non-celebrity has a right of publicity, that is the right to own, protect and commercially exploit one's identity .The genesis of the legal right of publicity is rooted and intertwined with the right of privacy.[1]

The right of privacy protects against intrusions upon one's seclusion or solitude to obtain private facts for public disclosure that would be highly offensive, false or embarrassing to a reasonable person. In short, this is a right to be left alone. However, privacy and publicity rights become entwined when an appropriation of another's name or likeness for one's own benefit occurs without permission. Notwithstanding, the right of privacy is distinguishable because it is a personal right, non-assignable and terminates at death. To further illustrate the difference and similarity between privacy and publicity rights, a photograph in an advertisement that causes injury to the plaintiffs' feelings and dignity, resulting in mental or physical damages implicates the right of privacy. Failing the elements of mental or physical injury invokes the right of publicity. It is the legal right to exploit for commercial purposes one's own name, character traits, likeness[2] or other indicia of identity. Depending on state law a caricature[3] popular phrase ("Here's Johnny"),[4] sound-alike voice,[5] name in a car commercial,[6] animatronic likeness[7] and statistics of professional baseball players,[8] without consent, have all been held to come within the ambit of publicity rights, constituting infringement.

PROPRIETARY INTEREST

An individual has the right to control, direct and commercially use his or her name, voice, signature, likeness or photograph. Publicity rights may include the right to assign, transfer, license, devise and to enforce the same against third parties. Today, 17 states have publicity statutes,[9] which differ widely and at least a half dozen more, by common law. It is the commercial value together with the commercial exploitation, without prior consent that triggers a cause of action. The unauthorized use, in a commercial context, engenders money damages or equitable relief by way of an injunction or both. Moreover, as to a celebrity, subject to exemptions, the post-mortem right of publicity extends after death to 70 years in California[10] and 100 years in both Oklahoma[11] and Indiana.[12] New York with one of the most developed jurisprudence in this area excludes protection for the persona of deceased celebrities.[13]

PENDENT JURISDICTION

Unlike other fields of intellectual property law, there is no federal statute or federal common law governing rights of publicity. Nevertheless, federal claims of unfair competition and false advertisement or false endorsement under the Lanham Act[l4] together with a state claim of publicity can be asserted in federal court under pendent jurisdiction. A prevailing party, in appropriate circumstances can collect treble damages, costs and attorney fees on Lanham Act claims, in establishing unfair competition, dilution or the likelihood of public confusion.[15]

Monetary relief in establishing liability for infringement of one's right of publicity is measured by the commercial value of the person's name, likeness or persona. In the absence of actual loss of money as a result of the defendant's unauthorized use, the "going rate" or compensatory damages is the appropriate measure of damages. And where the defendant's activities are also a willful disregard of the plaintiffs' rights, punitive damages are warranted.[16]

CONSTITUTIONAL PROTECTION

Reporting newsworthy events or newsworthiness, with nonconsensual use of a name or photo in a magazine, is afforded First Amendment guarantees of freedom of speech and the press.[17] There is no violation of publicity rights. It is this newsworthy dimension or article of public interest that provides constitutional protection, even for a newspaper selling promotional posters of NFL Quarterback Joe Montana's four Super Bowl Championships.[18] The posters were reproductions of actual newspaper pages of the newspaper. The California Court of Appeals opened that the posters depicted newsworthy events and the newspaper had a right to promote itself with them.

The plaintiff, Tony Twist,[19] a former professional "enforcer" hockey player, sued the creator of a comic series who used the name Anthony "Tony Twist" Twistelli, as a Mafia fictional character. Twist claimed the endorsement value of his name was damaged by association with the comic book thug. The Missouri Supreme Court adopted a predominant purpose test. The court held that the use and identity of Twist's name was predominantly a ploy to sell cosmic books rather than an artistic or literary expression. The court opened that under these circumstances free speech must give way to the right of publicity. However, because of improper jury

Continued on page 16

Continued from page 15

instructions, the verdict of $24.5 million in the plaintiff's favor was set aside.

Similarly, a publisher of artist's work depicting Tiger Woods' likeness entitled "The Masters of Augusta" is afforded First Amendment protection based on "fine art",[20] despite the fact that 5,250 copies of the print had been sold. The court found that the art print was not a mere poster or item of sports merchandise, but rather an artistic creation seeking to express a message. Further, the right of publicity does not extend to prohibit depictions of a person's life story in a television miniseries,[21] book[22] or film.[23]

New York's highest court extended such rights to a magazine that used a 14-year old girl's picture, without her consent, to illustrate a magazine column of teenage sex and drinking. The New York Court of Appeals ruled that publishers cannot be held liable, so long as the photograph bears a genuine relationship to a newsworthy article and is not an advertisement in disguise.[24] Despite the fact that the plaintiff's photo was used in a substantially fictionalized way, it may by implication make the plaintiff the subject of the article.

The New York ruling begs the question, would the result have been different if a high profile celebrity's picture was used without permission? And, should any and all purported newsworthiness, provide a safe haven for authors and publishers? If Section 50 of the Civil Rights Law provides a criminal misdemeanor penalty and Section 51, civil damages, then when do they really become actionable? Moreover, how is it that celebrities may prevent the use of their visual and audio images, yet cannot stop authors from writing about them? The courts do not draw a clear path between commercial exploitation and protected expression. In this morass, questions abound and answers elude.

Consider, *Priscilla Presley v. Third Coast Entertainment*.[25] Priscilla Presley was awarded $1.6 million in a right of publicity case, in Santa Monica, California, now on appeal. The facts and trial court ruling, if upheld, suggest that any use of another person' s name, irrespective of newsworthiness is actionable. It is interesting to note that Priscilla Presley was offered a position as a consultant on the film project and as an entertainment personality whose life and persona is of public interest. No constitutional or statutory protection here, says the court. Ouch! Stay tuned.

Consider further, the 9th Circuit's reversal of $1.5 million in compensatory damages and $1.5 million in punitives in *Hoffman v. Capital Cities/ ARC, Inc*.[26] The 9th Circuit disagreed with the district court's conclusion that the magazine article with a digitally altered photograph of Dustin Hoffman together with a fashion spread was pure advertisement and commercial speech. The court opined that the fashion article's purpose was not to propose a commercial transaction.[27] Since fully protected by the First Amendment, the court went on to state that Los Angeles Magazine could not be subjected to liability unless, under *New York Times v. Sullivan*,[28] the magazine intended to mislead its readers. Thus, raising the burden of proof to clear and convincing evidence that the magazine acted with actual constitutional "malice". Oh, my Tootsie! Is it now time for a uniform federal statute governing the rights of publicity?

RIGHT TO USE PERSONA

To keep the jump shot and other indicia of identity, "pure", to avoid a violation of the right of publicity is to secure the individual's consent. Most professional athletes, as part of their employment in individual contracts and through the relevant collective bargaining agreements, give their consent to the team and league to broadcast their pictures and use their names for promotional purposes. Absent expressed or implied consent, the most effective way is to obtain a release, endorsement agreement or a license. The appropriate instrument should transfer in whole or in part, specific rights setting forth, at a minimum scope, term, representations, warranties, fees, choice of law and a morals clause. A morals clause permits a team, league, product developer or licensee to terminate the player or the agreement for engaging in criminal conduct or acts involving moral turpitude. See the sample endorsement agreement at the end of this article.

CONCLUSION

The skyrocketing value of endorsements is astronomical. With the advent of the Internet and sophisticated computer technology we can expect the value of commercial endorsements by celebrities to go literally off the charts. Fame is valued. The right of publicity protects the athlete's proprietary interest in the commercial value of his or her identity from exploitation by others. Advertising is the quintessential commercial speech and the right of publicity is a tort that quintessentially consists of advertising. The crux of the right of publicity is the commercial value of human identity .In order to lawfully and properly exploit this legitimate proprietary interest, it is just like the game itself —one must know the rules.

1. Roberson v. Rochester Folding Box Co., 171 N. Y. 538, 64 N.E. 442 (1902) -rejected the common law right of publicity, which led to the enactment of the New York privacy law, codified in the New York Civil Rights Law, 1903, N. Y. Civ. Rights,§§ 50-51; Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) -first state to recognize a personal privacy right against unauthorized commercial exploitation; Pallas v. Crowley Milner and Co. 322 Mich 411, 33 N. W. 2d 911(1948) -Supreme Court of Michigan recognizes a right of publicity where invasion of privacy was pleaded in preventing the nonconsensual use of a model's photograph in a local department store advertisement. The plaintiff was not a nationally known celebrity. Michigan recognizes publicity rights through a derivative privacy right at common law.; Haelan Laboratories v. Topps Chewing Gum is the seminal case that coined the term right of publicity.
202 F.2d 866(2d Cir. 1953), cert denied, 346 U.S. 816 (1953).
2. Newcombe v. Coors, 157 F.3d 686 (9th Cir. 1998) -Don Newcombe's stance & windup of the Brooklyn Dodgers, displayed in a drawing in Sports Illustrated created a triable issue of fact; whether Newcombe is readily identifiable as the pitcher in the Beer Advertisement. It is interesting to note that Don Newcombe (Cy Young Award, MVP & Rookie of the Year) is the only player in major league history to have won all three awards.
3. Titan Sports, Inc. v. Comics World Corp., 870 F.2d 85 (2d Cir. 1989).
4. Carson v. Here's Johnny Portable Toilets, Inc., 698 F. 2d 831 (6th Cir. 1983).
5. Midler v. Ford Motor Co. 849 F.2d 460 (9th Cir. 1986), Waits v. Frito Lay, Inc. 978 F. 2d 1093 (9th Cir.1992).
6. Abdul-Jabbar v. General Motors Corp. 85 F. 3d 407 (9 Cir. 1996).
7. Wendt v. Host International Inc. 125 F.3d 806 (9th Cir. 1997), White v. Samsung Electronics America Inc. 971 F.2d 1395 (9th Cir. 1992; 989 F. 2d 1512 {9th Cir. 1993).
8. Uhlaender v. Hendricksen 316 F. Supp. 1277 (Minn. 1970).
9. California: Cal. Civ. Code § 3344; Florida: Fla. Stat. Ann.§ 540.08; Illinois: 765 Ill. Comp. Stat.§ 1075/30; Indiana: Ind. Cod 32-13; Kentucky: Ky. Rev. Stat. Ann. § 391.170; Massachusetts: Mass Gen. L. Ann., Ch 214,§ 3; Nebraska: Neb. Rev. Stat§§ 20-201-20-211 and 25-840.01; Nevada: Nev. Rev. Stat.§§ 597.77 -597.810; New York: N. Y. Civ. Rights L. §§ 50-51; N. Y. Gen. Bus. L.§ 397; Ohio: Ohio Rev. Code Ann. §2741.02; Oklahoma: 21 Okla. Stat.§§ 839.1- 839.3; 12 Okla. Stat.§§ 1448- 1449; Rhode Island: R.I. Gen. Laws§ 9-1-28; Tennessee: Tenn. Code Ann.§§ 47-25-1101-47-25-1108; Utah: Utah Code Ann.§§ 45-3-1; Virginia Va. Code Ann§§ 8.01-40, 18.2-216; Washington Wash. Rev. Code §§ 63.60.030- 63.60.037; Wisconsin: Wis. Stat. Ann.§§ 895.50; in Texas the tort of misappropriation protects a person' s persona and the unauthorized use of one' s name, image or likeness. Brown v. Ames, 201 F. 3d 654 (5th Cir. 2000), post-mortem right of publicity: Tex. Prop. Code§§ 26.001- 26.015.
10. Cal. Civ. Code §3344.1(g).
11. Okla. Stat. Ann. tit. 12§§ 1448 et seg. (West 1993).
12. Ind. Code Ann.§ 32-13-1 et seg. (West Supp. 1999).
13. Stephano v. News Group Publications, 64 N.Y. 2d 174,474 N.E. 2d 580 (1984).
14. Lanham Act § 43 (a), 15 U.S.C. § 1125(a). 15. Lanham Act§ 35 (a).
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16. Frazier v. South Florida Cruises, Inc., 19 U. S. P. Q. 2d (BNA) 1470 (E. D. Penn. 1991)- defendant placed a ful1-page unauthorized advertisement in Ring Magazine inviting the public to cruise with former world heavyweight boxing champion, Smokin' Joe Frazier.
17. Neffv. Time, Inc., 406 F. Supp.858 (W.D.P. 1976).
18. Montana v. San Jose Mercury News Inc., 34 Cal.App.4th 790 (1995), See e.g.,Hogan v. Hearst, 945 S. W .2d 246 (Tex. App. 1997) -exemplifying the breadth of the newsworthy exception in negating a claim of invasion of privacy based on disclosure ofhighly embarrassing facts, obtained from a public record; Peckham v. Boston Herald, Inc. 719 N.E.2d 888 (Mass.App.Ct.1999). -defense summary judgment on basis of newsworthiness to a statutory private facts claim.
19. Doe v. TCI Cablevision, 110 S.W. 2d 363 (Mo.2003).
20. ETWCorp. v. Jireh Publishing, Inc., 332 F. 3d 915 (6th Cir. 2003).
21. Ruffin-Steinbeck v. depasse 82 F. Supp. 2d723 (E.D. Mich.2000)
22. Matthews v. Wozencraft , 15 F. 3d 432 (5th Cir. 1994) -applying Texas law.
23. Seale v. Gramercy Pictures, 949 F. Supp. 331 (E. D. Penn. 1996- applying Pennsylvania law.
24. Messenger v. Gruner & Jahr Printing and Publishing, 28 Media L. Rep.(BNA) 1491 (S.D.N.Y. 2000), 94N.Y.2d 436 (2000).
25. Edwin F. McPherson, Truth In Advertising: A Look At One Right Of Publicity Case Gone Terribly Wrong, 1 Texas Rev. Ent. & Sports L. 1 (2000). Id. At 1184-86.
26.255 F. 3d 1180 (9th Cir. 2001).
27. Id. at 1184 -86.
28.376 U.S. 254 (1964).

Endorsement Agreement

AGREEMENT made this _____ day of _____, by and between _____, a Delaware Corporation having its principal place of business at Minneapolis, Minnesota (Licensee) and _____, an individual residing at Weston, Massachusetts (Licensor).

WHEREAS, Licensee wishes to use Licensor's name and likeness in Licensee's forthcoming print marketing and advertising campaign, entitled _____ (the "Campaign) in connection with _____ (the "Products");

WHEREAS, Licensee and Licensor desire to establish the terms of such use.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, Licensee and Licensor hereby agree as follows:

I. License

Licensee shall have the right, but not the obligation, to use the name and likeness of Licensor as attached as Exhibit A, in connection with the Campaign, for print advertising, out -of- home media, in-store marketing and direct mail in connection with the Product and for public relations materials, in any media, produced and distributed by Licensor to promote the Product and/or the Campaign, throughout the world, in any language and in multiple languages. Licensor agrees that Licensor wi1I not use or license the likeness attached hereto as Exhibit A for use by any third party, in any print advertising or in-store or out-of- home media marketing or direct marketing for the duration of this Agreement applicable to in-store usage.

2. Term

Licensee's rights under this Agreement shall terminate _____ months from first publication for print advertising and/or first out-of-home media usage for both print advertising and out-of-home media usage, and _____ months from first in-store usage and/or public relations usage for all other uses. Licensee has the option to extend use for print advertising and/or out-of-home media usage for an additional _____ months, to total _____ months from: first use (of print and/or out-of-home media), upon payment of an additional use fee as set forth below.

3. Fees

Licensee shall pay Licensor $_____ upon first publication of the image, :first out-of- home media usage or in-store usage, or :first public relations usage, whichever comes first. Licensee shall pay Licensor an additional fee of $_____ upon Licensee's election by written notice to Licensor to exercise its option to extend the term for print advertising and/or out-of-home media.

4. Advertising and Marketing

All copy appearing on or with Licensor's image must be submitted to Licensor for written approval which approval may not be unreasonably withheld or delayed.

5. Representations and Warranties

Licensor represents and warrants that Licensor has the exclusive right to grant this license to use the likeness attached hereto as exhibit A and that the rights granted will not infringe or violate any copyright, patent, trademark, trade name, service mark, trade dress or other personal property or proprietary right of any person or entity. Licensor agrees to indemnify and hold Licensee harmless against any and all claims, damages and expenses arising directly or indirectly from the breach of the foregoing representation and warranty.

6. Choice of Law

This Agreement shall be governed and constructed in accordance with the laws of the State of Massachusetts without regards to conflicts of laws. The parties agree the sole jurisdiction and venue for any disputes or actions arising under this Agreement shall be the jurisdiction of the Supreme Judicial Court of the State of Massachusetts or the United States District Court for District of Massachusetts -Boston.

7. Termination for Cause

Licensee may terminate this agreement upon written notice to the licensor, upon the Licensor's death, disability, suspension and for cause. Cause shall mean, the arrest, indictment or conviction for the commission of a crime by licensor or any other conduct, public or private, involving moral turpitude on which has or may reasonably be expected to have a material adverse effect on Licensee, it's business, reputation or interests.

8. Entire Agreement

This Agreement, including all exhibits hereto, constitutes the entire agreement between the parties relating to this subject matter and supersedes any and all prior or simultaneous representations, discussions, negotiations, documents and/or agreements, whether written or oral.

IN WITNESS WHEREOF the parties have executed this Agreement on the date first set forth above.

LICENSOR

By: _____
Name: _____
Title: _____

LICENSEE

By: _____
Name: _____
Title: _____

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law Students
South Texas College of Sports Law & Entertainment Society

Duke University Discriminates Against Female Place-Kicker

The Fourth Circuit Court of Appeals recently affirmed a lower court ruling prohibiting schools from discriminating against a woman after she tries out for an all-male team. Duke University argued Title IX provided an exception for contact sports. The court ruled the exception did not apply in this case.

Title IX prohibits federally-funded schools from excluding a person from athletic participation because of their sex. However, the law provides an exception for contact sports such as football. A school does not have to let a woman try out for the football team, but once it agrees to a tryout, the school must follow Title IX.

In this case, Heather Sue Mercer enrolled at Duke University after a distinguished high school career as an All-State place kicker in New York. Head Football Coach Fred Goldsmith gave Mercer a tryout, even though he never made a walk-on try out before. She spent the 1994 season as a team manager before playing in the Blue-White spring scrimmage the following year. After she kicked the winning field goal in the scrimmage, Coach Goldsmith announced to the players and the media that Mercer made the team. She did not play the next season, and then Coach Goldsmith dismissed her from the team before the 1996 season.

Heather Mercer filed suit in the District Court for the Middle District of North Carolina, alleging Coach Goldsmith and Duke University violated Title IX by discriminating against her on the basis of sex. Duke successfully argued the contact sport exception applied, and the trial court dismissed the case.

On appeal the Fourth Circuit ruled that once Coach Goldsmith gave Heather Mercer a tryout, he had to abide by Title IX regulations. On remand back to the district court, a jury awarded her one dollar in compensatory damages and $2 million in punitive damages.

This court found that Coach Goldsmith did treat Mercer differently because of her sex. He pressured her to quit football and enter beauty pageants. Coach Goldsmith forced Mercer to watch games from the stands, even though he allowed the male walk-ons players to stand on the sidelines. Also, many players testified Heather Mercer had more talent than other male kickers on the team. And finally, Coach Goldsmith said he dismissed Mercer due to lack of ability, something he had never done to anyone as a coach. The jury considered all of this sufficient evidence of discrimination.

After Duke University appealed, the Fourth Circuit vacated the judgment in part, holding punitive damages to be unavailable in a Title IX action. *Mercer v. Duke University*, 50 Fed. Appx. 643 (4th Cir. 2002). In the end, the courts decided that once a university allows a woman to try out for a team, the contact sport exception no longer applies. The exception allows schools to decide whether or not a woman can try out for a contact sport. It does not, however, allow the schools to discriminate against the woman once she does try out.

By: Matt Schlensker

Marvel Comic's Intellectual Property Genius Richly Rewarded

With a few brief exceptions, Stan Lee has worked at Marvel Enterprises since 1940. During this time, Mr. Lee has worked as an editor, art director, head writer and publisher. Most importantly, Lee created the Marvel characters of Spider Man, the Incredible Hulk, X-Men, and the Fantastic Four. These characters have become universally-known Marvel figures. They were originally "born" in Marvel comic books, but have been expanded into movies, television, and merchandising. Lee, as the original creator of these characters, had a contract with Marvel that enabled him to share in the profits of these expanded ventures.

One provision of Lee's contract with Marvel led to the current dispute. According to this provision:

[Lee] shall be paid a participation equal to 10% of the profits derived during [his] life by Marvel (including subsidiaries and affiliates) from the profits of any live action or animation television or movie (including ancillary rights) productions utilizing Marvel Characters. This participation is not to be derived from the fee charged by Marvel for the licensing of the product or of the characters for merchandise or otherwise¼.

According to Marvel, this provision entitled Lee to 10% participation in only those television and movie picture production deals where Marvel had "net profit participation." Marvel also believed that the second sentence in the provision barred Lee from collecting any merchandising profits. Lee, by contrast, argued that the contractual provision entitled him to 10% of all profits – including gross profits and gross proceeds in conjunction with the use of Marvel characters, with the exception of profits resulting from fees from licensing for merchandising.

The dispute involves thousands of merchandising agreements entered into by Marvel. These merchandising agreements provide licenses to third parties for the use of Marvel characters in connection with "various toys, games, collectibles, apparel, interactive games, arcade games and electronics, stationary and school products, health and beauty products, snack foods and beverages, sporting goods, party supplies, and amusement destinations." These merchandising agreements have generated hundreds of millions of dollars in revenue for Marvel.

The federal district court ultimately held the contractual language to be unambiguous in regard to profit participation, and found that Lee was entitled to share in the profits of Marvel's agreements for movie and televisions productions involving Marvel characters. *Lee v. Marvel Enterprises Inc.*, 2005 WL89376 (S.D.N.Y.). Furthermore, based on expert testimony from both Lee and Marvel concerning "common usage," it was determined that "ancillary rights" included merchandising rights. The provision also, by its plain language, only excluded Lee's participation in "fee[s] charged by Marvel for . . . licensing." As a result, Lee was entitled to 10% of gross profits from a wide-ranging use of Marvel characters, and the court granted Lee's motion for summary judgment.

By Mark Gooden

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Student Writing Contest

The editors of the *Texas Entertainment and Sports Law Journal ("Journal")* are soliciting articles for the best article on a sports or entertainment law topic for the Fifth Annual Writing Contest for students currently enrolled in Texas law schools.

The winning student's article will be published in the *Journal*. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the *Journal*. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than January 1, 2006.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½" x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the *Journal*, please call Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-2905.

ENTERTAINMENT & SPORTS LAW SECTION
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The Entertainment & Sports Law Section of the State Bar of Texas was formed in 1989 and currently has over 500 members. The Section is directed at lawyers who devote a portion of their practice to entertainment and/or sports law and seeks to educate its members on recent developments in entertainment and sports law. Membership in the Section is also available to non-lawyers who have an interest in entertainment and sports law.

The Entertainment & Sports Law Journal, published two times a year by the Section, contains articles and information of professional and academic interest relating to entertainment, sports, intellectual property, art and other related areas. The Section also conducts seminars of general interest to its members. Membership in the Section is from June 1 to May 31.

To join the Entertainment & Sports Law Section, complete the information below and forward it with a check in the amount of $25.00 (made payable to ENTERTAINMENT & SPORTS LAW SECTION) to Tamera Bennett, Treasurer, P.O. Box 12487, Capitol Station, Austin, Texas 78711.

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