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CHAIR'S REPORT - FALL 2007

In searching for a few words to express the great state of our section at this time, I recalled the title of an album by Mary Chapin Carpenter (and a few others): "C'mon, c'mon". Okay, I sound like a cheer leader, but I'm sticking with it. This section of wonderful, talented, generous lawyers has made so many strides in the past few years: listserve; website expansion with new url; color and expanded journal; moving from small to mid-size section (over 500 members!); a council as diverse as Texas; an annual seminar second to none in the country; a lifetime achievement award; an artist advocacy award -- even a Rock Star (attorney) T-shirt -- swag, by gum, befitting any self-respecting entertainment/sports outfit. There is much more than space will allow. And as a result we are poised to do even more.

The advances of the past few years were made possible by the hard work of each of the councils and committees since the inception of this still-young section. The many of you who have served the section over the years have done so out of devotion to these rewarding fields of practice of which you have made a career (a life). Many more of you are new to these fields and are developing your practice in these areas or are exploring such ideas. To each of you who have given your time and care to this section and these fields of practice, thank you. To those of you (lawyers, paralegals, law students) interested in these fields, a warm welcome. Lyle Lovett said "I Love Everybody," and we need and want everyone of you.

The technological and digital advances of the last ten years have been good to Texas, and the convergence of these phenomena with the entertainment and sports talent in our legendary Texas has created still more wonderful opportunities for our clients. This section has helped Texas lawyers in these fields keep pace with these opportunities. And, of course, in these changing times, there is much to do. We need your help in so many ways: updating content on the website; planning and developing courses for the annual Entertainment Law Seminar to keep pace with the rapidly changing industries; developing another sports seminar; moderating the listserve; helping the journal with its many tasks such as copy-editing, reading submissions, solicitation of sponsors and ads; tracking legislation to help members stay informed; helping the membership committee survey and communicate with the membership and helping the committee reach out to non-renewed and potential members and other sections with similar interests; planning the speakers and promotions and activities in connection with the annual meeting; etc. Serving on committees to do these

important tasks with fine lawyers from around the state is fun and develops relationships and networks. It helps you and helps us all. It helps our clients -- those who make up the entertainment and sports communities of our state.

Please pick up the phone or send an e-mail to me or any of the council and let us hear from you. We want you involved with us and the section. We hope to see you at our highly regarded Entertainment Law Seminar October 11th and 12th. We've really had it going on for the past several years. Let's keep it up. C'mon, c'mon!

--Craig Barker

SAVE THE DATE

October 11 & 12, 2007

**The 17th annual Entertainment
Law Institute Conference in
Austin, Texas**

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FOR THE LEGAL RECORD ...

Honesty or merely the way of sports law ...

Bill Belichick, the head coach of the New England Patriots was fined by the NFL \$500,000 for violation of the NFL's edict against spying on other teams. Commissioner Roger Goodell ordered the team to pay \$250,000 and forfeit a 2008 first round draft choice if the Patriots reach the playoffs, or a 2nd and 3rd pick if it does not. Goodell's efforts to clean up the NFL have kept him a most busy commissioner, including suspending Atlanta Falcons' star quarterback Michael Vick, Tennessee Titan's defensive back Adam "Pacman" Jones and Chicago Bear's defensive lineman Tank Johnson for their off field behavior. Belichick's fine, the maximum permitted by the NFL, is a small part of his \$5 million dollar per year contract, and appears arrogant and brazen following Goodell's enforcement of the NFL new policies of accountability for non football offenses. The Patriot's coach's intentional decision to tape the New York jet's sideline, clearly violated NFL rules, and not only calls into question the team's Super Bowl wins but also demonstrates the head coach's blatant disregard of NFL rules and apparent willingness to cheat to win. Whether Belichick's tactics impacted the team's championship seasons may never be known but like San Francisco Giant's outfielder, and all time home run record holder, Barry Bonds, will often enter into the conversation when considering if the Patriots violated league rules to win their 3 Super Bowls ...

\$100 million dollars was the hit a Ferrari took for cheating. The Formula One team was punished with the record fine in the biggest scandal in auto racing history. The McLaren drivers were not punished, but the team was also striped of its constructors' points when a 780 page dossier was found at the home of McLaren's chief designer, Mike Coughlan. Although the Ferrari team escaped further punishment because the evidence did not show that the documents were misused, Ferrari mechanic Nigel Stepney, who allegedly supplied the documents, was fired. The \$100 million fine is the largest fine on record and exceeded the McLaren team's previous FI record fine of \$2.5 million ...

Call of the docket:

Toronto Maple Leafs' forward Mark Bell plead no contest to drunken driving and hit and run, and was suspended for 15 games without pay by the National Hockey League ...

Josh Heytvelt, former and now current center on the Gonzaga basketball team, was permitted to return to the team after being suspended for possession of hallucinogenic mushrooms. Heytvelt not only met the terms of his probation, he exceeded them in doing over 300 hours of community service in an effort to return to the team and get back into the good graces, and a big payday, of the National Basketball Association. Heytvelt had been touted high draft choice prior to his involvement in the drug charges ...

University of Texas safety Tyrell Gatewood was arrested on two misdemeanor counts of possession of a dangerous drug, bond was set at \$2,500 and he was released on personal recognizance. The car Gatewood was riding in was pulled over on a routine traffic stop, and the car searched. Drug paraphernalia was found in the car and Gatewood was arrested, along with UT freshman defensive back Ben Wells. The car was pulled over by the Travis County, Texas sheriffs deputy for failing to properly signal a turn. After claiming he smelled marijuana from the car, the sheriffs deputy search the vehicle and found 9 grams of Xanax, a small amount of pot and a baby bottle containing codeine cough syrup ...

Florida A&M fired Mike Gillespie after the basketball coach was charged with misdemeanor stalking Gillespie was accused of stalking a former girlfriend while he was head coach of the basketball team ...

Former referee Tim Donaghy planned to plead guilty to federal charges that he bet on games he officiated. Donaghy allegedly placed wagers on games he officiated after being approached by low level mob associates. NBA commissioner David Stern reassigned Donaghy and then fired him following the FBI investigation. Stern called Donaghy a "rogue, isolated criminal" Despite Donaghy being in the top tier level of officials, no other NBA officials or players have so far been named in the scandal, which Stern called the "most serious situation and worst situation that I have ever experienced either as a fan of the NBA, a lawyer for the NBA or a commissioner of the NBA." ...

Faced with codefendants making deals with prosecutors, Atlanta Falcons' quarterback Michael Vick made a deal. Purnell Peace and Quanis Phillips plead guilty to their role in dog fighting conspiracy and blamed it all on Vick. Claiming that Vick financed the operation, the two former Vick associates, detailed how Vick not only was the money behind the dogfights, but also revealed that Vick attended several dogfights in Virginia and other states with his partners, offering purses as high as \$26,000. As star witnesses for the prosecution, Peace and Phillips detailed how Vick participated in various activities including getting rid of dogs that failed to win or performed poorly. Vick was alleged to have participated in various methods of mistreating the dogs, including hanging, drowning and slamming at least one dog's body to the ground. The U. S. District Court for the Eastern District of Virginia had issued an 18 page indictment of Vick prior to his guilty plea ...

Nebraska wide receiver Maurice Purify pleaded no contest to four charges, of driving while intoxicated, assault, disturbing the peace and hindering arrest ...

Wisconsin running back Lance Smith was suspended from the Badger football team following a dispute with his girlfriend. Despite no charges being filed, the school suspended the player after athletic director Barry Alvarez, said Smith violated the athlete department's student athlete discipline policy. The dispute allegedly arose after Smith and his girlfriend had a dispute about cab fare she owed him ...

An attorney admitted leaking the grand jury testimony of San Francisco Giants' outfielder Barry Bonds and others. He was sentenced to two and one half years in prison. Troy Ellerman pleaded guilty to allowing a San Francisco Chronicle reporter to see transcripts of testimony by Bonds, Jason Giambi, Gary Sheffield and other athletes. He initially blamed federal investigators for leaking the testimony. U.S. District Court judge Jeffrey White approved the revised deal after criticizing prosecutors for the initial plea bargain calling for a prison term of 15 24 months. Ellerman was hired by Victor Conte, founder of the Bay Area Laboratory Cooperative, and served as the attorney for BALCO vice president James Valente. During his representation of Valente Ellerman allowed his client to view the grand jury testimony, which led to publication of reports that Giambi and others admitted to using steroids ...

Your comments or suggestions on the Section's website may be submitted to Yocel Alonso at Yocelaw@aol.com and as always your comments regarding the journal may be submitted to your editor sijaimelaw@pdq.net; ...

Sylvester R. Jaime Editor

A SLICE OF PIE PRODS. V. WAYANS BROTHERS ENTERTAINMENT: EXPRESSION MISAPPROPRIATION AND SCREENWRITING

JAMES J. LARocca*

“[W]riters are the most important part of the making of a motion picture,
and we must do everything in our power to prevent them from finding out.”

—Irving Thalberg, MGM Studios

I. INTRODUCTION

As an aspiring screenwriter,² expression misappropriation in the screenwriting field strikes a particular chord with me. If any aspect of entertainment is unglamorous, it is the life of a screenwriter³—particularly the unknown screenwriter. Unknown screenwriters rarely have the resources (or the talent) to turn their manuscripts into motion pictures.⁴ Accordingly, after spending countless years working on a project, they may submit their scripts to those that have the resources only to experience continual rejection.⁵

“[M]iraculously, some scripts do get sold,”⁶ but the screenwriter may never get to share his story with the general public if the script does not make it to production.⁷ Perhaps worse, those screenplays that make it to the big screen often get revised and re-written (by studio executives,⁸ directors, actors, and agents⁹) that by the time the script comes to life as a film, the screenwriter’s original vision is completely tarnished.¹⁰ As Julius J. Epstein, the author of *Casablanca*, explains, this procedure “has driven more than a few screenwriters to the Betty Ford Rehabilitation Center in Palm Springs.”¹¹

It gets worse. Screenwriters (like Jon Coppola, Jason Coppola, and Mario Pittore¹²) may submit their scripts to large production companies (like Wayans Bros. Entertainment¹³) only to see the production company use their script without crediting them, leaving them in a seemingly endless legal battle of David v. Goliath proportions.¹⁴ This illegal practice, known as expression misappropriation, is a screenwriter’s nightmare, and it runs rampant in the film industry.¹⁵

This Paper argues that the law should impose higher punitive damages against large production companies, like Wayans Bros. Entertainment, to prevent these companies from misappropriating screenwriters’ expressions. Part II demonstrates the prevalence of expression misappropriation in the screenwriting context by highlighting numerous cases where prominent production companies may have misappropriated screenwriters’ works. Part III introduces the factual background surrounding the Capollas and Pitore’s claims against the Wayans brothers, and demonstrates why these screenwriters have a winning case. Part IV argues that the law should impose harsher monetary penalties to dissuade production companies from stealing screenwriters’ expressions. This section looks to the Sherman Antitrust Act for guidance.

II. EXPRESSION MISAPPROPRIATION OF SCREENWRITERS’ WORKS

A quick look at four recent cases—*Price v. Fox Entm’t Group, Inc.*,¹⁶ *Chalfant v. Tubb*,¹⁷ *Kourtis v. Cameron*,¹⁸ and *Preller v. Time Warner*¹⁹—emphasizes expression misappropriation’s pervasiveness in the film industry, particularly amongst production companies that steal screenwriters’ expressions.

A. *Price v. Fox Entm’t Group, Inc.*

In *Price v. Fox Entm’t Group, Inc.*,²⁰ two screenwriters “wrote a screenplay . . . entitled *Dodgeball: The Movie*,” which one of the writers registered with the Writers Guild of America.²¹ That same writer handed the script to a “then . . . agent-in-training in W[illiam] M[orris] A[gency]’s Independent Film division.”²² Shortly after, another screenwriter “completed his first full-length draft of his

screenplay, then-titled *Underdogs*.”²³ The writer registered the script “with the Writers Guild of America,” and sent the screenplay to the agent-in-training’s coworker.²⁴ The writer retained this coworker as his agent.²⁵

A film production company “develop[ed] *Underdogs* into a motion picture.”²⁶ Fox “acquired the rights to *Underdogs*,”²⁷ which was “re-titled as *Dodgeball: A True Underdog Story*.”²⁸ The original writers sued Fox,²⁹ and others associated with the film,³⁰ for copyright infringement.³¹ Due to the similarities between *Dodgeball: The Movie* and *Dodgeball: A True Underdog Story* (including plot and characters),³² and the association between the parties involved (the second script’s author may have had access to the original screenplay),³³ the court refused to grant the defendants summary judgment.³⁴

B. *Chalfant v. Tubb*

In *Chalfant v. Tubb*,³⁵ co-screenwriters “wrote a screenplay entitled ‘Blood Trail’ and obtained a copyright from the United States Copyright Office.”³⁶ “The screenplay combines elements of Westerns and horror films, in addition to Native American cultural themes.”³⁷ Madrugada Productions, Inc.’s owner “requested a copy of the screenplay from” one of the writers.³⁸ “After reading the screenplay, [the production company’s owner] expressed interest in producing a film based on the screenplay.”³⁹ He met with the screenplay’s co-authors and “mentioned the possibility that he would seek [the writers’] permission to use the screenplay for his film, but stated that contractual details could be worked out after the film was produced.”⁴⁰

After some preliminary name-calling,⁴¹ the production company’s owner obtained permission to turn the script into a film “without a written contract.”⁴² The production company’s owner “orally agreed that he would execute a contract with [the writers] once the film was produced and he had located a distributor.”⁴³ He “specifically agreed not to seek any distribution rights until [the writers] approved the distributor and the parties signed a contract solidifying [the writers’] rights as owners of the screenplay.”

After transforming the script into a film, the production company’s owner “filed applications for copyrights for the derivative screenplay of Blood Trail and the film itself.”⁴⁵ Although he listed the writer who he obtained permission to film from “as a coauthor of the [derivative] screenplay,”⁴⁶ he “failed to mention” the other writer.⁴⁷ Additionally, “[t]he application did not note that the screenplay for Blood Trail was a derivative work and omitted any reference to the [original] screenplay.”⁴⁸ The production company’s owner received copyrights to the screenplay and film.⁴⁹

The writers “claim[ed] that the final version of Blood Trail distributed by [the production company] contains large segments of dialogue lifted directly from [the writers’] original screenplay, as well as the same characters and events taken from the original work.”⁵⁰ Additionally, they “state[d] that they have never received any compensation from [the production company] for use of their screenplay.”⁵¹ The film’s “DVD packaging . . . states that the film is a Madrugada Ranch production and that the screenplay was coauthored by” the production company’s owner and the writer who gave him

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permission to film the story.⁵² Consequently, the writers sued the production company's owner for copyright violations.⁵³ A court has denied the production company and its owner's motions to dismiss the screenwriters' copyright claims.⁵⁴

C. Kourtis v. Cameron

In *Kourtis v. Cameron*,⁵⁵ two writers "developed the concept for a film entitled *The Minotaur*, which details the exploits of a half-man, half-bull that can transform itself into various human and inanimate forms."⁵⁶ They "set forth their ideas in a thirty-page 'treatment' that provide[d] a synopsis of the prospective film."⁵⁷ After registering the treatment "with the Worldwide Register of Copyrights," they hired a screenwriter "to write a screenplay based upon their treatment."⁵⁸ The treatment writers and the screenwriter agreed that the treatment writers "would own the screenplay's rights."⁵⁹

When the screenwriter finished the script, the treatment writers "began to shop the screenplay around."⁶⁰ "[A]n employee of International Creative Management ('ICM') . . . informed the [treatment writers] that he would share the materials with film maker James Cameron, who was an ICM client."⁶¹ "Cameron contacted the [treatment writers] and initially expressed an interest in *The Minotaur*, but ultimately neither Cameron nor anyone else agreed to produce the project."⁶²

Cameron subsequently "released the film *Terminator II: Judgment Day*, which—like *The Minotaur*—features a character that can transform its appearance into both human and nonhuman forms."⁶³ After a court determined that the treatment writers, not the screenwriter, owned the rights to *The Minotaur*,⁶⁴ "the [treatment writers] 'alleged that Cameron had utilized *The Minotaur*'s shape-changing concept in *Terminator II* without providing payment or attribution."⁶⁵ Despite the stories' similarities and Cameron's association with *The Minotaur*, the court denied the treatment writers' claim because the statute of limitations barred their claim.⁶⁶

D. Preller v. Time Warner

In *Preller v. Time Warner*,⁶⁷ a screenwriter wrote a screenplay "about a young, handsome male protagonist, who was the president of a modeling agency, and had a history of disrespectful behavior towards women."⁶⁸ Subsequently, a "heavenly being" transformed the protagonist's body "into the body of a woman."

Shortly after copyrighting the script, the writer "submitted two copies" of the script "with tapes and cartoons" to the head of Martin Elfand Productions.⁷⁰ "Nearly two years later," the writer learned that the company "was not interested in his work."⁷¹ After the screenwriter asked Martin Elfand Productions to return the scripts, tapes, and cartoons, the company told him they could not locate the materials.⁷²

About two years later, the writer discovered the movie *Switch*, and believed the movie's producers based the film off the script he submitted to Martin Elfand Productions.⁷³ The movie "concerns a male advertising executive, with a history of disrespectful behavior toward women."⁷⁴ Subsequently, the executive "dies and is returned to earth as a woman."⁷⁵

Approximately two years after the discovery, Home Box Office, Inc.'s ("HBO") senior counsel sent the writer a letter "informing him that 'Switch' was independently created and produced by B[lack] E[dwards] C[o.] for Cinema Plus, a limited partnership managed by a subsidiary of" HBO.⁷⁶ Eleven months later,⁷⁷ the writer sued The Black Edwards Co., Black Edwards, Time Warner, Inc., and Time Warner Entm't Co., L.P. for copyright infringement.⁷⁸ When the Time Warner, Inc., The Black Edwards Co., and Black Edwards moved for a dismissal, the court denied their motions because of the stories' similarities and the alleged infringer's access to the claimant's screenplay.⁷⁹

Price,⁸⁰ Chalfant,⁸¹ Kourtis,⁸² and Preller⁸³ demonstrate the prevalence of expression misappropriation in screenwriting.

III. A SLICE OF PIE PRODS. V. WAYANS BROS ENTM'T

A. Facts

Jon Coppola, Jason Coppola, and Mario Pittore "created and composed a screenplay entitled *Johnny Bronx*," which they "registered with the Writer's Guild of America . . . and . . . the United States Copyright Office."⁸⁴ "[T]he screenplay involves a fumbling FBI agent who is an African American. In order to gain back the respect of the Bureau, through modern technology, he is converted to a white Italian American mobster to infiltrate the mafia."⁸⁵ The writers submitted the screenplay to the Wayans brothers' agent,⁸⁶ and after "at least one of the Wayans Brothers reviewed the screenplay,"⁸⁷ a representative told the writers that the brothers "were not interested in the screenplay or starring in the film."⁸⁸

Thereafter, the Wayans brothers embarked on a project entitled *White Chicks*, a film that "involves two bumbling African American FBI agents who seek redemption through transformation into two undercover white women."⁸⁹ The writers "obtained a copy of the screenplay for the *White Chicks* film and discovered that the general idea, plot, theme and even scenes contained therein were almost identical to that contained in the[ir] screenplay."⁹⁰ Consequently, the writers sued the Wayans Brothers (and others associated with *White Chicks*) for copyright violations.⁹²

B. Analysis

The Coppolas and Pittore should prevail under the Second Circuit's infringement analysis.⁹³ After a screenwriter demonstrates that he owns a valid copyright to a story,⁹⁴ courts examine two factors to determine whether there is infringement: (1) the alleged infringer's access to the original story; and (2) similarities between stories.⁹⁵ As in *Price*,⁹⁶ *Chalfant*,⁹⁷ *Kourtis*,⁹⁸ and *Preller*,⁹⁹ the interaction between the Coppolas, Pittore, and the Wayans brothers' agents raises suspicion¹⁰⁰—in fact, since "at least one of the Wayans Brothers" actually reviewed the *Johnny Bronx* screenplay,¹⁰¹ access is not a disputed issue. Consequently, I focus my analysis on the substantial similarities between the *Johnny Bronx* and *White Chicks* screenplays.¹⁰²

Substantial similarity "requires that the copying [be] quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred."¹⁰³ "The qualitative concerns the copying of expression, rather than ideas [, facts, works in the public domain, or any other non-protectable elements]."¹⁰⁴ "The quantitative component generally concerns the amount of the copyrighted work that is copied," which must be more than "de minimis."¹⁰⁵

Since *White Chicks* qualitatively and quantitatively resembles *Johnny Bronx*, the Coppolas and Pittore should prevail in their lawsuit against the Wayans brothers. Qualitatively, *White Chicks* embraced *Johnny Bronx*'s very original concept—an African American FBI agent that transforms his race to infiltrate an exclusive part of society.¹⁰⁶ While each element alone may be an unprotected idea,¹⁰⁷ *Johnny Bronx*'s link of ideas creates a protectable expression. Quantitatively, *White Chicks* and *Johnny Bronx* are similar. Aside from the fact that in *White Chicks*, as in *Johnny Bronx*, an African American FBI agent transforms his race to infiltrate an exclusive part of society,¹⁰⁸ the screenwriters claim that scenes in *White Chicks* are "almost identical"¹⁰⁹ to scenes in *Johnny Bronx*.

Renown screenwriter Christopher Keane provides valuable insight into how production companies fiddle with screenwriters' expressions to produce distorted versions of the original scripts. Keane wrote a novel, which he later made into a screenplay, entitled

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The Crossing.¹¹⁰ *The Crossing* is a story “about the biggest poker game of World War II . . . a winner-take-all-five-card-stud game aboard a liberty ship heading home from war.”¹¹¹ While the story has never been transformed into a film, Keane has sold his tale to film makers—repeatedly.¹¹² And while the buyers have yet to turn the screenplay into a movie, they have come close.¹¹³ When MGM owned the rights to the script they felt it “needed work. It was the eighties [then] and people wanted to see romance in their movies . . .”¹¹⁴ MGM asked, “What about having a few nurses on board ship, maybe for one or two of the players to *schtumf* in between poker hands? . . . This is what Hollywood producers do.”¹¹⁵ Sometimes the revisions are not as subtle. Another production company told Keane:

“Instead of a World War II poker game on a ship . . . we’re going to hold a modern day video game championship in Las Vegas. We keep the characters. We keep your fabulous concept. We keep everything but World War II and poker, which no one wants anyway.”¹¹⁶

(Keane states, “This was possibly the worst idea I had ever heard.”¹¹⁷) Judgments aside, Keane’s commentary demonstrates that production companies revise (sometimes drastically) highly advanced ideas that they acquire from screenwriters—ideas the companies may never have thought of without the screenwriter’s story. Accordingly, the original screenwriter deserves credit even though the final product may veer “terribly” from the original script. As the producer acknowledged, if he transformed Keane’s World War II poker game into a modern-day video game competition, the producer would still be telling Keane’s story. Since this transformation is much more pronounced than an African American FBI agent that infiltrates high society America (as opposed to the Italian-American mafia) as two white women (instead of a white man), Keane’s analysis supports the Coppolas and Pitore’s claim that *White Chicks* is substantially similar to *Johnny Bronx*.

IV. HARSHER MONETARY DAMAGES

Like trusts that use their power to injure consumers and competitors,¹¹⁸ production companies take advantage of screenwriters’ vulnerability.¹¹⁹ In order to combat illegal trusts Congress enacted the Sherman Act, which imposes harsh monetary penalties against violators.¹²⁰ Copyright law should follow suit. Currently, federal copyright law imposes a statutory penalty of \$150,000 against infringers.¹²¹ Alternatively, the law provides an injured party with lost profits.¹²²

These remedies are inadequate because a \$150,000 penalty may not deter a production company from stealing a screenwriter’s work,¹²³ especially if the company believes the script will lead to a profitable movie (which the company believes if it buys a script or steals its expression of ideas).¹²⁴ Additionally, determining lost profits may be incredibly difficult if not impossible. Screenwriters negotiate with production companies over the sale of their scripts.¹²⁵ Such negotiations may lead to agreements that courts cannot accurately predict since negotiations are inherently unpredictable.¹²⁶ Screenwriters with superior negotiation skills (or excellent agents) may be able to secure larger payments than screenwriters with inferior skills. Moreover, negotiations may lead to a variety of different kinds of agreements ranging from outright buyouts to payments contingent upon options¹²⁷—courts cannot predict what kinds of agreements production companies and writers would have agreed to. Furthermore, courts should not look to the “going price” of scripts since script’s are unique and some may be (unpredictably) more valuable than others.¹²⁸ Finally, since production companies alter scripts as they feel appropriate,¹²⁹ a court would not be able to determine what profits a screenwriter would have made had a production company not altered his original work.

After considering the incredible profits production companies may “reel” in after transforming a screenwriter’s expression into a movie,¹³⁰ the Sherman Act’s \$100,000,000 punishment for corporate violations (production companies) and \$1,000,000 penalty for individual violations¹³¹ would serve as a more appropriate remedy than copyright law currently provides.¹³² If production companies like those in *Price*,¹³³ *Chalfant*,¹³⁴ *Kourtis*,¹³⁵ *Preller*,¹³⁶ and *Wayans*¹³⁷ faced such penalties, they undoubtedly would be less likely to misappropriate screenwriters’ ideas.

V. CONCLUSION

Jon Coppola, Jason Coppola, and Mario Pittore, the authors of *Johnny Bronx*, have a strong claim against the Wayans brothers.¹³⁷ Since the Wayans brothers used the screenwriters’ well-thought out and original concept about an undercover African American FBI agent, who transforms races to penetrate an exclusive social group, the screenwriters should prevail.¹³⁸ But their case is just one example of large production companies out-muscling powerless screenwriters by misappropriating their expressions.¹³⁹ In order to protect powerless screenwriters from these conglomerates—who currently do not have much to lose by stealing the screenwriters’ expressions¹⁴⁰—copyright law should impose punitive damages similar to those that the Sherman Act imposes against violators.¹⁴¹ Maybe then screenwriters will reap the benefits and respect they have long deserved—after all, they are “the most important part of the making of a motion picture.”¹⁴²

* Associate, Jackson Lewis, LLP, September 2007; J.D. Candidate, Boston University School of Law, 2007; B.S. Cornell University School of Industrial and Labor Relations, 2004.

1. Julius J. Epstein, *Foreword* in CHRISTOPHER KEANE, *HOW TO WRITE A SELLING SCREENPLAY* ix (Broadway Books 1998).

2. Those close to me frequently remind me not to quit my day job. I refuse to believe their insights stem from having read my work, which includes an adaptation of Upton Sinclair’s *The Jungle*, which I’ve entitled *Chicago Will Be Ours!* and an original piece entitled *Hello Richie!*

3. “We write in a solitary place, all alone, by ourselves. For a writer, solitude becomes a companion for life.” Christopher Keane, *Introduction* in CHRISTOPHER KEANE, *HOW TO WRITE A SELLING SCREENPLAY* 3 (Broadway Books 1998). “Every year we waste . . . time grousing about how unfair the movie business is.” CHRISTOPHER KEANE, *HOW TO WRITE A SELLING SCREENPLAY* 5 (Broadway Books 1998).

4. As evidenced by the vast amount of literature that instructs aspiring screenwriters on how to market their scripts to production companies. See e.g., KEANE, *supra* note 3; ROBIN U. RUSSIN AND WILLIAM MISSOURI, *DOWNSTREET SCREENPLAY: WRITING THE PICTURE* (Silman-James Press 2003).

5. “I wrote a number of screenplays. Some made it to the screen, the vast majority did not.” Keane, *supra* note 3 at 3.

6. Epstein, *supra* note 1 at x.

7. Screenwriter Christopher Keane elaborates:

As a screenwriter, can you make a living without ever having a movie made? The answer is a resounding yes. I know men and women screenwriters in Hollywood who make a hundred thousand-plus a year, year after year, and not one of their names has ever appeared in a movie’s credits. . . . I’ve written movies that never got made. Lots of them. One of them, *The Crossing*, has never been made into a movie, maybe never will be, but it’s been close. Many times. Since the novel was published, four studios—Columbia, Warner Bros., Fox, and MGM—and a bundle of production companies have tried to turn it into a movie, for which they have paid me over \$250,000 in options.

KEANE, *supra* note 3 at 162.

8. *Id.*

9. “To justify their salaries [executives] believe that they have to improve [the] script, so they chip away and away.” Epstein, *supra* note 1 at x. Similarly, “the agent, producer, and director . . . the actor, the actor’s agent, and even the grip—screw around with it without your permission, and then—then!—it comes out not on the page where you’d think it would, but on celluloid.” Keane, *supra* note 3 at 3.

10. Screenwriter Christopher Keane recalls:

After completing several drafts of *The Hunter*—working with McQueen, the producer, and the studio—I was horrified by what was happening to my book. “Stop,” I shouted “you are defiling my work.” They told me to calm down. I cried louder. They ignored me. Then McQueen, who saw my problem, came over to me and said, “Hey, kid, take it easy. You’ll give yourself a heart attack. This is a movie now; it’s no longer your book. Your book will always live as a book. This is a different form. If you want to be in this business, learn the ropes.”

Keane, *supra* note 3 at 3.

11. Epstein, *supra* note 1 at x.

12. See David Weber, *‘They stole our chicks’*; Conn. men claim Wayanses ripped off script, THE BOSTON HERALD, June 27, 2004, at News.

13. *Id.*

14. Weber, *supra* note 12.

15. See discussion *infra* Part II.

16. 2007 U.S. Dist. LEXIS 6083 (S.D.N.Y. 2007).

17. 453 F. Supp. 2d 1308 (N.D. Okla. 2006).

18. 419 F.3d 989 (9th Cir. 2005).

19. 1994 U.S. Dist. LEXIS 19568 (D. Md. 1994).

20. 2007 U.S. Dist. LEXIS 6083 (S.D.N.Y. 2007).

21. *Id.* at *3 (italics in original).

22. *Id.* at *3-4.

23. *Id.* at *4 (italics in original).

24. *Id.* at *2, 4.

25. *Id.* at *4.

26. *Id.* at *5 (italics in original).

27. *Id.* (italics in original). The lawsuit names numerous defendants that bear the Fox name—Fox Entertainment Group, Inc., Fox Filmed Entertainment, Twentieth Century Fox, and Twentieth Century Fox Home Entertainment, Inc. See generally *Price*, 2007 U.S. Dist. LEXIS 6083.

28. *Price*, 2007 U.S. Dist. LEXIS 6083 at *5 (italics in original). Dodgeball: *A True Underdog Story* starred celebrities Ben Stiller and Vince Vaughn. See William Glaberson, “Dodgeballs and Jokes May Seem Too Close for Comfort,” THE NEW YORK TIMES, February 22, 2007, at B.

29. *Price*, 2007 U.S. Dist. LEXIS 6083 at *5.

30. Aside from the defendants bearing the Fox name, the plaintiffs sued Red Hour Films, which “decided to develop” Dodgeball: *A True Underdog Story*, and Rawson Thurber, the screenwriter credited with writing the script. *Price*, 2007 U.S. Dist. LEXIS 6083 at *4-5; see generally *Price*, 2007 U.S. Dist. LEXIS 6083.

31. *Price*, 2007 U.S. Dist. LEXIS 6083 at *5.

32. Judge Shira A. Scheindlin noted that:

Both works are superficial fast-moving comedies that spoof underdog sports films. Each work tells the story of a group of misfits led by the main character who forms an underdog dodgeball team, pitted against a stronger rival team of bullies led by the main character’s nemesis. In each work, the underdog team decides to enter a national dodgeball tournament that awards prize money, which the team needs to save a business in distress. . . . The progression of the teams in each work is similar. In the beginning of both works, the team is uncoordinated, made up of very poor dodgeball players and loses to stereotypically inferior teams. . . . In

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each work, a former dodgeball champion comes along unsolicited to coach the team. Notably, both coaches are wheelchair-bound and use unorthodox training methods. . . . The underdog team in both works begins to excel and as a token of the success, the main character in both works receives a gift from the coach. . . . Moreover, in each work, the coach dies in a freak accident in the middle of the competition, causing the main character to lose hope and want to give up. However, in each work the coach reappears as a ghost and speaks to the main character to provide words of wisdom and advice on how to win.

Id. at *29. Judge Scheindlin also noted characters with similar names and personalities in both works: For example, as detailed above, the coach characters are quite similar. Numerous parallels also exist between the character of Gordo in the [screenplay, *Dodgeball: The Movie*,] and Gordon in the Motion Picture. Not only are their names almost identical, but they share certain characteristics as well. Gordo and Gordon are both overweight and they both have a flaw that they must overcome to help the team win the semifinal match: Gordo must overcome his fear of using other people's toilet paper in order to make it in time to the match; Gordon must take control of his anger and channel it to dodgeball during the match when he is the last man standing on the team. In both works, Gordo and Gordon do overcome the flaws and save the day at the semifinals in a very similar manner, by miraculously nearly single-handedly eliminating almost every player on the opposing team. Still other character parallels are present. Both works have a character named Kate who plays dodgeball: in the [screenplay, *Dodgeball: The Movie*,] Kate is a lesbian on the metamaterials team; in the Motion Picture, Kate is the bisexual player on the Average Joes. In both works, a young boy named Timmy appears in a short scene as one of the coach's mentees. There are also a few characters that appear in early . . . drafts [of the motion picture's screenplay] that share names with characters in the [screenplay, *Dodgeball: The Movie*,], such as Dick and Sam (short for Samantha in the [screenplay, *Dodgeball: The Movie*,]). In sum, I find that there are sufficient similarities to raise an issue of material fact as to the issue of actual copying. The degree of similarity between these works is clearly an issue for the trier of fact.

Id. at 29-30. Judge Scheindlin pointed out "'a particular chain of events or link by which the alleged infringer might have gained access to the work.'" *Id.* at 30 (quoting *Mowry v. Viacom Int'l, Inc.*, 75 U.S.P.Q. 2D (BNA) 1624 (S.D.N.Y. 2005)). For instance, "plaintiffs raise a genuine issue of material fact as to whether there is a reasonable possibility that 'the motion picture's credited screenwriter 'had access' to the *Dodgeball: The Movie* screenplay before he completed the motion picture's script 'through a third party intermediary such as' the agent-in-training, who had a copy of the *Dodgeball: The Movie* screenplay. *Id.* at 33-34. The then-trainee worked at the same company as the motion picture's credited writer 'at the same time.'" *Id.* at 33-34. "[T]hey were 'business friends' . . . and given the nature of the industry, they were likely to keep in touch in order to maintain networking connections." *Id.* at 34. Moreover, "a jury could find that there was a reasonable possibility that 'the agent-in-training's coworker, who now represents the motion picture's credited writer 'may have given' the *Dodgeball: The Movie* screenplay to his client. *Id.* at 34-35. Furthermore, the court also noted the "unusual speed" that the motion picture's credited writer completed the motion picture's script—within one month after the alleged date of access—to the *Dodgeball: The Movie* screenplay. *Id.* at *32. Notably, after this date "almost all of the characters who have the same names as the characters in the [*Dodgeball: The Movie* screenplay] . . . appear [in the motion picture's credited writer's drafts] for the first time." *Id.*

Id. at *38. 35. 453 F. Supp. 2d 1308 (N.D. Okla. 2006). 36. *Id.* at 1311. 37. *Id.* at 1311-12. 38. *Id.* at 1312. 39. *Id.* 40. *Id.* 41. One of the writers "became concerned that [the production company's owner] would produce a film based on the screenplay without [the writers'] permission." *Id.* Accordingly, that writer's attorney sent the production company's owner "a cease-and-desist letter forbidding" him from using the screenplay. *Id.* "After receiving the letter," the production company's owner "left a threatening message on" the writer's answering machine. *Id.* The writer then informed the production company's owner that his co-author had "control over filming rights for the screenplay," but both writers "would be given screenwriting credit if a film was ever produced." *Id.* Additionally, he told the production company's owner that both writers "would be entitled to compensation as par of any contract giving [the production company's owner] rights to produce a film based on the screenplay." *Id.*

42. *Id.* 43. *Id.* 44. *Id.* 45. *Id.* 46. This writer also acted in the film. 47. *Id.* 48. *Id.* 49. *Id.* 50. *Id.* at 1313. 51. *Id.* 52. *Id.* 53. *Id.* 54. *Id.* at 1323. 55. 419 F.3d 989 (9th Cir. 2005). 56. *Id.* at 993 (italics in original). 57. *Id.* A "treatment" is "[a] prose narrative . . . that recounts the events in a proposed script of movie." RUSSIN, *supra* note 4. 58. Kourits, 419 F.3d at 993 (9th Cir. 2005). 59. *Id.* 60. *Id.* 61. *Id.* James Cameron is an academy award winner director, perhaps best known for his work in *Titanic*. See, e.g., Jeff Jensen and Adam B. Vary, Cameron's *Titanic* Comeback, ENTERTAINMENT WEEKLY, January 19, 2007 at p. 12. 62. Kourits, 419 F.3d at 993 (9th Cir. 2005) (italics in original). 63. *Id.* (italics in original). 64. *Id.*

screenwriter claimed "that he—not the [treatment writers]—owned the copyright to [The] Minotaur screenplay and that Cameron had misappropriated *The Minotaur*'s concept of a shape-changing character. *Id.* (italics in original). Accordingly, the screenwriter "file[d] a copyright infringement action . . . against Cameron and other persons associated with *Terminator II*." *Id.* (italics in original). The [treatment writers] did not intervene in [the screenwriter's] suit." *Id.* "The court ultimately found that *Terminator II* and *The Minotaur* are not substantially similar and granted summary judgment to Cameron and the other defendants on [the screenwriter's] copyright infringement claim." *Id.* (italics in original) (referencing *Green v. Schwarzenegger*, No. CV 93-5893 (WMB) (C.D. Cal. July 1, 1994), at 8). "[The treatment writers], who reside in Australia, then brought suit against [the screenwriter] in an Australian court to determine ownership of *The Minotaur* materials. . . . [the treatment writers] prevailed." *Id.* at 994 (italics in original) (referencing Kourits v. Green, No. 8497 (Vic. Mar. 19, 1998)).

65. *Id.* 66. *Id.* at 1001. 67. 1994 U.S. Dist. LEXIS 19568 (D. Md. 1994). 68. *Id.* at *2. 69. *Id.* 70. *Id.* 71. *Id.* 72. *Id.* at *2-3. 73. *Id.* at *3. 74. *Id.* 75. *Id.* 76. *Id.* 77. *Id.* 78. *Id.* at *2. The writer sued Time Warner for "selling, leasing and distributing the movie '*Switch*.'" *Id.* at *6. 79. *Id.* at *5, *7. 80. 2007 U.S. Dist. LEXIS 6083. 81. 453 F. Supp. 2d 1308. 82. 419 F.3d 989. 83. 1994 U.S. Dist. LEXIS 19568. 84. Pl. Am. Compl. at ¶ 12. 85. *Id.* at ¶ 13. 86. *Id.* at ¶¶ 16, 17, 20. Hollywood talents Kenan Ivory Wayans, Sean Wayans, and Marlon Wayans are known as the Wayans brothers. *Id.* at 16.

87. *Id.* at ¶ 18. 88. *Id.* at ¶ 19. 89. *Id.* at ¶ 28. Notably, another production company expressed interest in the screenwriters' script until the company learned about *White Chicks* "because of the stark similarities between the general idea, plot and scenes contained in the screenplay and that depicted in" *White Chicks*. *Id.* at ¶ 31.

90. *Id.* at ¶ 32. 91. For instance, the Plaintiff's Fourth Amended Complaint names Revolution Studios, Inc., Sony Pictures Entertainment, and the Gold/Miller Agency. See generally *id.*

92. *Id.* at ¶¶ 35-40. 93. I focus my legal analysis on the Second Circuit because if the case goes to trial it will be litigated in Connecticut, which is in the Second Circuit. See Pl. Am. Compl. at ¶ 8.

94. "To establish [copyright] infringement, two element must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). "In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and

of the facts stated in the certificate." 17 U.S.C. § 410(c). The authors of *Johnny Bronx* meet this requirement. See discussion *supra* Part III.A.

95. "Because direct evidence of copying is seldom available, a plaintiff may establish copying circumstantially 'by demonstrating that the person who composed the defendant's work had access to the copyrighted material.'" *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) (citing *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1249 (11th Cir. 1999)) and that there are similarities between the two works that are 'probative of copying.' *Id.* (citing *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997), cert. denied, 525 U.S. 815 (1998)). "It is only after actual copying is established that one claiming infringement" then proceeds to demonstrate that the copying was improper or unlawful by showing that the second work bears 'substantial similarity' to protected expression in the earlier work." *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 137 (2d Cir. 1998) (citing *Webber*, 132 F.3d at 889; *Laureysens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992)).

96. 2007 U.S. Dist. LEXIS 6083. 97. 453 F. Supp. 2d 1308. 98. 419 F.3d 989. 99. 1994 U.S. Dist. LEXIS 19568. 100. See discussion *infra* Part III.B.1. 101. See discussion *supra* Part III.A. 102. See discussion *infra* Part III.B.2. While the Second Circuit holds that a copyright infringement claimant's proof of similarities should include a "probative" and then a "substantial" similarities demonstration, I only comment on *Johnny Bronx*'s substantial (not probative) similarities to *White Chicks* to avoid repetition. *Jorgensen*, 351 F.3d at 51; *Carol Publ'g Group*, 150 F.3d at 137.

103. *Carol Publ'g Group*, 150 F.3d at 138. 104. *Id.* (quoting *Ringgold*, 126 F.3d at 75). 105. *Id.* (quoting *Ringgold*, 126 F.3d at 75).

106. See discussion *supra* Part III.A. 107. Movies like *Lethal Weapon* (1987) and *Beverly Hills Cop* (1984) have portrayed African-American law enforcers that try to infiltrate exclusive social groups. Some movies like *Soul Man* (1986) have involved race transformation as well. Before such movies, these expressions alone arguably were copyrightable. Likewise, before *White Chicks*, the combination of the two ideas was original (or at least not mainstream) and, therefore, arguably copyrightable.

108. In *White Chicks* the exclusive society is aristocratic America; in *Johnny Bronx*, the Italian American mafia. See discussion *supra* Part III.A.

109. Pl. Am. Compl. at ¶ 32. 110. KEANE, *supra* note 3 at 163.

111. *Id.* 112. KEANE, *supra* note 3 at 162. "Since the novel was published, four studios—Columbia, Warner Bros., Fox, and MGM—and a bundle of production companies have tried to turn it into a movie, for which they have paid [Keane] over \$250,000 in options." *Id.*

113. *Id.* at 162-71. 114. *Id.* at 164. 115. *Id.* (italics in original).

116. *Id.* at 166. 117. *Id.* at 167.

118. The Sherman Antitrust Act's purpose is "to protect the public from the failure of the market. The law directs itself . . . against conduct which unfairly tends to destroy competition itself." *Spectrum Sports v. McQuillan*, 506 U.S. 447, 458 (1993). Copyright law should similarly protect screenwriters' expression of ideas by instituting punitive damages upon violators that unfairly steal these expressions. 119. See discussion *infra* Parts I, II, and III. Aside from simply misappropriating a screenwriter's expression, screenwriters Robin U. Russin and William Missouri Downs talk about other ways producers take advantage of screenwriters. For instance, they write:

. . . in the course of meeting people in Hollywood, you will inevitably come across would-be producers who have a killer idea they'd like you to work on with them. The pitch is something like this: "Listen, you sound like someone I'd like to work with. I've got this great story (fill in story) and I have a hot actor (or financier, distributor, director) who is really, really interested. And I have half the money in place. But I need a screenplay (or treatment) to clinch the deal. So won't you sit down and write it for me? I can't pay you anything now, but we can work out a good back-end arrangement." Back-end means you don't get paid until the movie is actually financed or, more often, actually produced. This is a great thing if the film is already greenlit, and many stars and top directors will take lower upfront fees if they're guaranteed a high percentage of the film's earning. But what it almost always means with these hustlers is that you'll never see a dime, because their contacts are tenuous or nonexistent.

RUSSIN, *supra* note 4 at 328-29. 120. The Sherman Act states that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 100,000,000 if a corporation, or, if any other person, \$ 1,000,000, or imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (YEAR). The law continues: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 100,000,000 if a corporation, or, if any other person, \$ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id. at § 2. 121. See 17 U.S.C. § 504.

122. *Id.* 123. See discussion *supra* Parts II and III.

124. For example, the following table lists the ten highest grossing films of all time:

Title	Worldwide Box Office
<i>Titanic</i> (1997)	\$1,835,300,000
<i>The Lord of the Rings: The Return of the King</i> (2003)	\$1,129,219,252
<i>Pirates of the Caribbean: Dead Man's Chest</i> (2006)	\$1,060,332,628
<i>Harry Potter and the Philosopher's/Sorcerer's Stone</i> (2001)	\$968,657,891
<i>Star Wars Episode I: The Phantom Menace</i> (1999)	\$922,379,000
<i>The Lord of the Rings: The Two Towers</i> (2002)	\$921,600,000
<i>Jurassic Park</i> (1993)	\$919,700,000
<i>Harry Potter and the Goblet of Fire</i> (2005)	\$892,194,397
<i>Shrek 2</i> (2004)	\$880,871,036
<i>Harry Potter and the Chamber of Secrets</i> (2002)	\$866,300,000

IMDb, All-Time Worldwide Box Office, available at <http://www.imdb.com/boxoffice/alltimegross/?region=world-wide> (last accessed April 3, 2007).

125. According to George Lucas, who produced *Star Wars* and *Raiders of the Lost Ark*, "They don't make movies in Hollywood; they make deals."

126. "Negotiation is a fascinating subject in part because the process is so often unpredictable." Lakshmi Balachandra, Robert C. Bordon, Carrie Menkel-Meadow, Philip Ringstrom, and Edward Sarath, *Improvisation and Negotiation: Expecting the Unexpected*, 21 (4) NEGOTIATION JOURNAL 415, 416 (October 2005) available at <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1571-9979.2005.00074.x?cookieSet=1>.

127. KEANE, *supra* note 3 at 136. Keane mentions a variety of ways production companies buy scripts from screenwriters: The agent shops your script to people inside the agency, some outside. Before long, there's a bite. Let's say a producer on the Universal lot believes he can make a movie from your script. He calls your agent and makes an offer—an outright buy. Your agent calls you and says that the producer is willing to buy your script for \$300,000 in a preemptive offer (which means: take it or leave it, now). Which means, if you accept the offer, they own the script. They may make it, they may put it on the shelf and leave it there. They own it. . . . What usually happens is that your agent sends your script to stars, then to directors, and, if there are no takers on those levels, finally to producers. Or in reverse order. Or to all of them at once. Let's say a producer agrees to option your screenplay and pays you \$25,000 for a one-year option against a purchase price of \$250,000 if the picture is made. This means that for \$25,000 you give the producer the exclusive right for one year to try to set up your script. During this time the producer will send it to actors, directors, and the studios. "Against a purchase price" means that if your script goes before the cameras, you will get the difference between whatever you've made so far on the project, and, in this case, \$250,000. This option agreement usually contains a clause granting the producer additional option time—for more money—if he or she needs it.

Id. note 3 at 136-37. 128. The wide-range of box office sales amongst the top ten grossing movies of all time demonstrates that some scripts are more valuable than others. See note 120.

129. See discussion *supra* Parts II and III. 130. *Supra* note 120.

131. See 15 U.S.C. §§ 1-2. 132. See 17 U.S.C. § 504.

133. 2007 U.S. Dist. LEXIS 6083. 134. 453 F. Supp. 2d 1308.

135. 419 F.3d 989. 136. 1994 U.S. Dist. LEXIS 19568.

137. See discussion *supra* Part III.B. 138. *Id.*

139. See discussion *supra* Part II.A-D. 140. See discussion *supra* Part IV.

141. *Id.* 142. See Epstein *supra* note 1.

THE EFFECT OF THE BASEBALL ANTITRUST EXEMPTION ON BASEBALL'S RECENT TELEVISION DEALS

by Allan M. Johnson

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I. FACTUAL BASIS FOR THE ANTITRUST ISSUE

A. Recent Baseball Television Negotiations and Transactions

Organized baseball's treatment of television has drastically changed over the past six decades. In 1946, major league teams adopted rules preventing the broadcast of their games more than fifty miles from the ballpark.¹ Additionally, organized baseball struck financially unfavorable deals with broadcasters.²

Presently, the major debate in the world of televised baseball revolves around how to best deliver out-of-market baseball games to consumers, in stark contrast to the fifty-mile rule. Moreover, Major League Baseball ("MLB") demonstrated the tremendous value that it could demand for its product when it announced a seven-year, \$700 million deal for DirecTV to exclusively carry its Extra Innings package.³

Extra Innings is MLB's out-of-market games television package.⁴ It allows subscribers, who pay a fee of about \$165⁵, to watch approximately 60 games per week featuring teams from across the league, not just the local ball club.⁶ Since 2002, Extra Innings has been non-exclusively distributed by DirecTV (a satellite television distributor), Dish Network (a competing satellite provider), and InDemand (a consortium of several cable television providers).⁷ During the 2006 season, there were close to 600,000 Extra Innings subscribers.⁸

Leading into the 2007 season, MLB solicited offers for the rights to broadcast Extra Innings. However, the package for which MLB was soliciting offers was not the same as in previous years; now it included rights to MLB's new 24-hour baseball channel.⁹ This packaging of rights is likely in response to the difficulties that both the National Football League and the National Basketball Association experienced in getting cable companies to carry their own league networks.¹⁰ MLB made the acceptance of the nascent MLB Channel, to be launched in 2009, a condition of a successful bid to carry Extra Innings.¹¹

This acceptance of the MLB Channel proved to be a tripping point for InDemand. InDemand's starting offer included non-exclusive rights to carry the MLB Channel.¹² MLB's condition was embraced by DirecTV, as it agreed to exclusively carry the MLB Channel as part of its \$700 million deal.¹³ Additionally, DirecTV received a twenty percent ownership stake in the new channel.¹⁴

Following the announcement of the DirecTV deal, InDemand made another offer to MLB, allegedly matching the terms of the DirecTV deal, but MLB rejected the offer.¹⁵ The rejection stemmed from a disagreement regarding the terms of the DirecTV deal, which MLB had suggested could be matched by InDemand.¹⁶ InDemand promised to match the 15 million subscribers to the MLB Channel that DirecTV would provide, but MLB claimed any prospective deal would require that MLB Channel be made available to eighty percent of all digital customers served by the distributor.¹⁷ InDemand claimed this term was particularly unfair, since they would "assume a disproportionate share of the \$100 million annual cost of Extra Innings and agree to carry The Baseball Channel on terms significantly more onerous than DirecTV."¹⁸

This failure to reach a deal would have prevented millions of television viewers from watching Extra Innings. Extra Innings

was available to almost 100 million viewers in 2006, and DirecTV has only 16 million customers.¹⁹ This dramatic shift in customer base caused Senator John Kerry to hold hearings on the entire Extra Innings bargaining process.²⁰ Stephen F. Ross, a sports law expert from Penn State University described the proceedings by noting "You had a United States senator trying to broker a deal in public."²¹

The senator did have some success as MLB announced a deal with InDemand with a week of the hearings.²² InDemand agreed to carry the MLB Channel when it debuted in 2009, and MLB furnished InDemand ownership stake "about equal" to that of DirecTV.²³ As the deals stand presently, DirecTV and the cable companies represented by InDemand will pay \$100 million per year to MLB for the rights to carry Extra Innings.²⁴ Additionally, MLB's majority share in MLB Channel will allow it to reap substantial financial benefits from the "estimated \$120 million in annual gross subscriber fees that the channel will generate."²⁵

B. Resulting Legal Issues

No less than three major antitrust issues present themselves from the preceding negotiations. First, if the InDemand agreement had not gone through, several million television viewers would have been precluded from watching Extra Innings because they were not DirecTV subscribers. The exclusive deal could be attacked as anti-competitive under Section One of the Sherman Act.

Second, each of the deals negotiated by MLB with the broadcasters conditions acceptance of MLB Channel as a condition of carrying Extra Innings. This could be considered an illegal tying arrangement. MLB forced the broadcasters to accept the MLB Channel by tying it to the Extra Innings package.

Third, there is the issue of the baseball antitrust exemption. This is the threshold issue in either of the above analyses. If the baseball antitrust exemption covers this type of negotiation and deal-making, then MLB will avoid antitrust scrutiny for deals which may otherwise be unlawful under federal antitrust law. This issue is the focus of the analysis of this article.

In Section II, the article examines several different areas of law which may afford antitrust immunity to MLB's conduct in the Extra Innings dealings. Section III analyzes the deals under each of the exemption doctrines. Section IV posits several conclusions regarding the outcome of the deal and what may happen in the future.

II. APPLICABLE LAW

A. Sports Broadcasting Act

When looking at the intersection of sports and broadcasting law, the logical place to start is the Sports Broadcasting Act of 1961 ("SBA"). The SBA provides an antitrust exemption for professional sports leagues when negotiating television deals, in certain contexts.²⁶ Specifically, the statute states that

[t]he antitrust laws . . . shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in

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football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball or hockey, as the case may be, engaged in or conducted by such clubs.²⁷

At first glance, the statute appears to exempt all television broadcasts from antitrust scrutiny.

However, that is not the case. The key is the narrow interpretation that courts have given to the language "sponsored telecasting." "[T]he phrase 'sponsored telecasting' refers to broadcasts which are financed by business enterprises (the 'sponsors') in return for advertising time and are therefore provided free to the general public."²⁸ Since satellite and cable signal providers provide their services for a fee, they could not be considered "free to the general public" in the context of this court's interpretation of the SBA.

In *Shaw*, a class of individuals challenged, on antitrust grounds, "an agreement among members of the National Football League ("NFL") to sell broadcast rights jointly to satellite distributors."²⁹ The NFL argued that "its pooled sale to the satellite distributor is nonetheless within the SBA's antitrust law exemption because it constitutes a sale of residual or retained rights in the sponsored telecasts."³⁰ However, the court did not accept this argument, and it held "[t]he broadcast rights sold to sponsored telecasters do not subsume the separate broadcast rights sold to a non-sponsored medium."³¹ Thus, the sale of NFL games to subscription satellite distributors is not with the antitrust exemption provided by the SBA.

B. The Baseball Antitrust Exemption

1. Origins- Toolson and Federal Baseball

The baseball antitrust exemption traces its roots in federal court jurisprudence all the way back to the demise of the Federal League.³² The Federal League started in 1913 as a third option to the two dominant leagues of the day, the American League and the National League.³³ The Federal League attracted players with contracts very favorable to the players.³⁴ However, these contracts proved to be overly burdensome to owners, leading to the financial downfall of the new Federal League.³⁵ Organized baseball bought out most of the Federal League ball clubs.³⁶

However, not all of the Federal League owners were satisfied with the dissolution of the league, especially the directors of the Baltimore franchise.³⁷ They sued organized baseball under federal antitrust laws, claiming the defendants conspired to destroy the Federal League by buying out all of its baseball clubs.³⁸

The Supreme Court disagreed, finding the Sherman Act did not apply to baseball.³⁹ The Court stated that "[t]he business is giving exhibitions of base ball, which are purely state affairs."⁴⁰ "But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."⁴¹ Even though teams must travel interstate, the Court clearly held the game of baseball was a purely intrastate activity. Section One of the Sherman Act declares illegal contracts and conspiracies "in restraint of trade or commerce among the several States."⁴² Consequently, by holding that baseball fails to meet the definition of interstate commerce, the Court exempted baseball from antitrust scrutiny under the Sherman Act.

Baseball's antitrust exemption was challenged again a few decades later. George Toolson, a former player in the Yankees farm system, filed an antitrust suit challenging the legality of the reserve clause.⁴³ At that time, the standard player contract contained a renewal clause that owners interpreted as a perpetual option to renew the player's services.⁴⁴ Many important people within organized baseball feared the possible outcome of a federal case testing the legality of the reserve clause.⁴⁵

Those fears proved unfounded as the Supreme Court upheld the legality of both the reserve clause and the baseball antitrust

exemption.⁴⁶ This time, the Court did not examine the interstate commerce aspects of baseball.⁴⁷ Instead, the Court looked to Congress' inaction with regard to the baseball antitrust exemption, noting "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect."⁴⁸ Federal Baseball was construed to stand for the proposition that Congress did not intend to include "the business of baseball within the scope of federal antitrust laws."⁴⁹ The Court concluded "that if there are evils in this field which now warrant the application to it of the antitrust laws it should be by legislation."⁵⁰ Thus, even though the Supreme Court itself exempted baseball from antitrust scrutiny, the Court held it was the provenance of Congress to overturn such a decision.

Other sports sought the same antitrust exemption as baseball, but the Court refused to extend the exemption past baseball.⁵¹ "[S]ince *Toolson and Federal Baseball* are still cited as controlling authority in antitrust action involving other fields of business, [the Court] . . . specifically limit[ed] the rule there established to the facts there involved, i.e., the business of organized professional baseball."⁵² The Court crafted a narrow exception just for baseball, even admitting that the ruling could be considered "unrealistic, inconsistent, or illogical."⁵³

2. Definition- Flood v. Kuhn

Baseball faced its third challenge regarding the antitrust exemption in fifty years after Curt Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies.⁵⁴ Flood, a member of the Cardinals for eleven years, disliked the fact he would be uprooted from a place where he had been cultivating various opportunities outside of baseball.⁵⁵ Moreover, the Phillies had a history of racial bigotry.⁵⁶ Adding insult to injury, Flood was told about the trade only after the trade had been consummated.⁵⁷ Flood wrote a letter to Commissioner Bowie Kuhn on Christmas Eve 1969, stating "After twelve years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes."⁵⁸ Kuhn denied Flood's request to be declared a free agent, leading to an antitrust challenge to the trade.⁵⁹

Both the trial court and the Second Circuit denied Flood's claim, citing baseball's long-standing antitrust exemption established in both *Toolson and Federal Baseball*.⁶⁰ The Supreme Court granted certiorari and began its opinion with an unusual paean to the sport of baseball.⁶¹ After an exhaustive review of the tortuous history of the antitrust exemption, the Court made several conclusions. First, the Court reversed course and held that professional baseball is "engaged in interstate commerce."⁶² This holding is the opposite of the result reached in *Federal Baseball*, and it effectively destroys the reasoning supporting the initial creation of the antitrust exemption. Second, the Court stated that the baseball was "an exception and an anomaly" given that its reserve system was exempt from federal antitrust laws.⁶³ Third, the baseball antitrust exemption "is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce."⁶⁴

Fourth, given that Congress has not acted to change the judicially created antitrust exemption for baseball, "[t]he Court, accordingly, has concluded that Congress has had no intention to subject baseball's reserve clause to the reach of the antitrust statutes."⁶⁵ The Court stated that Congress, through "positive inaction," has failed to act to reverse the judicially-created baseball antitrust exemption, and thus "has clearly evinced a desire not to disapprove them legislatively."⁶⁶ Similar to the reasoning in *Toolson* and completely ignoring its own ability to overturn precedent, the Court decided to construe Congress's failure to act as an affirmation of a doctrine that it did not create itself.

"If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long-standing that is to be remedied by the Congress and not by this Court."⁶⁷ In other words, the mess

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has been around so long that there's no reason to clean it up at this point, and even if it should be cleaned up, someone else should do it.

Even though the Court acknowledged that the reasoning behind the baseball antitrust exemption is either incorrect or, at best, illogical, the exemption survived its third challenge in fifty years. No other case challenging the exemption has reached to Supreme Court, and it appears that only Congress is able to change the law relative to the existence of the exemption.

3. The Curt Flood Act of 1998

Congress did act in a small way to change the exemption. In 1997, both the players' union and the owners lobbied Congress for a statutory change to the scope of the antitrust exemption.⁶⁸ They got what they wanted from Congress in the Curt Flood Act of 1998.

The Flood Act changes the application of antitrust laws in regard to their application to baseball players themselves. It states that

the conduct acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment if major league baseball players to play baseball at the major league level are subject to antitrust law to the same extent such conduct, acts practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.⁶⁹

Thus, collective bargaining between players and management in baseball is subject to the same antitrust scrutiny that collective bargaining would be in any other professional sport.

In reality, the Flood Act is a mere formality. The non-statutory labor exemption would free this type of activity from antitrust scrutiny.⁷⁰ Thus, the Flood Act does nothing more than formally put baseball on the same level as other sports in this limited context. The activity is still exempt from antitrust laws, just under a different doctrine.

Additionally, the Flood Act expressly states that the Act does not change, in any way, the antitrust exemption in any other context.⁷¹ The Act notes that it does not change the application of the SBA.⁷² Therefore, the baseball antitrust exemption stands as it does in the *Flood* case, with the exception of the context of major league player employment negotiations.

C. Scope of the Baseball Antitrust Exemption

1. Narrow Scope

While the existence of the baseball antitrust exemption is not in doubt, the exact scope of the exemption is not as precisely defined. Several courts have tackled the issue of the scope of the exemption, and the decisions can be broken down into three categories.

First, some courts have held the antitrust exemption to have a very limited scope. The prominent case espousing this interpretation involves an attempted purchase of a major league ball club.⁷³ Two investors, one of which is major league catcher Mike Piazza's father, attempted to purchase the San Francisco Giants in order to move the franchise to Tampa Bay.⁷⁴ MLB formally rejected the plaintiffs' bid following a background check which MLB felt raised questions about the plaintiffs' backgrounds.⁷⁵ The plaintiffs believed that MLB had implied that the plaintiffs, both of Italian heritage, were associated with the Mafia.⁷⁶ They filed an antitrust suit, claiming the MLB conspired to prevent their purchase of the ball club, in violation of antitrust laws.⁷⁷

MLB claimed baseball's antitrust exemption would preclude any liability in the matter.⁷⁸ The plaintiffs argued the exemption would not apply to the facts of the case.⁷⁹ To evaluate the argument, the court examined the history of the exemption at length.⁸⁰ In doing so, the court reached one important conclusion regarding the scope of the exemption- it was limited to the reserve clause.⁸¹ The court cited to several places in both *Toolson* and *Flood* where the Supreme Court indicated the dispositions of those cases specifically involved the reserve system.⁸² When analyzing the effect of stare decisis,

the district court noted "[t]he only aspect of *Federal Baseball* and *Toolson* that remains to be followed is the result or disposition upon the facts there involved, which the Court in *Flood* determined to be the exemption of the reserve system from the antitrust laws."⁸³ In light of this limited scope of the antitrust exemption, the court found that the activity of MLB in this case did not involve the reserve system, and thus was not excluded from antitrust scrutiny.⁸⁴

2. Broad Scope

In the second category of cases, the vast majority of courts have granted the exemption the widest possible scope, disagreeing with the *Piazza* analysis. These cases involve the application of the antitrust exemption to the "business of baseball."⁸⁵

The genesis of the broad interpretation of the baseball antitrust exemption may come from the Seventh Circuit.⁸⁶ Commissioner Kuhn rejected several player deals by the Athletics ownership because he felt it was not in the best interest of baseball to sell player contracts from team to team.⁸⁷ The plaintiff challenged the decision on antitrust grounds, a contention the court rejected.⁸⁸ "Despite the two references in the *Flood* case to the reserve system, it appears clear . . . that the Supreme Court intended to exempt the business of baseball, not any particular facet of that business, from the federal antitrust laws."⁸⁹ Consequently, the decisions of the Commissioner were not subject to antitrust scrutiny.

One case involved a failed attempt to bring a AA minor league franchise to New Orleans.⁹⁰ The move of the AA Charlotte franchise was approved with a condition; the move would be voided if a club of a higher classification league moved into the territory.⁹¹ Indeed, this condition was met when the AAA Denver Zephyrs applied to move to New Orleans, and the Zephyrs move was ratified.⁹²

The district court refused to follow the "cramped view" of the *Flood* case provided by the *Piazza* analysis.⁹³ "Even with the assistance of *Piazza*, the Court is not convinced that the baseball exemption to the antitrust laws does not apply in this case."⁹⁴ References to the reserve clause in the *Flood* opinion did not limit the holding to just the reserve clause.⁹⁵ As a result, the court granted the defendant summary judgment on the plaintiff's federal antitrust claims.

Another broad interpretation of the exemption came when two prospective classes of plaintiffs challenged, under antitrust laws, MLB's actions relative to the players during the 1994 strike.⁹⁶ The two classes were comprised of fans and businesses adversely affected economically by the strike.⁹⁷ The court explicitly rejected the *Piazza* holding, stating "the great weight of authority recognizes that the scope of the antitrust exemption covers the business of baseball."⁹⁸ Moreover, the court stated that "the Supreme Court should retain the exclusive privilege of overruling its own decisions."⁹⁹ The court applied the antitrust exemption to the facts and dismissed the antitrust claims.¹⁰⁰

Several antitrust exemption cases involve MLB's plans to contract the league, eliminating some Major League franchises. Three different cases involved MLB challenging Civil Investigative Demands propounded by attorney generals of different states.¹⁰¹ The Minnesota Supreme Court acknowledged a choice between "either a narrow or a broad reading of professional baseball's antitrust exemption."¹⁰² That court chose the broad reading, finding "that the sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood*, is an integral part of the business of baseball and falls within the exception."¹⁰³ In *Butterworth*, a federal district court came to a similar conclusion, stating "[t]he basic league structure, including the number of teams, remains an essential feature of the business of baseball, exempt from the antitrust laws."¹⁰⁴ The Eleventh Circuit also reached a similar conclusion, explicitly finding "[f]ederal antitrust law exempts the contraction issue from judicial scrutiny."¹⁰⁵

All of the broad exception cases deal with the "business of baseball."¹⁰⁶ In each case, this "business" involves parties that

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are either a part of organized baseball or parties that hope to be a part of organized baseball. None of these cases involve third party interacting with MLB.

3. *Baseball's Interaction with Third Parties*

Last, some cases not directly dealing with the interactions of third parties with organized baseball have acknowledged the possibility that the exemption may not cover such dealings. The Eleventh Circuit stated "[i]t is true that the antitrust exemption has not been held to immunize the dealing between professional baseball clubs and third parties."¹⁰⁷ The Seventh Circuit "recognized[d] that the exemption does not apply wholesale to all cases which may have some attenuated relation to the business of baseball."¹⁰⁸

At least two other district court cases have dealt with the coverage of the exemption in third party dealings. The first case arose out of the alleged breach of a concessions contract.¹⁰⁹ The new owner of the Athletics franchise refused to honor a contract to provide concessions at baseball games, claiming the contract violated antitrust laws.¹¹⁰ Neither party nor the court in this case claimed the contract was exempt from antitrust law under an exemption, leading to the conclusion that no one involved believe that the exemption would apply to such a contract.¹¹¹

Most illustrative is another district court case involving radio broadcasts of baseball games.¹¹² A radio station brought federal antitrust claims against the owner of the Houston Astros franchise when the defendant cancelled the plaintiff's contract to broadcast Astros games on the radio.¹¹³ In its review of the law behind the exemption, the court stated that the Supreme Court

has not considered the precise question of whether radio broadcasting of baseball games is also exempt, but its opinions imply that the exemption covers only those aspects of baseball, such as leagues, clubs, and players which are integral to the sport and not related activities which merely enhance its commercial success.¹¹⁴

Thus, the district court differentiated the "business of baseball" from "business with baseball" in terms of the application of the antitrust exemption. "Radio broadcasting is not a part of the sport in the way in which players, umpires, the league structure, and the reserve system are."¹¹⁵ The court refused to treat the radio station's claim differently simply because it made a deal with a baseball club, as opposed to any other entity.¹¹⁶ Any differentiation in treatment "would be to extend and distort the specific baseball exemption, transform it into an umbrella to cover other activities and markets outside baseball and empower defendants . . . to use that umbrella as a shield against the statutes validly enacted by Congress."¹¹⁷

D. *The Effects of Third Party Interactions on Other Antitrust Exemptions*

The *Henderson Broadcasting* court was "also persuaded by plaintiff's argument that an exempt baseball team, like a labor union or agricultural cooperative which is exempted from the Sherman Act by statute, loses its exemption when it combines with a non-exempt radio station."¹¹⁸

Several examples exist of exempt entities losing an exemption due to interaction with another entity that is not afforded such an exception. A union may lose its antitrust exemption when it conspires with employers.¹¹⁹ The Webb-Pomerene Act, created to exempt American joint export associations thus affording them the ability to compete with foreign cartels without running afoul of the Sherman Act, did not provide an exemption to "transactions initiated, controlled, and financed by the American Government."¹²⁰ The Noerr-Pennington doctrine, which extends antitrust immunity to attempts to influence judicial and administrative actions, did not exempt the defendant telecommunications company's refusal to interconnect local lines with its interstate lines because that refusal "was not directed toward influencing government action."¹²¹

These cases demonstrate that exceptions to antitrust scrutiny will be strictly construed. If an entity enjoying antitrust immunity strays

slightly outside the bounds of the exempted conduct, it will lose the exemption. In these cases, interaction with non-exempt entities led to the loss of immunity for an otherwise exempt organization.

III. **APPLYING ANTITRUST EXEMPTION DOCTRINES TO THE EXTRA INNINGS DEALS**

A. *Sports Broadcasting Act Analysis*

For the Extra Innings deals to enjoy antitrust immunity under the SBA, satellite television must qualify as "sponsored broadcasting."¹²² Under *Shaw*, broadcasting must be provided to the general public at no charge to fall under the SBA.¹²³ Extra Innings is only provided to customers for a fee. Consequently, the SBA will not provide an antitrust exemption for any of the facts surrounding the Extra Innings dealings.

B. *Analysis Under the Narrow Exception*

Even though the analysis under the narrowly construed baseball antitrust exemption has been routinely rejected, in the absence of a Supreme Court decision explicitly defining the scope of the baseball antitrust exemption, any district court could decide to follow *Piazza* reasoning. *Piazza* confined the antitrust exemption to just the reserve clause.¹²⁴ Since the Extra Innings dealings have no relation to the reserve clause, they cannot be exempted under a narrow construction of the baseball antitrust exemption.

C. *Analysis Under the Broad Exception*

Analysis under the broad antitrust exemption is not nearly as elementary as the above exemption theories. If the Extra Innings dealings qualify as the 'business of baseball', then they will enjoy antitrust immunity. Conversely, if the deals are considered 'business with baseball', they would be subject antitrust scrutiny.

The cases where a broad, "business of baseball" antitrust exemption is applied involve the inner workings of the game of baseball: franchise relocation, contraction, free agency, or the reserve clause. The exempted conduct relates to how the game is played or who is involved in organized baseball. Parties who are not a part of organized baseball seek to become part of that exclusive group. All cases directly connect to how the organized baseball presents itself to outside parties.

In contrast, the Extra Innings dealings do not involve the mechanics of organized baseball. The television negotiations and resulting contracts involve organized baseball making deals with entities entirely outside of baseball's internal functions. These would fall outside of the baseball antitrust exemption as previously construed. It would constitute business *with* baseball rather than the business *of* baseball.

If a court views *Henderson Broadcasting* as persuasive, it would almost certainly find the Extra Innings deals to be outside the scope of the exemption. The differences between radio broadcasting and satellite or cable television broadcasting are not so great that they merit different treatment under federal antitrust law. The Extra Innings deals should fall outside the scope of the exception if radio broadcasts fall outside of the exception.

Moreover, when baseball bargains with parties other than those engaged in the business of baseball, it need not be afforded antitrust protection. Such protection would be fundamentally unfair to television signal distributors. Those distributors, who may negotiate deals with a multitude of entertainment entities, should not lose the benefit of antitrust laws simply because they strike a television deal with baseball, as opposed to football or even ballet. Thus, policy concerns militate against application of the exemption to the Extra Innings deals.

Other sources of authority tacitly agree with the proposition that all business relating to the business is covered by a blanket exemption. "[O]ne would not be justified in concluding that all

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transactions between baseball leagues and broadcast networks would be exempt merely because the business of professional baseball itself is exempt from the antitrust laws.”¹²⁵

On the other hand, some commentators may support the extension of antitrust immunity to situations such as the Extra Innings deals. A Senior Vice President and General Counsel in the Office of the Commissioner states that “it would seem that a decision by the clubs or the Commissioner intended to . . . improve the collective health of the sport and its business should certainly be viewed as being with the business of baseball by any court fairly applying the exemption.”¹²⁶ This interpretation would characterize the Extra Innings deals as positively affecting the overall health of the sport. Since the deals are intended to advance the business of the sport, it may affect the business of baseball. Thus, the conduct would be immune from antitrust attack.

D. Analysis Under the Non-Sports Cases

Across antitrust doctrine, entities that choose to deal with non-exempt third parties may lose their own exemption. The cable and satellite providers are certainly not exempt from antitrust scrutiny under any existing legal doctrine. Thus, organized baseball’s interaction with these non-exempt entities may cause it to lose the benefit of the antitrust exemption.

Courts are not eager to expand an antitrust exemption to cover previously uncovered activity. “The unwillingness of the courts to imply antitrust immunity is based on recognition that the ‘antitrust laws represent a fundamental national economic policy’ which should not be lightly disturbed.”¹²⁷ Consequently, a court would be unlikely to expand the baseball antitrust exemption to previously uncovered activities, such as contracts between television distributors and MLB.

IV. CONCLUSION

In spite of the baseball antitrust exemption’s long and tortuous history, including no less than three Supreme Court cases, the exact nature of the exemption has yet to be defined by the judiciary. Some baseball activities are clearly immune from antitrust laws, but others’ immunity is questionable at best.

The Extra Innings deals fall into the questionable category. They do not fit the mold of the typical exemption case. The cable and satellite companies are not the typical aggrieved parties of past antitrust challenges to the MLB. Historically, deals of this type have not fallen under the umbrella of the exemption. Given courts’ hesitance to expand or change the antitrust exception doctrine without legislative input, it is unlikely that a court would expand the antitrust exception to cover activities like the Extra Innings deals.

MLB may be wise not to depend on antitrust immunity in their Extra Innings deals. MLB is leveraging the wildly popular Extra Innings package to force the television distributors to accept the new MLB Channel. Distributors could challenge the suit as an illegal tying arrangement. Given that they have a plausible argument that the exemption does not apply, MLB has greater incentive to settle any potential suit. A holding that refuses to apply the exemption would cut back MLB’s bargaining leverage in future negotiations in other contexts. MLB should give in to demands in this case to preserve the power of the exemption in future antitrust battles.

1. ROBERT F. BURK, MUCH MORE THAN A GAME, 109 (2001).

2. *Id.* at 110. Commissioner Happy Chandler brokered the first deal to televise the World Series. He sold the rights for \$1 million per year. The buyer promptly resold the rights to NBC for \$4 million per year. This poorly negotiated deal quickly led to Ford Frick’s installation as Commissioner.

3. Richard Sandomir, *Extra Innings Exclusively on DirecTV*, N.Y. TIMES, January 20, 2007, at D6.

4. *Id.*

5. Joe Nocera, *Tug of War Puts Fans in the Middle*, N.Y. TIMES, March 31, 2007, at C1.

6. Sandomir, *supra* note 3, at D6.

7. *Id.*

8. Richard Sandomir, *Baseball’s Deal for Extra Innings Draws F.C.C.’s Eye*, N.Y. TIMES, February 23, 2007, at D2.

9. Sandomir, *supra* note 3, at D6.

10. Nocera, *supra* note 5, at C1.

11. *Id.*

12. Sandomir, *supra* note 3, at D6.

13. Richard Sandomir, *Baseball Lays Off Cable Operators’ Pitch*, N.Y. TIMES, March 22, 2007, at D3.

15. *Sports Programming Issues Before the S. Comm. On Commerce, Sci., & Transp.*, 110th Cong. (2007) (statement of Rob Jacobson, President and CEO of InDemand Networks).

16. Sandomir, *supra* note 13, at D3.

17. *Id.*

18. *Sports Programming Issues*, *supra* note 15 (statement of Rob Jacobson).

19. *Id.*

20. *See generally Sports Programming Issues*, *supra* note 15.

21. Nocera, *supra* note 5, at C1.

22. MLB Announces in Demand Deal, http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20070404&content_id=1879904&vkey=pr_mlb&text=.jsp&c_id=mlb (last visited May 4, 2007).

23. Richard Sandomir, *Extra Innings Made Available*, N.Y. TIMES, April 5, 2007, at D4.

24. *Id.*

25. *Id.*

26. *See generally Sports Broadcasting Act*, 15 U.S.C. § 1291 (2007).

27. *Id.*

28. Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 301 (3d Cir. 1999) (citation omitted).

29. *Id.* at 299-300.

30. *Id.* at 301.

31. *Id.*

32. The first case dealing with baseball’s exemption from antitrust law comes from New York state court-American League Baseball Club of Chicago v. Chase, 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914). There, the court refused to apply antitrust laws to a player contract dispute because the judge “cannot agree to the proposition that the business of baseball for profit is interstate trade or commerce, and therefore subject to the provisions of the Sherman Act.” *Id.* at 16.

33. ROBERT F. BURK, NEVER JUST A GAME 194-95 (1994).

34. *See id.* at 194-96.

35. *Id.* at 208. The Federal League owners lost an estimated \$2.5 million over the 1915 season.

36. *Id.*

37. *Id.*

38. *See Fed. Baseball Club of Baltimore v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 207 (1922).

39. *Id.* at 208.

40. *Id.*

41. *Id.* at 208-09.

42. Sherman Act, 15 U.S.C. § 1 (2007) (emphasis added).

43. Burk, *supra* note 1, at 116.

44. *Id.*

45. *Id.*

46. *See Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

47. *See id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See generally United States v. Int’l Boxing Club*, 348 U.S. 236 (1955); *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957); *Haywood v. Nat’l basketball Assn.*, 401 U.S. 1204 (1971).

52. *Radovich*, 352 U.S. at 451.

53. *Id.* at 452.

54. *See Flood v. Kuhn*, 407 U.S. 258, 264-65 (1972).

55. Burk, *supra* note 1, at 162.

56. *Id.*

57. *See Flood*, 407 U.S. at 265.

58. Burk, *supra* note 1, at 165 (quoting Flood’s letter to the Commissioner).

59. *Id.*

60. Flood, 407 U.S. at 267-68.

61. *Id.* at 260-64. Chief Justice Burger and Justice White concurred with all but this part of the opinion.

62. *Id.* at 282.

63. *Id.*

64. *Id.*

65. *Id.* at 283.

66. *Id.* at 283-84.

67. *Id.* at 284.

68. Thomas J. Ostertag, *Baseball’s Antitrust Exemption: Its History and Continuing Importance*, 4 VA. SPORTS & ENT. L.J. 54, 65 (Fall 2004).

69. *Curt Flood Act of 1998*, 15 U.S.C. § 26b(a) (2007).

70. *See Ostertag*, *supra* note 68, at 65; *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

71. 15 U.S.C. § 26b(b).

72. 15 U.S.C. § 26b(b)(4).

73. *See Piazza v. Major League Baseball*, 831 F.Supp. 420, 421 (E.D. Penn. 1993).

74. *Id.*

75. *Id.* at 422.

76. *Id.* at 422-23.

77. *Id.* at 423.

78. *Id.* at 433.

79. *Id.*

80. *See generally id.* at 433-41.

81. *Id.* at 436.

82. *Id.*

83. *Id.* at 438.

84. *Id.*

85. *Radovich*, 352 U.S. at 451.

86. *See Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

87. *Id.* at 531.

88. *Id.*

89. *Id.* at 541.

90. *See New Orleans Pelicans Baseball, Inc. v. Nat’l Assn. of Prof’l Baseball Leagues, Inc.*, 1994 WL 631144 (E.D. La 1994).

91. *Id.* at *1.

92. *Id.* at *9.

93. *Id.* at *9.

94. *Id.*

95. *Id.*

96. *McCoy v. Major League Baseball*, 911 F.Supp. 454, 455-56 (W.D. Wash. 1995).

97. *Id.*

98. *Id.* at 457.

99. *Id.* at 457 (citation omitted).

100. *Id.* at 458.

101. *See Minn. Twins P’ship v. State*, 592 N.W.2d 847, 849 (Minn. 1999); *Major League Baseball v. Butterworth*, 181 F.Supp.2d 1316, 1318 (N.D. Fla. 2001); *Major League Baseball v. Christ*, 331 F.3d 1177, 1180 (11th Cir. 2003).

102. *Minn. Twins*, 592 N.W.2d at 854.

103. *Id.* at 856.

104. *Butterworth*, 181 F.Supp.2d at 1332.

105. *Christ*, 331 F.3d at 1184.

106. *Radovich*, 352 U.S. at 451.

107. *Christ*, 331 F.3d at 1183.

108. *Finley*, 569 F.2d at 541, n. 51.

109. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F.Supp. 235, 237 (N.D. Cal. 1972).

110. *Id.* at 238.

111. *See generally id.*

112. *See Henderson Broad. Corp. v. Houston Sports Assn.*, 541 F.Supp. 263 (S.D. Tex. 1982).

113. *Id.* at 264.

114. *Id.* at 265.

115. *Id.* at 269.

116. *Id.* at 271.

117. *Id.*

118. *Id.* at 271, n. 9 (citations omitted).

119. *See Ramsey v. United Mine Workers of Am.*, 401 U.S. 302, 311 (1971).

120. *See United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 206-10 (1968).

121. *See Mid-Texas Comm’n Sys., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1384 (5th Cir. 1980).

122. 15 U.S.C. § 1291.

123. *See Shaw*, 172 F.3d at 301.

124. *See Piazza*, 831 F.Supp. at 433-41.

125. Michael Jay Kaplan, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. Fed. 489, §4 (2007).

126. Ostertag, *supra* note 68, at 67.

127. *Mid-Texas*, 615 F.2d

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AUSTIN

October 11-12, 2007
Hyatt Regency Austin

Cosponsored by the Entertainment and Sports Law Section of the State Bar of Texas

Thursday

7.25 hrs including up to 1.5 hr ethics

- 7:30 **Registration**
- 8:30 **Welcoming Remarks**
Course Director
Mike Tolleson, *Austin*
Mike Tolleson and Associates
- 8:45 **Case Law Review and Trends 1 hr**
Stan Soocher, *Denver, CO*
Editor-in-Chief
"Entertainment Law & Finance"
- 9:45 **Review of Recent and Proposed Legislation .75 hr**
Daryl P. Friedman, *Washington, DC*
Vice President, Advocacy & Government Relations, NARAS
- Stan Soocher, *Denver, CO*
Editor-in-Chief
"Entertainment Law & Finance"
- 10:30 **Break**
- 10:45 **Ethics Jeopardy 1 hr ethics**
Tamera H. Bennett, *Lewisville*
Bennett Law Office
- William J. Chriss, *Austin*
Director, Texas Center for Legal Ethics and Professionalism
- 11:45 **Break - Lunch Provided**
- 12:10 **Texas Star Award Presentation**
Honoring Marybeth Peters, recipient of the 2007 Texas Star Award for Outstanding Achievement in the field of Entertainment Law
- 12:15 **2007 Award Recipient Remarks .5 hr**
Marybeth Peters, *Washington, DC*
Register of Copyrights
Library of Congress
- 12:45 **Break**

TRACK A

- 1:00 **Fundamentals of Copyright Termination Rights 1 hr**
Michael Perlstein, *Los Angeles, CA*
Fischbach, Perlstein, Lieberman & Almond
- 2:00 **Misappropriation of Name, Image, Likeness and Persona Claims - The Silver Bullet in Entertainment Litigation 1 hr**
D'Lesli M. Davis, *Dallas*
Fulbright & Jaworski
- Julie Anne Ford, *Austin*
George & Brothers
- 3:00 **Break**
- 3:15 **Legal Issues Encountered in Multi-Artist Rap/ Hip-Hop Album Production 1 hr (.25 ethics)**
- Producer Agreements
 - Featured Artist Agreements
 - Label Exclusivity Waivers
 - Sample Licenses
 - Remixing Agreements
- Ed Fair, *Austin*
Law Offices of Edward Z. Fair
- Tim Mandelbaum, *New York, NY*
Selve, Mandelbaum & Mintz
- 4:15 **State Incentives for Film/TV Production 1 hr**
Jeff Begun, *Los Angeles, CA*
Axiom International
- Bob Hudgins, *Austin*
Director, Texas Film Commission
- Brian O'Leary, *New York, NY*
Vice President, Tax Counsel NBC Universal
- 5:15 **Adjourn**

TRACK B

- 1:00 **"The Big Picture" - A Bird's Eye View of the Music Industry 1 hr (.25 ethics)**
- Revenue Streams
 - Distinction Between Songwriter Income and Recording Artist Income
 - Key Professional Relationships
 - Fundamental Intellectual Property Concepts
- Buck McKinney, *Austin*
Law Office of Buck McKinney
- 2:00 **Songwriter/Publisher Agreements 1 hr**
Jeffrey Brabec, *Los Angeles, CA*
Vice President of Business Affairs
Chrysalis Music Group
- Steve Winogradsky, *North Hollywood, CA*
President, The Winogradsky Company
- 3:00 **Break**
- 3:15 **Recording Agreements 1 hr**
Jeff Biederman, *Los Angeles, CA*
Manatt, Phelps & Phillips
- David Lessoff, *Beverly Hills, CA*
Vice President, Business Affairs
New West Records
- 4:15 **Talent Management Agreements 1 hr**
Neville Johnson, *Beverly Hills, CA*
Johnson & Rishwain
- Bernard Resnick, *Bala Cynwyd, PA*
Bernard M. Resnick, Esq., P.C.
- 5:15 **Adjourn**

Friday

6 hrs including up to .5 hr ethics

8:15 Announcements

Course Director

Mike Tolleson, *Austin*
Mike Tolleson and Associates

8:30 Breaking Up is Hard to Do 1 hr

- Legal Issues Arising from Band Breakups
- Review of Texas Partnership Law as Applied to Bands and Other Entertainment Industry Organizations

John C. Ale, *Houston*
Skadden, Arps, Slate, Meagher & Flom

Buck McKinney, *Austin*
Law Office of Buck McKinney

9:30 Accounting and Tax Issues for the Entertainer 1 hr

- Role of the Business Manager
- Choosing the Right Legal Structure
- Issues for the New Artist Client
- Issues for the High Income Client

Layne Lauritzen, *Austin*
Layne Lauritzen CPA, P.C.

Chuck Flood, *Nashville, TN*
Flood, Bumstead, McCready & McCarthy

10:30 Break

10:45 Nashville Record and Publishing Deals: The Process, the Politics, the Payoff 1 hr

Moderator

Jody Williams, *Nashville, TN*
Vice President, Writer Publisher Relations, BMI

Clay Bradley, *Nashville, TN*
Assistant Vice President
A&R, RCA Records, (Sony/BMG)

Craig Hayes, *Nashville, TN*
Zumwalt, Almon & Hayes

11:45 Lunch on Your Own

1:15 New Legal and Business Challenges Arising from Digital Distribution 1 hr

Robert H. Kohn, *San Diego, CA*
Chairman & CEO, RoyaltyShare, Inc.

2:15 Break

TRACK A

2:30 **The Digital Millennium Copyright Act is Not an Alibi** 1 hr (.25 ethics)
Chris Castle, *Sherman Oaks, CA*
Christian L. Castle, Attorneys

3:30 Producing and Pitching Film & Television Projects to Cable TV Networks 1 hr

- The Market for Indie TV Production
- From Idea to Series: How a TV Show Gets Sold
- Cable Television/Film Acquisition Deals

Moderator

Maureen A. Doherty, *Houston*
Doherty Legal

Harold Brook, *Culver City, CA*
The Point Media

Pearlena Igbokwe, *Los Angeles, CA*
Showtime Networks (*invited*)

4:30 Adjourn

TRACK B

2:30 **The Line Between Amateur and Professional Sports** 1 hr
Ameen Najjar, *Indianapolis, IN*
Director of Enforcement, NCAA

Timothy Davis, *Winston-Salem, NC*
Professor, Wake Forest University Law School

3:30 Negotiating for an Athlete's Services 1 hr (.25 ethics)

- Representing the Athlete
- Representing the Team Owner

Kevin Robinson, *Boulder, CO*
Ascent Sports Management

Woodie Dixon, *Kansas City, KS*
General Counsel, Kansas City Chiefs

4:30 Adjourn

MCLE CREDIT 13.25 HRS (UP TO 2 HRS ETHICS)

MCLE COURSE NO: 900028002

Applies to the College of the State Bar of Texas.

For their generous support of this program, we would like to recognize and thank:



2007 TEXAS STAR AWARD RECIPIENT



Marybeth Peters became the United States Register of Copyrights on August 7, 1994. She also served as Policy Planning Adviser to the Register, Acting General Counsel of the Copyright Office and as chief of both the Examining and Information and Reference divisions. A frequent speaker on copyright issues, Ms. Peters is the author of *The General Guide to the Copyright Act of 1976*.

A member of the bar of the District of Columbia, Ms. Peters received her undergraduate degree from Rhode Island College and her law degree, with honors, from The George Washington University Law School. She has received numerous recognitions for her work as Register of Copyrights, including the Women in Music 1999 Touchstone Award for legislative contributions that brought significant benefit to those in music. In October, 2006 she received the American Intellectual Property Law Association Excellence Award.

Ms. Peters is a member of The Copyright Society of the U.S.A., where she serves as a member of the Board of Trustees, the Intellectual Property Section of the American Bar Association, the U.S. Chapter of the Association Littéraire et Artistique Internationale (ALAI), the American Intellectual Property Law Association (AIPLA) and the Computer Law Association.

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Entertainment Law Institute

8095

1 Check all applicable boxes below to calculate your fee:

☐ **\$300 AUSTIN Live, October 11-12** *Early Registration Deadline: September 27*
Includes Thursday Luncheon!

☐ **Add \$20** if registering **after September 27th.**

(If registration is by mail, date of postmark will determine if this fee applies.)

☐ **Subtract \$25** if you are a member of the State Bar Entertainment and Sports Law Section -OR- State Bar College -OR- State Bar Legal Administrators or Paralegal Division -OR- licensed two years or less.

☐ **No charge** for Qualifying Judge

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**Online versions (PDFs) of course materials will be available for purchase 4-8 weeks after the course in the Online Library at TexasBarCLE.com. Course registrants receive access to the PDFs at no additional charge (see "Two Free Online Benefits for Course Registrants" in this brochure).*

[†]Plus 7.25% tax (8.25% for Austin address) on total. Book orders and audio CD orders are shipped separately and filled approximately 4-6 weeks after the live program. You will be billed unless you authorized a credit card charge above.

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QUESTIONS? 1-800-204-2222, ext 1574 • 512-427-1574

14th Anniversary

Austin Film Festival 2007

Don't miss the 14th anniversary of the Austin Film Festival, October 11-18, in Austin, Texas!

When the Austin Film Festival & Conference launched in 1993, we were the first Conference to celebrate the importance of narrative storytelling in film and the screenwriters' contributions to film and television. Fourteen years later, you can't throw a stick without hitting a film festival or writers' conference. So, what makes the AFF & Conference different from all the rest? Unparalleled access to the right people and the tools needed to get your filmmaking/screenwriting career off the ground.

We are honored to announce that John Milius will be the recipient of the 2007 Distinguished Screenwriter Award. Milius is best known for writing the screenplay *Apocalypse Now*. Other credits include *Big Wednesday*, *Conan the Barbarian*, *Red Dawn*, *Clear and Present Danger*, *The Hunt For Red October*, *The Wind and the Lion*, *Farewell To The King*, *Jeremiah Johnson*, *Judge Roy Bean*, *Geronimo* and *Flight of the Intruder*. John Milius' most recent work includes the HBO's award winning series, *Rome*.

OTHER CONFIRMED SPEAKERS: (Full listing at www.austinfilmfestival.com)
Aline Brosh McKenna (*The Devil Wears Prada*, *Laws of Attraction*, *Three To Tango*)

Larry Wilmore ("The Office", "The Bernie Mac Show", "The PJs", "The Fresh Prince of Bel-Air", "In Living Color")

In addition to the AFF Conference, there will be over 80 advance screenings and film premieres, as well as after parties providing the opportunity to mingle and network with the A-list filmmakers, screenwriters, agents, managers, producers, and development executives who attend annually.

The AFF has been committed to bringing the biggest and brightest names in entertainment to Austin for 14 years. In 2007, AFF continues its tradition of celebrating screenwriters and filmmakers while highlighting some of the most notable narrative and documentary independent films of the day. The AFF Screenwriters Conference will provide registrants unparalleled access to some of the best writers in the field. Don't just watch – be a part of it all!

The Conference is a rewarding, encouraging and fun experience for beginners and professionals alike. For writers, the climate of camaraderie and exchange created by the Conference is both incredible and indispensable.

Check out www.austinfilmfestival.com or call 1-800-310-FEST for more information.

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 TESLAW 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, 2008.

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 email Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at asolomon@stcl.edu.

Be sure to take advantage of these special
Austin Film Festival Discount Passes

****for Entertainment Law registrants**

Regular Conference Badge* \$325 (regular price = \$375)

This pass provides the perfect opportunity to network with your colleagues in the business and have lots of fun in the process! Includes admission to:

- Panel Discussions
- Exhibit Hall
- Meet and Greets
- Film Screenings for all 8 nights
- Late Night Welcome Party
- Conference Closing Wrap Party

All-Access Producers Pass* \$550 (regular price = \$695)

This is the real deal premier pass and includes admission to everything above AND the following:

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- Film Texas BBQ Supper
- Filmmaker's Happy Hour
- Closing Night Premier Party

*Certain special events may require an additional purchased ticket. Individual passes are for one person only and do not include a guest.

**Passes available by phone only at 1-800-310-FEST and require proof of registration for the 2007 TexasBarCLE Entertainment Law Institute.

Other Pass/Badge Deals for Registrants:

Weekend Badge \$200 (\$25 off!)

Day Badge \$85 (\$10 off!)

Film Pass \$30 (\$5 off!)

The New and Updated Section Website is at www.teslaw.org. Comments or suggestions may be submitted to Yocel Alonso at Yocelaw@aol.com or your editor at srjaimelaw@pdq.net ...

NOTICE:

Art-friendly journal seeking budding artist to display artwork on cover! If you would like to see your (or your client's, mother's, spouse's, friend's, etc.) artwork on the cover of our journal, please submit a JPEG or EPS file (no less than 300 dpi) along with a PDF of the artwork to Sylvester Jaime at sylvrbulit@pdq.net.

Articles appearing in the *Journal* are selected for content and subject matter. Readers should assure themselves that the material contained in the articles is current and applicable to their needs. Neither the Section nor the Journal Staff warrant the material to be accurate or current. Readers should verify statements and information before relying on them. If you become aware of inaccuracies, new legislation, or changes in the law as used, please contact the Journal Editor. The material appearing in the *Journal* is not a substitute for competent independent legal advice.

REVIEWING SILKWOOD AT 25: THE REEL IMPACT ON ENVIRONMENTAL POLICY

By Kelly Lynn Anders¹

Kelly Lynn Anders is an Associate Dean for Student Affairs, Washburn University School of Law. She holds a B.A., University of Nebraska, and a J.D., Pepperdine University School of Law. Ms. Anders is a former arts and entertainment reporter with the Omaha World-Herald, and has taught courses in Art Law and Law & Popular Culture.

INTRODUCTION

The year 2008 will mark the 25th anniversary of the release of the film, *Silkwood*, which depicted the events surrounding the apparent plutonium contamination and mysterious death of Kerr-McGee employee Karen Silkwood.² The film featured the facts leading up to the case, but many would argue that the resulting case involved a legal battle worthy of a sequel.³

Although Erin Brockovich⁴ is probably the most famous film involving environmental policy and toxic torts⁵ in recent years⁶, it will never rival the legal impact of *Silkwood*. For one thing, the case depicted in *Erin Brockovich* was settled out of court, so the terms of the deal were never released.⁷ In contrast, the *Silkwood* case was widely debated and continues to be positively cited in hundreds of federal and state cases.

The Kerr-McGee Corporation may no longer exist⁸, but the former company continues to impact our concepts of environmental policy, whistleblower protection, and damages awards through case law. This essay will provide a comparative analysis of the case and its depiction in film, and follow with a summary of how both continue to impact environmental policy.

LEGAL AND POLICY ISSUES

The primary areas of law and policy that apply to the issues presented in *Silkwood* concern employee safety, whistleblower protection, and toxic torts. There are several federal regulations and statutes that address workplace safety and health for workers at facilities that produce, use, store, or dispose of hazardous materials.⁹ These provisions give four agencies – and their state counterparts, where appropriate – various responsibilities affecting workplace safety and health at hazardous material facilities. These agencies are the Department of Labor's Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms (ATF), and the Chemical Safety and Hazard Investigation Board (CSB).¹⁰

Workplaces that produce, use, store, or dispose of hazardous materials are often considered to be among the nation's most dangerous.¹¹ Workers at such facilities face the potential for injury, chronic illness, or death, which can be caused not only by the machinery and processes used to handle these materials, but also by exposure to the materials themselves, as was the case with Karen Silkwood.¹²

According to one recent study, between 1994 and 1999, hazardous material facilities in the United States experienced almost 2,000 major chemical release accidents, causing 33 worker deaths and more than 1,800 worker injuries.¹³ The aforementioned agencies, each with its own mission, method of operation, regulatory requirements, and organizational structure, play a role in protecting workplace safety and health. Having multiple agencies play some role for protecting workers who are exposed to hazardous materials may help to ensure that all workers are adequately protected. However, if not coordinated properly, the need to comply with multiple authorities may also cause employers an unnecessary burden and result in confusion that might actually endanger worker safety.

Concerns have also been raised that there still may be regulatory gaps that leave some workers inadequately protected.¹⁴ For example,

federal regulations often do not extend to workers who handle certain types of materials that become hazardous or explosive when mixed. In August 2000, a CSB investigation report found that an explosion that injured nine people – two seriously – largely resulted because unprotected workers lacked the proper equipment or training to safely mix materials and recognize when the mixture had become unstable. The report noted that existing federal safety standards do not provide sufficient protection for workers using this kind of reactive chemical process and recommended that OSHA and EPA issue joint guidelines governing reactive chemical process hazards that result from mixing such materials.¹⁵

An accident at a plutonium plant, such as the Kerr-McGee plant where *Silkwood* worked, could result in severe harm or death not only for workers but also for thousands of people living in the surrounding areas. Although the Nuclear Regulatory Commission (NRC) is directly responsible for monitoring the nation's more than 100 nuclear power plants, as well as the more than 6,000 individuals and organizations licensed to possess and use nuclear materials and wastes, it is physically impossible for NRC inspections to detect all health and safety hazards.¹⁶ For this reason, it is critical that nuclear plant employees feel free to raise health and safety concerns without fear of retribution.

Federal laws prohibit retaliation by power plant operators (licensees) or their contractors against employees who "blow the whistle" by surfacing health and safety issues.¹⁷ Protection is provided as follows: If discrimination occurs, employees are to receive restitution and sanctions may be imposed against employers. If employees believe the system established by these laws adequately protects them, they will be more than willing to report hazards. Similarly, if licensees believe they will receive burdensome sanctions or other negative consequences when they discriminate against these employees, they will be unlikely to retaliate and the atmospheres at their plants will be those in which employees feel free to raise these concerns.¹⁸

THE REAL KAREN SILKWOOD

A chemical technician at the Kerr-McGee plutonium fuels production plant in Crescent, Oklahoma, and a member of the Oil, Chemical, and Atomic Workers' Union, Karen Silkwood was also an activist who was critical of plant safety.¹⁹ During the week prior to her death, she was reportedly gathering evidence for the Union to support her claim that Kerr-McGee was negligent in maintaining plant safety, and at the same time, was involved in a number of unexplained exposures to plutonium. She died on November 13, 1974, in a single-car crash. The circumstances of her death have been the subject of great speculation.²⁰

After her death, organs from Silkwood's body were analyzed as part of the Los Alamos Tissue Analysis Program at the request of the Atomic Energy Commission (AEC) and the Oklahoma City Medical Examiner. Her case was important to the program because it was one of very few cases involving recent exposure to plutonium. It also served to confirm the effectiveness of contemporary techniques for the measurement of plutonium body burdens and lung burdens. The following account is a summary of Silkwood's exposure to

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plutonium at the Kerr-McGee plant and the subsequent analysis of her tissues at Los Alamos²¹:

“During the evening of November, 5, 1974, plutonium-239²² was found on Silkwood’s hands. She had been working in a glove box²³ in the metallography²⁴ laboratory where she was grinding and polishing plutonium pellets that would be used in fuel rods. She was taken to the plant’s Health Physics Office where she was given a test called a “nasal swipe,” which measures a person’s exposure to airborne plutonium, but might also measure plutonium that got on the person’s nose from his or her hands. The swipe showed an activity of 160 disintegrations per minute, a modest positive result.

“The two gloves in the glove box Silkwood had been using were replaced. Strangely, the gloves were found to have plutonium on the outside surfaces that were in contact with Silkwood’s hands, but no leaks were found in the gloves. No plutonium was found on the surfaces in the room where she had been working and filter papers from the two air monitors in the room showed that there was no significant plutonium in the air. By 9:00 p.m., Silkwood’s cleanup had been completed, and as a precautionary measure, she was put on a program in which she was tested for five days for plutonium measurements. She returned to the laboratory and worked until 1:10 a.m., but did no further work in the glove boxes. As she left the plant, she monitored herself and found nothing.

“Silkwood arrived at work at 7:30 a.m. on November 6. She examined metallographic prints and performed paperwork for one hour, then monitored herself as she left the laboratory to attend a meeting. Although she had not worked at the glove box that morning, the detector registered alpha activity on her hands. Health Physics staff members found further activity on her right forearm and the right side of her neck and face, and decontaminated her. At her request, a technician checked her locker and automobile with an alpha detector, but no activity was found.

“On November 7, Silkwood reported to the Health Physics Office. A preliminary examination of her bioassay samples showed extremely high levels of activity. Her locker and car were checked again, and essentially no activity was found.

“Following her cleanup, the Kerr-McGee health physicists accompanied her to her apartment, which she shared with another laboratory analyst, Sherri Ellis. Significant levels of activity were found in the bathroom and kitchen, and lower levels of activity were found in other rooms. No plutonium was found outside the apartment. Ellis was found to have two areas of low-level activity on her, so Silkwood and Ellis returned to the plant where Ellis was cleaned up.

“Between October 22 and November 6, high levels of activity had been found in four of the samples that Silkwood had collected at home, while those that were collected at the Kerr-McGee plant or at Los Alamos contained very small amounts of plutonium, or any at all.

“The amount of plutonium at Silkwood’s apartment raised concern. Therefore, Kerr-McGee arranged for Silkwood, Ellis, and Silkwood’s boyfriend, Drew Stephens²⁵, who had spent time at their apartment, to go to Los Alamos for testing. On Monday, November 11, the trio met with Dr. George Voelz, the leader of the Laboratory Health Division. The next day, Voelz told Ellis and Stephens that their tests showed a small but insignificant amount of plutonium in their bodies. Silkwood, on the other hand, had 0.34 nanocuries²⁶ of americium-241

(a gamma-emitting daughter of plutonium-241) in her lungs. Based on the amount of americium, Voelz estimated that Silkwood had about 6 or 7 nanocuries of plutonium-239 in her lungs, or less than half the maximum permissible lung burden (16 nanocuries) for workers. He reassured her that, based on his experience with workers that had much larger amounts of plutonium in their bodies, she should not be concerned about developing cancer or dying from radiation poisoning. Silkwood wondered whether the plutonium would affect her ability to have children or cause her children to be deformed. Voelz reassured her that she could have normal children. Silkwood and Ellis reported for work the next day, but they were restricted from further radiation work.

“After work that night, Silkwood attended a Union meeting in Crescent, Oklahoma. At the end of the meeting, at about 7:00 p.m., she left alone in her car. At 8:05, the Oklahoma State Highway Patrol was notified of a single-car accident seven miles south of Crescent. The driver, Karen Silkwood, was dead at the scene from multiple injuries. An Oklahoma State Trooper who investigated the accident reported that her death was the result of a one-car, sleeping-driver accident. Later, blood tests performed as part of the autopsy showed Silkwood had 0.35 milligrams of methaqualone (Quaalude) per 100 millimeters of blood during the time of her death. That amount is almost twice the recommended dosage for induced drowsiness. About 50 milligrams of undissolved methaqualone remained in her stomach.

“At the request of the AEC and the Oklahoma State Medical examiner, Dr. A. Jay Chapman, who was concerned about performing an autopsy on someone reportedly contaminated with plutonium, and a team from Los Alamos were sent to make radiation measurements and assist in the autopsy. Voelz, Michael Stewart, Alan Valentine, and James Lawrence comprised the team. Because Silkwood’s death was an accident, the coroner was not required to obtain consent from her next of kin to perform the autopsy. However, Silkwood’s father was contacted and he gave permission for the autopsy over the telephone. The autopsy was performed on November 14, 1974, at the University Hospital in Oklahoma City, Oklahoma.

“Appropriate specimens were collected, preserved, and retained by Dr. Chapman for his pathological and toxicological examinations. At the request of the coroner and the AEC, certain organs and bone specimens were removed, packaged, frozen, and brought back to Los Alamos for analysis of their plutonium content. Because Silkwood had been exposed to plutonium and had undergone two in vivo plutonium measurements, her tissue was also used in the Los Alamos Tissue Analysis Program to determine her actual plutonium body burden, the distribution of the plutonium between different organs in her body, and the distribution within her lungs. There was no significant deposition of plutonium in any other tissues, including the skeleton. The highest concentrations measured were in the contents in the gastrointestinal tract, which proved that she had ingested plutonium prior to her death.

“Some of the most interesting observations made during Silkwood’s tissue analysis were the distribution of plutonium-239 within her lungs and the concentration of plutonium in the lungs relative to that in the tracheobronchial lymph nodes. The plutonium concentrations in the inner and outer parts of Silkwood’s lungs were about equal, in stark contrast with another case examined under the Tissue Analysis Program in which the concentration in the outer parts of the lungs was 22.5

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times higher than that in the inner part. That difference was an indication that Silkwood had probably been exposed within 30 days prior to her death, whereas the other case had been exposed years prior to death. Furthermore, the concentration of plutonium in Silkwood's lungs was about six times greater than that in the lymph nodes, whereas in typical cases that ration would be about 0.1. Both of those results indicated that Silkwood had received very recent exposure and supported the view that the plutonium tends to migrate from the inner part to the outer part of the lungs and lymph nodes over time."

Silkwood's estate brought suit against Kerr-McGee to recover for contamination injuries to Silkwood's person and property caused by the escape of plutonium from the facility.²⁷ The United States District Court for the Western District of Oklahoma entered judgment on a jury verdict in favor of the estate, awarding actual damages of \$505,000 and punitive damages of \$10 million. The District Court denied the plant operator's alternate motion for judgment N.O.V. or for a new trial.²⁸ The United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part, holding that punitive damages could not be awarded because such an award was preempted by federal law. The 10th Circuit reduced the award to \$5,000 for the personal property Silkwood lost during the cleanup of her apartment.²⁹

On appeal, the United States Supreme Court held that it did not have appellate jurisdiction but granted certiorari to reach the merits, and the Court reversed and remanded. In an opinion by Justice White, joined by Justices Brennan, Rehnquist, Stevens, and O'Connor, the Court held that a state-authorized award of punitive damages arising out of the escape of plutonium from a federally-licensed nuclear facility was not preempted by federal law.³⁰

Even though the Court had recently held that state regulation of the safety aspects of a federally-licensed nuclear power plant was preempted in *Pacific Gas & Electric Co. et al. v. State Energy Resources Conservation and Development Commission et al.*³¹, the Court drew a different conclusion in the Silkwood case with respect to Congress's desire to displace state tort law – even though the tort actions might be premised on a violation of federal safety regulations.

The Court said that safety regulation concerning nuclear energy is the exclusive concern of federal law, but a state may nevertheless award damages to those injured by nuclear incidents based on its own law of liability, even though an award of damages based on state law may be regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards.

Justice Blackmun, joined by Justice Marshall, dissented, expressing the view that punitive damages should be preempted since the federal government has occupied the entire field of nuclear regulatory concerns.

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, dissented, asserting that punitive damages are regulatory in nature and should be preempted because they conflict with the fundamental concept of comprehensive federal regulation of nuclear safety.

In 1986, 12 years after her death, the suit was headed for retrial when it was finally settled out of court for \$1.3 million. The Kerr-McGee plant where Silkwood worked was closed in 1975.

THE REEL KAREN SILKWOOD

Released in 1983 and featuring Meryl Streep in the title role, Silkwood received wide critical acclaim. The all-star cast also included Cher³² as Karen Silkwood's roommate and Kurt Russell as her boyfriend, Drew Stephens, who was hired as a consultant on the film.³³ The film was directed by Mike Nichols³⁴ and written by Nora Ephron³⁵ and Alice Arlen. As one might expect, Silkwood was depicted as a sympathetic character, yet one with human frailties. She was featured as a fun-loving, hardworking woman who worked in a blue collar job and just wanted to be treated fairly. Although Kerr-McGee was to blame for her plutonium contamination, Nichols is to

be commended for resisting the temptation to make other employees and managers seem like complete monsters. Instead, they have the appearance of workers caught in an unfortunate situation who are struggling with the delicate balancing act of doing what's right and keeping gainful employment.

It's always challenging to portray scientific details in storylines in a way that is both accessible and interesting to viewers. Usually, an emotional hook is employed before too many details are introduced into the story, presumably so that viewers will care enough to pay attention. Silkwood is no exception. A lot of time is spent on gradually getting to know the characters before there are detailed descriptions of contamination. However, by that time, viewers are hooked – and Karen's welfare not only matters, but becomes central to the story.

The film ends as Silkwood drives to meet a New York Times reporter to tell her story. However, as a subsequent New York Times article advises, "We see her with a fat folder, apparently thick with incriminating papers. The myth, repeated in a written statement at the end of the movie, is that documents were never found. This is wrong. Lots of documents were found - but they in no way substantiated Miss Silkwood's charges that the company was doctoring evidence of faulty fuel rods."³⁶

Silkwood received excellent reviews. It was thought to be an important film that was both funny and moving. Sam Osteen, editor of the film, recalled, "The critics also appreciated how the film set up the contrast between the messy, eccentric lives of the characters and the futuristic technology of a nuclear plant. And how well the tension of that contradiction escalated when Silkwood became aware of the dangers in that workplace."³⁷

THE AFTERMATH

Little has been written about Karen Silkwood during the past two decades.³⁸ This could be due to the sporadic availability of news coverage in Logan County, where Crescent is located.³⁹ According to one account from the Associated Press, the 25th anniversary of Silkwood's death went largely unnoticed in Crescent: "Many residents have negative memories of the Silkwood case and 'all the myths that grew up around it,'" said Police Chief Jack Harris, who thinks "her death has been milked for about everything people can get out of it."⁴⁰

For many merchants and citizens of the town of 1,600, the plutonium contamination threat at the now-closed Kerr-McGee plant was given little thought at the time. Through the years, reporters and investigators have resurrected Silkwood's memory in this farming and ranching community, but the case isn't the subject of daily conversation. For example, a 23-year-old gas station attendant, who grew up in Crescent, was interviewed about it in 1999. He claimed to know nothing about Karen Silkwood until he was a teenager and happened to see the film about the incident on television. He said that he occasionally hears locals talk about it, and speculates that "somebody became upset with her and ran her off the road. But I don't know anything. It's just talk."⁴¹

The final chapter of the Silkwood story has yet to be written because cleanup of the Kerr-McGee facility continues more than a quarter century after it was closed. Security and cleanup workers still drive there every day, where a weather-faded blue sign adorns a tall, chain-link fence, warning that "all vehicles and persons are subject to search upon entering or leaving this facility."⁴² The cleanup, supervised by the NRC, is reportedly nearing an end.⁴³

Ironically, as of 2003, 11 of Kerr-McGee's chemical facilities in the United States had earned Star status from the OSHA Voluntary Protection Programs (VPP).⁴⁴ Established in 1982, VPP supplements enforcement of OSHA standards by identifying employers who are in the forefront of employee protection.⁴⁵ One cannot help but wonder whether the Silkwood case – and Kerr-McGee's tainted reputation that resulted from the film's exposure of its practices – motivated the company to obtain such a high and publicized level of OSHA approval.

Continued on Page 20

CONCLUSION

When considering films depicting whistleblowers and toxic torts, several questions surface: Must there always be a “David versus Goliath” element in order to make these stories compelling? Would it be less interesting if these companies literally cleaned up their acts without being dragged through the mud of courts and popular public opinion? Would there even be a story worth telling without such drama? If not, what does that say about us as a society?

Some contend that there’s a symbiotic relationship between films and viewers because films are created for entertainment, viewers watch to be informed (and sometimes educated), and often the information gleaned from films becomes meshed in our concept of popular culture. As one recent textbook about the intersection of law and popular culture advises, “[P]opular culture has effects on the people who consume it that go far beyond entertainment or pleasure.... Indeed, pop culture often invites viewers to work as surrogate police, jurors, judges, and lawyers, allowing them to vicariously experience the practice of law from the inside. In addition, viewers are invited to draw conclusions about whether law as they experience it in film or television promotes or undermines the search for justice.”⁴⁶

Do these stories dilute the challenges typically faced by whistleblowers, many of whom are quietly dismissed before any real “damage” to the company is done? Exposing gross misconduct in the workplace almost always has a price, whistleblower advocates say.⁴⁷ Punishments range from being shunned by colleagues to termination to blacklisting. Whistleblowers have become the victims of smear campaigns. Friends and family may distance themselves, and some marriages don’t survive the ordeal.⁴⁸

It has been said that environmental laws were created because other laws have failed to protect a very basic and intrinsic necessity to life – nature, itself.⁴⁹ Moreover, the risk-takers who either force these laws into being or ensure their application against wrongdoers are naturally applauded by society as a whole.⁵⁰ How, then, can anyone not root for the Karen Silkwoods of the world? Right or wrong, and despite human frailties, they are fighting for all of our interests, our home, and our world.

One would like to believe that policymakers and the public-at-large would be just as interested in the environmental, legal, and policy issues raised by these films without the Hollywood fanfare. But there are some people who would never be exposed to these issues but for these movies, and it may take actors with widespread appeal to get them to pay attention. For this reason, such films continue to provide a great service in furtherance of the public’s awareness of critical environmental policy issues. Only through awareness can they be addressed – and *acted* upon.

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² Silkwood’s death in 1974 was officially ruled an accident, but the story became highly publicized in the media and among anti-nuclear groups. Several books were also written on the topic. See Kohn, Howard, *Who Killed Karen Silkwood?* (Simon & Schuster, 1981) and its update by Richard Raske, *The Killing of Karen Silkwood: The Story Behind the Kerr-McGee Plutonium Case*, 2nd Ed. (Cornell University Press, 2000). See also Annas, George J.: “The Case of Karen Silkwood,” *American Journal of Public Health*, Volume 74, Number 5 (May 1984).

³ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

⁴ Released in 2000, Erin Brockovich starred Julia Roberts in the title role. The film depicts the true story of an unemployed single mother and a world-weary attorney working together to rally the citizens of a small California town against the Pacific Gas & Electric Company for medical injuries due to water contamination caused by the company. The film received wide critical acclaim and Roberts won the 2001 Best Actress Oscar and Golden Globe awards for her performance. Source: The Internet Movie Database, www.imdb.com (last accessed 6/27/07).

⁵ Toxic torts combine deterrent elements from both criminal and civil law. Criminal law and tort law, in their pure forms, utilize very different mechanisms to deal with harmful conduct. In criminal law, government attorneys prosecute wrongdoers for their illegal acts, employing the sanctions of imprisonment and criminal fines. Tort lawsuits, in contrast, are initiated by private parties as civil actions in order to obtain redress through compensation for the damages that they have suffered. Tort remedies generally take the form of monetary damages, though equitable remedies such as injunctive relief are ordered in some environmental cases. See Thomas H. Koenig and Michael L. Rustad, “Toxic Torts, Politics, and Environmental Justice: The Case for CrimTorts,” *Law and Policy*, Volume 26, Number 2 (April 2004).

⁶ Other films in this genre include *The China Syndrome* (1979) and *A Civil Action* (1998). Source: The Internet Movie Database, www.imdb.com (last accessed 6/27/07).

⁷ The case depicted in *Erin Brockovich* was decided with binding arbitration, a form of Alternative Dispute Resolution (ADR). Some contend the use of ADR in this case was detrimental to the plaintiffs. See Sharpe, Kathleen: “Erin Brockovich: The Real Story,” *Salon*, April 14, 2000.

⁸ On August 10, 2006, Anadarko completed the acquisition of the Kerr-McGee Corporation in an all-cash transaction totaling \$16.5 billion plus the assumption of approximately \$2.6 billion in debt. Based in Texas, Anadarko Petroleum Corporation is among the largest independent oil and gas exploration and production companies in the world, with 3.01 billion barrels of oil equivalent of proved reserves as of December 31, 2006. The Company’s major areas of operation are located onshore in the United States, the deepwater of the Gulf of Mexico and Algeria. Anadarko also has production in China, Venezuela and Qatar, a development project in Brazil and is executing strategic exploration programs in several other countries. The Company actively markets natural gas, oil and natural gas liquids and owns and operates gas gathering and processing systems. In addition, the Company engages in the hard minerals business through non-operated joint ventures and royalty arrangements in several coal, trona (natural soda ash) and industrial mineral mines located on lands within and adjacent to its Land Grant holdings. Source: 2006 Annual Report, www.anadarko.com (last accessed 6/27/07).

⁹ This list includes the Occupational Safety and Health Act of 1970 (29 USC 651 et seq.) and regulations concerning the handling of hazardous materials (29 CFR 1910 et seq.) and emergency response plans (40 CFR 300 et seq.).

¹⁰ OSHA, EPA, and ATF are regulatory agencies. CSB determines the root causes of serious chemical-related accidents and recommends ways to reduce their occurrence and severity. EPA and CSB are both independent agencies. OSHA and ATF are component agencies of larger cabinet departments.

¹¹ According to EPA, hazardous materials include chemicals, oil- and petroleum-based products, and radioactive materials. Hazardous waste is any waste material with properties that make it dangerous or capable of having a harmful effect on human health or the environment, especially if it is improperly stored, treated, transported, disposed of, or otherwise managed. Source: www.epa.gov (last accessed 6/27/07).

¹² Karen Silkwood is often mentioned in examples of the public’s concerns about full disclosure of dangers associated with hazardous materials. Companies, in contrast, feel pressured to quickly ensure that problems are resolved. As an example, see the transcript of a NRC Discrimination Task Group Meeting at www.nrc.gov/about-nrc/regulatory/enforcement/sanctions/091400-summary.html: “With regard to Public perception issues, we have seen that large cases, such as Silkwood tend to make us generalize that utilities are bad players and that they are not looking out for the public.”

¹³ P. Kleindorfer, H. Feldman, and R. Lowe: “Accident Epidemiology and the U.S. Chemical Industry: Preliminary Results from RMP Information,” Center for Risk Management and Decision Processes, The Wharton School, University of Pennsylvania (Philadelphia, Pa., 1999).

¹⁴ General Accountability Office Report: “Nuclear Employee Safety Concerns: Allegation System Offers Better Protection, But Important Issues Remain” (March 1997), www.gao.gov (last accessed 6/27/07).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ The Whistleblower Protection Act (5 USC 1212) provides protection rights for federal employees against retaliation for whistleblowing activities. Whistleblower protection provisions are also written into several environmental statutes, including the Clean Air Act (42 USC 7622), Safe Drinking Water Act (42 USC 300), Toxic Substances Control Act (15 USC 2622), Solid Waste Disposal Act (42 USC 6971) and the Comprehensive Environmental Response, Compensation, and Liability Act, also known as CERCLA (42 USC 9610). Employees, both federal and non federal, who experience retaliation for whistleblower activities related to these environmental statutes can file a complaint with OSHA. There are also many state whistleblower laws. Source: Occupational Safety and Health Administration, www.osha.gov (last accessed 6/27/07).

¹⁸ GAO Report, *infra*, Footnote 14.

¹⁹ Source: Frontline: “The Karen Silkwood Story,” First published in *Los Alamos Science*, Volume XXIII, November 23, 1995.

²⁰ See Footnote 2, *infra*.

²¹ See Footnote 19, *infra*.

²² Plutonium-239 is a heavy element consisting of 94 protons and 145 neutrons. It can have a number of chemical forms. Nuclear weapons use plutonium metal. Plutonium dioxide is used as a component of some nuclear fuels. It has a life of more than 24,000 years (a “half-life” is the time it takes for half of a given amount of radioactive material to decay into other elements). Source: Institute for Energy and Environmental Research, www.ieer.org (last accessed 6/27/07).

²³ A glove box is a sealed container that is designed to allow one to manipulate objects while being in a different atmosphere from the object. Built into the sides of the glovebox are two gloves arranged in such a way that one can place their hands into the gloves and be able to perform tasks inside the box without breaking the seal or allowing potential damage to a worker’s hands. Part or all of the boxes are usually transparent to allow one to see what he or she is manipulating. Source: http://en.wikipedia.org/wiki/Glove_box#External_links

²⁴ Metallography is the study of metals. It includes techniques used to prepare specimens for examination, examining the specimen, and interpreting the structures. Source: www.metallography.com (last accessed 6/27/07).

²⁵ Played by Kurt Russell in the film, Drew Stephens died in an airplane crash while practicing aerobatic loops outside El Reno, Oklahoma, on June 14, 1995. Source: www.celebratetoday.com (last accessed 6/27/07).

²⁶ A nanocurie is one-billionth of a curie. A curie is the basic unit used to describe the intensity of radioactivity in a sample of material. It is named for Marie and Pierre Curie, who discovered radium in 1898. Source: U.S. Nuclear Regulatory Commission, www.nrc.gov (last accessed 6/27/07).

²⁷ The case was brought by Silkwood’s father, Bill Silkwood. Silkwood’s attorney was Gary Spence, who went on to represent Imelda Marcos and other famous clients. Spence has authored numerous books, including *The Making of a Country Lawyer and With Justice None: Destroying an American Myth*.

²⁸ It is especially interesting to note the following jury instruction: “The jury was admonished not to view the movie ‘China Syndrome’ and not to let any aspect of the nuclear debate affect their deliberations on the narrow issues of this trial.” 485 F. Supp. 566 (1979).

²⁹ The majority opinion was written by Judge William E. Doyle (1911-1986). The William E. Doyle Papers were donated to the Aurora Library Archives and Special Collections Department by Mrs. Helen S. Doyle in 1988 and 1989. The collection spans the years 1927 to 1987, with the bulk of the material falling into the period of his active years on the Colorado Supreme Court (1958 to 1961) and the United States Court of Appeals, Tenth Circuit (1971 to 1984). Source: Aurora Library, carbon.cudenver.edu/public/library/archives/doyle/main.html (last accessed 6/27/07).

³⁰ *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), referenced at footnote 1, *infra*.

³¹ 461 U.S. 190 (1983).

³² Cher’s performance as Karen Silkwood’s roommate, Dolly, was her second critically-acclaimed dramatic performance. Actress Lily Tomlin also auditioned for the role. Cher’s first critically-acclaimed dramatic performance occurred in Robert Altman’s *Come Back to the Five and Dime, Jimmy Dean, Jimmy Dean*, which was released in 1982. Source: www.imdb.com (last accessed 6/29/07).

³³ Osteen, Sam (as told to Bobbie Osteen): *Cut to the Chase: Forty-Five Years of Editing America’s Favorite Movies* (2002).

³⁴ Nichols also directed other noteworthy films such as *The Graduate* (1967), *Working Girl* (1988), and *Primary Colors* (1998). Source: www.imdb.com (last accessed 7/23/07).

³⁵ Ephron also wrote *When Harry Met Sally* (1989), *Sleepless in Seattle* (1993), and *You’ve Got Mail* (1998). She and Nichols worked together a second time in *Heartburn* (1986). Source: www.imdb.com (last accessed 7/23/07).

³⁶ Broad, William J.: “Fact and Legend Clash in Silkwood,” *New York Times*, December 11, 1983.

³⁷ *Ibid.* at 181.

³⁸ There was, however, an event of note at Cornell University in 2000. See “Conference Commemorates Karen Silkwood,” <http://www.news.cornell.edu/Chronicle/00/5.4.00/Silkwood.html> (last accessed 6/29/07). See also Mary Ann Thomas and Ramesh Santanam, “Local Case Has Ties to Silkwood,” *Valley News Dispatch*, August 27, 2002.

³⁹ According to one website, “The history of newspapers in Logan County is rough and tumble. There have been many papers, some lasting only weeks, and others lasting many years.” Source: <http://homepages.rootsweb.com/~tammie/news/news.htm> (last accessed 6/27/07).

⁴⁰ Jenkins, Ron: “Anniversary of Silkwood’s Death Goes Unnoticed,” *The Associated Press*, November 22, 1999.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ The estimated date for closure is May 1, 2010. Source: <http://www.nrc.gov/info-finder/decommissioning/complex/kerr-mcgee-cimararon-corporation-former-fuel-fabrication-facility.html> (last accessed July 2, 2007).

⁴⁴ In 1998, of the more than 6.5 million U.S. worksites eligible for Star status, fewer than 350 held federal OSHA Star approval and less than 100 held state approval. Kerr-McGee flew OSHA Star flags at chemical facilities in Mobile, Ala., Soda Springs, Idaho, Oklahoma City, and two in Hamilton, Miss. In addition, only six railroad crosstie-treating plants in the United States were recognized as Star sites, and all were operated by Kerr-McGee. Those sites were located in Indianapolis, Madison, Ill., Columbus, Miss., Springfield, Mo., Texarkana, Texas, and The Dalles, Ore. Source: “Kerr-McGee Texarkana Plant Earns Star Rating,” *The (Oklahoma City) Journal Record*, July 17, 1998.

⁴⁵ According to OSHA, “the legislative underpinning for VPP is Section 2(b)(1) of the Occupational Safety and Health Act of 1970, which declares the Congress’s intent ‘to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to motivate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions.’” Federal worksites became eligible for the designation in 1998. Source: <http://www.osha.gov/dcspp/vpp/index.html> (last accessed 6/27/07).

⁴⁶ Michael Asimow and Shannon Mader: *Law and Popular Culture: A Course Book* (Peter Lang Publishing, 2004), page 7.

⁴⁷ Taylor, T. Shawn: “Whistleblowers Say Exposing an Employer Can Deal a Career-Crushing Blow,” *Chicago Tribune*, August 18, 2002.

⁴⁸ *Ibid.*

⁴⁹ Rodgers, Jr., William H.: “The Most Creative Moments in the History of Environmental Law: The Who’s,” *Washburn Law Journal*, Volume 39, Number 1 (Fall 1999).

⁵⁰ *Ibid.*

RECENT CASES OF INTEREST

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

UNITED STATES SUPREME COURT: *INTERSCHOLASTIC ATHLETIC ASSOCIATION'S ANTI-RECRUITING RULE DOES NOT VIOLATE FIRST AMENDMENT.*

The Supreme Court of the United States recently held that an interscholastic athletic association has the authority to restrict First Amendment rights of member institutions when members voluntarily join the organization. In *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, the Respondent, Brentwood Academy (Brentwood), sued Petitioner, Tennessee Secondary School Athletic Association (TSSAA) under 42 U.S.C. § 1983 (2000) claiming that TSSAA's rule preventing recruitment was state action that violated the First and Fourteenth Amendments. 127 S.Ct. 2489 (2007). The main issue was whether the enforcement of a rule prohibiting high school coaches from recruiting middle school athletes violated the First Amendment. The Court also decided whether the sanction imposed on Brentwood for violating the anti-recruiting rule violated of Brentwood's due process rights.

TSSAA is a non-profit, membership organization that regulates interscholastic sports among its members. Membership is comprised of public and private high schools in Tennessee. Brentwood is a private high school that is a member of TSSAA. Historically, since the 1950's, the TSSAA has prohibited high schools from recruiting middle school students anti-recruiting policy. *Id.* at 2492. In 1997, Brentwood's football coach sent a letter to a group of eight grade students inviting them to participate in spring football practice drills. The letter was signed by the Brentwood coach, who proclaimed that he would be the students' football coach when they began high school. *Id.* Each of the students receiving the letter attended at least some of the practice drills. As a result of the letter, the TSSAA sanctioned Brentwood for violating the anti-recruiting policy. After the TSSAA's internal review concluded that the actions of Brentwood violate the anti-recruiting rule, Brentwood filed suit. The District Court granted relief to Brentwood, but the Sixth Circuit Court of Appeals reversed the decision stating that the TSSAA was a private organization that did not act under color of state authority. *Id.* at 2492-93. The Supreme Court initially granted certiorari and reversed the Sixth Circuit's decision, indicating that the TSSAA acted under color of state law. On remand, the Sixth Circuit sent the case back to the District Court, who again ruled in favor of Brentwood. The Sixth Circuit then affirmed the ruling stating that the anti-recruiting rule was a content-based regulation of speech not narrowly tailored

for its intended purpose. *Id.* at 2493.

The Supreme Court, after granting certiorari a second time, ruled that while the First Amendment protects Brentwood's right to publish truthful information about the school and its athletic programs, Brentwood's speech rights are not absolute. Because Brentwood chose to join the TSSAA, the school agreed to abide by the TSSAA's rules that were designed to protect the organization's mission. The Court noted that the TSSAA is allowed to curtail some freedoms in order to achieve its goals of preventing the exploitation of children, ensuring that high school athletics remained secondary to academics, and promoting fair competition among its members. *Id.* The Court noted that while the TSSAA placed restrictions on speech, it never banned the dissemination of truthful information relating to sports. *Id.*

On the issue of whether the TSSAA violated Brentwood's due process rights, the Court again ruled against Brentwood. Brentwood asserted a due process violation based on the TSSAA's decision to hear from witnesses and consider evidence in closed meetings, thereby preventing the school from properly responding. The Court, however, reasoned that the decision to sanction Brentwood was proceeded by an investigation, several meetings, exchanges of correspondence between the parties, and a de novo review by the entire TSSAA Board of Directors. *Id.* at 2496. The Court noted that Brentwood was notified of all charges against it, represented by legal counsel at each hearing, and had the opportunity to present evidence in its favor. The Court held that even if the closed door meetings were unconstitutional, it could safely conclude that any due process violation was harmless beyond a reasonable doubt because Brentwood could not show that the severity of its punishment was increased by the closed meetings. *Id.* at 2497.

In reversing and remanding the case, the Court ruled that an athletic association acting as a state actor could limit certain civil rights of its members, and attempted to strike a balance between schools and athletic associations. The Court's ruling provides flexibility for schools in promoting its athletic programs by declaring that the First Amendment protects a school's right to try to persuade prospective students and their parents that the school's excellence in sports is a reason for enrolling at the school.

By: D. Anthony Robinson

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