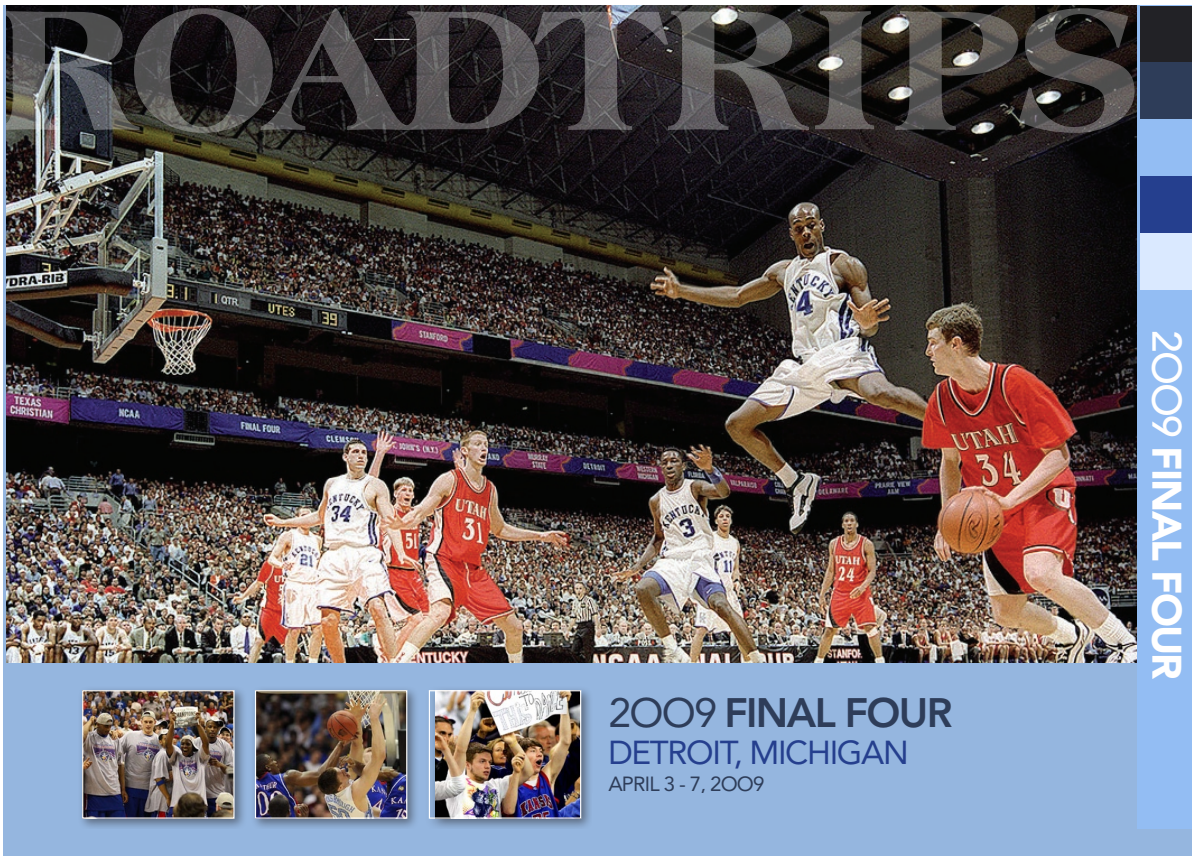
Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section
Vol. 18 No. 1, Spring, 2009



2009 FINAL FOUR
DETROIT, MICHIGAN
APRIL 3 - 7, 2009

IN THIS ISSUE:

FRIDAY NIGHT LIGHTS!
Texas High School Football

CHAIR'S REPORT

Thank you for your membership in TESLAW, the State Bar of Texas Entertainment & Sports Law Section. Each year, your Council members give their time and effort to provide you with valuable resources and assistance for your practice. We sincerely hope that you will take advantage of the resources provided by TESLAW and that they will be useful to you. I am pleased to have the opportunity to work with this wonderful and generous group of people – your TESLAW Council members – and to serve as the Section Chair for 2008-2009.

The valuable resources that you receive in return for your TESLAW membership dues include the outstanding *Texas Entertainment and Sports Law Journal*, published in conjunction with the South Texas College of Law. The Journal is published twice per year and includes numerous articles with insights for entertainment and sports law practitioners. Archived Journal issues and other resources are available through the brand new TESLAW website, www.TESLAW.org. Your membership also entitles you to use the TESLAW listserve (*eandslawsection@yahoogroups.com*), a convenient (and free) way to network and get helpful practice hints from other Section members. Your TESLAW Council Legislative Committee members also actively follow and report on proposed legislation at the state and federal levels that may affect the entertainment and sports law practice areas.

Another benefit of TESLAW membership is the free CLE program presented during the Section's annual meeting. Our upcoming annual Section meeting will be held on Friday, June 26, 2009 in connection with the State Bar of Texas Annual Meeting at the Hilton Anatole in Dallas. We have scheduled Ted Goldthorpe and E. Michael Harrington to discuss music copyright protection and Steven Johnston, General Counsel of the Oakland A's Major League Baseball team and San Jose Earthquakes Major League Soccer team, to speak on current issues in sports law. Be sure to mark your calendar and attend this most informative program.

As always, if some portion of your practice is in the entertainment or sports law areas and you would like to get more involved, we welcome you to serve on any of the TESLAW committees and/or the TESLAW Council. Please contact any of the Section officers and let us know what you'd like to do. We will do our best to find a spot on the team for you!

Thanks again for your involvement.

Alan W. Tompkins
atompkins@unityhunt.com

ANNUAL MEETING OF THE ENTERTAINMENT & SPORTS LAW SECTION OF THE STATE BAR OF TEXAS

FRIDAY, JUNE 26, 2009 ~ HILTON ANATOLE IN DALLAS

2:00 p.m. - 2:40 p.m.	***Music Copyright Protection in Business***	**Dr. E. Michael Harrington**
2:40 p.m. - 3:20 p.m.	***The Past, Present & Future of Music Publishing***	**Ted Goldthorpe**
3:20 p.m. - 4:00 p.m.	***Current Issues in Sports Law***	**Steve Johnston**

Check out the Section's Website!

Check it out at www.teslaw.org. The password for members is "*galeria3*". Should you have any comments or suggestions to improve the site please feel free to e-mail Yocel at Yocelaw@aol.com or the editor at srjaimelaw@comcast.net …

SOLICITATION OF NOMINATIONS FOR THE CINDI LAZZARI ARTIST ADVOCATE AWARD

The TESLAW Council is now soliciting nominations for the recipient of the 2010 Cindi Lazzari Artist Advocate Award. The award is named for the late Cindi Lazzari, a Texas attorney who went far beyond the call of duty in her efforts to protect the rights of artists in the music industry. Each year the Council recognizes an individual working in Texas who has been actively involved in advocating and supporting artist's rights in the music business. Nominees need not necessarily be attorneys. Nominations should be sent by e-mail only to LazarriNomination@gmail.com and should include the following information: (1) the nominee's name; (2) the nominee's employment and contact information; (3) a brief statement (not to exceed 100 words) as to why the individual believes the nominee should receive the award; and (4) a short bio of the nominee (if available). Nominations will be accepted through December 31, 2009.

TEXAS ENTERTAINMENT AND SPORTS JOURNAL STAFF

Sylvester R. Jaime, Editor
1011 Highway 6 South, Ste. 216, Houston, Texas 77077
281/597-9495 FAX: 281/597-9621
E-mail: srjaimelaw@comcast.net

Professor Andrew T. Solomon, Faculty Advisor
South Texas College of Law
1303 San Jacinto, Houston, Texas 77002-7000
713/646-2905 FAX: 713/646-1766
E-mail: asolomon@stcl.edu

Steven Ellinger, Proofing Editor
207 Carmichael Court, League City, Texas 77573-4369
713/253-1255 FAX: 281/334-0114
E-mail: sellinger@nba.com

Craig C. Crafton, Proofing Editor
Cozen O'Connor
1717 Main Street, Suite 2300, Dallas, Texas 75201
214/462-3030
E-mail: ccrafton@cozen.com

FOR THE LEGAL RECORD ...

IS SECTION READY FOR ELECTRONIC JOURNAL? . . .

The Section Council is considering sending the Journal to its membership electronically. It is expected that by providing the membership with the Journal electronically there will be a cost savings for the Section, leaving more funds for other Section benefits. Anyone having an opinion, may send them to Section Chair Alan Tompkins at ATompkins@unityhunt.com or your editor. It is anticipated that the electronic Journal will be downloadable and linkable. We will keep you posted …

ECONOMIC HARD TIMES IN SPORTS? . . .

NASCAR chairman Brian France has the group looking at ways to reduce cost. "To have a system where you don't need $25 million [for] a competitive team." France said "What CEO in today's economy is going to approve a commitment of $120 million over three years in one sport" You're not going to find it. With manufactures limiting spending, and sponsorless multicar teams pooling resources to remain in business, NASCAR is feeling the impact of today's economy. Wood Brothers Racing, for example, a NASCAR mainstay for over 50 years, was hit by losing its Air Force sponsorship to Gillett Evernham Motorsports. After having the money to race No. 43 and No. 45, even Petty Enterprises is impacted by the millions in cuts of the major sponsors. "here you have the most iconic number in the sport's history [No. 43}, and it's not that we're losing deals to others." say Petty's chief marketing officer Mike Bartellis, "It's that deals aren't there. We had a deal done two weeks ago, and the CEO reversed the decision after blessing it." Fortunately for Petty five or six companies are available to share primary sponsorship for Petty and space for more than half of the 36-race season. However, new alliances such as the pact between Dale Earnhardt Inc. and Chip Ganassi Racing are being formed to meet what Bartellis called "emergency situations." "Has everything bottomed our or not? We don't know how far down we'll go. Racing isn't going to survive without the economy surviving." Petty said. Bartellis said "Title caliber teams can command $20 - 30 million a season and sponsors have to putout the same amount on marketing on an annual basis. Given the investments need to be competitive, sponsorships can reach $100 million on a 3 year contract." …

WHERE ELSE WILL THE HARD TIMES HIT? . . .

How about in New Jersey? The New Jersey Nets are trying to help their fans in these tough economic times by giving away 1,500 tickets to unemployed fans who send the team their resumes. The Nets plan to send the resumes to 120 of its corporate sponsors and other companies holding season tickets. Nets chief executive Brett Yormark said, "Our belief right now is, "Let's invest in people who might invest in us later. In doing so, we can help people who need it most." Of course the Nets are not guaranteeing any one a job just for submitting a resume …

COACH OR DISCIPLINARIAN? …

Bevill State Community College baseball coach Ed Langham told the Birmingham News that the grandfather of a freshman player told police that he was forced to put on catcher's gear and kneel in front of a pitching machine that the coach used to pelt him with baseballs. Russell Howton, the athletic director for the community college located in Sumiton, Alabama, went to the emergency room after reporting that the Langham used the machine to hurl "80-, 90-mile-an-hour fastballs" at the player. Howton confirmed that "(The coach's) been here 10 years, and nothing has ever come up with him. He runs a pretty clean-cut program." Sumiton city prosecutor Herbie Brewer told the News that the player, Shawn Rider, had to complete an interview with police and the records have to show an injury before the DA could move forward …

BONDS GETTING MORE TIME …

Judge Susan Illston heard arguments put forth by Dennis Riordan on behalf of Bonds, that 10 counts against him were redundant or vague and should be dismissed. Douglas Wilson, Assistant U. S. District Attorney, argued that the 14 counts of perjury and one count of obstruction of justice relating to Bonds' testimony before a grand jury in 2003 "stand on its own." Illston has taken the arguments to dismiss the felony counts under advisement ...

ARE BASEBALL AND SOFTBALL "COMPARABLE SPORTS"? …

Not if you have been playing baseball with the boys for 9 years. Logan Young, a 14 year old freshman at Bloomington South, argues they aren't the same sport, so girls should be able to try out for baseball. Young and her parents have sued the Indiana High School Athletic Association for a chance to try out for the high school baseball team. The IHSAA prohibits girls from trying out for baseball if heir school has a softball on the basis that the sports are comparable. Young's suit was filed in U.S. District Court in Indianapolis, Indiana in an effort to get her a chance to tryout for the baseball team …

SPORTS ETHICS 101 …

J. P. Hayes disqualified himself (remember Bagger Vance) from a PGA Tour qualifier when he determined that he had accidentally used an unapproved golf ball for two shots. The 43 year old Hayes got back to the hotel room, having turned his scores for the day, and realized that he had used the wrong golf ball. The impact of his decision demonstrated his integrity. By failing to qualify as a result of the error, Hayes' only way onto Tour events in 2009 is to have sponsors grant him one of their special exemptions (a la Michelle Wie). Having last won in the 2002 John Deere Classic, Hayes has won over $7 million on the Tour, so if he had not turned himself in, he likely would have continued to be able to be an earner on the Tour. A lesson in honesty for all from a simple oversight that likely cost Hayes his 2009 Tour card. "I would say everybody out here (on the Tour) would have done the same thing." said Hayes. "It's not the end of the world." …

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 at srjaimelaw@comcast.net …

Sylvester R. Jaime--Editor

CINDI LAZZARI ARTIST ADVOCATE AWARD RECIPIENT FOR 2008

THE SIMS FOUNDATION

Cindi Lazzari was a well-known and well-respected music attorney in Austin, Texas. Cindi spent much of her time passionately and tirelessly fighting on behalf of artists' rights. In 2007, Cindi lost her long fight against cancer. The Entertainment and Sports Law Section of the State Bar of Texas posthumously recognized Cindi's efforts by creating the Cindi Lazzari Artist Advocate Award in her honor. The award is presented each year to an individual or entity in Texas which goes far beyond the call of duty in efforts to assist artists in the music business.

The Section has selected the SIMS FOUNDATION as the 2008 recipient of the award. Named for Austin recording artist, Sims Ellison, the SIMS FOUNDATION provides low-cost counseling and other mental health services tailored specifically to the needs of musicians and their families. Nearly 1,500 musicians have bettered their lives through SIMS' services. The Entertainment and Sports Law Section of the State Bar of Texas is proud to honor the organization for its efforts.

left to right: Anthony Haley, SIMS Board Member; Mr. Don Ellison, Founding Board Member; Craig Barker, Entertainment and Sports Law Section, State Bar of Texas; Mark D. Grossman, SIMS Chairman; Ed Fair, Entertainment and Sports Law Section, State Bar of Texas; Carter Watkins, son; Copeland Lazzari, daughter; Governor Rick Perry; Catarina Sigerfoos, Board Member; Joe Priesnitz, husband; Casey Monahan, Texas Music Office; Enzo Priesnitz, son.

Governor Rick Perry entertains the audience at the Lazarri Award gala.

THE RIGHT OF PUBLICITY IN AMATEUR ATHLETES:

DO AMERICA'S FUTURE SUPERSTARS ENJOY THE SAME RIGHTS AS TODAY'S SUPERSTARS?

By: John C. Webb

John C. Webb is a graduate of Northwestern University School of Law in Chicago, IL with an LLM in Taxation. John also holds a Juris Doctor/Masters of Business Administration from St. Thomas Univeristy School of Law in Miami, FL amd a Bachelor of Science in Business Administration / Bachelor of General Studies in Liberal Arts from Northwestern State University in Natchitoches, LA. He is also a Member in Good Standing of the Florida Bar. John currently resides in Hallandale, FL where he is Solo Practitioner of his own law firm.

I. INTRODUCTION

What do professional athletes Kevin Garnett, Kobe Bryant, Shaquille O'Neil, Dwyane Wade, LaDainian Tomlinson, and Peyton Manning have in common? A typical answer, albeit correct, would be "superstar" athletes with huge endorsement deals and multi-million dollar contracts. However, as much fame and fortune these athletes enjoy through their athletic pursuits today, there was a time when these athletes, along with their present professional counterparts, were simply known as "student athletes" or "amateurs."

Every year, collegiate sporting events draw capacity crowds and generate billions in revenue through ticket sales, endorsement deals, and sponsorship agreements. However, that is only a fraction of the total income produced by "amateurs" in the collegiate ranks. There are numerous magazines, websites, clothing lines, and even video games which realize a substantial profit by portraying collegiate "amateur" athletes in a light that was once thought to be reserved for professionals. For example, sporting goods stores, such as Foot Locker and Dick's specialize in all types of athletic gear, including clothing. Some of this clothing consists of jerseys from various athletic teams, many times college teams, and, most of the time, these jerseys are accompanied by a number, which reflects one of the better players on the team. However, the distinction between these jerseys and the professional jerseys for sale is that there is often no name on the back of the jersey. Does the simple fact that the name on the back of a jersey of the college athlete is absent make the situation right? Is it right that these "amateur" athletes are being marketed and individuals are obtaining a substantial profit, while the athlete gains nothing in return?

The same may also be said for high school "amateurs." Throughout the past decade, there has been a growing trend in the popularity of high school athletic events, especially in football and basketball. There has been an increase in the amount of publicity these young stars are receiving – there are websites, televised contests, and special features and stories which are available to the public. In fact, many high school teams, feeling the need to market themselves on a national level in order to attain a heightened level of prestige, may fail to play against in-state opponents.[1]

One example of this is Evangel Christian Academy, a school located in Shreveport, Louisiana, who, during the 2003 football season, had only four in-state opponents on their nine game schedule – the district opponents that they were required to play under the Louisiana High School Athletic Association format.[2] All five non-district games that Evangel competed in were against out of state opponents from Florida, Alabama, Missouri, Texas, and California.[3] In fact, the game against the California team, De La Salle High School of Concord, California, was televised live on an ESPN network station.[4] Even more interesting is that the contest was arranged by Paragon Marketing Group of Chicago, who was also responsible for bringing then-high school basketball sensation LeBron James to ESPN the previous winter.[5] The marketing group even agreed to cover Evangel's traveling and lodging expenses, which included airfare.[6]

In addition to the national television exposure of high school "amateurs," marketing campaigns of large corporations, such as Reebok and NIKE, are cashing in on these athletes through their sponsorships in camps, like NIKE's football camps and Reebok's ABCD basketball camp.[7] In addition, NIKE has filmed a series of commercials, which feature high school athletes lifting weights and performing practice drills, while flashing highlights of now-professional athletes from their high school years.[8]

This article will discuss the growing trend and increasing popularity of "amateur" athletics and address the question of whether these "amateur" athletes are afforded the same right of publicity as professional athletes with regard to the various marketing campaigns and other money generating enterprises which focus on them. And, if these "amateur" athletes are afforded this right, what cause of action is available to them and what effect does an award in their favor have on their "amateur" status?

II. THE RIGHT OF PUBLICITY EXAMINED

Within the realm of the right to publicity, there is relevant case law which has shown that an athlete has a remedy against those who unlawfully use his name, nickname, likeness, image, or essentially anything else that evokes their marketability, for commercial gain.[9] In this age of rampant commercialism, it has been an ever-growing concern of athletes and their agents to demand control of their names and images, in an attempt to hold on to the hottest property they know: themselves.[10] The reason for this is athletes, especially those in such high contact sports as football, realize that stardom may be short-lived and that their career may end at any moment, due to injury or another form of replacement.

In many respects, an athlete views his athletic ability as a product, one which he receives his fair market value through a contract with his team, endorsement deals, etc. However, in most instances, such athletic ability is interchangeable, meaning that an athlete may be replaced by another equally talented athlete upon satisfaction of his obligation. This satisfaction may come as a result of his contract term expiring, an injury which he has endured, or an inability to perform as he once did. Regardless, an athlete realizes that, one day, he will be replaced by another individual; meaning that, it is extremely important for him to receive maximum compensation for his ability to perform and marketability. Through the right of publicity, an athlete protects this proprietary interest and has the ability to collect and bargain for his name, nickname, likeness, or image to be used for commercial gain and has the ability to prevent those who attempt to do so unlawfully.[11]

A. Right of Publicity Defined

Generally, the right of publicity is the inherent right of every human being to control the commercial use of his or her identity.[12] This means that it is illegal under the right of publicity to use, without a license, the identity of a real person to attract attention to an advertisement or product.[13] The right of publicity can give every person the right to either prevent or permit, for a fee, the use of his or her identity in an advertisement to help sell some other persons' product.[14] However, the right of publicity cannot be used to prevent someone's name or picture in news reporting, the use of identity in an unauthorized biography, or an entertainment parody or satire.[15]

For example, an athlete like Cleveland Cavalier LeBron James, who has enjoyed a great deal of publicity throughout his basketball career, cannot use the right of publicity to prevent the use of his name in a story in ESPN The Magazine or Sports Illustrated and cannot prevent a sports writer from criticizing him in a newspaper, because such information is deemed a "newsworthy" item of public interest protected under the First Amendment.[16] Likewise, LeBron James cannot use the right of publicity to stop a writer from doing a biography on his life in print or film, whether he likes it or hates it, and cannot use the right of publicity to stop *60 Minutes* from doing an "in depth" exposé of his life.[17] However, LeBron James can use the right of publicity to either prevent or license, for a fee, the use of his name to help sell sports equipment.[18] Therefore, for all practical purposes, the only kind of speech that is likely to be impacted by the right of publicity is commercial speech, which is usually limited to advertising and other purely commercial uses.[19]

Continued on Page 5

Continued from Page 4

B. Scope of Right of Publicity

In proving a prima facie case of right of publicity, there are three elements which are generally recognized and applied.[20] First, the plaintiff must own an enforceable right in the identity or persona of a human being.[21] Second, a defendant, without permission, has used some aspect of the plaintiff's identity or persona in such a way which is identifiable from the defendant's use.[22] Third, the defendant's use of the plaintiff's identity or persona is likely to cause damage to the commercial value of that identity or persona.[23]

1. Enforceable Right to Sue

In order to bring an action, a plaintiff must have standing. Under the right of publicity, the "enforceable right" element is met where the plaintiff's own identity is at issue or the plaintiff is an assignee or exclusive licensee of someone else's right of publicity.[24] Therefore, an athlete or his agent will not have standing to sue unless his own identity is at issue or he has been assigned or licensed the right to use the identity or persona at issue.[25] In *MJ & Partners Restaurant Limited Partnership v. Zadikoff*, the court raised the question of whether a licensee of a trademark can state a claim under the right of publicity when the owner of the mark has authorized its use to the person doing the alleged infringing.[26]

In this case, basketball legend Michael Jordan licensed the right to use, in the restaurant business, his name and likeness in the Chicago area to a restaurant company. Subsequently, Jordan and the C.E.O. of the licensee to the agreement entered into a separate agreement to develop a rival restaurant which would utilize different aspects of Jordan's "likeness." The restaurant company brought suit in the United States District Court, alleging unauthorized use of name in violation of the Lenham Act, unfair competition, common law misappropriation, and a breach of fiduciary duty, among others.[27] As to the misappropriation claim, Zadikoff argued that only Jordan could assert a claim of misappropriation and, therefore, the restaurant company was unable to bring the cause of action.[28] The court rejected Zadikoff's argument, reasoning that "[s]ince the tort of misappropriation is premised on a person's economic interest in publicity rights, the range of plaintiffs who have standing to make such a claim expands to the extent that the publicity rights are assignable."[29] The court continued, stating that "the exclusive licensee of the right to exploit a celebrity's name, likeness, or personality has a proprietary interest assignable in gross to the extent permitted under the original licensing agreement."[30] For these reasons, the court held that a licensee of a celebrity's name may state a cause of action for misappropriation of the right to publicity.[31]

2. Identification

The second element that the plaintiff must prove is that the defendant, without permission, has used some aspect of the plaintiff's identity or persona in such a way that is identifiable from the defendant's use.[32] However, this identification element does not require any confusion as to the endorsement of the product by the person; rather, all that is required is that more than a de minimis number of ordinary viewers can identify the plaintiff through the advertisement.[33] In fact, the Wisconsin Supreme Court has stated that, in a right of publicity case, the fact that the proof might show that only a few people would reasonably identify the plaintiff would "not vitiate the existence of a cause of action" but would "affect the quantum of damages."[34]

There are many instances where an individual's identity can be stolen and used to attract attention in an advertisement or product without giving rise to a valid claim of false endorsement.[35] In fact, it is common in advertising to use the picture or name of a celebrity or person prominent in a certain field without any hint of endorsement.[36] One of the most memorable cases regarding identification without false endorsement featured one of the most celebrated boxers in history, Muhammad Ali. The identification controversy in this case concerned an image in Playgirl Magazine's February, 1978, issue, which bore an unmistakable resemblance to Ali.[37] The image was of a nude black man, seated on a stool, in the corner of a boxing ring, with both hands taped and outstretched resting on the ropes.[38] The image was captioned "Mystery Man," however, the identification of Ali was implied by an accompanying verse, which referred to the figure as "the Greatest," a term used consistently by Ali in reference to himself.[39] The court reasoned that, since it was undisputed that Ali had obtained such a "celebrated status" and established a valuable interest in his name and likeness, and because there was a clear resemblance between Ali and the image, Ali's right of publicity had been violated.[40]

While the *Ali* case has been considered bear important precedent to the right of publicity, many have stated that it was the 1992 case regarding a non-athlete, Vanna White, which stretched the issue of identifiably to the limit.[41] In *White v. Samsung Electronics America*, a dispute arose between White and Samsung Electronics over a Samsung commercial, which depicted a futuristic world, based in the 20th Century, featuring various Samsung electronic products in an attempt to convey the message that Samsung products would still be in use at that time.[42] A particular segment of the Samsung advertisement featured a robot with hair and dress similar to Vanna White, positioned next to a game board, which was instantly recognizable to viewers as the "Wheel of Fortune" game show set, and contained a caption that read: "Longest-running game show. 2012 A.D."[43] In rendering its decision, the Ninth Circuit Court of Appeals came to three important findings.

First, the court found that, while White's statutory right of publicity was disallowed because her "name or likeness" was not appropriated within the advertisement by Samsung, White still retained the ability to bring a claim pursuant to the common law right of publicity.[44] The court found that the common law right of publicity did not only reach means of appropriation other than name or likeness, but, also, reached the specific means of appropriation relevant for determining whether the defendant had in fact appropriated the plaintiff's identity.[45]

Second, the court found that "individual aspects of advertisement say little," but, "[v]iewed together, they leave little doubt about the celebrity the ad is meant to depict."[46] The court noted that, while the long gown, blond wig, and large jewelry worn by the robot resembled the exact way Vanna White dresses at times, there are many women who dress in a similar fashion.[47] However, the court noted that all aspects of the advertisement, when viewed together, including the robot's dress, style, and actions of turning block letters on a game-board resembling the "Wheel of Fortune" game show set, could only draw a connection to Vanna White.[48]

Third, the court considered the defense of parody.[49] Samsung claimed that the robot in the commercial represented nothing more than good humor and that such humor was protected speech.[50] However, the court drew a distinction between "parody" and a "knock-off," recognizing that one is intended for fun and one for profit.[51] The court concluded that the robot's purpose in the commercial was not for poking fun of Vanna White or the Wheel of Fortune game show; rather, its sole purpose was to sell Samsung VCRs.[52]

3. Damage to the Commercial Value of the Individual

The third element of a violation of the right of publicity requires a plaintiff to prove that the defendant has unlawfully used his or her identity or persona in such a way that is likely to cause damage to the commercial value of that identity or persona.[53] This element was discussed in *Shamsky v. Garan*.[54]

In *Shamsky*, individual members of the 1969 "Miracle Mets" baseball team brought action against a clothing manufacturer for the use of each of their images on jerseys featuring a team photo of 1969 Mets baseball club.[55] The manufacturer had been licensed by Major League Baseball, but had not obtained the individual consent of each of the players in the photograph.[56] Holding in favor of the ballplayers, the court came to three important findings.[57]

First, with regard to the manufacturer's claim that the jerseys were merely conveying historical information of a separate and historically recognizable entity, the court found that this was "not a situation where a thousand [components], each . . . meaningless on its own, [were] arranged to form a meaningful picture."[58] Rather, each ballplayer held a separate value in his identity and, thus, had the "right to commercial exploitation of [his] individual identit[y], even if collectively [this] identity[y] may be somewhat less valuable than the identity of a greater, more memorable whole."[59]

Second, the manufacturer argued that the plaintiffs gave away all individual publicity rights by agreeing to the terms of the Uniform Players Contract.[60] The Uniform Players Contract, signed by each of the former ballplayers prior to the 1969 season, contained paragraph 3(c), which stated:

> The player agrees that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and agrees that all rights in such pictures shall belong to

Continued on page 6

Continued from page 5

> the Club and may be used by the Club for publicity purposes . . . . The player further agrees that during the playing season he will not make public appearances, participate in radio or television programs or permit his picture to be taken . . . or sponsor commercial products without the written consent of the Club, which shall not be withheld except in the reasonable interests of the Club.[61]

In response, the court found that, while the first sentence of paragraph 3(c) purported to grant the Club a right to the publicity use of the players' pictures for still photographs, motion pictures, and television, such publicity use did not extend to the each player's individual right of commercial exploitation in his identity.[62] The court noted that the second sentence of paragraph 3(c) had clearly contemplated that each player retained the right to the commercial exploitation of their identity and any possible restriction concerning this right was limited to "the playing season."[63] The court held that the players were not seeking to assert a right "in the picture," but, rather, were seeking to assert a right in the commercial exploitation of their identities through the manufacture of the jerseys.[64] The court recognized that "[i]t is common knowledge that sports personalities retain the right to make commercial endorsements, etc., and do not concede this right to their teams." [65]

Finally, the court rejected the manufacturer's interpretation of the Seventh Circuit's decision in *Baltimore Orioles v. Major League Baseball Players Association* that "the Players' rights of publicity in their performance cannot escape preemption" by distinguishing the right of publicity in a particular performance and the individual's right to commercial exploitation in one's identity.[66] Furthermore, the court pointed to the express language of the *Baltimore* court, that "a player's 'right of publicity in his name or likeness would not be preempted' if the club, without consent, commercially exploited the player's identity."[67] The court held that, since the image on the jerseys was not used for a particular publicity purpose, but, to commercially exploit the players' identity, each player's right of publicity claim was not preempted.[68] For these reasons, the ruling in *Shamsky* stands for the position that an individual's agreement with a professional baseball team or league does not result in forfeiture of that individual's right to control the commercial exploitation of his identity.[69]

C. Defenses to Right of Publicity

There are two primary defenses to an individual's right of publicity claim – the consent defense and the First Amendment defense.[70] Under the defense of consent, the person accused of unlawfully extorting another individual's likeness, persona, etc., claims that the individual, either implicitly or explicitly, gave his or her consent to the product's use for commercial gain. On the other hand, the First Amendment defense is used most often where the accused is using another's identity or persona for "communicative" rather than "commercial" uses; meaning that the use of the individual's persona, likeness, etc. is being used to convey information, like a newspaper article, rather than for profit.[71]

1. Consent Defense

The consent defense is a claim that the commercial use of an individual's name, voice, or likeness was either licensed or assigned to the accused.[72] The approach when addressing the consent defense is to examine (i) whether consent was validly given or transferred to the defendant, (ii) what was the purpose and scope of the consent, and (iii) whether the use of the plaintiff's name, voice, or likeness was within the scope of the consent.[73]

In *Sharman v. C. Schmidt & Sons, Inc.*, the court considered the consent defense.[74] The plaintiff, William Sharman, was a professional basketball player who had had hired the services of an agent to secure modeling agreements for him to be used in advertisement.[75] Pursuant to the agent's work, Sharman had several photos taken, one which he posed in a red shirt holding a bowling ball, and was compensated $125 for the use of his likeness in advertising.[76] Sharman read and signed two releases, which permitted the use of the photos either as taken or "distorted in character, or form," for advertising purposes and gave unrestricted rights to all persons and corporations to use his name in conjunction with his picture.[77] Subsequently, the image of Sharman holding the bowling ball was selected and approved by the advertising manager of a beer manufacturer to be used in one of their promotions.[78] Later, a beer glass and bottle were engraved on the composite advertisement of the promotion.[79] Sharman brought suit against the beer manufacturer, claiming that the amendment of the picture to include a beer glass and bottle exceeded the consent conferred by the releases signed.

The court found that it had been "contemplated by all parties concerned that the picture would eventually be used for a commercial purpose" and, thus, since the sale of beer was a commercial purpose, Sharman's argument that the form of the advertisement exceeded his consent was unpersuasive.[80] The court noted that "[a] sports figure can complain when his name or likeness is used to advertise a product but can recover damages only if he has not consented to such use or the advertising exceeds the consent granted."[81] In its holding, the court found that the use of Sharman's picture in the advertisement for beer did not come within the reservations of the release and was not such an intrusion on Sharman's rights that the advertisement would be considered "outrageous" or "beyond the limits of common decency"; therefore, there was no invasion which warranted relief.[82]

2. First Amendment Defense

In determining whether the right of publicity is applied or pre-empted by a First Amendment protection, it is best to determine whether a name, likeness, persona, etc., is taken for "commercial" or "communicative" use.[83] "Commercial" use is one which the right of publicity is infringed because, while there are overtones of ideas being communicated, the use is primarily commercial in nature.[84] On the other hand, "communicative" use is one which the policy of free speech predominates over the right of a person to his identity, and no infringement of the right of publicity takes place.[85] The medium used, "commercial" or "communicative," will often determine the result. For example, the unpermitted use of a person's identity on a product such as a coffee mug or T-shirt will usually be deemed "commercial" and require a license.[86] Conversely, the unpermitted use of a person's identity and picture to illustrate a story in a newspaper, magazine, or television news program will be considered "communicative" and, thus, immune from a right of publicity challenge.[87] Such unpermitted use of an individual's picture was classified as "communicative" in *Namath v. Sports Illustrated*.[88]

In *Namath*, legendary New York Jet quarterback Joe Namath brought suit against Sports Illustrated for its publication of his photograph in conjunction with advertisements promoting subscriptions to the magazine without his consent.[89] Sports Illustrated had run various articles about the Jets' victory in Super Bowl III, a great deal of which featured Namath. Later, in a promotional push to sell more magazines, Sports Illustrated ran multiple advertisements featuring a picture of Namath, under headings such as "The Man You Love Loves Joe Namath," and "How to Get Close to Joe Namath."[90] While the court admitted that the magazine's subsequent republication of Namath's picture was "in motivation, sheer advertising and solicitation," the court concluded that "[t]his alone is not determinative of the question so long as the law accords an exempt status to incidental advertising of the news medium itself."[91] Therefore, the court reasoned that, as long as Sports Illustrated's reproduction of Namath's image was used to illustrate the quality and content of the periodical in which it originally appeared, Namath's rights under the statute were not violated.[92] Further, the court found that there was no evidence that Namath, through these advertisements, could be deemed to have endorsed Sports Illustrated in any way; rather, the use of Namath's image was one which portrayed the general contents of what is likely to be included in future issues of the magazine.[93]

D. Remedies in Right of Publicity Cases

Plaintiffs, including professional athletes, who successfully bring a cause of action under right of publicity, are entitled to both injunctive relief and monetary damages.[94] The monetary damages in a right of publicity action are awarded for damage done to the commercial value of a proprietary right of the plaintiff, as opposed to damages under misappropriation claims, which are awarded for mental anguish.[95] Perhaps the easiest way to differentiate between the right of publicity and misappropriation with regard to damages is that a violation of the right of publicity inflicts an injury to the pocketbook, whereas an invasion of privacy focuses on the injury to the psyche.[96]

1. Injunctive Relief

In *Uhlaender v. Henrickson*, the Association of Major League Baseball Players, acting on behalf of some several hundred Major League Baseball Players, brought an action against the manufacturer of two games that they claimed violated each of the players' right of publicity.[97] The games employed the names and professional statistical

Continued on Page 7

Continued from Page 6

information, such as batting, fielding, earned run and other averages, of some 500 to 700 major league baseball players.[98] The court found that "a celebrity's property interest in his name and likeness is unique, and therefore there is no serious question as to the propriety of injunctive relief."[99] In holding, the court noted that "a celebrity, by investing years of practice and competition in a public personality, should be entitled to the fruits of his labors from the marketability of this personality."[100]

There are two considerable advantages to injunctive relief. First, an injunction can be carefully tailored to preserve whatever rights the wrongdoer possesses in the proper use of the victim's identity.[101] Such a situation would arise where a defendant has been assigned certain rights to the plaintiff's persona in advertising, but has exceeded the terms of the agreement.[102] Injunctive relief could require the defendant to stay within the terms of the agreement, but need not take away all rights to the use of the plaintiff's name.[103] Additionally, when the issue of free speech arises, an injunction could effectively prohibit the illegal behavior while affecting the free speech of the defendant as little as possible, allowing courts to utilize the "least restrictive alternative."[104]

Second, an injunction can protect a plaintiff's image and marketable reputation in a way that other forms of relief cannot. For example, an advertisement which depicts a celebrity figure in a compromising position, such as a nude photograph, has the ability to do serious damage to the athlete's marketability by conveying a negative public image or jeopardizing the professional standing of the athlete.[105] This damage to public image can be difficult for the athlete to overcome and is of even greater difficulty to measure by monetary standards.[106] Therefore, in these situations, injunctive relief designed to enjoin the defendant from committing such infringing acts could be deemed more beneficial and desirable.

2. Compensatory Damages

There are three standards that may be used to compute the amount of compensatory damages awarded: 1) fair market value of identity, 2) damage to professional standing and publicity value, and 3) unjust enrichment and infringer's profits.[107] All three kinds of damages may be awarded in right of publicity cases involving professional athletes.

A. Fair Market Value of Identity

Under the "fair market value of identity" theory, damages are awarded to the extent of the "market value of the use of plaintiff's identity or persona in the commercial setting in which the defendant has used it."[108] This market value can be determined easily through expert testimony as to the kind of fees that similarly situated individuals get for similar uses of their persona.[109]

This measure of "fair market value of identity" was explored in *Town & Country Properties, Inc. v. Riggins*. In *Town & Country*, former football great John Riggins brought suit against a real estate firm for the use of his name in an advertisement to sell his former home.[110] Mr. Riggins' former wife, Mary Lou Riggins, had become a licensed real estate agent under the employ of the defendant real estate firm, whereby she attempted to sell the couple's former marital home.[111] In advertising an open house for the property to brokers, Ms. Riggins printed flyers with a photograph of the home's exterior and gold heading stating, "Come see . . . JOHN RIGGINS' Former Home."[112] In rendering its decision, the trail court found that such advertising violated Mr. Riggins' right of publicity and concluded that Mr. Riggins was entitled to damages.[113] In determining the amount of damages, the court turned to Riggins' expert, an owner of a sports marketing company that specialized in marketing and promoting athletes.[114] The expert testified that, in his expert opinion, Mr. Riggins was a "proven commodity," and that it was common in the sports marketing business for an ex-athlete with Mr. Riggins' credentials to charge a fifty thousand dollar fee for lending his name to a flyer such as the one used by Ms. Riggins.[115] Taking this into consideration, the jury awarded Mr. Riggins twenty-five thousand dollars.[116] On appeal, the court found the award to be essential and supported by "ample credible evidence."[117]

B. Damage to Professional Standing and Publicity Value

The "damage to professional standing and publicity value" standard is utilized in instances where the use of a plaintiff's identity, without his or her consent, amounts to more than merely the fair market value of a particular use.[118] The reasoning behind this measure is that "the timing or context of the defendant's use may damage the plaintiff's professional standing and reasonable expectation of income, as well as the future publicity value of the plaintiff's identity."[119] This type of damage usually occurs in situations where there is an endorsement of a shoddy product, a product outside the scope of the plaintiff's carefully developed image, goods that are similar to other goods that the plaintiff endorses, the plaintiff has never licensed his identity for like goods before, overexposure of the plaintiff's identity, or a product that the public knows the plaintiff does not use or support.[120]

In the *Hirsch* case, discussed earlier, the court addressed the damage to professional standing and publicity value standard, noting that an athlete's investment of work, time, and money all combine to build the publicity value of his or her name.[121] The court concluded that an appropriate remedy for appropriation of a person's name for trade purposes would take into account that the "economic damage caused by unauthorized commercial use of a name."[122]

C. Unjust Enrichment and Infringer's Profits

The recovery of the profit made by the infringer is a standard form of damages in trademark and copyright cases, which are analogous to cases involving the right of publicity.[123] The Restatement (Third) of the Law of Unfair Competition takes the view that damages of this type are an "ordinarily available" remedy in right of publicity cases and some state statutes even explicitly provide for unjust enrichment as an ordinary measure of damages in such cases.[124]

In *Hogan v. A.S. Barnes & Co., Inc.,* golf legend Ben Hogan brought suit against an author of a book which discussed the golfing techniques of many famous golfers.[125] Prior to publishing the book, the author had offered to compensate Hogan for pictures taken in hopes of using them in his book.[126] While Hogan flatly refused the offer, the author moved forward with the book's publication and included the pictures of Hogan within.[127] With regard to measuring the amount of damages to be awarded to Hogan, the court considered the measure of unjust enrichment and infringer's profits.[128] The court found that, while a book's success or non-success in rendering a profit or loss is neither determinative of a plaintiff's right to damages nor the extent thereof, the measure of unjust enrichment and infringer's profits may be one of the factors considered in assessing the amount of damages.[129]

3. Punitive Damages

While courts have consistently recognized that punitive damages are to be awarded in only the most extreme cases, they have been awarded in right of publicity cases where there is a showing of a "premeditated or knowing" use of the plaintiff's identity by the defendant.[130] In *Frazier v. South Florida* Cruises, a promoter of cruises used boxing great Joe Frazier's name in conjunction with an advertisement to sell more passes on a cruise ship.[131] What the cruise promoter failed to mention in their advertisement was that Frazier had already denied the proposal for his name to be used in advertisement and had not consented to the use of his name in connection with the cruise.[132] The court found that the cruise promoter had "commenced its advertising campaign without any genuine belief that [Frazier] had granted, or would grant, permission to use his name to promote the venture."[133] The court noted that the jury was entitled to conclude not only that the cruise promoter had acted with willful disregard for Frazier's rights, but also that punitive sanctions were justified to deter repetition of similar conduct in the future.[134] For these reasons, the court held that Frazier was entitled to the jury's award of punitive damages.[135]

III. AMATEUR ATHLETES' RIGHT OF PUBLICITY

A. Amateur Athletics: A Growing Industry

The evolution of high school and college athletes transforming into public superstars has taken place. No longer is a high school or college athlete seen as merely a "student-athlete," who is a great talent, that "one-day" may be a superstar. Rather, the day has arrived that the high school or college athlete is the superstar, more so, possibly, than many professionals.

Within the billion dollar sports industry, fewer sports are more profitable and popular than college football and basketball. In fact, many of these sports' athletic events are viewed almost as American holidays, for instance, college football bowl games and the NCAA basketball tournament, better known as the "Big Dance" or "March Madness." Whatever the reason for the popularity, be it school pride or the excitement of witnessing America's elite young talent perform

Continued on page 8

Continued from Page 7

on center stage, there is a great demand for these events and an even greater profit being made by many, not including the athletes.

Over 1,200 major colleges and universities in the United States are members of the National Collegiate Athletic Association ("NCAA"), the governing body for intercollegiate athletic events.[136] The NCAA is a private, non-profit association which distributes all of the profits made by the intercollegiate events to its member institutions.[137] In its Bylaws, the NCAA states within its principle of amateurism that "[s]tudent-athletes shall be amateurs . . . and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived."[138] However, it has often been disputed as to whether the NCAA and its member institutions share this same principle purpose, as there is a great deal of commercialization taking place within each athletic season.[139] In fact, some commentators even claim that the concept of amateurism in the NCAA "is a sham due to [its] commercial nature."[140]

The commercial nature of intercollegiate athletics is evidenced by some of the deals that are made in conjunction with the NCAA's most high-profile events. For instance, in 1999, the NCAA, acting on behalf of its member institutions and the athletes of these institutions, entered into an 11 year contract extension with CBS Sports for the exclusive right to televise the NCAA men's basketball tournament.[141] This extension not only gave CBS the right to show a televised broadcast of the tournament's games, but granted CBS the right to show game content on the internet and merchandise tournament-related products.[142] The amount for this extension: a whopping six billion dollars ($6,000,000,000).[143] However, while this agreement included the most on-demand showcase of college basketball, it is only a small fraction of the total revenue gained by the NCAA from these "amateur athletes."[144]

While it is well documented that college athletics and the events surrounding the athletes associated is a big ticket within the American sports industry, there is another sector of amateur athletics that is growing at a seemingly faster rate than that of the collegians. This sector is high school athletics. For years, high school athletic events were known for having some of the most historic rivalries and have been a source of pride for many communities and alumni associated with each team or school. While this fire and passion still remains within these fans today, a greater market for these events has emerged and many are recognizing the demand for these events.[145] This demand is attributed to many factors, most notably the growth of talent at such an early age that is often associated with these events.[146]

In 1995, the Minnesota Timberwolves made basketball history by drafting with its first pick a 6'11" super-athlete from a Chicago area high school, Kevin Garnett.[147] The drafting of Garnett was significant, as he was the first high school athlete to be selected in the NBA draft, and was criticized by many. However, the move has since proven to be a wise one, and many professional teams have followed suit.[148] In fact, since 1995, a total of twenty-nine high school basketball players have been drafted in the first round of the NBA draft.[149] With this realization of talent and the competitive nature of the various media outlets, there have been many television programs, websites, and magazines that have surfaced to generate a profit from this demand.[150]

One such example of this is a 2005 event that took place Cincinnati, Ohio, that featured a local high school, North College Hill, against Oak Hill Academy of Mouth of Wilson, Virginia.[151] Between the two teams, there were at least five players that were dubbed as superstars by many in high school basketball circles, with two projected to be NBA lottery picks.[152] Additionally, the game was played on neither North College Hill nor Oak Hill's home court; rather, it was held at the U.S. Bank Arena with a sellout crowd of 16,202 in attendance.[153] This event was sold out months in advance and a pair of front row tickets sold for $431 on eBay![154] While the players on each team seemed to particularly enjoy the publicity given to them, as many of them stand an increased chance to obtain a college athletic scholarship from this event through the publicity received, it is interesting to note who was making the profit. Unlike the collegiate athletics, high school athletics do not have a single governing body that oversees transactions made with regard to television deals of this sort. Rather, high school teams are regulated by individual state athletic associations, many of which do not have provisions in their rules that address revenue distribution obtained from nationally televised games or other commercial endeavors entered into by the schools. In fact, a good number of high schools are not members of their state high school athletic association; Oak Hill is one of them.[155] So, the question remains, where does the money go and who does it rightfully belong to?

In games such as the North College Hill-Oak Hill match-up, promoters have the ability to make up to $100,000 on a particularly successful game from the sale of broadcasting rights to national or regional sports networks.[156] Meanwhile, each participating high school's athletic departments stand to benefit from the games by negotiating broadcasting fees and equipment contracts.[157] Even individual high school basketball coaches have been known to receive a share of the pot from these events, in the form of under-the-table cash compensation for agreeing to bring their teams to venues that often cross state lines.[158] Given all of this, the players on the competing teams do not seem phased, as most see the opportunity of playing on television as a way to market themselves to various colleges and, in some cases, professional basketball teams.[159]

B. An Amateur's Right to Publicity

While most right of publicity cases in the courts today involve people who the general public would consider a celebrity, the right of publicity protects everyone – both celebrities and non-celebrities.[160] It is commonly held that the status of celebrity is given to those who, by virtue of talent and hard work, "have attained national or international recognition in a particular field of art, science, business, or other extraordinary ability."[161] Indeed, an individual may be considered a celebrity by a certain subculture rather than by the public at large.[162]

Looking into the context of amateur athletics, there is no doubt that there are athletes competing in both college and high school levels that are considered "celebrities" within the sports subculture.[163] For instance, take LeBron James. As early as his sophomore year in high school, James was a USA Today High School Basketball All-American, named Ohio's "Mr.Basketball," and had obtained a great deal of recognition within the high school basketball community.[164] However, by the time James reached his senior year, he was no longer only a well-known figure within the high school basketball ranks; rather, he was considered a "celebrity" and had been on the cover of Sports Illustrated.[165] Additionally, many Americans who were not high school basketball enthusiasts knew of his fame through various information mediums throughout the country.

Another example of an amateur athlete attaining "celebrity" status is former University of Southern California ("USC") quarterback Matt Leinart. Leinart had been a two year starter for the Trojans when he won the prestigious Heisman trophy in 2004 and was projected by many National Football League ("NFL") experts to be the number one pick in the 2005 NFL draft.[166] However, Leinart decided to by-pass the opportunity of playing professionally and opted to play an additional season at USC.[167] Prior to the beginning of that season, Leinart was considered by many to be the most popular celebrity athlete in Los Angeles and was instantly recognizable by not only USC football fans, but the public in general.[168]

The purpose of these examples is to illustrate the enormous amount of fame that individuals in both the high school and collegiate athletic mediums are receiving and that these individuals have attained such a "celebrity" status as required for one to bring a right of publicity claim. However, the question remains, under what circumstances can these amateur celebrity athletes successfully bring a right to publicity claim and what recourse is available to them?

C. The Amateur Athlete's Right of Publicity Claim

For American amateur athletes today, there are various athletic associations that oversee and define an athlete's "amateur" status. In high school athletics, each individual state has an athletic association that provides rules and bylaws to be followed by its member schools and athletes. However, while many of the athletic associations' bylaws outline ways in which an athlete forfeits his amateur status, the question remains as to whether an amateur athlete, whose identity is appropriated for commercial gain or use by another unlawfully, has recourse against the wrongdoer and, if so, may he or she collect an award in his or her favor.[169]

Collegiate athletes and the institutions they represent are governed by the rules and bylaws of the NCAA. Within Article 12 of the NCAA Bylaws, there are provisions which outline the various rules and regulations regarding "Amateurism" in intercollegiate athletics and state

Continued on Page 9

Continued from Page 8

the permissible and non-permissible commercial uses of an athlete and his or her likeness or image.[170] Specifically, NCAA Bylaws 12.5.2.1 and 12.5.2.2 outline the non-permissible uses of an athlete's name or picture in commercial products and advertisement.[171]

NCAA Bylaw 12.5.2.1 states:

> Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

NCAA Bylaw 12.5.2.2 states:

> If a student-athletes' name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters) or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps to stop such activity in order to retain his or her eligibility for intercollegiate athletics. Such steps are not required in cases in which a student-athlete's photograph is sold by an individual or agency (e.g., private photographer, news agency) for private use.

Under Bylaw 12.5.2.1, it is clear that a collegiate amateur does not have the right to accept compensation for a commercial advertisement for which he knowingly endorses or permits endorsement.[172] However, what happens if the athlete does not receive any compensation and does not permit the use of his name? This answer is given rather vaguely within Bylaw 12.5.2.2, stating that the "student-athlete (or institution . . .) is required to take steps to stop such activity in order to retain his or her eligibility in intercollegiate athletics." Thus, a variety of questions are left unanswered, in particular: What are the "steps" that the "student-athlete" or "institution" is required to take? What is an appropriate approach for the student athlete and/or institution to take? Do these "steps" include the right of an athlete to institute an action against the wrongdoer to protect his name and to protect his likeness from being exploited?

Earlier, we mentioned Matt Leinart, the former USC quarterback. During his time at USC, it is fair to say that he had achieved a "celebrity" status and was well known within the sports subculture as a great quarterback for the Trojans. Assume that, for example, an image of Leinart was improperly placed on a billboard used to promote a tobacco product. The tobacco company, hypothetically named X Tobacco, digitally enhances a photo of Leinart to include a cigarette in Leinart's hand and places a slogan on the billboard, which reads: "Smokin' Quarterbacks Smoke X Tobacco!" For the purposes of this hypothetical, assume that Leinart has no knowledge of the advertisement and, further, has neither received any form of compensation nor permitted the use of his name or image to be associated with the X Tobacco product. Leinart, without doing anything wrong, would fall within the purview of NCAA Bylaw 12.5.2.2 and would be required to take "appropriate steps to stop such activity in order to retain his eligibility." Further, Leinart may run the risk of being associated with smoking, which could cause him to suffer a taint to his image, as athletes are typically encouraged and, often, required to refrain from such unhealthy habits as smoking or using tobacco products.

In this hypothetical, we clearly have a commercial advertisement for tobacco with Leinart's image and likeness used in conjunction with X Tobacco's sale of tobacco. In applying the three elements of the right to publicity, we would first inquire as to who has the enforceable right to sue. In the context of the right of publicity, an "enforceable right to sue" means that either the plaintiff's own identity is at issue or that plaintiff is an assignee or exclusive licensee of someone else's right of publicity.[173] In our case, Leinart's individual identity is obviously at issue, as it is his image and likeness is evident from the billboard advertisement.

With regard to the second element, would have to prove that the advertisement used some aspect of his identity or persona in such a way that is identifiable from X Tobacco's use. For this element to be satisfied, X Tobacco must have used some aspect of Leinart's identity or persona in such a way that is identifiable.[174] As we discussed earlier in the *White* case, "individual aspects of advertisement say little, but view together, they leave little doubt about the celebrity the ad is meant to depict."[175] In the case of Matt Leinart, the advertisement by X tobacco clearly identifies him in two ways. First, the advertisement features his image, which is instantly identifiable by more than a de minimis number of ordinary viewers, as he has established such a "celebrity" status within the college football sports subculture.[176] Second, the fact that Leinart is a well-known quarterback for the USC Trojans and the advertisement's phrase states: "Smokin' Quarterbacks Smoke X Tobacco!" clearly indicates a connection between the two. While the phrase does not specifically state Leinart's name, the billboard includes Leinart's image, which is recognizable, and a phrase that connects Lienart by using the word "quarterback," Leinart's position at U.S.C. Therefore, the phrase can be reasonably connected to Leinart.

Finally, one would have to prove that damage has been done to Leinart's commercial value. In our case, Leinart's unwanted appearance on the X Tobacco billboard is likely to cause damage to Leinart's personal standing as well as professional standing. A court is likely to find that, just as it has in other right of publicity cases, damage has been done to Leinart's commercial value, as X Tobacco has unlawfully used his name, image, and likeness to sell tobacco products without his consent. Furthermore, even if X Tobacco would claim that they somehow received a right to place Leinart's picture in advertisement from USC, under *Shamsky*, Leinart has retained his personal right of publicity, as "it is common knowledge that sports personalities retain the right to make commercial endorsements, etc., and do not concede this right to their teams."[177]

D. Does the Athlete Lose Amateur Status?

As stated earlier, there are three remedies that are available to the plaintiff in a right of publicity action: injunctive relief, compensatory damages, and punitive damages. In Leinart's case, it is likely that he would be entitled to at least injunctive relief and compensatory damages and, possibly, punitive damages. An injunction would be proper under the rules and bylaws of the NCAA, as it would likely satisfy the required "steps" that Leinart would be required to take to prevent X Tobacco from continuing the use of his name and image in commercial advertisement. The problem with only granting an injunction, however, is that the wrongdoer is not punished in any manner other than he or she must discontinue the use of Leinart's image on their billboard. If this were the only consequence, X Tobacco could, theoretically, continue to use the images of young athletes (other than Leinart) until the courts told them otherwise. Therefore, there must be some type of compensatory or punitive damage award in order to punish the wrongdoer for their violation of the athletes' right of publicity.

If an award for compensatory or punitive damages were granted to the athlete, herein lies the question: may the athlete accept a monetary award from the court for the damages incurred? The problem with granting a monetary award to an amateur athlete is the principle of "amateurism" – that an amateur athlete may not collect monetary compensation for his or her performance in the sport pursued. This principle is clearly expressed by the NCAA in NCAA Bylaw 12.5.2.1, which states that an athlete is not to accept "any remuneration for his or her picture to advertise, recommend or promote directly the sale or use of a commercial product. . . ."[178] If the amateur athlete were to collect a monetary award in court for the use of his or her image, would this be considered the type of "remuneration" disallowed by the NCAA? Further, would a wrongdoer be dissuaded from using advertisements with other amateurs in the future? Is the injunction enough to stop the wrongdoer, or should there be some form of monetary punishment to the wrongdoer?

E. Proposed Solution

As stated under NCAA Bylaw 12.5.2.2, the student-athlete or institution is required to take steps to stop the unlawful commercialization of his or her name or picture.[179] While the term "steps" is not defined in the NCAA bylaws, a legal action will likely constitute a "step" to preventing a wrongdoer from inappropriately using the athlete's name, likeness, or image for commercial gain. Just as an injunction to prevent the wrongdoer from using athlete's persona would likely be a sufficient "step" to prevent the wrongdoer's further use of the athlete's name, likeness, or image, and would not disqualify the athlete from participating in amateur events, it should follow that monetary damages stemming from such a violation also be considered a part of the sufficient "step" and not disqualify the athlete from amateur events.

The reasoning for this is that the athlete's award of compensatory or punitive damages would be more in line with deterring the wrongdoer or others from taking advantage of another person's identity or persona for commercial gain than it would compensate an athlete for his or her

Continued on page 10

Continued from page 9

athletic performance. While the athlete, theoretically, would not have otherwise been featured in an advertisement had it not been for their athletic prowess, such a monetary award would not be directly linked to his personal athletic pursuits and would be related more to his identity as a person. Thus, the athlete should be entitled to collect the monetary judgment equal to at least the fair market value of his identity and damage to his professional standing and publicity value, just as any other individual without jeopardizing their amateur status.

IV. CONCLUSION

With the ever growing demand for amateur athletics and an even greater profit to be realized by many, it is inevitable that an "amateur" will eventually be placed in a situation where his name, likeness, image, or persona, is being used unlawfully for commercial gain. When this instance arises, we should remember who the wronged party is in this action and not punish an amateur for the unlawful actions of another. Additionally, the athletic associations and other governing bodies of these amateurs must recognize the commercialization within their sports and try to do more to protect their amateur athletes from infringements upon their publicity rights. Amateur athletes should be entitled to an individual right of publicity, just as every other living person, and should not have to forfeit their amateur status by merely exercising this right.

1 See Gary Mihoces, Evangel Has to Look Out-of-State for Opponents, USA TODAY, July 9, 2003, available at http://www.usatoday.com/sports/preps/football/2003-07-09-evangel-schedule_x.htm (last visited February 15, 2006).
2 See id.
3 See id.
4 See id.
5 See id.
6 See id.
7 See generally Reebok.com, ABCD CAMP, at http://www.reebokabcdcamp.com/home.htm; Rivals.com, NIKE FOOTBALL TRAINING CAMP, at http://studentsports.rivals.com/content.asp?SID=1112&CID=245842.
8 Football Matters (NIKE 2005).
9 *See*, *e.g.*, Abdul-Jabbar v. Gen. Motors, 85 F.3d 407 (9th Cir. 1995); *see also* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977); Newcombe v. Adolf Coors Co., 157 F.3d 686 (9th Cir. 1998); White v. Samsung Elecs. Am., 971 F.2d 1395 (9th Cir. 1992); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Uhlaender v. Henrickson, 316 F.Supp. 1277, 1283 (D. Minn. 1970); Hirsch v. S.C. Johnson & Son, Inc. 90 Wis. 2d 379 (Wis. 1979).
10 *See* Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes*, N.Y. Times, Feb. 16, 1999 at D1.
11 *See generally* Newcombe, 157 F.3d 686; Abdul-Jabbar, 85 F.3d 407; White, 971 F.2d 1395; Hirsch, 90 Wis. 2d 379.
12 *See* 4 J. Thomas McCarthy, McCarthy on Trademarks & Unfair Competition § 28:1 (4th ed. 1996).
13 *See* J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 Colum.-VLA J.L. & Arts 129, 130 (1995) [hereinafter McCarthy, Human Persona].
14 *See id.*
15 *See id.* at 130-31.
16 *See* Montana v. San Jose Mercury News, Inc., 34 Cal. App. 4th 790 (Cal. Ct. App. 1995).
17 *See* McCarthy, Human Persona, *supra* note 13 at 131.
18 *See id*.
19 *See* J. Thomas McCarthy & Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 Marq. Sports L. Rev. 195, 198 (2001) [hereinafter McCarthy, Protection].
20 *See* Stapleton, *supra* note 20 at 25.
21 *See id.*
22 *See id.*
23 *See id.*
24 *See id.* at 34.
25 *See id*.
26 *See* MJ Partners Rest. Ltd. P'ship v. Zadikoff, 10 F.Supp.2d 922, 927 (N.D. Ill. 1998).
27 *See id*.
28 *See id*. at 930.
29 *Id*.
30 *Id*.
31 *See id*.
32 *See* Stapleton, *supra* note 20 at 36.
33 *See* McCarthy, Human Persona, *supra* note 13 at 135.
34 Hirsch, 280 N.W.2d at 137.
35 *See* McCarthy, Human Persona, *supra* note 13 at 135.
36 *See id*.
37 *See* Ali v. Playgirl, 447 F.Supp. 723, 726 (S.D.N.Y. 1978).
38 *See id*.
39 *See id*.
40 *See id*.
41 *See* McCarthy, Human Persona, *supra* note 13 at 136.
42 *See* White, 971 F.2d at 1396.
43 *See id*.
44 *See id*. at 1397.
45 *See id*. at 1398.
46 *Id*. at 1399.
47 *See id*.
48 *See id*.
49 *See id*. at 1401.
50 *See id*.
51 *See id*.
52 *See id*.
53 Stapleton, *supra* note 20 at 41.
54 *See generally* Shamsky v. Garan, 632 N.Y.S.2d 930 (Sup. Ct. N.Y. 1995).
55 *See* Shamsky, 632 N.Y.S.2d at 931.
56 *See id*. at 932.
57 *See id*. at 933-936.
58 *Id*. at 933.
59 *Id*.
60 *See id*. at 934.
61 *Id*. at 931.
62 *See id*. at 934.
63 *See id*.
64 *See id*.
65 *Id*.
66 *See id*. at 936; *see also* Baltimore Orioles v. Major League Baseball Players Assoc., 805 F.2d 663 (7th Cir. 1986).
67 *Shamsky*, 632 N.Y.S.2d at 936 (citing Baltimore Orioles, 805 F.2d at 676).
68 *See id*. at 935-936.
69 *See generally id*. at 931-937.
70 *See* Stapleton, *supra* note 18 at 42.
71 *See id*. at 44-45
72 *See* Alexander Margolies, *Sports Figures' Right of Publicity*, 1 Sports Law J. 359, 365 (Spring, 1994) [hereinafter Margolies].
73 *See id*.
74 *See generally* Sharman v. C. Schmidt & Sons, Inc., 216 F.Supp. 401 (E.D. Penn. 1963).
75 *See id*. at 403.
76 *See id*.
77 *Id*. at 404-405.
78 *See id*. at 403.
79 *See id*.
80 *Id*. at 406.
81 *Id*. at 407.
82 *Id*.
83 *See* Stapleton, *supra* note 20 at 44-45.
84 *See* McCarthy, Protection, *supra* note 19 at 202.
85 *See id*.
86 *See id*.
87 *See id*.
88 *See generally* Namath v. Sports Illustrated, 371 N.Y.S. 10 (N.Y. Sup. Ct. 1975).
89 *See id*. at 11.
90 *Id*. at 13.
91 *Id*.
92 *See id*.
93 *See id*.
94 *See* Stapleton, *supra* note 20; *see also* Margolies, *supra* note 86.
95 *See* Stapleton, *supra* note 20.
96 *See id*.
97 *See* Uhlaender, 316 F. Supp. at 1277.
98 *See id* at 1278.
99 *Id*. at 1283.
100 *See id*. at 1282.
101 Stapleton, *supra* note 20 at 54.
102 *See id*.
103 *See id*.
104 *Id*.
105 *See generally* Ali, 447 F.Supp. at 723.
106 *Id*. at 729.
107 *See* Stapleton, *supra* note 20.
108 *Id*.
109 *Id*.
110 *See* Town & Country Properties, Inc. v. Riggins, 249 Va. 387, 390 (Va. 1995).
111 *See id*. at 390-391
112 *See id*. at 391.
113 *See id*. at 393.
114 *See id*. at 397-398.
115 *See id*.
116 *Id*. at 393.
117 *See id*. at 398.
118 Stapleton, *supra* note 20 at 57.
119 *Id*.
120 *Id*.
121 *See* Hirsch, 280 N.W. 2d at 129.
122 *Id.* at 134-135
123 *See* Stapleton, *supra* note 20 at 60
124 *See id*.
125 *See* Hogan v. A.S. Barnes & Co., Inc., 114 U.S.P.Q. (BNA) 314, 315 (Pa. 1957).
126 *See id.* at 315.
127 *See id*.
128 *See id*.
129 *See id*. *at* 321.
130 *See* Stapleton, *supra* note 20 at 61.
131 *See* Frazier v. South Florida Cruises, Inc., 19 U.S.P.Q.2d 1470, 1471 (E.D. Pa. 1991).
132 *See id*.
133 *See id*. at 1472.
134 *See id*.
135 *See id*.
136 NCAA Online, About the NCAA: Membership, *at* http://www.ncaa.org (last visited April 16, 2006).
137 *See id*.
138 NCAA Bylaw 2.9.
139 *See generally* Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Right of Publicity by Not Paying for Their Likenesses*, 21 Loy. L.A. Ent. L. Rev. 227 (2001) [hereinafter Matzkin]; C. Peter Goplerud III, *Pay for Play For College Athletes: Now, More Than Ever*, 38 S. Tex. Rev. 1081, 1088 (1997); Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 Loy. L.A. Ent. L.J. 307 (1998).
140 *See* Matzkin, *supra* note 152 at 236.
141 CNN.com, CBS renews NCAA B'ball, http://money.cnn.com/1999/11/18/news/ncaa (last visited April 16, 2006).
142 *See id.*
143 *See id.*
144 *See* NCAA Online, About the NCAA: Budget & Finances, *at* http://www.ncaa.org (last visited April 16, 2006) (the NCAA's budgeted revenue and expenses for 2005-2006 were $521.1 million).
145 *See generally* L. Jon Wertheim & George Dohrmann, *High School Basketball*: *Going Big Time*, Sports Illustrated, March 13, 2006, at 62 [hereinafter Wertheim & Dohrmann].
146 *See id.* at 64
147 The Draft Review with Matthew Maurer, http://thedraftreview.com (last visited April 16, 2006) [hereinafter Draft Review].
148 Garnett has been voted to the NBA's All-Star team eight times and has received the Most Valuable Player award on one occasion in his 11 year NBA career (1995-2006).
149 *See* Draft Review, *supra* note 159.
150 There have been many televised broadcasts of high school football and basketball games, such as the North College Hill - Oak Hill contest. Additionally, there are websites, such as rivals.com and scout.com, which charge membership fees and display the best high school football and basketball talent.
151 *See* Wertheim & Dohrmann, supra note 158 at 64
152 *See id.*
153 *See id.*
154 *See id.*
155 *See id.*
156 *See id.* at 66
157 *See id.*
158 *See id.* at 68; *Compare with* Stephen Flanagan Jackson, *The $30 Million Understanding*, August 17, 2005, *at* http://www.locustfork.net/blog/archives/000291.html (high school football coach used his position to peddle high school football stars on the black market to prominent college football programs all over the United States).
159 *See* Wertheim & Dohrmann, *supra* note 158 at 67. Episcopal Academy basketball player Gerald Henderson Jr., when referring to the television cameras which are used to televise games and interview athletes, stated "You get used to the little red light."
160 *See, e.g.,* Margolies, *supra* note 85 at 363; McCarthy, Human Persona, *supra* note 13 at 134.
161 *See* Palmer v. Schonhorn Enters., Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967)
162 *See generally* Mickey Dora v. Frontline Video, Inc., 18 Cal.Rptr.2d 790, 792 (Cal. Ct. App. 1993) (holding that surfer from the 1950s may be celebrity among other surfers)
163 *See* Wertheim & Dohrmann, supra note 158 (stating that some of the high school athletes "are already celebrities in their own right").
164 Christopher Lawlor, *All-USA Boys Basketball Team Named*, USA Today, November 27, 2001, http://www.usatoday.com/sports/preps/basketba/2000-2001allusaboys.htm.
165 *See* Sports Illustrated, February 18, 2002, Vol. 96, Issue 7.
166 Scott Wright's Draft Countdown 2006, *Player Scouting Report: Matt Leinart*, http://www.nfldraftcountdown.com/scoutingreports/qb/mattleinart.html.
167 John Nadel, *Leinart Says He'll Stay at USC*, Cincinnati Post, January 15, 2005, at http://www.cincypost.com/2005/01/15/collfoot01-15-2005.html.
168 Sean Deveney, *California Cool*, Sporting News, at http://www.sportingnews.com/features/sportsman/2005. (Leinart has appeared not only in major sports magazines but in culture magazines Esquire, GQ, Rolling Stone, People, US Weekly, and Star)
169 The Oklahoma Secondary School Activities Association and the Massachusetts Interscholastic Activities Association have similar provisions regarding an amateur athlete forfeiting his or her amateur status. While not identical, both provisions basically state that an athlete forfeits his or her amateur status by: 1) Competing for money or other monetary compensation (excluding travel, meals, and lodging expenses), 2) Receiving any award or price of monetary value which has not approved by his or her state association, 3) Capitalizing on athletic fame by receiving money or gifts of more value (scholarships to institutions of higher learning are specifically exempted) or 4) Signing a professional playing contract in that sport.
170 NCAA Bylaws, Art. 12, Amateurism
171 NCAA Bylaws 12.5.2.1, 12.5.2.2
172 *See* NCAA Bylaw 12.5.2.1
173 *See* Stapleton, *supra* note 20 at 34; *see also* MJ & Partners Rest. Ltd. P'ship, 10 F.Supp. 2d at 927.
174 *See* Stapleton, *supra* note 20 at 39; *see also* White, 971 F.2d at 1395.
175 *See id.* at 1399.
176 *See* McCarthy, Human Persona, *supra* note 13 at 135; *see also* Ali v. Playgirl, 447 F.Supp. at 726.
177 *Shamsky*, 632 N.Y.S.2d at 934
178 NCAA Bylaw 12.5.2.1.
179 NCAA Bylaw 12.5.2.2.

GRADUATE-TRANSFER RULE: *A Reward for the Student-Athlete who Excels in the Classroom or The Creation of Intercollegiate Free Agency?*

By Matt Maher

Matthew S. Maher holds a Bachelor of Science degree from the University of Nebraska-Lincoln, Lincoln, NE and a Juris Doctor from the University of Nebraska College of Law, Lincoln, NE. Mr. Maher has served as a Marketing Intern for the University of Nebraska Athletic Marketing Office, Lincoln, NE; a Compliance Extern for Creighton University Athletic Compliance Office, Omaha, NE; a Compliance Intern for the University of Nebraska-Lincoln Athletic Compliance Office, Lincoln, NE; and as a

I. INTRODUCTION

The phrase "student-athlete" is used with such ease anymore. It rolls off one's tongue as if it were simply one word. However, every once in a while this combination of "student" and "athlete" are separated because of a pressing matter. Proposal 2005-54, which later was adopted as the Graduate-Transfer Rule, is a perfect example of a piece of legislation that not only split the phrase "student-athlete" into two, but drew a line right down the middle of the two words and subsequently, their supporters. In this article, the reader will be introduced to the legislative process that Proposal 2005-54 went through, in the hope that they will be more equipped to fully grasp the importance of the Graduate-Transfer Rule and its effect on the diverse and interested parties. From traveling through the legislative process, the article will then focus its attention on two main components: why student-athletes favored the rule and why their coaches opposed it. Within each component, a number of subcomponents will be thoroughly discussed, ultimately portraying the controversial result. Finally, amidst the constant discussion of whether Proposal 2005-54 was beneficial to the student-athlete or simply a means to create a free agency market, another piece of legislation strictly dealing with football, Proposal 2005-109, was formulated, adopted, and never mentioned as potentially creating a conflict of interest with Proposal 2005-54. This potential conflict will be discussed, as it should have been, prior to determining if the Graduate-Transfer Rule should be resubmitted. Recommendations will conclude the article and will center on whether the exact same proposal should be resubmitted, if a new proposal with similar characteristics should be constructed and submitted, or if the override should stand. The NCAA and its member institutions should take into consideration these recommendations for the future.

II. PROPOSAL 2005-54 LEGISLATIVE PROCESS

A. The Creation, Amendment, and Adoption of Proposal 2005-54

Before discussing whether Proposal 2005-54: The Graduate-Transfer Rule was an excellent opportunity for student-athletes to take advantage of or if the rule would result in competitive inequality due to the creation of a free agency market, the reader must first understand the legislative process the proposal went through. Proposal 2005-54 was initially introduced by the Division I Academics/Eligibility/Compliance Cabinet in its June 1-3, 2005 meeting in Indianapolis, Indiana. Proposal 2005-54 was one of thirty eight proposals for the 2005-2006 Division I legislative cycle.[1] There are a variety of reasons why specific proposals are initiated every legislative cycle. However, there is one overlying reason why the process of various committees proposing legislation is so vital to intercollegiate athletics. "In the totality of their relationship, NCAA bylaws and regulations advance and preserve the collegiate model of competitive athletics. They are implemented with the prime objective to protect and enhance the educational and physical well-being of all student-athletes and they reflect considered judgment as to how best to balance a host of competing and legitimate interests, including a variety of interests of different cohorts of student-athletes."[2]

The reason Proposal 2005-54 was introduced and later submitted on June 24, 2005 for consideration, was because the cabinet's continuing-eligibility subcommittee believed "the provision benefits those student-athletes wanting to pursue postgraduate work in areas not offered at their current institution, and that the likelihood of potential abuse in this area (transferring as a "ringer", for example) is low."[3] Proposal 2005-54 specifically has been the cause of much controversy because "in most NCAA sports, players already are allowed to transfer without sitting out. But, in football, basketball and hockey, transfers sit out a year at their new school."[4] This piece of legislation would have ended the one year waiting period for all graduate students. As a result, the student-athlete would now "be immediately eligible for financial aid, practice and competition, no matter the student-athlete's prior transfer history."[5] With the creation and submission for consideration, the next step for Proposal 2005-54 was to be published in the 2006 NCAA Division I Publication of Proposed Legislation. This publication occurred on August 15, 2005 and its purpose was to present "all proposed amendments to the NCAA legislation that were properly sponsored by Division I conferences, committees, Management Council and Board of Directors."[6]

Following the publication of the 2006 NCAA Division I Publication of Proposed Legislation, various meetings were held giving student-athletes, faculty representatives, coaches, athletic directors, and presidents an opportunity to comment and critique all proposed legislation for the upcoming year, including Proposal 2005-54. This is done for the benefit of each party to formulate its opinion within their respective group to determine overall, which proposals they support and which ones they do not. Further, the time frame of when a piece of legislation is proposed by the middle of July, in comparison to when the Management Council will vote on it in January, creates an open forum for various pros and cons to develop. The hope is that by the time the Management Council meets to vote on each prospective rule, a vast amount of discussion will have already taken place, allowing an easier deliberation and ultimately resulting in a well-educated conclusion.

The Academic/Eligibility/Compliance Cabinet "unanimously [supported] Proposal 2005-54" and by doing so recommended its approval by the Management Council.[7] The cabinet's reasoning was that "in the spirit of student-athlete well-being, student-athletes that complete their degrees and have eligibility remaining should be able to transfer and enroll in the graduate program of their choice without NCAA transfer restrictions."[8] Similarly, according to the November minutes of the Big 12 Conference Student-Athlete Advisory Committee (SAAC), the full SAAC group voted on Proposal 2005-54 with 11 members voting to support the legislation passage and only 2 opposing it.[9] The reason there were 13 votes compared to 12 is because this was the first year that there was a president for the group and that individual was allowed to vote independently of a university.[10]

In November, the NCAA published the Division I Official Notice, which "[contained] all legislation for initial consideration by the NCAA Division I Management Council at its January 8, 2006, meeting and for possible consideration and adoption by the Division I Board of Directors at its January 9, 2006 meeting."[11] This is an integral part of the legislative process because the NCAA Division I Management Council Legislative Review Subcommittee reviews all proposals contained in the Official Notice, as well as makes recommendations for the Management Council's consideration at its January meetings each year.

The subcommittee members determined that there was one major concern with how Proposal 2005-54 was worded. They deemed that the Academics/Eligibility/Compliance Cabinet had good intentions, but an amendment was necessary in order to specify that the student-athlete must be enrolled in a specific graduate degree program. Therefore, on January 9 and 10, 2006, a vote to amend the proposed legislation was conducted to specify the requirement for the graduating student. The Management Council approved adding the amendment into the original language by a vote of 45 to 6. Following the adoption of adding the amendment, the Management Council voted on Proposal 2005-54 itself. The proposal was approved 37 to 14 and was forwarded directly to the Board of Directors for possible adoption. The board decided to defer any action on the proposal until April.[12] According to Bylaw 4.2.1, the Board of Directors "shall include 18 members and shall be comprised of presidents or chancellors."[13] On April 27, 2006, the Board of Directors voted in favor of Proposal 2005-54 by a vote of 13 in support, 4 oppose, and 1 member was not present.[14] With this adoption, Proposal 2005-54 became effective immediately and was now known as the Graduate-Transfer Rule, incorporated as Bylaw 14.1.9.1.

> **2005-54 ELIGIBILITY--GRADUATE STUDENT OR POST BACCALAUREATE PARTICIPATION -- TRANSFER ELIGIBILITY**
>
> **Status:** Adopted
>
> **Intent:** To permit a student-athlete who is enrolled in a specific graduate degree program of an institution other than the institution from which he or she previously received a baccalaureate degree to participate in intercollegiate athletics, regardless of any previous transfer. **Bylaws:** Amend 14.1.9, page 140, as follows:
>
> "14.1.9 Graduate Student/Post baccalaureate Participation. A student-athlete who is enrolled in a graduate or professional school of the same institution from which he or she previously received a baccalaureate degree, a student-athlete

Continued on page 12

Continued from page 11

who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year period set forth in Bylaw 14.2 (see also Bylaw 14.1.8.2.1.4).

"14.1.9.1 **Graduate Student in Specific Degree Program Transfer Exception. A graduate student-athlete who is enrolled in a specific degree program in a graduate or professional school of an institution other than the institution from which he or she previously received a baccalaureate degree may participate in intercollegiate athletics, provided the student-athlete has eligibility remaining and such participation occurs within the applicable five-year period set forth in Bylaw 14.2 (see also Bylaw 14.1.8.2.1.4).**"

[14.1.9.2 and 14.1.9.3 unchanged.]

Source: NCAA Division I Board of Directors [Management Council (Academics/Eligibility/Compliance Cabinet) (Subcommittee on Continuing Eligibility) (Ad Hoc Group to Study the One-Time Transfer Exception)]
Effective Date: Immediate
Proposal Category: Amendment
Topical Area: Eligibility

Rationale: This proposal would allow a student-athlete to enroll in a specific graduate degree program at an institution other than the one from which he or she earned a four-year degree and be immediately eligible for intercollegiate competition, provided the graduate student has remaining eligibility. A student-athlete who earned his or her undergraduate degree has achieved the primary goal of graduation and should be permitted to choose a graduate school that meets both his or her academic and athletics interests, regardless of his or her previous transfer history.

Estimated Budget Impact: None.
Impact on Student Athlete's Time: None.
Position Statement(s):

Academics/Eligibility/Compliance Cabinet: The cabinet unanimously supports Proposal No. 2005-54. In the spirit of student-athlete well-being, student-athletes that complete their degrees and have eligibility remaining should be able to transfer and enroll in the graduate program of their choice without NCAA transfer restrictions.

B. The Override Path of the Graduate-Transfer Rule

As with any legislation that is adopted, an override period exists. Often times the override period passes without an issue simply because of the thoroughness of the legislative process. Proposal 2005-54 was approved by the presidents as a result of the proposal progressing through the legislative cycle without fanfare. "Board members stood firm on their April action, citing academic primacy as the basis for their decision. The presidents acknowledged the possibility of a "free agency" market with this new pool of student-athletes but agreed that the legislation correctly [assumed] that graduates [would] make their decisions based on where they [wanted] to attend school, not on where they [wanted] to play games."[15] However, there are times when an override is seen as necessary by enough members of the NCAA to return to an adopted piece of legislation. That is what occurred with the Graduate-Transfer Rule. According to Bylaw 5.3.2.3.1, "in order to call for a vote to override the adoption of a legislative change or the failure of a legislative change, written requests for such a vote from at least 30 active member institutions with voting privileges must be received in the national office not later than 5 pm Eastern time within 60 days of the date of the Board of Director's action."[16] Within the 60 day limit, 45 Division I member institutions submitted requests to override the Graduate-Transfer Rule.[17]

Since the number of member institutions requesting an override was well over the number required, the Graduate-Transfer Rule still maintained its immediate effective date, but would now be revisited at the Board of Directors' August meeting. Entering the August meeting, the Board of Directors had three options. First, they could accept the override requests' position by changing its original action and defeating proposal 2005-54. If this occurred, another 60 day override period would be required. Secondly, the board could uphold its earlier decision, thereby resulting in a vote of active Division I members in the Management Council meeting scheduled for January 2007. Lastly, the board could develop alternative approaches which would require an override period.[18] Out of the three options, the third one was quickly dismissed simply because this rule did not grant much creativity. If a member institution felt that any graduating student with one year of eligibility remaining should be able to compete immediately at the new institution, then that member voted in support of the Graduate-Transfer Rule. If not, then the member institution voted against the rule.

The topics of interest will be discussed in much greater detail after the conclusion of the legislative process, but it is important when walking through the override path to have a brief understanding of why a separation of opinion was created. Rich Rodriguez, West Virginia's head football coach, reiterated what several basketball, football, and hockey coaches were wondering when he said, "How can they pass it that quickly without anybody knowing about it?"[19] This reaction, coupled with the after thought of competitive inequality because the potential development of a free agency market, are the greatest reasons for such an uproar when the legislation was passed in April.

However, in preparation for the August meeting, as more and more coaches were voicing their opinions on how horrible of a rule this was, there was another side that supported the student-athlete having the ability to choose where to attend graduate school and as a benefit be able to participate immediately. To try and combat the Board of Directors from accepting the override position's request in its August 2 – 3, 2006 meeting, the NCAA research staff submitted what they deemed to be reasonable estimates of how many graduating student-athletes could and potentially would take advantage of this rule. The information resulting from the two estimates was sent by Thomas S. Paskus, Principal Research Scientist to members of the NCAA Division I Board of Directors on July 18, 2006. The first estimate was based on student-athletes who graduated and actually went on to compete as post graduates. From the fall 2004 to spring 2004, roughly 900 Division I graduates went on to compete in their sport as post-graduates. That number equates to just over 6% of all graduates.[20] The second estimate was based on the broader question of "how many graduates have not exhausted eligibility and could potentially play?" This study found that close to 4,000 student-athletes per year might graduate with eligibility remaining.[21] The memo further divides the projected numbers according to the sports that would be affected by the Graduate-Transfer Rule. Paskus concludes the memo by stating that he is more confident in the first set of estimates due to the numbers representing actual participation after graduation.

After considering numerous viewpoints from a variety of interested parties, the Board of Directors "defeated a motion to reconsider the Board's previous adoption of Proposal 2005-54. Accordingly, a vote of the active Division I membership [would] occur at the Division I business session at the 2007 NCAA Convention."[22] In the vote to defeat the motion, ten members were in support of defeating the motion and six were opposed.[23] Interestingly, the ten in support of maintaining the Graduate-Transfer Rule and receiving more information on the interested parties' concerns represented a wide disparity in conference sizes. Many might assume that larger conferences would disagree with smaller conferences' stance but that was not the case. For example, the Big 12 and ACC Conferences voted to defeat the motion to reconsider, along with the Mountain West Conference, the Sun Belt Conference, and the Atlantic Sun Conference.[24]

With the Board of Directors' defeat to reconsider the Graduate-Transfer Rule, it now had to be included yet again in the Division I Official Notice in November 2006. Besides containing all legislation for initial consideration by the Management Council, the Official Notice must publish "any proposals for which an override vote has been requested by the membership."[25] What made this piece of legislation so interesting, besides the real divide it caused between student-athletes and their coaches, was that "it [was] only the second time Division I [would] have [to] [conduct] an override vote."[26] With the Official Notice publication, every concerned identity was trying to voice their reasoning and support for the rule or the override as January quickly approached. Similarly to the Big 12 SAAC one year earlier, the Southeastern Conference SAAC voted to support the Graduate-Transfer Rule.[27]

C. The Override Vote of the Graduate-Transfer Rule

One and a half years had passed since the initial creation and consideration of Proposal 2005-54. Eight months had gone by since the strong majority vote for its adoption into an NCAA bylaw had taken place. However, on Saturday, January 6, 2007, what was known as the Graduate-Transfer Rule was rescinded. With the Management Council's vote, that each member institution and conference was allowed and encouraged to partake in, the bylaw addition was erased from the NCAA Manual as if it never existed.

Before the vote took place, Division I Board of Directors Chair, Philip Austin, president of the University of Connecticut, called the business session to order and explained how the voting procedure would work. "Please remember that a 'yes' vote will support the motion to override the Board…a 'no' vote would defeat the override and will support the Board of Directors' action to adopt 2005-54."[28] Five-eighths majority of "yes" votes over the total "yes" and "no" would be required to successfully override the Graduate-Transfer Rule.[29] Austin also allowed for an open discussion to take place for those who wanted one last chance to express their view point in the hopes of persuading a voting member still in discernment.

The first two individuals to speak were Patrick Henry from Siena College, representing the student-athletes of the Metro Atlantic Athletic Conference, and Katie Street from Boise State University, representing the student-athletes of the Western Athletic Conference. Street illustrated that Division I student-athletes were adamantly opposed to the override of the Graduate-Transfer Rule. "Current legislation aims to provide graduating student-athletes with eligibility remaining to continue their education in a graduate program that best fits their needs to enhance their career outside of sports."[30] Street urged the voting members, "please give the student-athletes the credit to make this important decision for themselves."[31] Henry tried to highlight the importance that is stressed by the very member institutions that comprise the NCAA and its beliefs. "By graduating, these student-athletes are fulfilling one of the major goals and aims of the NCAA and its respective member institutions. The Association has consistently emphasized the importance of graduation rates and aspiring students first and athletes second."[32] He went on to quote Dr. Myles Brand, the president of the NCAA. "Athletics can and does teach the knowledge and skills that develop young people into productive citizens in a wide range of careers beyond sports. Very few student-athletes become professional athletes. Many more become doctors, lawyers, engineers and teachers."[33] Henry closed his comments by providing a realization that many in opposition may not have considered. "If the proposal is overridden, graduating students with eligibility remaining who do not qualify for the one-time transfer exception and attend an institution that does not offer graduate programs are placed in a terrible situation."[34]

University of North Carolina's David Goldfield offered a faculty athletics representative's perspective on the override, which he also opposed. "The override movement is based primarily on speculation on what might happen or what the worst case scenarios might be. I urge the membership to not allow this proposal to be overridden and allow it to run its course for a year or two so we can develop data and see what the trends are."[35] Goldfield concluded by asking, "What is the NCAA? Is it a collection of coaches' associations, or is it a collection of academic institutions?

Continued on Page 13

Continued from Page 12

Our role as faculty, as presidents, as athletic directors and administrators is to educate and graduate our student-athletes. I think this proposal not only rewards that, but actually enhances that possibility."[36]

Not everyone who spoke before the vote was against the override. James Haney, representing the National Association of Basketball Coaches, made a few comments on behalf of himself. He made it very clear that the coaches' perspective was overwhelming in favor of overriding the legislation. However, Haney spoke on what he felt was in the best interest of the game. "We have a great game right now. What we have seen over the last couple of years is the evolution of experience versus inexperience. Teams that are traditionally looked at as historically weak and find their way into the top 25 or 30 in the country and make their way to the Sweet 16 tend to be immature. We have also seen the rise of experience and the value that experience has for the vast majority of institutions in this country. The result of that is George Mason."[37] To Haney, to not override the Graduate-Transfer Rule would be to destroy the excitement that college basketball possesses. The excitement of a powerhouse, youthful team like the University of Connecticut Huskies being upset by a mid-major, senior-lead team that was the George Mason Patriots.

At the conclusion of the commentary, it was time to vote. When the votes were tallied, the Management Council's vote resulted in 196 member institutions voting in support of the override, 83 member institutions voting in opposition of the override, and unfortunately, 76 institutions chose not to participate.[38] Therefore, there were 196 "yes" votes out of 279 total votes, resulting in roughly 70% of voting members voting "yes." This percentage exceeded the five/eighths majority that was required to override the Graduate-Transfer Rule, thereby resulting in its termination.

III. ACADEMICS V. ATHLETICS: WHAT CONTROLS THE FIELD OF PLAY?

Now that one has a greater understanding of the legislative process Proposal 2005-54 underwent, the article shall now fully immerse the reader into exploring the various considerations and rationale that guided the proposal along its way. The first voice of reason to begin with is from the group that influenced Proposal 2005-54's rapid growth. This group is comprised of several people with different backgrounds, yet all share the same interest in preserving the student-athletes' academic well-being first and foremost. Following the academia analysis of the proposal will be an in depth analysis of the coaches' perspective on Proposal 2005-54.

A. Student-Athletes' Graduation Should Warrant Further Alternatives

When the Board of Directors voted to adopt Proposal 2005-54, creating the Graduate-Transfer Rule, many saw this decision as the only sensible thing to do. Every other Division I sport besides football, basketball, and men's ice hockey granted the graduating student-athlete the opportunity to "transfer" to another institution for graduate school and utilize his or her remaining year of eligibility immediately. Why should these selective sports be any different? Further, why even discuss the effect on the sport itself when this rule was solely designed to benefit the student-athlete and his or her academic prowess? B. David Ridpath, an assistant professor at Mississippi State University and often-timed cynic of how the NCAA operates in an educational context, praised the adoption as "a wonderful step in empowering student-athletes to pursue their educational goals as they see fit."[39] Similarly, Terry Bowden, a former University of Auburn head football coach and current college football analyst, articulated, "I believe this is one of the few times we've done something right for the good guys. I'm talking about the true student-athletes who come to college, graduate ahead of schedule and qualify to get into graduate school. These are the athletes we ought to be bending over backward to assist."[40]

Terry Bowden makes a great observation. It is not enough that a student-athlete graduates in four years. The student-athlete must also possess a high enough GPA to get into graduate school, must test well enough on the graduate placement exam, and must be accepted by the graduate school itself. Later in the paper, many questions will arise as to why exactly a student-athlete would want to "transfer" to another institution. However, "when you start restricting where and how a person can go to school because of a real or imagined athletic boost that school could get, you start to lose the point of going to school in the first place, that being the academic purpose of it."[41] Former Missouri Valley Conference student-athlete Chas Davis confronted the issue of student-athletes' intentions to transfer by expressing what he, and other representatives for student-athletes, thought. "The general feeling was that a student-athlete has fulfilled their obligation to a school and themselves once they have graduated. Regardless of the intentions of their transfer or any unintended consequences, we're talking about another major step in many student-athletes' lives and careers."[42]

The override of the Graduate-Transfer Rule was viewed as an incredible hindrance to the academically accomplished student-athlete who participated in these select sports. The reason this retraction is such a tragedy, according to some, can best be illustrated by realizing how many student-athletes in fact took advantage of the Graduate-Transfer Rule when it was in place, how student-athletes' freedom to continue their academic pursuits were halted, and how student-athletes' athletic ambitions were sacrificed.

1. Inside the Numbers

The benefit of the Graduate-Transfer Rule's immediate effective date on April 27, 2006, provided the NCAA and its member institutions the ability to collect concrete data. Since the rule was not rescinded until January 2007, the Graduate-Transfer Rule granted a graduating student-athlete in one of the selected sports the ability to take advantage of the rule. So, how many graduating football, basketball, or men's ice hockey student-athletes were not only eligible to utilize the rule, but in fact did?

As presented earlier, Thomas Paskus estimated roughly 6% of graduating student-athletes could have taken advantage of the one time transfer exception rule in 2004-2005. On December 7, 2006, The NCAA News released research that had been compiled and analyzed in the hope of better informing the Management Council members prior to the override vote in January 2007. The new NCAA research indicated that, in fact, less than 1% of eligible student-athletes took advantage of the Graduate-Transfer Rule.[43] To conduct this research, an online survey was sent to compliance coordinators at all NCAA Division I institutions, with follow up phone calls to non-respondents.[44] "Of the 326 active Division I members, 301 responded."[45] The question posed in the survey was, "Does your institution have incoming transfer student-athletes in any sport entering a graduate program who will be competing in 2006-2007?"[46] Out of the 301 institutions that responded to the survey, 84 institutions indicated "Yes," with the number totaling 112 graduate student-athletes with remaining eligibility. Of the 112 graduate student-athletes with eligibility remaining that in fact took advantage of the transfer exception, only twenty five were going to be competing in football, basketball, or men's ice hockey.[47] That means that every other football, basketball, or men's ice hockey graduating student-athlete who qualified under the transfer rule, decided to remain at their current institution and participate. The Findings of the Graduate Student Transfer Survey even went as far as to break the total number of graduate transfer student-athletes down by individual sport. Men's basketball saw eight transfer, women's basketball had one, men's ice hockey had zero, and football had sixteen.[48]

According to Paskus' original guesstimate in July 2006 and then the more accurate evidence in December 2006, one would think that many concerns about the abuse of the Graduate-Transfer Rule would have been calmed. However, that was not the case. Despite the breakdown of the survey that included 92% of all Division I member institutions and their precise numbers, football and basketball associations, representing the coaches, were quick to contest the conclusive determination that the proponents of the Graduate-Transfer Rule were making. As the proponents of the Graduate-Transfer Rule were exalting the factually based analysis, the opponents were preparing their refutation. Grant Teaff, the executive director of the American Football College Association, stated in an interview that "as many as three football players per institution per year would qualify for this transfer exception."[49] He stated that the number "three" was derived from the AFCA's own survey they did with Division I coaches. Unfortunately, that survey has not been found. James Haney, representing the National Association of Basketball Coaches, stated "I think we will see in the years ahead more and more student-athletes in a position to take advantage of this opportunity to transfer and be immediately eligible."[50] Whether Mr. Teaff and Mr. Haney are correct in assuming that the number of transferring students will increase in the future, no one will ever know unless this rule, or a similar one, is presented and adopted once again. It is hard to fathom that the potential for future abuse and how competitive inequality could result, managed to outweigh the analytical facts by such a large margin in the 2007 Management Council meeting.

II. The Fight for Academic Freedom

The increasing popularity of the Graduate-Transfer Rule among student-athletes was due to one overarching principle: the freedom to choose. When the NCAA Division I Student-Athlete Advisory Committee declared its position in November 2005, the committee collectively illustrated why it was in support of the then-proposal. Proposal 2005-54 "enables student-athletes to pick the best academic program, it eliminates current restrictive legislation, and it is limited to graduate students and provides opportunity following the achievement of graduation."[51] Richard Kovalcheck, a former University of Arizona football player that graduated and took advantage of the rule by "transferring" to attend graduate school and play quarterback at Vanderbilt, stated "it gives you incentive to get homework done just in case you're in a situation."[52] Vanderbilt provided a wonderful opportunity for him because of its post-graduate academics, as well as its football team's quarterback position had recently opened up for competition. Kovalcheck is a prime example of how the opportunity following the achievement of graduation can be incredibly beneficial to graduating student-athletes. One thing many tend to forget or over look is that it is common for graduate students to do their graduate work at a different institution than the previous one. This is the case for all students, not just student-athletes. Furthermore, the student-athletes' position would suggest that there are predominately two reasons why graduating student-athletes in general want to couple their academic interests with their ability to continue pursuing their athletic interest. First, most graduating student-athletes are simply looking for one more year of participation in their sport with the ability to begin their graduate education. Secondly, many graduate student-athletes are accepted into graduate school, but they may not receive an academic scholarship. If they are allowed to utilize their remaining year of eligibility at the new institution, they might be able to receive one year of graduate school at a discounted price or full tuition reimbursement.

Opponents of the Graduate-Transfer Rule questioned the reason why the graduating student-athlete would want to attend another institution and participate. Upon understanding some of the reasons previously illustrated, the opponents wanted to have some sort of check on these "transfers." "How do you prove that the student that is transferring is truly intending to take the classes that he signed up for? And by the time anything can be figured out in a three month span, the student could have dropped out of the school."[53] This concern references the sport football, where a student-athlete could play the entire football season since it is only in the fall, and once the season was complete, he could drop out. There are many reasons why a student-athlete could drop out. Opponents of the rule quickly wanted to argue that the student-athlete was simply trying to improve his draft stock. However, regardless of whether a student-athlete transfers from one institution to another in undergraduate or graduate school, aren't the reasons usually the same? The student-athlete thought the

Continued on Page 14

Continued from Page 13

course load was too difficult, they were homesick, the culture is different than what they expected, or the student-athlete simply does not like it. The reasons are numerous and for people to assume that a student-athlete who graduated and was admitted into law school, medical school, or some type of graduate school would quit once they have completed their athletic eligibility participation seems a bit preposterous. Even if any student-athlete would transfer to play and then drop out of school; one would not think it would be the same student-athlete who voluntarily chose not only more school, but more difficult school. In all honesty, when was the last time someone used the phrase "drop out graduate" when talking about a former student-athlete?

Although the potential exploitation for "drop out graduates" is a possibility, a rather slim one most would agree, the greatest concern that coaches shared was articulated by Terry Bowden. "The big fear is that schools will abuse this rule and steal players from other schools. That is, a player who graduates from a lower-level Division I-A school and still has eligibility remaining will be coaxed into transferring to a bigger school where he might have a chance to go to a bowl [game] or play for a championship. Or more likely, considering where the early complaints are coming from, a lower-level school will encourage an unhappy backup or depth player to transfer to somewhere he might be able to start."[54] This fear that coaches shared was interesting in that both the larger schools and the smaller schools were terrified that the other would take their student-athletes. However, should that be the focus of why to disapprove the rule? If a student-athlete has satisfied all of his or her academic requirements to graduate from an institution, then the freedom to choose where they want to attend graduate school immediately should be theirs. They have put the work in and they should reap the reward. This does not mean that every graduating student-athlete will "transfer" because, as the earlier numbers provided, only twenty five student-athletes left their school for another. Further, it is completely understandable for transferring student-athletes to have to sit out one year because the importance of education must be instilled upon these individuals as a priority, with as much significance in their lives as the sport they are participating in receives. However, graduate student "transfers" are uniquely different because not only have they met the academic requirements, they have excelled in the classroom as seen by the opportunity to attend graduate school. Therefore, even with the nervous tension that coaches from every institutional size can portray, these student-athletes seem to deserve the ability to choose where they want to attend graduate school without any hindrances, especially trying to discern upon playing the sport they love at their current institution or giving the sport up to attend another institution for their career aspirations.

When discussing the freedom for academic choice, so far it has been assumed that the student-athlete is in the position to stay at his or her current institution and receive the same graduate degree while finishing up their collegiate career. However, that is far from the norm. Institutions vary on what curriculum they provide for graduate studies or if the institution even offers any graduate course work. Due to the inconsistency, it would appear vital to provide the graduating student-athlete with the ability to move forward with her career without being hampered by the decision to forego her final year of eligibility.

Thanks to the rule, Tyler Krieg was one of the individuals blessed with the opportunity to attend graduate school while being allowed to play Division I football immediately. Krieg graduated from Duke University with one year of eligibility remaining. His academic focus was to receive his master's degree in education that focused on athletes and academic achievement. Duke did not offer that particular graduate studies program, but the University of California-Berkeley did.[55] Texas State University-San Marcos Associate Athletic Director Tracy Shoemake believes "this rule is designed for players who want to pursue a graduate program and the school they're at doesn't have it."[56] The Graduate-Transfer Rule allowed Krieg to focus on both academics and athletics when deciding where to attend graduate school, a common theme with student-athletes in sports that are allowed to transfer and play immediately. California gave Krieg the opportunity to seek a specified post-graduate degree Duke did not provide, as well as the opportunity to play in a college bowl game, another aspect that Duke football would not provide due to their losing record.

Tracy Shoemake also pointed out that "maybe they'd like to play for one more year or have their first year of graduate school paid for. This has some huge benefits for students, and I think we're just trying to be student-athlete friendly and give them opportunities."[57] Many opponents of the Graduate-Transfer Rule had no problem with the student-athlete using his or her athletic ability to receive a scholarship that would help them out financially. Instead, they focused on the dilemma that if an undergraduate student transfers, they still can be on scholarship, but must sit out one year. In that regard, why can't the graduate student-athlete do the same? That way the student-athlete is still receiving scholarship money, is still able to attend the institution of their preference for graduate school, and can still participate in their sport to complete their eligibility. That scenario seems perfect, except what do you do with the graduate student-athlete who wants to receive her master's degree in political science, which often time only takes one academic year, and then wants to go to law school at another institution? What about the individual who wants to receive a one year master's degree and then go into the work force? These student-athletes really are not in any position to sit out for one year to gain their eligibility in order to play the following year. To be eligible the following year, they would have to be a student the year they transferred. So, does the individual slow down his master's degree program? It does not seem worth it just to utilize their final season. Yet, without the rule, this is the reality of the situation. It can be presumed that no one would care if the student-athlete could sit out one year during her master's program if that was a possibility, but unfortunately that is not always available. Therefore, unless the NCAA would take each and every student-athlete on a case-by-case analysis to determine if the NCAA is willing to waive the required one year of non-participation, it is believed that to accept the Graduate-Transfer Rule would be the least time consuming option and universally, the fairest decision for student-athletes nationwide.

Also discouraging is the issue that some institutions simply do not provide any type of graduate studies. Patrick Henry pointed out to the Management Council prior to the override vote that "as a senior athlete at Siena College, a terrific institution that does not offer graduate programs, I understand that these athletes are left with very few options. They must either avoid graduating and delay pursuing their future or forego their final year of eligibility."[58] Henry went on to conclude that "this is a horrible situation that no student-athlete should ever have to be in. Every student-athlete possesses a great passion for athletics. Each one of us loves to play, and more importantly, compete. The current rule grants us the greatest opportunity to do that."[59]

Without the Graduate-Transfer Rule opportunity, one can look at a hypothetical situation as a strong possibility of what could occur to a high school senior. For example, let's assume John is recruited by several top schools for football. He also is quite bright and thinks he wants to be a lawyer. If John knew coming into college that he wanted to be a lawyer and knew he would most likely redshirt his freshman year, then there is no reason he should choose to attend Siena College or Lafayette because he will not be able to maximize his final season of eligibility if he graduates in four years. Further, if he decided to attend the University of Nebraska-Lincoln, and while in college decided that the lawyer he thought he wanted to be at age seventeen really is not his calling, but medicine is, he again will forego using his final year of eligibility because Nebraska does not have a medical school. The University of Nebraska educational system has its own medical school, the University of Nebraska Medical Center, but this is a separate campus in Omaha, Nebraska. The end result of both of the possibilities is that the gifted prospective student-athlete will need to focus on what career choice they foresee, as well as potential alternatives, and make sure they choose an institution that provides not only what they are looking for in undergraduate studies, but that the institution also provides a great source of post-graduate studies. To ask a seventeen year old to determine what law school, medical school, or graduate school she wants to attend in four years, and then to make that an integral part of her discernment on what college she chooses, is absurd.

Lastly, when Proposal 2005-54 was adopted to create the Graduate-Transfer Rule, the sole focus was on providing a great opportunity to graduate student-athletes. However, some institutions, such as Lafayette, would be hindered because they would lose their graduating student-athletes, as well as not be able to take advantage of the rule with other graduates coming to Lafayette. What the Patriot League did was create a "policy of not accepting graduate school transfers since it would be unfair for our league-mates who don't have graduate programs."[60] This is a great way for each conference to become more stringent than what the NCAA issues. As a conference, member institutions cannot override or disregard what the NCAA declares, but the conference can choose to regulate itself by providing a blanket rule that states even though the NCAA has adopted a rule, because the adoption is unfair to specific member institutions in our conference, we will adhere to the rules we originally set forth.

III. Athletic Possibilities Only Provided by the Graduate-Transfer Rule

As skepticism developed throughout the coaching communities, the general consensus was that the Graduate-Transfer Rule was beneficial for student-athletes and their academic achievements; however, in reality, graduating student-athletes would take advantage of this rule only for their athletic objectives. Although a very valid argument, which is one of numerous concerns that will be provided when looking at this rule more from the coaches' side, it is important to recognize that the opportunity to play for a better team or play more minutes on another team is not always the sole reason of why these student-athletes would transfer. Sure there are those examples where a student-athlete lost their starting spot to another, younger athlete. This rule obviously would grant that student-athlete the ability to play immediately somewhere else for one season. Ryan Mundy, a graduate from the University of Michigan, decided to attend graduate school at West Virginia because of the opportunity to start, as well as be close to his family. His father told him, "You've been blessed with an opportunity. If you didn't do it like you wanted at your previous location, now you can do it [at West Virginia]."[61] Many support the idea that if a graduate desires to play as much as he or she possibly can during their final season, or has a problem with the coach, or simply believes their team is going to struggle and have another pitiful season, because the student-athlete has satisfied all undergraduate academic requirements, the student-athlete should be allowed to transfer for whatever reason they want. As important as the specific master's program the University of California-Berkeley offered that met Tyler Krieg's needs, Krieg also made it known that he wanted to be a part of an institution that was successful in football. "I came from a place where there was no respect, the bottom of the barrel. There is a lot of hype around Cal."[62] "Cal gave me a second change to try and go to a bowl game, so I'm excited about that."[63]

Besides the opportunity to attend graduate school that meets the student-athlete's needs academically, the Graduate-Transfer Rule resulted in wonderful consequences that were unforeseen by the Academics/Eligibility/Compliance Cabinet when they created this piece of legislation. For example, three individuals took advantage of this rule for three completely different athletically related reasons. The three individuals were Almamy Thiero, Ryan Smith, and Kevin Kruger.

Almamy Thiero graduated from the University of Memphis, where he was on the basketball team. Unfortunately for Thiero, his entire collegiate career was plagued with various injuries, limiting his playing time and playing seasons. The Graduate-Transfer Rule though, gave Thiero one final opportunity to play the sport he loves by attending another institution where he would be vitally important for a number of reasons. Thiero chose to attend Duquesne University and play for Ron Everhart. "He had some tough luck with injuries at Memphis and is looking forward to a fresh start. Almamy is a veteran of major college basketball at the highest level. We expect him to provide leadership and guidance for our younger players."[64] This rule allowed

Continued on Page 15

Continued from Page 14

Thiero the opportunity to not only play quality minutes again, the one thing he wanted to do when he chose to attend Memphis for college, but it also allowed Thiero to help another program with inexperienced student-athletes, by teaching them how to act and react in all situations. Without the Graduate-Transfer Rule, Thiero would not have had the new start he was searching for; the revitalization of excitement that had been replaced so long by despair.

Another individual that was able to benefit from the Graduate-Transfer Rule was Ryan Smith. Unlike Thiero, Smith was not plagued by injuries and was actually "named a second-team freshman All-American by the Sporting News" when he played at the University of Utah.[65] However, "whether the opportunity [Graduate-Transfer Rule] existed or not, Smith was headed elsewhere."[66] Smith had no desire to continue playing for Utah even without the creation of the rule, because he "had a falling out with the coaching staff that took over after [Urban] Meyer left for Florida."[67] Meyer was Utah's head football coach when Smith was a freshman and was also the man that recruited him to play for Utah out of high school. Before the adoption of the Graduate-Transfer Rule, Smith had originally planned to transfer to Howard University and play immediately since Howard was a I-AA school.[68] However, once the legislation was passed, Smith now had the opportunity to attend graduate school at the University of Florida, where his former head coach at Utah was currently serving as Florida's head football coach. "It's like a dream, I'm just proud to be here."[69] Smith's story has nothing to do with dirty recruiting on Florida's part, it has nothing to do with him not being able to play at Utah, it simply was an opportunity for him to play for the man that he initially aspired to play for.

Finally, Kevin Kruger is the most notable student-athlete to benefit from the Graduate-Transfer rule. "Kevin Kruger became the first college basketball player to use a new rule," according to Andy Katz from ESPN.com.[70] However, becoming the first student-athlete to utilize this rule was not why he garnered so much press. As Kruger was going to enter his fifth season of basketball, starting for Arizona State University, "his coach, Rod Barnes, had just been fired, and his new coach, Herb Sendek, was certain to go through a rebuilding process."[71] As Kruger was trying to determine what he should do for his final season since he was graduating in May, he found out about the Graduate-Transfer Rule. "It was crazy to interpret the rule and then realize that it [applied] to me. That's when it seemed like things were starting to go my way a little bit and lining up for me."[72] Things were going to go his way more than he could have ever imagined. Kruger decided to transfer to the University of Nevada-Las Vegas (UNLV). He did not decide to transfer because he could start there, because he was already a starter at Arizona State. He did not decide to attend UNLV because they had a chance to win the National Title, even though with his experience, the team did make a great tournament run to finish in the Sweet Sixteen. No, Kevin Kruger decided to attend UNLV because "the NCAA's new legislation has allowed me to play for my father, something I have always wanted to do."[73] Playing for his father, what has it meant to Kruger? "It feels very similar to the feelings I had when [he was] winning games in the tournament back when I was not a player. Watching a member of your family be happy is one of the greatest feelings in the world…just to be a part of that and have something to do with that - it feels really good. Wins or losses are irrelevant to the experience I've had this year."[74] Without the Graduate-Transfer Rule, Kevin would not have had the ability to reunite with his father and play for him.

"Will a few mid-majors lose a player or two who decide to try their skills at a higher level? Likely. Will a few BCS contenders lose a backup quarterback who wants a chance to start before his playing days are over? Probably. Will that be such a bad thing? Absolutely not."[75] Student-athletes have a variety of reasons to attend a specific institution. Whether utilizing the Graduate-Transfer Rule was based on academics alone, the ability to have a new start, play for an old coach, or even their father, every student-athlete that took advantage of this rule did so for an individualistic purpose. Even Krieg and Mundy who blatantly stated their decision had just as much to do with athletics as it did academics, still chose to attend a graduate school that offered a program that their previous institution lacked. One now has a grasp on the student-athletes' side by not only understanding why the student body collectively were proponents of the Graduate-Transfer Rule, but further comprehending why specific individuals decided that it was in their best interest to attend another institution. "Those involved in the administrative or coaching ranks constantly espouse the educational values of intercollegiate athletics. They say education and graduation are student-athletes' primary goals and that education lasts a lifetime, whereas their athletics career will most likely end after their college playing days are over. The rhetoric sounds great, but if true, why do those very same people protest the new rule?"[76]

B. The Graduate-Transfer Rule Produces Unintended Consequences

Every coin has two sides and the Graduate-Transfer Rule is no exception. Many aspects supporting the Graduate-Transfer Rule have been discussed, yet it is imperative to remember that the motion to override the rule was approved by the Management Council's vote of 196-83-2.[77] That number signifies an astounding discrepancy that should lead one to question why the clear majority disapproved of the rule. Ironically, although the Kruger family was clearly the beneficiary of the Graduate-Transfer Rule, both Kevin and his father Lon disagreed with the rule. Kevin stated "I don't really know what [the NCAA] was thinking with it," while Lon pointed out, "I would think most coaches feel it's a dangerous rule. Just because it has benefited us doesn't make it a good one."[78] Numerous coaching staffs and their representatives were in strong opposition to the Graduate-Transfer Rule. The coaches' two greatest concerns focused on the fairness of developing a student-athlete with the program's facilities and then missing out on potentially the student-athlete's greatest season because that individual excelled in the classroom, thereby graduating with remaining eligibility, as well as the development of a free agency market of these graduates resulting in competitive inequality.

I. Unfair to Student-Athletes… Try Unfair to the Programs

"Framed by its intent – student-athlete welfare – Proposal 2005-54 makes sense. Dropped on the desk of a I-A coach, it might be a curse."[79] From a student-athlete's perspective, this rule breeds academic possibilities. However, from a coach's perspective, what stands out is "that fifth year of eligibility could be spent chasing greater [athletic] glory in the guise of grad school shopping."[80] It is essential to understand that the coaches and their representatives who disagreed with this rule did not want to hinder these outstanding student-athletes' academia career goals. Instead, their concern was for their own programs which would lose these great individuals, as well as for programs that would now have to worry about competing against these individuals due to their selection of a graduate school. "College athletics teams outside the power-league framework have no interest in becoming feeder programs."[81] The Colonial Athletic Association Commissioner Tom Yeager believed the legislation "could have a disruptive effect" and was concerned about "unintended consequences."[82]

After the Graduate-Transfer Rule was adopted, coaching staffs began to fully understand the potential repercussions of what had just been enacted. In response, many opponents spoke out against it by favoring an override vote. "That would be a major disaster," stated West Virginia head football coach Rich Rodriguez.[83] "We don't love this rule," exclaimed University of Florida Director of Athletics Jeremy Foley.[84] The reason not to love the rule can be defined by two words: Kevin Kruger. As previously mentioned, Kruger helped lead his father's UNLV basketball team not only into the NCAA Tournament, but all the way to the Sweet Sixteen. In the first round of the tournament, after Kruger scored 23 points and defeated Texas A&M-Corpus Christi, TAMUCC's head coach Ronnie Arrow spoke about the Graduate-Transfer Rule and how it enabled Kruger to play and be such a vital part of UNLV's victory over TAMUCC. "He's a nice kid, but what kind of rule is that? You go to a school for four years, graduate, and then go wherever you want? That's wacko."[85] In round two of the tournament, UNLV faced off against number two seed Wisconsin. After Kruger led UNLV in an upset win over the Badgers, Wisconsin's head basketball Coach Bo Ryan stated, "I'm one of those hundreds of coaches out there that tried to stop the rule of fifth-year guys transferring. I said, 'A guy like Kevin Kruger – he can play. Heck, we're going to end up playing one of those guys, and they're going to beat us. I said that a year ago."[86] Similarly to Kruger, Ryan Smith also had quite an impact at the University of Florida upon arrival. Smith started on Florida's football team his final season, ultimately leading them to win the national championship. The frustration many coaches felt due to the unfairness of allowing a student-athlete to transfer to another institution upon graduation and compete immediately against them was only one problematic aspect they had with the rule. Another issue was how detrimental losing a graduate student-athlete to another institution would be for the initial program.

To lose a player can be awful, but to lose one that is a fifth-year graduate, who exemplifies intelligence and athleticism, has been a part of your program, and is likely to be a team leader, is devastating and demoralizing. Unfortunately for programs in every other sport besides football, basketball, and men's ice hockey, these transfers not only occur, but in some regard are encouraged. Previously mentioned were Kruger, Thiero, and Smith. All three are great representatives of the athletic opportunity that the Graduate-Transfer Rule can provide. However, as these individuals are good examples, there are others that can demonstrate a negative outcome. Take, for example, Gary Neal of Towson University. In the 2005-2006 basketball season, Neal averaged 26.1 points, making him the top returning scorer in Division I.[87] Amidst allegations of rape at a previous institution, Towson was the university that took a chance on Neal. Towson was the institution that fours year later graduated Neal. "Towson's the school that should reap the benefits of Neal's fourth and final year of eligibility."[88] Put another face on this rule. Taylor Coppenrath played for the University of Vermont basketball team. "He redshirted. Four years later, he graduated. He also was a two-time conference player of the year, one of the best players in college basketball, and he had a year of eligibility left thanks to his redshirt season. Had this rule been in effect in 2004-05, Coppenrath could have transferred from Vermont to, say, Kansas."[89] This seems like a great opportunity for Kansas basketball, but what about Vermont's program? "The school found Coppenrath. Nurtured him. Developed him. Graduated him. And then, in what should have been his ultimate payoff season, Vermont could *lose* him?"[90] Grant Teaff, the executive director of the American Football Coaches Association, reiterated the same point, focusing solely on what the Graduate-Transfer Rule's implications would be upon the sport of football. Teaff stated in an interview, "in football, the development and training period of time is very important. Youngsters come into college programs not ready [to play]. They are immature and the institution pays for them and helps them get better. The problem with football, in particularly, is the length of time you spend on a player parallels the improvement of a player, ultimately resulting in his final year of eligibility being his best football year. It does not make any sense for the institution that has helped mold him physically and mentally, and has paid for these transformations, to not get his final year's productivity and utilize his potential."[91]

The final issue involved with how unfair it is to these programs to lose hardworking overachieving student-athletes, is to move away from the high profile athlete, and instead, focus on what happens when a program loses depth chart athletes. Every program would have this dilemma, but this problem would be worse for other institutions, such as Notre Dame. Notre Dame is notorious for having one of the highest graduation rates for football players. Furthermore, the university seems to "desire to see players graduate in four years as opposed to the five year track found at many other colleges."[92] Due to the academic pursuit of a diploma in four years, yet the use of a redshirt for many freshmen, numerous football student-athletes would qualify for the Graduate-Transfer Rule exemption. "Of the 29 scholarship players in next year's senior and junior classes, 23 are eligible for a fifth year."[93] Because of

Continued on Page 16

Continued from Page 15

the high number of potential transfers, the coaching staff not only must worry about recruiting highly touted high school student-athletes, but also must worry about filling the depth chart if a fifth year depth chart athlete decides to take his experience to a rival program. To lose one student-athlete is difficult, but to lose as many as four or five fifth year seniors simply is irreplaceable in many facets.

When discussing unfairness to programs, it is important to put everything into perspective. Bruce Feldman, a senior writer at ESPN The Magazine illustrates, "Are they [fifth years] letting down the coaches and teammates who helped them along the way to get to where they are? Probably, but is this much different from our society's norms? If you start out at a company and develop and do well, then you decide to move on to a company that has more to offer, then should you be free to go? And let's not forget the other side of this: There are plenty of examples of colleges squeezing out 'dead weight' and not renewing scholarships of players who aren't contributing enough to their programs."[94] Feldman makes a great observation. To spend so much time, energy, and money into developing players only to have them leave when they are arguably entering their best season of competition seems unfair. But, is it fair to deprive a student-athlete who wants to participate in the sport and attend graduate school at a different institution? "Those opposed to Proposal 2005-54 would have us believe that student-athletes' career paths should be dictated by athletics 'obligations.'"[95]

II. Competitive Inequality and the Creation of a Free Agency Market

"Competitive equity is, without a doubt, important to the integrity of everyone's experience within collegiate athletics."[96] Without striving to constantly level the playing field, amateur athletic competition would lose its appeal in a variety of areas. That is why with each addition or subtraction of an NCAA rule, one must always consider the adoption or retraction in light of both the larger and smaller programs. In terms of the Graduate-Transfer Rule, many people opposed the rule as a representative of the smaller institutions, others opposed the rule as a representative of the larger programs, and still others opposed the rule as a representative of the sport itself. James Haney, a representative of the National Association of Basketball Coaches stated that "the loss of a single player with three years of experience from your team or the addition of an experienced player to your team is definitely going to have an impact on the game."[97] Haney later said, "I think that this whole idea that somebody comes in for one year and they somehow can change the course of history of a particular team effects the game's integrity."[98] If competitive equity on the playing surface was the only issue at hand, then the restriction of these student-athletes transferring is an incredibly weak point. The reason is that different student-athletes would attend different programs for a variety of reasons. Sure, large programs such as the University of California-Berkeley could pick up a much needed experienced lineman like Tyler Krieg. However, smaller programs like Duquesne or UNLV could pick up marquee athletes to lead their team like Almamy Thiero and Kevin Kruger, respectively. With both large and small programs potentially benefiting in equal proportion, it would suggest that the competitive advantage would disintegrate. Therefore, what could occur that would drive more graduate student-athletes toward transferring? The answer and overall concern is that a free agency for fifth year student-athletes would develop.

Grant Teaff stated that "competitive equity was never a concern of his."[99] However, with the potential for a free agency market developing, Teaff alluded to the survey that the American Football Coaches Association had conducted among its coaches. He expressed concern on behalf of the AFCA coaches, in regards to the potential for as many as three individuals per institution per year being eligible to transfer and play immediately. Teaff gave an example to portray his great concern: "Suppose a talented wide receiver at Chili Copper Barbie College was recruited by a coach to make big catches and make big plays. However, he is not getting the ball thrown his way. Meanwhile, school "X" just lost its great receiver and the wide receiver [at Chili Copper Barbie College] is thinking he can catch the ball and if he transfers, he can get someone to throw to him."[100] "The potential for abuse is incredible and given the ever increasing demands for instant success, college coaches certainly are going to find ways to make this rule benefit them and not the student-athletes in question."[101] The fear associated with a free agency market is that coaches, who regularly are fighting over prospective student-athletes in high school and junior college, now will work to establish underground methods to recruit these fifth years. Why would these coaches have to resort to underground and back channel recruiting? Because NCAA bylaws directly prohibit a coach from one institution to speak with a student-athlete from another program who has remaining eligibility, regardless of who contacts who.[102]

Furthermore, there were two other concerns that surfaced when discussing the development of a free agency market. One issue dealt with coaches trying to recruit away their conference rivals' talented student-athletes. "Imagine the Michigans and Ohio States raiding the Illinois and Indiana's, taking their best players, their team leaders, and wisking them away with promises of playing in a bowl game their senior year."[103] This resembles what Teaff and the AFCA thought could potentially occur, except this would be even worse because this action would mean that not only would the coaching staff, team, and program lose a vitally important student-athlete, but now that student-athlete would be competing against them in the following season. Secondly, as the concern for players being contacted through back channels in the hopes of swaying their allegiance would increase, coaches would quickly realize that there is one way to halt other programs from recruiting their student-athletes. The most obvious step for a coach would be to find a way to avoid redshirting any of his or her student-athletes. By allowing a student-athlete to participate in a few kickoff returns or play in a few minutes of the first few games, the redshirt would be voided and the limited amount of participation would be enough to exhaust one season of eligibility. Now, the only way a student-athlete who graduated in four years could have one remaining season of eligibility would be if the student-athlete was injured at some point throughout her collegiate career and was granted a medical hardship from the NCAA.

With the speculation of adverse consequences, it is important to explore the realism of each concern. When discussing the transfer of student-athletes to conference rival teams, initially one could foresee this occurring. However, it is highly unlikely. Not necessarily because a graduate student-athlete would not want to attend that rival school and participate, but because "players still have to be released from their scholarships by their coaches in order to transfer."[104] Therefore, since the majority of schools and coaches would most likely not grant an open release for the student-athlete, because they usually don't for undergraduate transfers, the student-athlete would have to compile a list of specific schools that he or she is interested in speaking with. Once the coaching staff understood the student-athlete's reasoning for wanting to attend those schools, the head coach could release him or her to those schools. If the head coach disapproved of certain schools, the coach would let that student-athlete know that if he or she applies and is accepted into that school's graduate program, they will not have the ability to play immediately because they will not be released from their scholarship commitment. Ultimately, a coach will most likely refuse to release a student-athlete if that coach's team will compete against that athlete in the following year.

Secondly, the potential for numerous coaches burning redshirts seems improbable. Initially, it might be a great way for a coach to protect his highly touted recruits and potential playmakers. But, after a few years of burning incoming freshman redshirts by only playing these student-athletes minimally, other coaching staffs would take notice and are guaranteed to let that prospective student-athlete know what the outcome will be if he or she attends that particular school. As imperative as recruiting is to the collegiate game, to safeguard against a few fifth year student-athletes leaving by burning numerous redshirts seems counterintuitive. Instead of preserving these valuable athletes, there would be a great chance that a coaching staff would miss out on even having them because the staff would be portrayed as one that exhibits a lack of care towards student-athletes' well being and aspirations.

III. Not So Fast Fellow Coaches

Although grave consequences seemed likely from some coaches' viewpoint, other coaches and representatives felt differently about the possible implications of the Graduate-Transfer Rule. There are predominately two reasons why the rule was not bothersome for many coaches. The first reason focused on the likelihood of the fifth year student-athlete actually transferring. The University of Clemson head football coach Tommy Bowden said, "If the guy's a good player, he's probably going to stay at the school he's at because he's having a good time (and) he's playing. I can't hardly see a guy who's a good player leaving to go play a fifth year somewhere else."[105] Furthermore, coaches have shown an overall interest in their student-athletes' well-being by fully understanding these graduates' ambitions. University of Arizona head football coach Mike Stoops shared his thoughts on the rule's possible implications. "I don't get why people worry about it. It happened to one of our guys. If a guy didn't fit in or got beat out and had a chance to play someplace else, so be it."[106] When speaking about Ryan Smith leaving Utah to attend Florida and play for his original coach Urban Meyer, Utah's head football coach Kyle Whittingham stated, "Everything doesn't turn out exactly how you would like it to. We certainly wish he would have been able to stay here and finish out. But as it turned out, we're happy for the success he's had."[107] Simply because the Graduate-Transfer Rule would present an option for these student-athletes, does not mean that many of them would actually utilize the rule, especially if their motive was simply to play for another season. In the majority of cases, there would have to be something much more important to direct that student-athlete away from his or her program. "I'm ok with the rule," University of California-Berkeley head football coach Jeff Tedford said. "If we had a fifth-year guy who wasn't completely happy, I would be ok with him transferring."[108] However, "I would hope when a guy gets to the fifth year, he would have more invested in the program."[109]

Tedford's hope that a student-athlete would be tremendously invested in the program and not want to leave, seems to be accurate. "It has been my experience that the large majority of my fellow student-athletes were very loyal to their programs and teammates. If at all possible, we usually wanted to complete our eligibility with the program that had afforded us so much opportunity," Chas Davis said.[110] What is interesting about the Kevin Kruger story is that initially, Kruger was a prime example of what these coaches believe to be true. Prior to Kruger transferring to play for his father, Arizona State University had a record of 11-17. This losing season was, if not the reason, at least one of the reasons, why former head basketball coach Rob Evans was fired. However, if Evans would not have been fired, Kruger would have concluded his collegiate career at ASU. "I wasn't highly recruited out of high school and I don't think I could have left with him [Evans] still there."[111] The reason for Kruger's loyalty reached farther than the fact that Evans took a chance on him. Instead, there was a great bond between the two, as each fought for the other when the other came under scrutiny. This bond is experienced in every program in some capacity. It is only natural for a fifth year student-athlete to have a great relationship with his or her coach, teammates, and the university as a result of such a commitment of time and energy by both parties.

The reason the rule was not too bothersome also focused on the athletic scholarship. If the student-athlete was a fifth year, chances are even if he or she had not been on scholarship initially, the student-athlete more than likely would have earned a scholarship through their hard work and commitment to the team over the years. Therefore, if that student-athlete would transfer, their removal from the team would release their scholarship, which would go back to the team. "I don't see what the big uproar is," said Vanderbilt head football coach Bobby Johnson. "It will be beneficial to both parties. The school gets another scholarship and the player can go where he's needed."[112] On the opposite side of the coin, what are the chances that the post graduate program will even provide one of the team's few scholarships to a player that will only participate for one season? For a student-athlete to have the

Continued on Page 17

Continued From Page 16

opportunity to have at least one year of professional school paid for through athletics is wonderful, but the chances of the new school granting that opportunity are drastically lower than the original institution. There are numerous reasons why this is true, but the greatest reason why the initial program would provide a scholarship for the fifth year is because of his or her commitment throughout the years to the program, compared to simply one season.

IV. Graduate-Transfer Rule's Potential Conflict with Proposal 2005-109

With the conclusion of the complete analysis of both the student-athlete and the coaching staff's perspectives, it is important to point out one final factor that must be discussed prior to providing any recommendation. As Proposal 2005-54 was progressing through the legislative process, encountering numerous arguments from its proponents and opponents, another proposal was also making its way through the same legislative cycle that could have had an adverse effect on the Graduate-Transfer Rule had it maintained its existence. Amazingly, Proposal 2005-109 flew under the radar of so many people directly involved with Proposal 2005-54, as evidenced by its lack of significance upon the decision to adopt Proposal 2005-54. Proposal 2005-109 was adopted as an amendment to Bylaw 14.5.5.2.10, dealing specifically with football transfers between I-A and I-AA. The intent of Proposal 2005-109 was "to specify that a football student-athlete who transfers from a Division I-A institution to a Division I-AA institution may qualify for the one-time transfer exception only if the student-athlete has two or more seasons of competition remaining."[113] The Football Issues Committee created this proposal and in strong opposition was the Academics/Eligibility/Compliance Cabinet. However, the AEC Cabinet did not oppose the proposal because of its potential effect on their own proposal, 2005-54, but instead because "the cabinet [believed] there [was] no compelling reason to create an additional transfer restriction in Division I-AA football."[114] The rationale behind Proposal 2005-109 was that "this proposal will require a football student-athlete at a Division I-A institution who transfers to a Division I-AA institution to demonstrate both an academic, as well as an athletic commitment to the Division I-AA institution to which he transfers by having at least two seasons of competition remaining in football in order to qualify for the exception."[115]

Now, as part of Bylaw 14.5.5.2.10(a), Proposal 2005-109 is another factor that must be considered to affect the Graduate-Transfer Rule in football situations if there would ever be the desire to formulate legislation again. For that reason, it is imperative to examine the two proposals to determine if there is any ambiguity or obscure language that results in the two proposals being at odds with each other. In essence, the Graduate-Transfer Rule allowed any student-athlete who graduated in four years and had one year of eligibility remaining the opportunity to transfer to any Division I-A or I-AA program in the country for graduate school and participate in their sport immediately. Therefore, a graduating football player could transfer from Michigan (I-A) to attend the University of Delaware's school of government and policy (I-AA) and compete. However, according to the One Time Transfer Exception in Division I-AA Football, the Michigan student-athlete could only attend the University of Delaware if he had at least two seasons of competition left.

Initially, one might read both pieces of legislation and determine that they co-exist because graduation is the deciding factor. That may very well be true. But, what also is true is that both proposals centered on the ability for one student-athlete to "transfer" to another school. Therefore, did the Football Issues Committee for Division I-AA football schools mean that a Division I-A student-athlete can transfer and participate in their programs if he has already satisfied the graduation requirement? Regardless of whether or not that was the understanding, Proposal 2005-109 explicitly states "a participant in Division I-AA football at the institution to which the student is transferring may utilize this exception only if the participant transferred to the certifying institution from an institution that sponsors Division I-A football and has two or more seasons of competition remaining in football."[116] Where in the rule does it say the student-athlete must be an undergraduate student-athlete? Or that the rule is null and void upon graduation? Because of the way Proposal 2005-109 was written, it seems as though a graduate desiring to transfer to a school such as Fordham or Delaware may go there to attend graduate school, but cannot participate in football because he only possesses one final season of eligibility.

To resolve this conflict, the Football Issues Committee would need to decide what the best policy is. According to the committee's rationale, the reason for the creation of 2005-109 was to prohibit student-athletes from transferring to a I-AA school to play immediately, and upon exhausting their eligibility, the student-athletes would return to their original school to graduate. If this is their sole intention, then they must reference that Proposal 2005-54 would trump 2005-109 somewhere in the rule. Otherwise, the unforeseen consequence is that both would exist simultaneously, resulting in what some may title "fifth year junior college student-athletes" of I-AA graduates. What is meant by "fifth year junior college student-athletes," is that Division I-A football graduates could transfer to another I-A school and play, but not I-AA. However, unlike I-A football players, I-AA student-athletes could transfer to another I-AA school, as well as a I-A school. This would conclude in the outcome of I-A programs being able to utilize star I-AA student-athletes, with no reciprocity effect.

V. Recommendation

After researching numerous articles, interviewing several people, and compiling articulate arguments for both interested parties, it is time to place my recommendations upon whether or not the Graduate-Transfer Rule, or some altered form, should be resubmitted. Below is my proposal, Proposal 2008-1, that I would advocate should be passed through the same NCAA legislative process that was previously described. My proposal does three things that Proposal 2005-54 lacked. First, it takes into account both the proponents and opponents' arguments prior to the creation of the language. Secondly, it erases any potential conflict of interest with Proposal 2005-109. Finally, my proposal implements a case-by-case analysis that each graduate transfer would be subjected to. The student-athlete would apply to the NCAA's Eligibility Center for the ability to transfer and participate immediately, providing information about the specific degree program he or she is interested in, as well as any other relevant information. This third recommendation should relax the coaches' fear of a free agency market because not only would the original institution have to agree to the transfer, but now, so to would the NCAA. This process should also limit the number of applicants requesting to transfer and play immediately in these select sports.

> ***2008-1 ELIGIBILITY -- GRADUATE STUDENT OR POSTBACCALAUREATE PARTICIPATION -- TRANSFER ELIGIBILITY***
>
> **Status:** Proposed
>
> **Intent:** To permit a student-athlete who is enrolled in a specific graduate degree program of an institution other than the institution from which he or she previously received a baccalaureate degree to participate in intercollegiate athletics, regardless of any previous transfer. Furthermore, once a student-athlete in Division I-A football has graduated, Proposal 2005-109 is not in effect, thereby allowing the student-athlete to transfer to a Division I-AA school and participate in football immediately. Each transfer is subject to a case-by-case analysis prior to approval.
>
> **Bylaws:** Amend 14.1.9, page 140:
>
> "14.1.9 Graduate Student/Post baccalaureate Participation. A student-athlete who is enrolled in a graduate or professional school of the same institution from which he or she previously received a baccalaureate degree, a student-athlete who is enrolled and seeking a second baccalaureate or equivalent degree at the same institution or a student-athlete who has graduated and is continuing as a full-time student at the same institution while taking course work that would lead to the equivalent of another major or degree as defined and documented by the institution, may participate in intercollegiate athletics, provided the student has eligibility remaining and such participation occurs within the applicable five-year period set forth in Bylaw 14.2 (see also Bylaw 14.1.8.2.1.4).
>
> "14.1.9.1 **Graduate Student in Specific Degree Program Transfer Exception. A graduate student-athlete who is enrolled in a specific degree program in a graduate or professional school of an institution other than the institution from which he or she previously received a baccalaureate degree may participate in intercollegiate athletics, provided the student-athlete has eligibility remaining and such participation occurs within the applicable five-year period set forth in Bylaw 14.2 (see also Bylaw 14.1.8.2.1.4).**"
>
> [14.1.9.2 and 14.1.9.3 unchanged.]
>
> "14.1.9.4 **Graduate Student desiring to transfer from Division I-A to Division I-AA. Upon graduation, a student-athlete has satisfied his or her academic requirements and as a result, now has the opportunity to seek approval from the NCAA to 'transfer' to another institution for graduate school and to compete immediately in their respective sport, including a 'transfer' to a Division I-AA institution."**
>
> "14.9.5 **All graduate transfers are subject to a case-by-case analysis by the NCAA Eligibility Center prior to approval of the transfer."**
>
> **Source:** Matt Maher
>
> **Effective Date:** Immediate
>
> **Proposal Category:** Amendment
>
> **Topical Area:** Eligibility
>
> **Rationale:** This proposal would allow a student-athlete to enroll in a specific graduate degree program at an institution other than the one from which he or she earned a four-year degree and be immediately eligible for intercollegiate competition, provided the graduate student has remaining eligibility. A student-athlete who earned his or her undergraduate degree has achieved the primary goal of graduation and should be permitted to choose a graduate school that meets both his or her academic and athletics interests, regardless of his or her previous transfer history. A student-athlete in football shall also have the opportunity, upon graduation, to transfer to a Division I-AA school and participate immediately. All graduate transfers are subject to a case-by-case analysis by the NCAA Eligibility Center.
>
> **Estimated Budget Impact:** None.
>
> **Impact on Student Athlete's Time:** None.
>
> **Position Statement(s):** In the spirit of student-athlete well-being, student-athletes that complete their degrees and have eligibility remaining should be able to transfer and enroll in the graduate program of their choice and be able to utilize their remaining season of eligibility.

Considering all of the information present within the article, there is one major issue that I have with the coaches' side. The issue presented is that all of their points and counterpoints are not supported by one piece of evidentiary proof. In opposition, the academia side provided an incredibly relevant study produced by the NCAA Research Staff in December 2006 that best illustrated how many student-athletes utilized the Graduate-Transfer Rule. When discussing the coaches' arguments, everything seems to be based on mere speculation of what could happen or is likely to happen. I agree with the Director of Athletics for Creighton University, Bruce Rasmussen, when he said, "I do not think the competitive equity argument was valid. I would rather have

Continued on Page 18

Continued from Page 17

supported the legislation, tracked those who used it for several years, and then based our thoughts on data rather than on opinion. If the data supported an abuse, then we should change the legislation."[117] Without allowing student-athletes to take advantage of this rule over a period of time, the NCAA Management Council members can only make a decision based on nothing more than conjecture. Furthermore, if numbers increase dramatically, is that still a bad thing? How should Management Council members handle an increase year after year?

Those questions lead to my second point. As persuasive as the student-athletes were in proving how the Graduate-Transfer Rule is a wonderful opportunity for a graduate student-athlete to achieve his or her academic career goals, the coaches were equally as persuasive in providing relevant hypotheses in what could result from the rule as athletic abuses. Therefore, along with maintaining the language in the Graduate-Transfer Rule that requires a "specific degree program" to be identified by the graduate, another boundary line must be a fixation of this rule. In addition to the strong language, the graduate must apply to the NCAA Eligibility Center to utilize the rule. In the application, the graduate will have to show cause of why he or she should be allowed to participate immediately in these select sports. Mr. Davis makes a valuable point when he wrote, "sure, cross country doesn't carry the same stakes as a football or basketball program, but the stakes don't change the principles."[118] However, he also alludes to the reality that these specific sports do require another barrier of protection from the potential free agency development. This application would do just that.

Finally, the potential conflict of interest issue is resolved utilizing my proposal. To thwart any potential issue between the two rules, it is important to define what will now occur when a student-athlete graduates from a Division I-A institution, has one season remaining of eligibility, and wants to transfer to a Division I-AA institution for graduate school and to participate in football. The easiest approach for both rules to co-exist is to place in Proposal 2008-1, that "upon graduation, a student-athlete has satisfied his or her academic requirements and as a result, now has the opportunity to seek approval from the NCAA to 'transfer' to another institution for graduate school and to compete immediately in their respective sport, including a 'transfer' to a Division I-AA institution." This rational will still maintain the principle goal of Proposal 2005-109, while at the same time, at least grant that Division I-A graduate the opportunity to attend and participate at the Division I-AA institution they so desire.

The NCAA and its member institutions should take into consideration these recommendations for the future, as they encompass the best approach for creating a compromising piece of legislation that both interested parties could agree upon, ultimately restoring "student" and "athlete" as one.

1 Gary T. Brown, *AEC Cabinet kicks off legislative cycle with 38 proposals,* THE NCAA NEWS, June 20, 2005, http://www1.ncaa.org/membership/ach/releases/20050620news.
2 *Written Testimony of Josephine (Jo) R. Potuto Submitted to the House Judiciary Committee's Subcommittee on the Constitution,* 2 (2004) (statement of Josephine (Jo) R. Potuto, Vice Chair, NCAA Division I Committee on Infractions).
3 Brown, *supra* note 1.
4 Jack Carey, *College football coaches oppose rule easing transfer,* USA TODAY, June 4, 2006, http://usatoday.com/sports/college/football/2006-06-04-transfer-rule_x.htm.
5 *Few take advantage of graduate-transfer rule,* THE NCAA NEWS (Dec. 7, 2006), http://wbca.org/upload/DILegislationDec06GradTransfer.pdf.
6 2006 NCAA DIVISION I PUBLICATION OF PROPOSED LEGISLATION (August 15, 2005), *available at* http://www.ncaa.org/library/membership/d1_popl/2006/2006_d1_popl.pdf.
7 REPORT OF THE SEPTEMBER 7-9, 2005, NCAA DIVISION I ACADEMICS/ELIGIBILITY/COMPLIANCE CABINET, http://www1.ncaa.org/membership/governance/division_I/aec_cabinet/2005/September/AEC_Report_9-2005.htm.
8 *Id.*
9 MINUTES OF THE BIG 12 CONFERENCE STUDENT-ATHLETE ADVISORY COMMITTEE (Nov. 5-6, 2005), http://graphics.fansonly.com/photos/schools/big12/genrel/auto_pdf/SAAC_Minutes_11_5-6_2005.pdf.
10 Telephone Interview with Ian Gray, Former Knights Commission Panelist and President of the Big 12 Student-Athlete Advisory Committee, in Omaha, Neb. (Oct. 5, 2007).
11 DIVISION I OFFICIAL NOTICE (January and April 2006), *available at* http://www.ncaa.org/library/membership/d1_official_notice/2006/2006_d1_official_notice.pdf.
12 ACTION TAKEN ON ITEMS CONSIDERED BY THE MANAGEMENT COUNCIL AND, IF NECESSARY, THE BOARD OF DIRECTORS (January 9 and 10, 2006), http://www.ncaa.org/wps/portal/!ut/p/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLN4j3NQDJgFjGpvqRqCKO6AKGph4QIUNTT5iYTxhcla9Hfm4qUDzSHMg38vbUD9GPdNL31g_QL8gNDQ2NKDe0cFRUBABeiuOx/delta/base64xml/L3dJdyEvd0ZNQUFzQUMvNElVRS82XzBfTFU!?CONTENT_URL=http://www1.ncaa.org/membership/governance/division_I/board_of_directors/2006/January/BOD_MC_follow_up.htm.
13 2007-08 NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL 4.2.1 Composition (July 2007).
14 The Academics/Eligibility/Compliance Cabinet, *2005-54 Eligibility –Graduate Student or Post Baccalaureate Participation – Transfer Eligibility,* LSDBI (Aug. 12, 2007), https://goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home.
15 *Division I Board of Directors Results: Goodbye I-AA,* THE NCAA NEWS (Aug. 3, 2006), http://www.i-aa.org/article.asp?articleid=79814.
16 2007-08 NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL 5.3.2.3.1 Call for an Override Vote (July 2007).
17 WHAT TO EXPECT WITH REGARD TO THE STATUS OF PROPOSAL NOS. 2005-54 AND 2005-128 (Aug. 11, 2006), http://www1.ncaa.org/membership/governance/division_I/board_of_directors/2006/August/11_Add_override.htm.
18 *Id.*
19 Dennis Dodd, *Football coaches start pushback against new transfer rule,* CBS SPORTSLINE.COM, (May 26, 2006), http://cbs.sportsline.com/print/collegefootballstory/9463380/2.
20 Thomas S. Paskus, *Division I student-athlete graduates with eligibility remaining,* MEMORANDUM TO THE NCAA DIVISION I BOARD OF DIRECTORS (July 18, 2006), http://www1.ncaa.org/membership/governance/division_I/board_of_directors/2006/August/11_Att_A_Paskus_memo.htm.
21 *Id.*
22 SUMMARY OF THE NCAA DIVISION I BOARD OF DIRECTORS AUGUST 2006 ACTIONS RELEVANT TO NCAA DIVISION I ACADEMICS/ELIGIBILITY/COMPLIANCE CABINET (Sept. 2006), http://www1.ncaa.org/membership/governance/division_I/aec_cabinet/2006/September/S5.htm.
23 I-AA.org, *supra* note 15.
24 *Id.*
25 2007 DIVISION I OFFICIAL NOTICE (January and April 2007), *available at* http://www.ncaa.org/library/membership/d1_official_notice/2007/2007_d1_official_notice.pdf.
26 I-AA.org, *supra* note 15.
27 Torrie A. Johnson, SOUTHEASTERN CONFERENCE MEMORANDUM (Nov. 13, 2006), http://www.secsports.com/doc_lib/saac_meeting_nov06.pdf.
28 2007 NCAA CONVENTION PROCEEDINGS (January 5-8, 2007), *available at* http://www.ncaa.org/library/membership/convention_proceedings/2007/2007_convention_proceedings.pdf.
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.*
38 AGENDA ITEMS FOR MANAGEMENT COUNCIL CONSIDERATION ON SUNDAY, JANUARY 8 (January 2006), http://www1.ncaa.org/membership/governance/division_I/management_council/2007/January/Anticipated_Action.htm.
39 B. David Ridpath, *Don't mess with postgraduate choices,* THE NCAA NEWS (July 17, 2006), http://www.ncaa.org/wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2006/Editorial/Don%27t+mess+with+postgraduate+choices+-+7-17-06+NCAA+News?pageDesign=Printer+Friendly+NCAA+News+And+Updates.
40 Terry Bowden, *Transfer Trouble?,* YAHOO! SPORTS (June 6, 2006), http://sports.yahoo.com/ncaaf/news?slug=tb-transfertrouble060606&prov=yhoo&type=lgns.
41 Posting of GannonFan to http://www.anygivensaturday.com/forum/archive/index.php/t-11145.html (July 5, 2006, 9:10a.m.).
42 Chas Davis, *In The SAAC,* (The Voice of the D-I National Student-Athlete Advisory Committee), Summer/Fall 2006, at 6.
43 THE NCAA NEWS, *supra* note 5.
44 FINDINGS OF THE GRADUATE STUDENT TRANSFER SURVEY (Fall 2006), http://www1.ncaa.org/membership/governance/division_I/management_council/2007/January/22.htm.
45 THE NCAA NEWS, *supra* note 5.
46 FINDINGS OF THE GRADUATE STUDENT TRANSFER SURVEY, *supra* note 44.
47 THE NCAA NEWS, *supra* note 5.
48 FINDINGS OF THE GRADUATE STUDENT TRANSFER SURVEY, *supra* note 44.
49 Telephone Interview with Grant Teaff, Executive Director of the American Football Coaches Association, in Omaha, Neb. (Oct. 11, 2007).
50 2007 NCAA CONVENTION PROCEEDINGS, *supra* note 28.
51 NCAA DIVISION I STUDENT-ATHLETE ADVISORY COMMITTEE SELECTED PROPOSALS (November 2005), http://www1.ncaa.org/membership/governance/division_I/management_council/2006/January/16_Att_SAAC.htm.
52 David Fox, *New transfer rule starting to make sense,* RIVALS.COM (July 29, 2006), http://collegefootball.rivals.com/content.asp?CID=565744.
53 Posting of Lehigh Football Nation to http://www.anygivensaturday.com/forum/archive/index.php/t-11145.html (July 5, 2006, 8:59a.m.)
54 Bowden, *supra* note 40.
55 Dave Newhouse, *Duke grad now a 'free agent' for Cal,* Oakland Tribune, Aug. 10, 2006, http://findarticles.com/p/articles/mi_qn4176/is_20060810/ai_n16657001/print.
56 *New Rule to Help Grad Students,* COACHING MNGT, November 2006.
57 *Id.*
58 2007 NCAA CONVENTION PROCEEDINGS, *supra* note 28.
59 *Id.*
60 Posting on Lehigh Football Nation, *supra* note 53.
61 Chuck Finder, *Obscure NCAA rule is why you will find former WPIAL standout in a WVU uniform this fall,* POST-GAZETTE, May 6, 2007, http://www.post-gazette.com/pg/07126/783808-144.stm.
62 *Athletes ponder athletics as much as academics with new transfer rule,* Knight Commission on Intercollegiate Athletics (Aug. 12, 2006), http://www.knightcommission.org/students/item/athletes_ponder_athleics_as_much_as_academics_with_new_transfer_rule/.
63 Newhouse, *supra* note 55.
64 Almamy Thiero Leaves Memphis for Post Graduate Year, http://uofmtigers.blogspot.com/2006_08_01_archive.html (Aug. 28, 2006).
65 Pat Forde, *Smith, Gators reap benefit of new NCAA rule,* ESPN.COM (Jan.4, 2007).
66 Dirk Facer, *Effective immediately: Transferring from Utah, Smith has capitalized on his Florida opportunity,* DESERET MORNING NEWS, Jan. 6, 2007.
67 Forde, *supra* note 65.
68 Facer, *supra* note 66.
69 *Id.*
70 Andy Katz, *Kruger to play for father at UNLV – without penalty,* ESPN.COM (July 7, 2006).
71 John Akers, *Father and son,* YAHOO!SPORTS (March 21, 2007).
72 *Id.*
73 Katz, *supra* note 70.
74 Michael Poppy, *Coach's son proves Ryan right,* The Badger Herald, March 19, 2007.
75 Bowden, *supra* note 40.
76 Ridpath, *supra* note 39.
77 2007 NCAA CONVENTION PROCEEDINGS, *supra* note 28.
78 Ed Graney, *Rebels can thank "Panda" for helping land Kruger,* ESPN.COM (Jan. 5, 2007).
79 Dodd, *supra* note 19.
80 *Id.*
81 John O'Connor, *Transfer-Rule Change Stirs Some Concern,* RICHMOND TIMES-DISPATCH, June 13, 2006.
82 *Id.*
83 Bowden, *supra* note 40.
84 *Id.*
85 Ron Kantowski, *Ron Kantowski eulogizes a 'wacko' NCAA rule that, while used innocently enough by UNLV's Lon and Kevin Kruger, left the door open for 'unintended consequences',* LAS VEGAS SUN, Jan. 8, 2007.
86 Poppy, *supra* note 74.
87 Gregg Doyel, *Strange new NCAA transfer rule has everybody saying 'What??',* CBS SPORTSLINE.COM (May 24, 2006).
88 *Id.*
89 *Id.*
90 *Id.*
91 Teaff, *supra* note 49.
92 Pat, Have Diploma, Will Travel, http://bluegraysky.blogspot.com/2006_06_01_bluegraysky_archive.html (June 29, 2006).
93 *Id.*
94 Bruce Feldman, *Escape clause?,* ESPN.COM (May 29, 2006).
95 Davis, *supra* note 42.
96 *Id.*
97 2007 NCAA CONVENTION PROCEEDINGS, *supra* note 28.
98 *Id.*
99 Teaff, *supra* note 49.
100 *Id.*
101 Have Diploma, Will Travel, *supra* note 92.
102 2007-08 NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL 13.1.1.3 Four-Year College Prospective Student-Athletes (July 2007).
103 Posting of PSUMIKE to http://hailtothelion.blogspot.com/2006/05/ncaa-free-agency.html (May 30, 2006, 10:53a.m.).
104 Dodd, *supra* note 19.
105 Fox, *supra* note 52.
106 *Id.*
107 Facer, *supra* note 66.
108 KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 62.
109 Newhouse, *supra* note 55.
110 Davis, *supra* note 42.
111 Graney, *supra* note 78.
112 Fox, *supra* note 52.
113 The Football Issues Committee, *2005-109 Eligibility – Transfer – One-Time Transfer Exception – Division I-AA Football,* LSDBI (Aug. 28, 2007), https://goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home.
114 *Id.*
115 *Id.*
116 2007-08 NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL 14.5.5.2.10 One-Time Transfer Exception (July 2007).
117 E-mail Interview with Bruce Rasmussen, Director of Athletics for Creighton University, in Omaha, Neb. (Oct. 5, 2007).
118 Davis, *supra* note 42.

TOWARD A BRIGHT LINE RULE: THE DUTY OF CARE OWED BY UNIVERSITIES TO STUDENT-ATHLETES

By: Joanna W. Brooks

Ms. Joanna Brooks holds a Bachelor of Arts degree in English from Clemson University, Clemson, SC and is expected to receive a Juris Doctor in May 2009 from Charleston School of Law in Charleston, SC. Ms. Brooks currently resides in Charleston, SC where she is employed as a law clerk for the General Counsel at Trident Technical College in Charleston. Her duties include researching and writing memoranda pertaining to copyright and trademark law, employment law, the Freedom of Information Act, and the Family Education Rights and Privacy Act.

I. INTRODUCTION

Courts are generally reluctant to find a special relationship between universities and private students. It follows that courts usually will not impose liability on colleges and universities for breaching an alleged duty of care owed to private students. For example, in *Beach v. University of Utah*, a student was injured on a university-sponsored field trip when, intoxicated, she wandered from thecampsite and fell, brought action against the university, her professor, and others. The court rejected the plaintiff's contention that there was a special relationship between the student and the university, and thus held that the university had no general affirmative duty to supervise and protect the student against voluntary intoxication.[1] Similarly, in *Bradshaw v. Rawlings*[2], the court addressed the issue of whether a college may be subject to tort liability for injuries sustained by one of its students involved in an automobile accident when the driver of the car was a fellow student who had become intoxicated at a class picnic. The court held there was no special relationship creating a duty to control the conduct of a student from driving while intoxicated. However, courts will pierce this veil of university immunity from liability in situations involving foreseeable, dangerous activities by students that occur on university property.[3]

In the context of the student-athlete, on the other hand, courts are more likely to impose liability based on a special relationship between the student-athlete and the university characterized by mutual dependence. Colleges depend on student-athletes for economic and non-economic benefits, while student-athletes depend on colleges to provide them with an education, often through athletic scholarships, and an ability to fine-tune their athletic prowess in hopes of advancing from amateur to professional athletics.

II. NATURE OF THE RELATIONSHIP BETWEEN COLLEGES AND "PRIVATE" STUDENTS.

There are three primary theories under which universities may owe a duty to a private student: (1) the *in loco parentis* doctrine; (2) landowner-invitee theory; and (3) negligence (student-college relationship as special and voluntary undertaking).[4] Historically, colleges and universities owed students a duty of protection under the common law *in loco parentis* doctrine.[5] The doctrine developed in the United States in the 1800s and reflected the judicial and social attitudes of the era.[6] College students were viewed as children requiring guidance, and thus the college or university was deemed to stand *in place of the parents*. Therefore, the college or university had the ability to regulate many aspects of its students' lives. With this power to regulate its students' lives arose a common law duty to protect students from harm.[7] Toward the latter half of the twentieth century, however, the relationship between the student and the college student began to shift from a parent-child relationship to a relationship that afforded the student much greater autonomy. The shift was largely the result of the political and social changes of the 1960s, including the Vietnam War, the Civil Rights Movement, and the addition of the Twenty-Sixth Amendment (lowering the age of majority from 21 to 18).[8] As universities conceded more control to the individual student, a shift regarding the universities' common law duties to protect their students from harm arose. Courts began to refuse to use the *in loco parentis* doctrine as a basis to hold universities liable to their students.[9] College students *are now regarded as adults in almost every phase of community life*.[10] Today, the application of the doctrine of *in loco parentis* is limited to certain injuries arising in the high school context.[11]

Students have generally been more successful in bringing a claim under the landowner-invitee theory than under the *in loco parentis* doctrine.[12] *[A] landowner owes a duty of reasonable care under the circumstances to one injured on his property, with foreseeability as a measure of liability.*[13] The duty of universities as landowners has been narrowed in that the injury must have been reasonably foreseeable and must have been sustained on campus.[14] Student-athletes can assert the landlord-invitee theory that *[u]niversities are considered landlords to their student-athletes based on the ownership of campus dormitories and buildings*.[15] However, student-athletes have little protection from the college or university should the injury occur during an off-campus athletic contest. Critics propose that university liability should not turn on whether the injury occurred on-campus or off-campus.[16]

The third theory under which students attempt to recover from universities for their injuries is negligence. Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.[17] To successfully state a claim for negligence, one must establish that the defendant owes a duty to the plaintiff.[18] Whether a defendant owes a duty of care to a plaintiff is a question of law.[19] Negligence law distinguishes between either action and inaction or misfeasance and nonfeasance. A defendant's affirmative action or misfeasance creates a duty.[20] In the absence of affirmative action, liability can still be founded upon several different theories. One way to impose such a duty is to establish a special relationship between the parties. The *Restatement (Second) of Torts* §315 (1965) asserts:

> *There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.*

Apart from establishing a duty owed the plaintiff by the defendant, the plaintiff must establish a breach of that duty, an injury that proximately results from that breach, and damages.[21] The *Restatement (Second) of Torts* § 314(A) (1965) lists special relationships that give rise to a duty to aid or protect:

> *(1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.*
>
> *(2) An innkeeper is under a similar duty to his guests.*
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> *(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.*

Although the *Restatement (Second) of Torts* does not specifically identify the college and student-athlete relationship as special, the list is not exhaustive and does allow for recognition of special relationships other than those listed in §314A.[22] The existence of a special relationship often turns on whether

Continued on Page 20

Continued from Page 19

there is mutual dependence between the parties.[23] In the student-athlete and university context, mutual dependence is often premised on the exchange of the student-athlete's ability to generate economic (and non-economic) benefits for his or her school for the university's promise to provide access to educational opportunities for the student. For example, the University of Michigan's athletic department realized $18.5 million in 1989 revenues.[24] Conversely, universities often provide athletic scholarships to student-athletes the terms of which require scholarship recipients to attain a level of athletic performance in exchange for an access to education.[25]

Plaintiffs can also attempt to establish liability via a voluntary undertaking theory. *Restatement (Second) of Torts* §323 (1965) provides:

> *One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject for liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.*

In *Furek v. University of Delaware*[26], scholarship football player Jeffrey Furek brought suit against the University of Delaware for injuries he sustained from another student in the course of a fraternity hazing activity that occurred on school grounds. The court found the university could be held liable because it knew of the dangers associated with hazing on campus and had attempted to educate its students and fraternities about the school policy of disciplining hazing. These two factors combined satisfied the court in finding that a voluntary undertaking to provide for Furek's safety. This theory of recovery is utilized in the student-athlete context as student-athlete plaintiffs assert liability based upon the college's voluntary undertaking to provide certain services to them.[27]

III. NATURE OF THE RELATIONSHIP BETWEEN COLLEGES AND STUDENT-ATHLETES.

The relationship between colleges and their athletes, however, is different from that of colleges and private students. Unlike their private student counterpart, student-athletes generate *substantial revenue for major college athletic departments*[28] and universities exert substantial control over their student-athletes.[29] Student-athletes increase attendance at sporting events, attract corporate sponsors, generate school enthusiasm, facilitate recruitment, and attract national media exposure.[30] Colleges and universities often control the student-athlete's academic decisions and social activities.[31] Some athletic departments determine the athlete's academic course load and concentration of study.[32] One could argue that while *in loco parentis* is dead as applied to the private student, it exists to a substantial degree for the student-athlete. Participating in a sport as a student-athlete is similar to a full time job in terms of time commitment. Student-athletes devote an extensive amount of time during the season toward practices and athletic contests, and during the off-season they engage in training sessions and workouts.[33] In contrast, colleges and universities afford the private student considerably greater autonomy. Private students are generally able to control their own academic decisions and fully create their own social life.[34]

While student-athletes do generate income for the university through avenues such as ticket sales to sporting games and increases in applications for admission, courts will not recognize an employer-employee relationship between the student-athlete and university.[35] The importance of establishing a special relationship between the student-athlete and the university, and establishing a duty of care owed by the university to the student-athlete, becomes even clearer as courts continue to strike other theories of recovery in tort. Despite the marked policy differences between private students and student-athletes, some courts refuse to impose a duty of care on a university when an athlete becomes injured. Other courts have imposed a heightened duty of care on the university.

IV. COURTS IMPOSING A DUTY OF CARE ON COLLEGES BASED ON A SPECIAL RELATIONSHIP BETWEEN THE COLLEGE AND THE STUDENT-ATHLETE

Several courts have found a special relationship exists between a student-athlete and a university. *Knapp v. Northwestern University*[36] demonstrates that colleges and universities can exercise their duty of care and stop a student with a significant health risk from playing intercollegiate sports.[37] Nicholas Knapp was recruited to play basketball at Northwestern University at the end of his junior year in high school.[38] However, a few weeks into his senior year of high school, Knapp suffered sudden cardiac death during a pick-up basketball game.[39] Paramedics resuscitated him using defibrillation and injection of drugs and subsequently Knapp had a cardioverter-defibrillator implanted into his abdomen as a preventative measure.[40] Northwestern informed Knapp that it would still honor its commitment for a scholarship, and Knapp signed a national letter of intent to attend Northwestern. Two months after enrolling at Northwestern, Northwestern's head team physician rendered Knapp ineligible to participate in the men's basketball program that year. At the close of the season, Northwestern and the Big Ten Conference determined Knapp permanently medically ineligible to play intercollegiate basketball at Northwestern.

Knapp filed suit against Northwestern, and the district court found Knapp medically eligible to participate in Northwestern's basketball program.[41] The court determined that (1) intercollegiate basketball constituted a "major life activity" under Section 504 of the Rehabilitation Act of 1973; (2) the university's exclusion of Knapp from intercollegiate basketball was a substantial limitation on a major life activity; and (3) Knapp was *otherwise qualified to play basketball at the Northwestern*.

The Seventh Circuit subsequently reversed the district court's decision and remanded the case.[42] The court refused to find Knapp *disabled* under the Rehabilitation Act, declaring "playing intercollegiate basketball obviously is not in and of itself a major life activity".[43] The court further noted that even if he were disabled under the Act, he would still come up short because he is not "otherwise qualified" to play intercollegiate basketball at Northwestern.[44] Thus, in reversing the district court and leaving the decision on Knapp's eligibility in Northwestern's sole discretion, the Seventh Circuit in effect noted that "colleges and universities can exercise a duty of care and protect their student-athletes against foreseeable injuries"[45] and recognized the existence of a special relationship between the student athlete and the university.

In *Kleinknecht v. Gettysburg College*[46], the parents of a college lacrosse player who suffered a fatal heart attack during practice brought a negligence suit against the college. The court determined that the college owed a duty of care based on a special relationship between the college and Kleinknecht in his capacity as an intercollegiate athlete engaged in a school-sponsored activity for which he had been recruited.

Gettysburg College recruited Drew Kleinknecht for its Division III intercollegiate lacrosse team.[47] At 3:15 p.m., Drew was participating in a *six on six* drill in a fall practice held by two coaches when he suffered a cardiac arrest. No trainers or student trainers were present and the nearest telephone was inside a training room roughly 200-250 yards away.[48] Teammates testified that Drew simply stepped away from the play and dropped to the ground, and that no person or object struck Drew prior to his collapse. The team captain, Polizzotti, ran toward the stadium, which required scaling a chain link fence, and secured the help of student trainer Traci Moore. Moore ran toward the practice field by foot until securing a ride from a passing car.[49] Polizzotti continued into the training room where he notified the other student trainers of the incident and one of them phoned Plank Gymnasium to inform the head trainer, Donolli, about the emergency. Teammate Dave Kerney ran toward the College Union Building and had someone telephone for an ambulance. Upon arrival at the scene, Moore did not attempt CPR or

Continued on Page 21

Continued from Page 20

any other first aid technique as Drew was engaged in labored breathing. As she observed him, his complexion changed. Donolli arrived on the scene and saw that Drew was not breathing. At approximately 4:15 p.m., Donolli began CPR with the help of student who was a certified emergency medical technician and had arrived on the scene by chance. He was subsequently placed in an ambulance, but despite various resuscitation efforts he could not be revived. He was pronounced dead at 4:58 p.m.[50]

Kleinknecht's parents sued Gettysburg College, alleging the college's negligence and that of its agents was the legal cause of their son's death after he suffered cardiac arrest. The district court granted summary judgment in favor of the College.[51] The court determined the College had no duty to anticipate and guard against the chance of a fatal arrhythmia in a young and healthy athlete.[52] The court further held that actions taken by school employees following Drew's collapse were reasonable, and thus the college did not negligently breach any duty it may have owed to Drew.[53] The court found that the college owed no special duty of care to Drew and thus it was unnecessary to reach the question of whether the immunity provided by Pennsylvania's Good Samaritan law applied to any one of the defendants, but if the immunity law were applicable both trainer Traci Moore and the college would be shielded from liability.[54]

On appeal, the Klenknechts presented three arguments: (1) the district court erred in determining that the college had no legal duty to implement preventative measures assuring prompt assistance and treatment in the event one of its student athletes suffered cardiac arrest while engaged in school-sponsored intercollegiate athletic activity; (2) the district court erred in determining that the actions of school employees following Drew's collapse were reasonable and that the college therefore did not breach any duty of care; and (3) the district court erred in determining that both Traci Moore and the college were entitled immunity under the Pennsylvania Good Samaritan Act.[55] The Klienknechts asserted three different legal theories upon which they predicated the college's duty to establish preventative measures capable of providing treatment to student athletes in the event of a medical emergency such as Drew's cardiac arrest: (1) existence of a special relationship between the college and its student athletes; (2) foreseeability that a student athlete may suffer cardiac arrest while engaged in athletic activity; and (3) public policy.[56]

The Kleinknechts relied on *Hanson v. Kynast*,[57] where the plaintiff, a recruited club lacrosse player, was seriously injured by his own teammate while playing in a game against another college. The plaintiff alleged the university breached its legal duty to have an ambulance present during the game. The Ohio Court of Appeals determined *[i]t is a question of fact for the jury to determine whether or not appellee University acted reasonably in failing to have an ambulance present at the field or to provide quick access to the field in the event of an emergency.*[58] As the court in *Kleinknecht* later noted, by directing the issue to be submitted to the jury, the court implicitly held that the University owed a duty of care to the plaintiff.[59]

The Third Circuit in *Kleinknecht* relied on *Hanson* to determine that a duty of care to ensure the health of athletes exists, thus reversing and remanding for further findings based on the determination that the college owed a duty to its student-athletes based on the existence of a special relationship.[60] The court limited its holding by noting the college owed Drew a duty of care in his capacity as an intercollegiate athlete engaged in school-sponsored intercollegiate activity for which he had been recruited.[61] The court thus recognized a limited duty of care in favor of student-athletes participating in intercollegiate athletics. The first limitation is that the duty of care exists only for injuries sustained by student-athletes during participation in the sport for which they were recruited. The second limitation is that a duty can only be imposed on the university when it is reasonably foreseeable. Thus, the court limited its holding to a small group of students.[62]

Another case finding a special relationship between a student-athlete and a university is *Pinson v. State of Tennessee*. The court determined that *a duty arose from the fact that as a college athlete, Pinson enjoyed a 'special relationship' with UTM*.[63] There was no mention of the necessity of a recruited college athlete; therefore, some commentators suggest that after *Pinson*, *Kleinknecht* now *stands for the proposition that a special relationship exists between the university and an intercollegiate athlete, such that the university has a duty to the athlete to provide appropriate medical treatment for those athletes injured during regularly scheduled games or practices.*[64]

In *Davidson v. University of North Carolina at Chapel Hill*[65], the Court of Appeals of North Carolina imposed a heightened duty on the university based on a special relationship between the university and its student athlete and a voluntary undertaking of the university in providing for the safety of its students. The plaintiff, Davidson, was a sophomore at UNC Chapel Hill and a member of the school's junior varsity cheerleading squad. Davidson was injured while performing in the top position of a *two-one-chair* pyramid. She fell thirteen feet onto the hardwood floor of Carmichael Auditorium, struck her head, and sustained permanent brain damage and serious bodily injury. No mats were being used at the time.[66] At the time, UNC did not provide its junior varsity or varsity cheerleading teams with a coach.[67] Additionally, the cheerleaders taught themselves stunts and had received no safety training or instruction from the university or otherwise. UNC had not adopted guidelines regarding the experience required to join either cheerleading squad, the skill level required to perform particular stunts, or safety in general.[68] Unbeknownst to the cheerleading squad, there had been considerable concern expressed by members of the UNC faculty and staff regarding safety of cheerleading stunts prior to Davidson's accident.[69] Moreover, the ACC had banned cheerleaders form engaging in pyramids *more than two high*.[70]

The court found that UNC provided the squad members with school uniforms, transportation to away games and other events, and access to university facilities in equipment.[71] Furthermore, a student's participation on the squad allowed the student to opt out of one hour of physical education credit.[72] Davidson testified that the cheerleaders were considered representatives of the school and that they had to abide by certain standards of conduct, such as maintaining a minimum GPA and refraining from drinking in public.[73]

The court framed the issue as *whether a university has an affirmative duty of care toward a student-athlete who is a member of a school-sponsored, intercollegiate team*.[74] As this case involved an omission, the burden rested with Davidson to establish a *special relationship* between the parties.[75] The court noted that special relationships are most often premised upon the existence of mutual dependence.[76] The court concluded a special relationship existed based on mutual dependence and control, noting UNC depended upon the cheerleading program for a variety of benefits, including cheering at various games, representing UNC at a trade show, and entertaining before games. Moreover, the cheerleaders received significant benefits from the school, such as uniforms, transportation, use of facilities and equipment, and the opportunity to satisfy an hour of school credit.[77] The court noted that UNC exerted substantial control over the cheerleaders by requiring them to maintain a minimum GPA and refrain from drinking alcohol in public. The court further found that UNC's voluntary undertaking to advise and educate the cheerleaders regarding safety established a duty of care on the university's behalf owed to Davidson. The court based this conclusion on the findings that the faculty and staff had vocalized concern about the safety of stunts and the fact that the ACC had banned pyramids *more than two high*.

Thus, courts have found colleges and universities liable to their student-athletes in negligence under the special relationship theory and the voluntary undertaking theory. Courts often premise this finding of liability on a mutual dependence of the parties, considering factors such as whether the athlete was provided with an athletic scholarship and/or whether the university recruited the athlete.

Continued on Page 22

Continued from Page 21

V. COURTS REFUSING TO IMPOSE A DUTY OF CARE ON COLLEGES BASED ON A SPECIAL RELATIONSHIP BETWEEN THE COLLEGE AND THE STUDENT-ATHLETE

In *Orr v. Brigham Young University*,[78] on the university's motion for summary judgment, the court held that the university had no special relationship with a football player that would impose duties on it beyond those duties owed to other students. Vernon Orr was a football player at Brigham Young University from the fall of 1988 until April 1990 and played on the varsity team for two football seasons.[79] In August of 1988 he began experiencing pain in his back during a practice drill. He was examined by the university's associate head trainer who concluded Orr had a probable SI joint immobilization, which he began treating with heat and massage.[80] Prior to practice the next day, Orr discussed his injury and pain with his position coach who told him to see if it would loosen up during practice. Orr's back felt progressively better during practice. Orr was not injured or impaired for any of the games in 1988 but did have back pain during the remainder of the season.[81]

Thereafter, in the 1989 season, Orr complained of back pain at half-time and was examined by two orthopedic specialists. The doctors found no signs of disc impairment but located the *trigger point* of a muscle spasm and injected anesthetic at the trigger point to relax the spasm. Orr returned to play with the instruction that he was to leave the game if the pain increased or changed. Orr was instructed to report to the medical clinic in the athletic training room after the game but failed to do so.[82] Two weeks later, Orr suffered a back injury. Further examination revealed three herniated discs. Orr underwent surgical repair of the herniated discs.

Orr filed suit in the district court of Utah alleging negligence in connection with the university's response to his back injury.[83] The court, relying on *Beach v. University of Utah*,[84] concluded that no special duties were owed to a student-athlete on the basis of a special relationship with the university by virtue of his football player status.[85] The court found no difference between a student-athlete's relationship with a university and a private student's relationship with a university which would justify the conclusion that a student-athlete has a special relationship when the private student does not.[86] The court found that any distinctions between a collegiate football player and an average college student are more of a contractual nature than a custodial nature mandating special duties of care and protection beyond those traditionally recognized under a simple negligence theory of liability.[87] The court noted the athlete's choice to participate in a sport is not coerced. The court did not address the fact that Orr was recruited to play collegiate football for Brigham Young University in conducting its analysis of whether a special relationship existed between the university and Orr.[88]

In *Fisher v. Northwestern State University*,[89] Northwestern cheerleader Jennifer Fisher was injured while attempting to perform a partner stunt known as a cupie. Jennifer argued that Northwestern should have provided adult supervision of cheerleading and stunting, and that because of this failure to provide adult supervision she and her partner were permitted to attempt a stunt beyond their skill level.[90] The court held the university owed no duty to its cheerleaders to provide adult supervision and monitor their activities. In refusing to impose a duty of supervision upon the university, the court noted participation on the cheerleading squad was on a voluntary basis, the squad's two captains had attended camp where they learned about safety in performing stunts, and in 1990 only three of the fourteen universities in Louisiana had coaches for their cheerleading squads.[91] The court emphasized the policy choice highlighted by the court in *Fox v. Board of Supervisors of Louisiana State University*[92] that part of the educational experience is responsibility gained through the autonomy of operating a club without the administration or faculty second-guessing every decision.[93]

VI. CLUB AND INTRAMURAL SPORTS

Courts generally will not find a special relationship between a university and a club student-athlete. Furthermore, courts typically will not find a special relationship between a university and an intramural player. These two categories of students are often grouped together, but there are marked differences. Like intramural participants, universities typically do not award club athletes scholarships and most are not actively recruited by their schools for the schools' own benefit.[94] In *Fox*[95], *supra*, the court refused to find a special relationship between the university and the plaintiff, a club athlete. The court noted that although L.S.U. required the club to submit its charter to the school for approval, required the club to have a faculty advisor, provided the club with some financial assistance, limited office space and equipment, and allowed the use of the parade grounds for tournament, these actions did not automatically obligate L.S.U. to scrutinize all of the club activities.[96] However, in *Fox*, the club athlete was not recruited by the university. Moreover, L.S.U allowed students to run the club sports.

However, some club athletes are actively recruited by their colleges or universities.[97] A presumption thus arises that the college or university anticipates receipt of some benefit from actively recruiting such athletes. Reason dictates that when a college actively recruits a club athlete it is more involved in and maintains more control over its club sports. Also, unlike in *Fox*, where LSU club sports were student-run, some universities provide club teams with a coach, game jersey, and transportation to road games.[98] The same presumption is not present for intramural or fraternity athletic contests, because the athletes in such contests are not solicited to play by the college or university.

VII. A PROPOSED NEW TEST

A proper distinction was drawn in *Kleinknecht* between students injured while participating in the sport for which he was recruited and a student injured while pursuing his private interests.[99] Therefore, *Pinson*, *supra*, should not be read as repealing the requirement of recruitment.[100] The requirement of recruitment serves a bold purpose in satisfying the mutual dependence necessary to propel the relationship into the special category. If a university recruits a student, it is manifest that its ambition in doing so stems from serving the university's own self-interests in creating a successful, well-recognized athletic program.

However, an improper line was drawn in *Kleinknecht* when the court noted that the student was participating in an *intercollegiate* sport for which he was recruited. The imposition of a duty of care upon colleges and universities should not turn on whether a sport is intercollegiate or club, but instead should turn on whether the university actively recruited the athlete for its own benefit. Colleges and universities recruit athletes likely anticipating their skill at the particular sport *would bring favorable attention and so aid the [c]ollege in attracting other students.*[101] If the university actively recruited the athlete for its own benefit, it follows that a mutual dependence arises and the athlete should be able to seek redress from the university in court for its injuries. The inclusion of recruited club athletes clarifies the discrepancy between the *Kleinknecht* and *Davidson* rulings. *Davidson* was overbroad in that it extends the special relationship to those athletes that were not recruited, such as walk-ons. Thus, the *Davidson* holding extended the duty of colleges and universities beyond the limitations contemplated in *Kleinknecht*.[102]

In *Kleinknecht*, the court noted that there was a duty based on a special relationship between Drew Kleinknecht and the university. However, the court related that such a conclusion merely defined the class of persons to whom the duty extends. It did not determine the nature of the duty or demands it made on the college.[103] This reservation may have been an attempt to limit university liability. Thus, commentators may argue that extending university liability to recruited club athletes may open the floodgates of university liability; however, this fails to recognize both the underlying considerations

Continued on Page 23

Continued from Page 22

making this sound policy and the fact that it is within judicial discretion to determine the nature of the duty or demands made on the college.

When analyzing the factors courts look at when determining whether a student-athlete could hold the university liable in tort, it only clarifies how sound a policy it is to create a bright-line rule establishing the determinative factor at recruitment. For example, financial aid or scholarships based on athletic participation should not be the determinative factor because courts would not impose a duty of care based on a special relationship between a university and a private student who was awarded financial aid based on academic achievement. Additionally, active recruitment establishes a closer relationship than the mere acceptance by an individual of an athletic scholarship. This note does not suggest that the finding of a special relationship should be limited to athletes recruited by colleges or universities while participating in the college or university sport for which they were recruited. It does suggest, however, that where intercollegiate or club athletes are recruited by colleges and universities, and the athletes are injured while participating in the sport for which they were recruited, a special relationship should always be found to exist.

1 726 P.2d 413 (Utah 1986).
2 612 F.2d 135 (3rd Cir. 1979).
3 *Furek v. University of Delaware*, 594 A.2d 506 (Del. 1991).
4 Michelle D. McGirt, *Do Universities Have a Special Duty of Care to Protect Student-Athletes from Injury?* 6 Vill. Sports & Ent. L.J. 219 at 221.
5 *Id.* at 222-23.
6 Edward Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*. 2 Sports Law. J. 25 at 29 (1995).
7 *Id.*
8 Whang, *supra* note 6, at 30.
9 *Id.*
10 *See Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3rd Cir. 1979), *cert. denied*, 446 U.S. 909 (1980).
11 *Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982).
12 McGirt, *supra* note 4, at 223.
13 W. Champion, Fundamentals of Sports Law, §1.3 at 11.
14 McGirt, *supra* note 4, at 223.
15 Nicole Somers, *College and University Liability for the Dangerous yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics*, 33 J.C. & U.L. 653 (2007).
16 Andrew Rhim, *The Special Relationship Between Student-Athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-Athletes*, 7 Marq. Sports L. J. 329, 344 (1996).
17 Restatement (Second) of Torts § 283 (1965).
18 Champion, *supra* note 13, at 1.
19 *See* Restatement (Second) of Torts, §328(B) (1965) (court determines whether facts give rise to any legal duty on the part of the defendant).
20 James J. Hefferan, Jr., *Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care owed by Universities to their Student-Athletes*, 37 Wake Forest L. Rev. 589 at 596 (2002).
21 Champion, *supra* note 13, at 1.
22 Rhim, *supra* note 16, at 339.
23 *See University of Denver v. Whitlock*, 744 P.2d 54, 59-61 (Colo. 1987) (stating mutual dependence underlies the recognition of a duty of care involving special relationships).
24 *See* Shannon Brownlee & Nancy S. Linnon, The Myth of the Student-Athlete, U.S. News and World Report, Jan 8, 1990, at 52.
25 Rhim, *supra* note 16, at 340.
26 594 A.2d 506 (Del. 1991).
27 *See Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1366 (3rd Cir. 1993), *reh'g denied*, 1993 U.S. App. LEXIS 9969 (3rd Cir. 1993).
28 *Id.* at 329.
29 McGirt, *supra* note 4, at 222.
30 *Id.*
31 *Id.*
32 Rhim, *supra* note 16, at 338.
33 Hefferan, *supra* note 20, at 601.
34 Rhim, *supra* note 16, at 338.
35 Rhim, *supra* note 16, at 329; b *Coleman v. Western Michigan University*, 336 N.W.2d 224 (Mich. Ct. App. 1983).
36 *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1976).
37 Rhim, *supra* note 16, at 345.
38 *Knapp*, 101 F.3d at 476.
39 *Id.*
40 *Id.*
41 *Knapp v. Northwestern Univ.*, 938 F.Supp. 508 (N.D. Ill. 1996)
42 *Knapp v. Northwestern Univ.*, 101 F.3d at 485.
43 *Id.* at 480.
44 *Id.* at 482.
45 Rhim, *supra* note 16, at 347.
46 989 F.2d 1360 (3rd Cir. 1993).
47 *Id.* at 1363.
48 *Id.*
49 *Id.* at 1364.
50 *Id.*
51 *Klenknecht v. Gettysburg College*, 786 F.Supp. 449 (M.D.Pa. 1992).
52 *Id.* at 454.
53 *Id.* at 456.
54 *Id.* at 457.
55 *Kleinknecht*, 989 F.2d at 1365.
56 *Id.* at 1366.
57 494 N.E.2d 1091 (Ohio 1986).
58 *Id.*
59 Hefferan, *supra* note 20, at 615.
60 McGirt, *supra* note 4, at 232.
61 *Kleinknecht*, 989 F.2d at 1368.
62 Rhim, *supra* note 16, at 344.
63 *Pinson v. Tennessee*, 1995 Tenn. App. LEXIS 807 (1995).
64 Walter Champion, *The Evolution of a Standard of Care for Injured College Athletes: A Review of a Standard of Kleinknecht and Progeny*, 1 Va. J. Sports & Law 290.
65 543 S.E.2d 920 (N.C. Ct. App. 2001).
66 *Id.* at 546.
67 *Id.* at 547
68 *Id.* at 547-48.
69 *Id.* at 548.
70 *Id.* at 549.
71 *Id.* at 548.
72 *Id.*
73 *Id.*
74 *Id.* at 553.
75 *Id.* at 554.
76 *Id.* at 555.
77 *Id.*
78 *Orr v. Brigham Young University*, 960 F. Supp. 1522 (Dist. Ct. Utah 1994).
79 *Id.* at 1524.
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 726 P.2d 413 (Utah 1986) (finding no special relationship between a private student injured on a university-sponsored field trip and the university imposing a duty to supervise and protect the student against voluntary intoxication).
85 *Orr*, 960 F.Supp. at 1529.
86 *Id.* at 1528.
87 *Id.*
88 *Id.*
89 624 So.2d 1308 (La. Ct. App. 1993).
90 *Id.* at 1309.
91 *Id.* at 1311.
92 576 So.2d 978 (La. 1991).
93 *Fisher*, 624 So.2d at 1311.
94 Hefferan, *supra* note 20, at 613.
95 576 So.2d 978 (La. 1991).
96 *Fisher*, 624 So.2d at 1310-11 (further noting the court in *Fox* stated the task of supervising every group, club, or organization at L.S.U. would involve countless man hours and a large budget).
97 *Hanson v. Kynast*, 494 N.E.2d 1091 (Ohio 1986).
98 *Id.* at 1094.
99 *Kleinknecht*, 989 F.2d at 1368.
100 Champion, *supra* note 64, at 306, (arguing the most likely candidate for 'son of Kleinknecht' is *Pinson v. Tennessee*", thus effectively eliminating the necessity of a *recruited* college athlete).
101 *Id.*
102 Hefferan, *supra* note 20, at 612.
103 *Kleinknecht*, 989 F.2d at 1367-68.

2008 ENTERTAINMENT LAW INSTITUTE

Steve Winogradsky, Kathryn Wagner of NMPA, Susan Chertkof of RIAA, and Kerri Howland-Kruse of BMI discuss music royalties in the digital space.

Attorney and author Don Passman accepts the 2008 Texas Star Award from Mike Tolleson, Director of the Entertainment Law Institute.

SAVE THE DATE

OCTOBER 1-2, 2009

THE 19TH ANNUAL ENTERTAINMENT LAW INSTITUTE

Hyatt Regency Hotel • Austin, Texas

This is the same weekend as the AUSTIN CITY LIMITS MUSIC FESTIVAL which starts on Friday.

RECENT CASES OF INTEREST

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

CHEERLEADING IS A SPORT!!!

On December 17, 2004, varsity cheerleader Brittany Noffke was practicing a stunt with her squad before a basketball game. The stunt being performed on this occasion is called a "post-to-hands" stunt, which requires a "post," a "base," and a "flyer." A "post" helps the "flyer" get into position on the shoulders of the "base," and supports the flyer's weight until she is securely on the base's shoulders. Brittany was the position of flyer and Kevin Bakke was her post. On that day, Lady Luck was not in Noffke's favor for three reasons. First and most significantly, once Brittany was positioned on the base and Kevin let go of her, he moved to the front of the base instead of going behind the base to catch her. When Brittany fell backward, Kevin was not there to catch her fall. Secondly, this stunt was performed without any mats. When Brittany fell backwards, instead of being caught, her head hit the tile floor. Lastly, Brittany's cheerleading coach was approximately ten feet away working with another group of cheerleaders when the accident occurred. As a result of the accident, Brittany brought suit against Kevin for negligently failing to properly spot her. She also sued the school district alleging that the school's cheerleading coach was negligent by failing to provide a second spotter and failing to require the use of mats.

The case made its way to the Wisconsin Supreme Court case because it involved the interpretation of the state's immunity statute, Wis. Stat. 895.525(4m)(a), which provides immunity from negligence actions for participants in a "recreational activity that involves physical contact between persons in a sport involving amateur teams." Noffke ex rel. Swenson v. Bakke, 760 N.W.2d 156, 161 (Wis. 2009). The statute includes a non-exhaustive list of recreational activities that "do not involve physical contact," including dancing but not expressly mentioning cheerleading. Therefore, to obtain the benefit of immunity, Kevin Bakke was required to have participated in a recreational activity that included physical contact between persons and the persons must have been participating in a sport that involved amateur teams. The Court needed to address the controversial question that has been debated around high school locker rooms and stadium sidelines for ages: Is cheerleading a sport? The Court boldly answered, "Cheerleading is a sport because a sport is an activity involving physical exertion and skill that is governed by a set of rules or customs, and cheerleaders are on amateur teams because a team is a group organized to work together and cheerleaders, as provided in the spirit rules, are a group dedicated to leading fan participation and taking part in competitions." Id. at 162. The Court held that cheerleading was a sport because it involves "physical contact between persons" by utilizing the American Dictionary to define "physical" and "contact." The Court found that some of the stunts performed by cheerleaders produce a forceful interaction between the participants, and concluded that cheerleading was in fact a recreational activity that includes physical contact between persons. Therefore, the Court held that immunity applied and that cheerleaders cannot bring a negligence action because they participate in a recreational activity that includes physical contact between persons in a sport involving amateur teams. To overcome the immunity for negligence, Brittany would have needed to show recklessness and the Court concluded, as a matter of law, that the facts did not support finding that Kevin Bakke was reckless. Finally, the Court found that "the school district was immune because no ministerial duty was violated by the cheerleading coach and there was no known and compelling danger that gave rise to a ministerial duty." Id. at 171.

By: Brad Russell

SUBMIT YOUR ARTICLES

The editors of the *Texas Entertainment and Sports Law Journal ("Journal")* are soliciting articles on a sports or entertainment law topic for publication in the TESLAW Journal.

All submitted articles will be considered for publication in the *Journal*. Although all submitted articles may not be published, we may choose to publish more than one article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All articles should be submitted to the editor and conform to the following general guidelines. Articles submitted for publication in the Spring 2009 issue of the journal must be received no later than January 1, 2009.

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.

If you have any questions concerning the *Journal*, please email Sylvester R, Jaime, Editor, Texas Entertainment & Sports Law Journal, at srjaimelaw@comcast.net.

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@comcast.net …

RECENT SPORTS AND ENTERTAINMENT LAW PUBLICATIONS

Compiled by Monica Ortale, Faculty Services & Reference Librarian
The Fred Parks Law Library, South Texas College of Law

SPORTS LAW BIBLIOGRAPHY:

CONSTITUTIONAL LAW

Alison E. Price. Comment. *Understanding the Free Speech Rights of Public School Coaches*, 18 Seton Hall J. Sports & Ent. L. 209 (2008).

CRIMINAL LAW

Katarzyna Homenda. Note. *The Court Is A Fan Of Fans*: Johnston v. Tampa Sports Authority *Correctly Refused To Extend The Special Needs Doctrine To Pat-Downs At Raymond James Stadium*, 57 DePaul L. Rev. 755 (2008).

Clifford Stott, et al. *Tackling Football Hooliganism: A Quantitative Study Of Public Order, Policing and Crowd Psychology*, 14 Psychol. Pub. Pol'y & L. 115 (2008).

Benjamin C. Thompson. Note. *Personal Foul...15 Years in Jail: Sports' Problem with Excessive Violence and the Severe Punishment Solution*, 76 UMKC L. Rev. 769 (2008).

David C. Weiss. Student Article. *How Terrell Owens, Collective Bargaining, And Forfeiture Restrictions Created A Moral Hazard That Caused The NFL Crime Wave And What It Meant For Michael Vick*, 15 Sports Law. J. 279 (2008).

DISCRIMINATION

N. Jeremi Duru. *Exploring Jethroe's Injustice: The Impact of an Ex-Ballplayer's Legal Quest for a Pension on the Movement for Restorative Racial Justice*, 76 U. Cin. L. Rev. 793 (2008).

Hannah Gordon. Student Article. *The Robinson Rule: Models for Addressing Race Discrimination in the Hiring Of NCAA Head Football Coaches*, 15 Sports Law. J. 1 (2008).

GENDER

Deborah L. Brake, *The Invisible Pregnant Athlete And The Promise of Title IX*, 31 Harv. J.L. & Gender 323 (2008).

Deborah L. Rhode & Christopher J. Walker. *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 Stan. J. C.R. & C.L. 1 (2008).

LABOR

Walter T. Champion, Jr. *Looking Back To* Mackey v. NFL *to Revive the Non-Statutory Labor Exemption in Professional Sports*, 18 Seton Hall J. Sports & Ent. L. 85 (2008).

Adam B. Marks. Note. *Personnel Foul On The National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members by Not Fighting the Enactment of the Personal Conduct Policy*, 40 Conn. L. Rev. 1581 (2008).

MISCELLANEOUS

Victoria J. Siesta. Note. *Out At Home: Challenging The United States-Japanese Player Contract Agreement Under Japanese Law*, 33 Brook. J. Int'l L. 1069 (2008).

PROFESSIONAL SPORTS

Ryan T. Dryer. Comment. *Beyond The Box Score: A Look At Collective Bargaining Agreements In Professional Sports And Their Effect On Competition*, 2008 J. Disp. Resol. 267.

Avi Sinensky. Comment. *Not That There Is Anything Wrong With That: The Practical And Legal Implications Of A Homosexual Professional Athlete*, 10 U. Pa. J. Bus. & Emp. L. 1009 (2008).

PROPERTY

Aaron Mensh. Note. "*Upon Further Review*": *Why A Sports Stadium Can Justify An Eminent Domain Taking*, 40 Conn. L. Rev. 1623 (2008).

SYMPOSIA

UMKC Sports Law Symposium: Emerging Legal Issues Affecting Amateur & Professional Sports, 76 UMKC L. Rev. 567 (2008).

ENTERTAINMENT LAW BIBLIOGRAPHY:

ART

Randall P. Bezanson. *Performing Art:* National Endowment for the Arts v. Finley, 60 Fed. Comm. L.J. 535 (2008).

Emily J. Follas. Note."*It Belongs In A Museum*": *Appropriate Donor Incentives for Fractional Gifts of Art*, 83 Notre Dame L. Rev. 1779 (2008).

Joseph C. Gioconda. *Can Intellectual Property Laws Stem the Rising Tide of Art Forgeries?* 31 Hastings Comm. & Ent. L.J. 4 (2008).

Continued on Page 27

Continued from Page 26

David Keane. *Cartoon Violence and Freedom of Expression*, 30 Hum. Rts. Q. 845 (2008).

Mary Ellen O'Connell. *Beyond Wealth: Stories Of Art, War, and Greed*, 59 Ala. L. Rev. 1075 (2008).

CONTRACTS

Ryan Kriegshauser. Comment. *The Shot Heard Around Virtual Worlds: The Emergence And Future Of Unconscionability In Agreements Relating To Property In Virtual Worlds*, 76 UMKC L. Rev. 1077 (2008).

COPYRIGHT

Richard J. Hawkins. Comment. *Substantially Modifying the Visual Artists Rights Act: a Copyright Proposal For Interpreting The Act's Prejudicial Modification Clause*, 55 UCLA L. Rev. 1437 (2008).

Christina J. Hayes. Note. *Changing the Rules of the Game: How Video Game Publishers Are Embracing User-Generated Derivative Works*, 21 Harv. J.L. & Tech. 567 (2008).

Britton Payne. *Copyright Your Life: The Implications Of Works Made For Hire And Termination Of Transfer In Non-Scripted Entertainment*, 15 U. Balt. Intell. Prop. L.J. 171 (2007).

Meghan Ruesch. Note. *Creating Culture: Protection of Traditional Cultural Expressions and Folklore and the Impact on Creation and Innovation in the Marketplace of Ideas*, 35 Syracuse J. Int'l L. & Com. 369 (2008).

CRIMINAL

Andrea Vanina Arias. Comment. *Life, Liberty, and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods*, 57 Emory L.J. 1301 (2008).

Terri Day. Bumfights *and Copycat Crimes...Connecting the Dots: Negligent Publication or Protected Speech?* 37 Stetson L. Rev. 825 (2008).

INTERNATIONAL

Sarah K. Mann. Student Article. *What's A Survivor to Do? An Inquiry into Various Options and Outcomes for Individuals Seeking Recovery of Nazi-Looted Art*, 5 Loy. U. Chi. Int'l L. Rev. 191 (2008).

MISCELLANEOUS

Christine A. Corcos. *George Carlin, Constitutional Law Scholar*, 37 Stetson L. Rev. 899 (2008).

Sora Y. Han. *The Conditional Logic of Strict Scrutiny: Race and Sexuality in Constitutional Law*, 4 Stan. J. C.R. & C.L. 77 (2008).

Ashley Kelly. Note. *Bargaining Power On Broadway: Why Congress Should Pass The Playwrights Licensing Antitrust Initiative Act In The Era Of Hollywood On Broadway*, 16 J.L. & Pol'y 877 (2008).

MUSIC

Neil Conley. *The Future of Licensing Music Online: The Role of Collective Rights Organizations and the Effect of Territoriality*, 25 J. Marshall J. Computer & Info. L. 409 (2008).

PROFESSIONAL RESPONSIBILITY

Kimberly L. Alderman. *The Ethical Trade in Cultural Property: Ethics and Law in the Antiquity Auction Industry*, 14 ILSA J. Int'l & Comp. L. 549 (2008).

TAX

Nadine Klass, et al. *Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law Concerning The Commission's Plans To Prolong The Protection Period For Performing Artists And Sound Recordings*, 39 IIC 586 (2008).

David J. Mack. Comment. *Itax: An Analysis of the Laws and Policies behind the Taxation of Property Transactions in a Virtual World*, 60 Admin. L. Rev. 749 (2008).

TORTS

Artistic Freedom and Personality Rights, 39 IIC 606 (2008).

Ansgar Ohly, Agnès Lucas-Schloetter & Huw Beverly-Smith. *Artistic Freedom versus Privacy--A Delicate Balance. The* Ersa *Case Analyzed From A Comparative Law Perspective*, 39 IIC 526 (2008).

Matthew R. Porio. Comment. *Off-Guard and Online: The Unwitting Video Stars Of the Web and the Public Disclosure Tort*, 18 Seton Hall J. Sports & Ent. L. 339 (2008).

ENTERTAINMENT & SPORTS LAW SECTION
of the STATE BAR of TEXAS
MEMBERSHIP APPLICATION

The Entertainment & Sports Law Section of the State Bar of Texas was formed in 1989 and currently has nearly 600 members. The Section is directed at lawyers who devote a portion of their practice to entertainment and/or sports law and seeks to educate its members on recent developments in entertainment and sports law. Membership in the Section is also available to non-lawyers who have an interest in entertainment and sports law.

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

To join the Entertainment & Sports Law Section, complete the information below and forward it with a check in the amount of $30.00, made payable to the Entertainment & Sports Law Section, ATTN: TESLAW Treasurer, P.O. Box 12487, Capitol Station, Austin, Texas 78711. You can also go to www.texasbar.com, click on "Sections and Committees", click on "Sections", click on "Join a Section Online" - It's as easy as 1, 2, 3. If these methods do not work for you, please call the State Bar Sections Department at 1-800-204-222 ext. 1420 to register by phone or fax.

NAME: _____

ADDRESS: _____

_____

_____

BAR CARD NO. _____

STATE BAR OF TEXAS
P. O. Box 12487, Capitol Station
Austin, Texas 78711

NON PROFIT ORGANIZATION
U. S. POSTAGE
PAID
PERMIT NO. 1804
AUSTIN, TEXAS