Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

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CHAIR'S REPORT

Dear Entertainment and Sports Law Section Member:

The Officers and Council Members of TESLAW are excited to invite you to the first-ever TESLAW reception at SXSW. The event will be held from 4:00 p.m. until 6:00 p.m. on Thursday afternoon, March 17, 2011, at the Melting Pot. The Melting Pot is located conveniently at the corner of 3rd and Trinity… right across the street from the Convention Center. It will be an excellent opportunity to network with fellow entertainment attorneys, music -business professionals, and artists. Even if you are not attending SXSW, as a member of TESLAW you are invited to the reception.

Prior to the reception there will also be a TESLAW Council Meeting at the Texas Law Center, 1414 Colorado Street, from noon to 2:00 p.m. Our topics of discussion will include plans for our council meeting, membership meeting, and CLE Program during the State Bar of Texas Convention in San Antonio this June. Any TESLAW member is welcome.

There are excellent opportunities to serve and get involved with committees and planning the future of the section. Some of the areas in which you can serve are legislative (state and federal), merchandising, website design, social networking, activity planning, marketing and more. If you are also interested in the possibility of serving as a Council Member, please do not hesitate to contact one of the Officers or Council Members. You will find our contact information by clicking on the "About" tab on our web page and then selecting "TESLAW Officers."

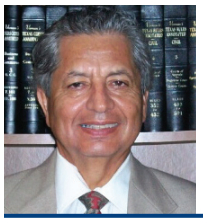
Our goal is to keep Texas lawyers at the forefront of entertainment and sports law practice.

Sincerely,

Don Valdez
Chair, TESLAW

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 Kenneth W. Pajak at ken@bannerot.com or the editor at srjaimelaw@clear.net …



FOR THE LEGAL RECORD ...

Sylvester R. Jaime, Editor

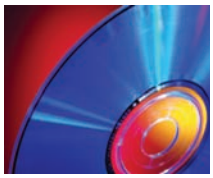
The Section's Electronic Journal can be found on the Section's Website at **www.teslaw.org**. To get your copy, go to the Section's website and download the Journal for your leisure reading. Feel free to send your comments to your editor and they will be passed on to the Council.

Speaking of your Editor, times change and with the coming of new technology, it is a good time for a change in editorship of your Journal. Thus, I will be stepping down as editor of your Journal.

Having served as Editor since the Volume 5 No. 1 1995 Winter Issue to Volume 20 No. 2, 2011, I have had the privilege of helping provide the Section members with 38 issues of the Journal. Prior to serving, the Journal's editor was Ronald Kaiser, who served as Editor for Volume 1 No. 1 1989 to Winter Issue Vol. 4 No. 2 1995 (11 issues of the Journal). It has been my pleasure serving and hope that the Section members have found each issue informative and easy to read.

I think that the era of an on-line Journal offers tremendous opportunities for the Section and a new editor to provide a new and unique product to the members. If you are interested in serving as Journal Editor please contact me and I will pass on your interest to the Council or you can contact the Section Chair and express your interest.

MUSIC INDUSTRY WINS! ILLEGAL DOWNLOADER HAS TO PAY!



Whitney Harper of San Antonio accessed and shared 37 copyright songs when she was 16. At the age of 22, she lost when the U. S. Supreme refused to hear her appeal for illegally downloading music. Despite encouragement from Justice Samuel Alito, the Supreme Court refused to hear the May 2010 appeal from the 5th Circuit Court of Appeals.

Harper, then 16 years old, was sued by Maverick Recording Co., UMB Recordings, Arista Records, Warner Bros. Records and Sony BMG Music Entertainment alleging that she illegally downloaded and shared copyrighted music from Kazaa and other sites. Harper argued that her acts fell under the "innocent infringement" defense and she was protected under copyright law as one who unintentionally download copyrighted music. However, the lower court ruled against Harper and she was ordered to pay damages of $27,750.00, or $750.00 per song—37 copyrighted songs.

While, *Harper* argued that listening to music available free to her and others on the file-sharing sites carried no copyright warnings, the 5th Circuit Court ruled that the copyright notice on CDs was enough to provide *Harper* with fair warning of the risks of infringing the record companies' rights. A Recording Industry Association of America spokesperson was quoted as saying "We're pleased that the U. S. Supreme Court recognized that the law in this area is clear."

FEDS TARGET WEBSITES DEALING IN ILLEGAL GOODS!

Operation In Our Sites v. 2.0 resulted in the Justice Department and other federal law enforcement agents shutting down web domains trafficking in counterfeit goods or copyright works. Online retailers of sports equipment, shoes, handbags, athletic apparel sunglasses, illegal copies of copyrighted DVD boxes, sets, music and software were the targets of the targets of the Justice Department and the Department of Homeland Security Immigration and Customs Enforcement. U. S. *Attorney General Eric Holder* issues a statement that termed the efforts a disruption of "the sale of thousands of counterfeit items, while also cutting off funds to those willing to exploit the ingenuity of others for their own personal gain."

Many of the sites were based in the U.S. but many more were based overseas, according to the Houston Office of Homeland Security Investigations. The seizures of the 82 sites included the shut down of sites such as dvdscollection.com, nfljerseysuply.com and handgagspop.com.

Holder went on to say "Intellectual property crimes are not victimless. The theft of ideas and the sale of counterfeit goods threaten economic opportunities and financial stability, suppress innovation and destroy jobs." *Operation In Our Sites v. 2.0* followed *Operation in Our Sites I, targeted* sites dealing in pirated movies.

EMPLOYMENT LAW NEWS

NBA Collective Bargaining – The current collective bargaining agreement between the National Basketball Associations and its Players' Union expires June 30, 2011. At issue, *inter alia*, are a salary cap, length of contracts and guaranteed salaries. The parties are far apart, as evidenced by the union rejecting the league's November 2010 proposal and the league showing no interest in the union's counterproposal. The parties scheduled the All-Star weekend of Feb. 18-20, 2011, in Los Angeles as the next serious effort to reach agreement. However, a lockout seems to be the most talked about topic between parties showing little interest in settling their issues before the expiry date for the CBA.

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NFL Collective Bargaining - The NFL and its players face a work stoppage with the CBA expiring on March 4, 2011.

With the key issue being revenue split between the owners and the players, both sides at least keep talking. Steve Bisciotti, owner of the Baltimore Ravens, expressed some reservation in getting a deal done when saying, "Everybody keeps talking about the health of the league because they keep seeing revenues go up. They don't' know that expenses are rising at a higher rate than those revenues. If you were a public company, your stock would be going backward." He went on to say, "We've got some work to do, but it doesn't do me any good not to be optimistic. I know how intelligent and committed our group is to getting a deal done."

However, as the threat of a lockout looms, the NFL's players' representatives were in Washington D.C. to lobby for congressional help in their labor negotiations. Philadelphia Eagles team representative offensive tackle *Winston Justice* characterized the trip to Capitol Hill as an opportunity "… to share our opinions and stance on the whole idea of the NFL possibly locking us out." *Jeff Miller*, the NFL's chief lobbyist responded "We think a collective bargaining agreement will be settled at the bargaining table, not in the halls of Congress or in a hearing."

There has not been a formal bargaining session since November 2010, but there have been informal meetings between union executive director *DeMaurice Smith* and NFL Commissioner *Roger Goodell.*

"When it comes to their negotiations over a new collective bargaining agreement, that is a business dispute." Said *Rep. Lamar Smith* (R-Texas) after postponing a meeting with the players and then holding a meeting. Rep. Smith went on to say "The owners and the players are both literally and figuratively big boys and do not need Congress to referee every dispute for them."

The NFL political action committee has given nearly $600,000 to federal candidates during the November 2010 elections after having contributed nearly $1.1 million in 2009. The NFLPA, according to Politico, spent nearly $350,000. *George Atallah,* spokesman for the union, said, "We don't have a PAC and we don't need a PAC. Our PAC is our players. The same way we try to directly engage with fans, we're trying to engage with members of Congress."

Notwithstanding the lobbying efforts of the respective parties, the NFLPA filed a collusion claim against the owners, accusing the teams of conspiring to restrict salaries. *Jeff Pash,* the NFL's chief labor negotiator, said, "It's something that was not unexpected. It's just another piece of litigation that we have to work our way through."

Commissioner *Goodell* responded "This is not going to get resolved through litigation. It will get resolved through negotiation. It's time to get to the table and negotiate."

COLLEGE SPORTS NEWS

Crime does not go away even if it pays. *Adam Cuomo,* a former football player at the University of Toledo, plead guilty, in a Detroit courtroom nearly 5 years after being accused of conspiring to influencing sporting events between 2004 and 2006. *Cuomo* plead guilty to supplying non-public information about Toledo and its opponents to a Detroit-area gambler. *Cuomo* also regularly introduced basketball players to the gambler during the 2003-04 and 2004-05 seasons to persuade the players to shave points. *Cuomo* said he was paid $500 when the gambler won.

Play now and no transfer later. *Christian Standhardinger,* a former Nebraska basketball player, had his transfer to La Salle University pulled after he was issued a citation for public indecency. The 6-8 native of Munich, Germany was found engaged in a sex act with a 19 year-old woman in a park in Lincoln, Nebraska. *John Giannini,* the La Salle coach, said it would be "in the best interest of all parties that *Christian Standhardinger* does not attend La Salle University."

PAY ME NOW BECAUSE I PAID TO PLAY LATER

Robert Burton and his family contributed $3 million to the University of Connecticut football program. The university put his family name on its football complex. After the university allegedly ignored the donor's opinions on the selection of Paul Pasqualoni as its new football coach, Burton wants his money back and his family's name removed from the complex. *Jeff Hathaway,* the schools athletic director, received Burton's written demand in which the donor called the university's actions "a slap in the face and embarrassment to my family." Burton went on to say that he "planned to let the correct people know that you did not listen to your number one football donor …" and that "We want our money and respect back." Burton claimed that "[A]lthough he was not seeking veto power in the hiring, he earned [his] voice on this subject." Burton retained legal representation to pursue the demand to get the money back.

Your comments or suggestions may be submitted on the Section's website or to your editor at srjaimelaw@clear.net ...

Sylvester R. Jaime — Editor

IS SHE A HE? AN EXAMINATION OF THE INTERPLAY BETWEEN INTERNATIONAL SPORTS LAW AND GENDER TESTING

Abstract: Imagine that after years of training and sacrifice you finally get your dream job. It places you within an elite category of professionals in the world. Then one day a series of humiliating and embarrassing rumors puts your job, career, and way of life in jeopardy. Granted, this is such a common scenario in the world of politics, especially when those rumors turn into nasty skeletons tumbling out of the closet. However, outside of politics, what if you really did nothing wrong and have nothing to hide? Are a jealous competitor's unsubstantiated allegations enough to get you fired or even blacklisted from working in the industry? Well, if you are a professional athlete, the answer might just depend on your gender.

In August 2009, South African track runner Caster Semenya won the 800-meters gold medal at the World's Athletics Championship in Berlin. Not only did she win, she shattered her competition—setting the best time for the category in the world that year. However, immediately questions regarding her gender surfaced because of her "masculine build and suprising performance." Eventually, Ms. Semenya was ordered to go through gender verification testing. While the results of that testing are still under review, the controversy surrounding Ms. Semenya has exposed differing views on gender, and its lack of definiteness in sports, especially when applied to women.

I. INTRODUCTION

Imagine that after years of training and sacrifice you finally get your dream job. It places you within an elite category of professionals in the world. Then one day a series of humiliating and embarrassing rumors puts your job, career, and way of life in jeopardy. Granted, this is such a common scenario in the world of politics, especially when those rumors turn into nasty skeletons tumbling out of the closet. However, outside of politics, what if you really did nothing wrong and have nothing to hide?

Are a jealous competitor's unsubstantiated allegations enough to get you fired or even blacklisted from working in the industry? Well, if you are a professional athlete, the answer might just depend on your gender.

In August 2009, South African track runner Caster Semenya won the 800-meters gold medal at the World's Athletics Championship in Berlin.1 Not only did she win, she shattered her competition—setting the best time for the category in the world that year.[2] Before the competition began, questions regarding her gender surfaced because of her "masculine build and surprising performance" at the African Junior Championships in July.[3] Elisa Cusma Piccione, an Italian rival, called her a man, and Russian runner Mariya Savinova agreed telling the press to "just look at her."[4] The IAAF, the international federation governing track and field competitions, ordered Ms. Semenya to undergo gender testing before the race in Berlin, but still allowed her to compete.[5] The results of the testing are currently under review by the IAAF, but leaks suggest that Ms. Semenya has an intersex condition—a condition that does not place her squarely within the category of male or female.[6] How the IAAF will remedy this situation is unknown at this time, but Ms. Semenya is not the first athlete to go through the gender verification process.[7] Ms. Semenya could have her gold medal stripped from her, be disqualified from future competitions, or possibly even asked to undergo a medical procedure to decrease her testosterone levels.[8]

Does this situation comport with the notions of "fairness" and "justice"? Should it be enough for a competitor's complaints based on physical appearance to place an athlete's career in limbo? Furthermore, how can someone who has worked hard enough to compete at an international level be denied the chance to compete because of a genetic abnormality? I will examine the rationale behind the necessity for gender verification testing, the rules under the IAAF that allow for gender testing to take place, the procedures available to someone subject to gender testing, and whether international laws could serve as a basis for independent causes of actions to prevent the enforcement of any adverse ruling to the participant.

II. GENDER VERIFICATION IN SPORTS

The first gender verification or "sex testing" occurred at the 1966 European Track and Field Championships in Budapest, Hungary.[9] The tests were "in response to rumors suggesting that men were masquerading as women for the sole purpose of excelling in international athletic competition."[10] Specific concerns arose concerning Iron Curtain[11] countries placing men to compete in women's competitions, despite the lack of documented proof of such an occurrence in nearly 30 years.[12] However, regulators did not create corresponding gender verification procedures for male athletes, apparently unconcerned with a woman attempting to enter a male competition *incognito*.[13]

Initial testing was by visual inspection, and any female wanting to compete had to traipse nude in front of a panel of physicians looking for corresponding genitalia.[14] Alternative methods evolved over time amid concerns over humiliating the athlete and the inaccuracy of test results.[15] The reliability and legitimacy of using testing procedures alone to determine gender also became a source of concern.[16] For example, in 1991, the IAAF abolished mandatory testing and implemented a "suspicion-based" model allowing for medical examination of "questionable cases of sex identity."[17] Additionally, the following year, the agency published a report criticizing mandatory chromosomal and genetic testing, and recommended that other sports governing bodies institute suspicion-based sex verification.[18]

The purpose of gender verification has arguably been to protect the integrity and "fairness" for women competing in sports. However, despite its purpose and the evolution of testing procedures, opponents of gender verification remain. One concern is that the tests typically do not incorporate many of the contributing factors to a person's sex, like self-identification, or take into account the role gender plays in a person's identity.[19] Chromosomal sex testing and genetic disorders can "declare athletes to be a sex that the athletes themselves have never identified as," and most women do not

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discover their "'male' chromosomal identity" until being subjected to sex testing at an elite-level competition.[20]

Therefore, in addition to the psychological harm the athlete suffers, they are also subject to disqualification from competing despite having committed no wrongdoing.[21] Furthermore, only females are subject to gender verification, and under suspicion-based testing, "traditional" or "feminine-looking" women bypass the testing process.[22] This in essence abandons the idea that a woman should accept herself as she is, but should instead ensure she is complying with societal norms of what a woman should look like. Supporters of gender verification argue a proper analysis of the issues includes the interests of *all* women athletes.[23] Athletes not under scrutiny need protection from an athlete whose "muscle strength and body build provides them with an unfair competitive advantage."[24] While not all cases classifying women as men provide an athletic advantage, there are certain conditions that will.[25] Of main concern is the presence of elevated levels of testosterone and the effect that it has on the body.[26] Testosterone can help build muscle mass and allow an athlete to train longer and harder.[27] So much so, that the IAAF regularly screens for elevated levels of testosterone as part of their anti-doping procedures.[28] However, as stated by famed sports attorney Jeffrey Kessler,

> *Every superlative athlete in the world has some genetic advantage. There's a reason Michael Jordan could jump as high as he could. Sports has never been about genetic equality. This whole inquiry to determine things like whether an athlete has too much or too little testosterone goes against the whole fundamental nature that sports is about different people who have different advantages.*[29]

III. IAAF & GENDER VERIFICATION

Regardless of the issues surrounding gender verification testing, sports regulating bodies, like the International Olympic Committee (IOC) and the IAAF, still use testing as a way to regulate participation.30 According to the IAAF, gender verification measures are used to "ensur[e] fair competition amongst female athletes."31 However, unlike explicit provisions for anti-doping, gender testing policies and regulations do not appear in the IAAF's Competition Rules or governing Constitution.[32] There is an indirect reference to the agency's intention to verify gender listed under the description of the "Medical Delegate," but one must do an intensive search for more substantive information on the topic.[33]

It appears the governing authority on the topic, as far as the IAAF is concerned, is simply a policy statement concerning the matter.[34] The "IAAF Policy on Gender Testing," contains two parts. The first half of the paper includes the position of the IAAF in regards to gender testing, and the process for handling gender ambiguity.[35] The second half of the paper includes attachments from the IOC, which the IAAF used as a basis for the development of its gender policy.[36] The IAAF's position appears to address many of the issues and concerns surrounding gender verification testing. For example, there is no mandatory testing, and any "suspicion" or "challenge" to the athlete's gender might subject the athlete to a full-scale medical evaluation before a panel of specialists.[37] Furthermore, any determination of the athlete's status is not to be based "solely on laboratory based sex determination."[38] There is also a list of permitted genetic conditions, and a section regarding reconstructive surgery and sex reassignment.[39]

The gender verification process can be initiated by: (1) another athlete or team "challenging" the athlete's gender; (2) "suspicions" raised about the athlete's gender because of what was witness during an anti-doping control specimen collection; and (3) an approach made to the governing sports bodies by an athlete or his representative for advice and clarification.[40] The national federation,[41] a medical delegate of an IAAF sponsored event, and the IAAF medical committee have authorization to "handle" gender verification matters, and are responsible for deciding if there is a case to investigate and, if so, who will investigate the matter.[42] The investigating authority contacts the athlete "in confidence" to complete the investigation.[43] Eventually, the investigating authority gives a verdict to the athlete's national federation "with advice for further action including appropriate advice to the athlete as the need to 'withdraw' from competition until the problem is definitively resolved through appropriate medical and surgical measures."[44] Additionally, the policy provides for an evaluation of the effects of the suggested measures to determine if, and when, the athlete can return to competition.[45]

The policy, however, fails to articulate how to handle disputes concerning the investigation and/or the subsequent verdict.[46] Additionally, there is no statement concerning the appealability of the verdict and its incorporated recommendations.[47] Therefore, dispute provisions in the IAAF Competition Rules are likely to control.[48] According to one provision of the Rules, if the dispute arises as a result from protests made concerning the status of the athlete prior to the competition, the Technical Delegate can render a decision, which can be appealed to the Jury of Appeal.[49] If an athlete competes "under protest," then the IAAF Council is responsible for making the eligibility decision.[50] Decisions by the Jury of Appeal or the IAAF Council are final and cannot be appealed, even to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland.[51] It is possible, but not likely that this provision applies to gender verification testing. For instance, under this provision, the Technical Delegate can issue a decision on the matter. However, under the Rules only the Medical Delegate may "arrange for the determination of the gender of an athlete."[52] Accordingly, the most probable process is in the general dispute provisions of the Rules, which allows an IAAF decision to be exclusively appealed to CAS.[53] The governing law for all CAS appeals is Monegasque[54] law, and decisions of CAS are final and binding on all parties with no right of appeal from the CAS decision.[55]

Notwithstanding the gender verification policy and its lack of clarity, athletes must submit to it if they want to compete.[56] The IAAF is a non-profit, non-governmental organization and participation in its competitions is voluntary.[57] Therefore, if an athlete wants to compete, they must agree to the rules and regulations promulgated by the IAAF, and normally the agreement is memorialized in a written contract or implied by conduct.[58] As stated by Travis Tygart, CEO of the U.S. Anti-Doping Agency, "compet[ing] in a sport is a privilege."[59] There is no inherent right a person has to *compete* in a sports related activity, therefore, an organization can regulate who participates in their competitions and under what terms.[60]

IV. INDEPENDENT CAUSES OF ACTION

While contract law largely governs the relationship between an athlete and the IAAF, that does not mean that an athlete can

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never lodge complaints against the IAAF and seek relief from a court. In addition to national laws, various international treaties and declarations address human rights and discrimination issues in sports. For example, the Olympic Charter, which governs the Olympic Movement, states that "[e]very individual must have the possibility of practicing sport, without discrimination of any kind…"[61] Additionally, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) carves out two provisions for the protection of women in sports.[62]

Furthermore, the European Sport for All Charter "prohibits discrimination in access to sports facilities or sports activities on the grounds of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, and birth or other status."[63]

In the European case of *Meca-Medina v. Commission*, two professional swimmers tested positive for a banned substance,[64] and subsequently received suspensions from competitions by the International Swimming Federation (FINA). [65] The athletes initiated a series of challenges in the European Courts to anti-doping provisions adopted by the IOC and implemented by FINA alleging the "practices relating to doping control were incompatible with the Community rules on competition and freedom to provide services."[66] The case eventually reached the highest court in Europe, the European Court of Justice, and while it was ultimately dismissed, the decision redefined the scope of the applicability of EU law to govern sports.[67]

In *Chambers v. British Olympic Association*, an Olympic runner sought an interlocutory order from the Queen's Bench Division challenging a rule of the British Olympic Association (BOA), which excluded him from the upcoming Olympics.[68] The rule banned for life any athlete who committed a doping offense from competing in the Olympics, and the Plaintiff challenged the rule on the basis that it was a restraint of trade, conflicted with Arts 81 and 82 EC, and competition law.[69] The court recognized its supervisory authority over sporting regulatory bodies as articulated under Meca-Medina if the case affected the claimant's right to work.[70] However, the court stated, "the BOA, if acting honestly and not capriciously and within its powers, is and must be a body better fitted to judge what was needed than me, or any court."[71] Ultimately, the case was dismissed.[72]

However, there is a difference between challenging the legality of a rule or regulation, and challenging a decision or verdict that is the result of a permissible rule or regulation. Courts are less likely to intervene in disputes between athletes and their governing organizations just to obtain rulings that are more favorable. For example, in *DeFrantz v. United States Olympic Committee*, a group of athletes and one member of the executive board for the USOC sought an injunction barring the Committee from enforcing a resolution not to send an American team to participate in the 1980 Summer Olympics.[73] The court dismissed the case, holding that "the USOC not only had the authority to decide not to send an American team to the summer Olympics, but also that it could do so for reasons not directly related to sports considerations."[74]

Furthermore, if the dispute has been previously adjudicated in arbitration, then that decision is given more deference, and will likely be upheld as long as it's "fundamentally fair."[75] For example, in *Slaney v. IAAF*, a track and field athlete, who was found to have committed a doping violation by the IAAF in foreign arbitration proceedings, sued the IAAF and the USOC under state law and civil Racketeer Influenced and Corrupt Organization (RICO) claims.[76] The Court of Appeals upheld the district court's motion to dismiss against the athlete finding that because she participated in an arbitration proceeding concerning the matter, her state law claims against the international body were barred.[77] As stated by the court, "[o]ur judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received."[78]

V. CONCLUSION

While it is unknown at this time how Caster Semenya's situation will be resolved, the controversy surrounding her has exposed differing views on gender, and its lack of definiteness in sports, especially when applied to women. While one may sympathize with the plight of an athlete whose chosen profession may be denied due to no fault of their own, there must also be concern for the other competitors who are not genetically enhanced to a point that it causes an unfair advantage. One suggestion is to refer back to the days of mandatory testing for all female athletes. While this approach seems to place everyone on an even playing field, the costs of administrating the tests would substantially outweigh the benefits. Another option would be to eliminate gender verification all together since recently there has been little to no documented proof of men intentionally disguising themselves to compete in women's competitions. Regardless of the position, if the IAAF and other sports regulatory bodies want gender verification testing, they should take a long look at their policies. For example, the IAAF's current policy allows a competitor to contest an athlete's gender based on their physical appearance, possibly allowing a jealous competitor to sabotage their rival with baseless accusations without supporting evidence. Additionally, the policy fails to articulate how disputes concerning gender testing are to be handled. In order for a policy to be successful and ensure fairness, agencies should be careful to effectively control who initiates the gender verification process, eliminate ambiguities in its gender policies, and provide a detailed process on how gender testing issues and disputes are to be resolved.

1 IAAF Urges Caution Over Semenya Intersex Claims, CNN, Sept. 11, 2009, http://www.cnn.com/2009/SPORT/09/11/athletics.semenya.gender.iaaf/in dex.html [hereinafter Caution].
2 Id.
3 Id.
4 Robyn Dixon, Runner Caster Semenya Has Heard The Gender Comments All Her Life, LA TIMES, Aug. 21, 2009, http://www.latimes.com/news/nationworld/world/la-fg-south-africa¬runner21-2009aug21,0,5294672.story.
5 Caution, supra note 1.
6 Id.; see also Pat Griffin, Inclusion of Transgender Athletes on Sports Teams, WOMEN'S SPORTS FOUNDATION, http://www.womenssportsfoundation.org/Content/Articles/Issues/Homoph obia/I/Inclusion-of-Transgender-Athletes-on-Sports-Teams.aspx (last visited Nov. 8, 2009) ("Intersex refers to people who are born with both male and female anatomical, physiological or chromosomal characteristics.").
7 Eight female athletes were not allowed to compete in the 1996 Atlanta Olympics because of failed gender tests, although they were eventually cleared by subsequent examinations. Additionally, Indian runner Santhi Soundarajan considered suicide after failing a gender test and being forced to return her silver medal from the 2006 Asian Games. Jason Stallman, Lab Ready for Sex Tests for Female Athletes, NEW YORK TIMES, July 27, 2008, http://olympics.blogs.nytimes.com/2008/07/27/lab-ready-for-sex¬tests-for-female-athletes/; Ramachandra Maniappa, Indian Runner Knows What South African Caster Semenya Is Going Through, THE ASSOCIATED PRESS, Sept. 19, 2009, available at http://ca.sports.yahoo.com/top/news?slug=capress-track_indias_semenya¬183441026&prov=capress&type=lgns.
8 According to an IAAF official, it is unlikely they will take the medal from her if she is shown to have an advantage due to male hormones because she has not cheated. However, other disciplinary matters can be taken. See IAAF has Gender Test Results on Runner Semenya, HURRIYET DAILY NEWS AND ECONOMIC REVIEW, Sept. 11, 2009, http://www.hurriyetdailynews.com/n.php?n=iaaf-has-gender-test-results¬on-runner-semenya-2009-09-11; see also Caution, supra note 1; see also Oren Yaniv, Caster Semenya, Forced to Take Gender Test, is a Woman ... and a Man, NY DAILY NEWS, Sept. 10, 2009, http://www.nydailynews.com/news/world/2009/09/10/2009-09¬10_caster_semenya_.html; see also Amanda Fox, Caster Semenya and the Issues Surrounding Gender and Discrimination in Sports, HELIUM, http://www.helium.com/items/1584711-semneya-sex-semenya-stripped¬medals?page=2 (last visited Nov. 8, 2009).
9 Jill Pilgrim, David Martin & Will Binder, Far From the Finish Line: Transsexualism and Athletic Competition, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 509 (2003).
10 Pilgrim, supra note 9, at 509; see also Phyllis Randolph Frye, Symposium: (De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law, 7 WM. & MARY J. WOMEN & L. 133, 170 (2000).
11 Countries included Poland, Czechoslovakia, Yugoslavia, Hungary, Romania, Albania, and Soviet-occupied East Germany. "Communism." ENCYCLOPÆDIA BRITANNICA ONLINE, http://www.britannica.com/EBchecked/topic/129104/communism (last visited Nov. 8, 2009).

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12 Frye, supra note 10, at 171; see Haley K. Olsen-Acre, Article, The Use of Drug Testing to Police Sex and Gender in the Olympic Games, 13 MICH. J. GENDER & L. 207, 212 (2007) ("[T]he only documentation of a male intentionally competing as a female in the Olympics occurred in 1936 when Hermann Ratjen of Germany bound up his genitals and took part in the women's high jump competition. (Ratjen took fourth place, behind three women.)").
13 Olsen-Acre, supra note 12, at 212.
14 See Frye, supra note 10, at 171 quoting (Littleton v. Prange, 9 S.W.3d 223, 223 (Tex. App. 1999) ("Every schoolchild, even of tender years, is confident he or she can tell the difference [between a man and a woman], especially if the person is wearing no clothes.")).
15 See Pilgrim, supra note 9, at 509-11; see also Olsen-Acre, supra note 12, at 217.
16 Olsen-Acre, supra note 12, at 217.
17 Pilgrim, supra note 9, at 511.
18 Id.
19 Olsen-Acre, supra note 12, at 212.
20 Id. at 218 ("Spanish hurdler Maria Jose Martinez Patino, [discovered] her XY chromosomal pattern for the first time at the 1985 World University Games. Patino was advised to fake an injury and withdraw from the competition. Patino later said of her experience: 'What happened to me was like being raped. I'm sure it's the same sense of incredible shame and violation. The only difference is that, in my case, the whole world was watching.'"); see Maniappa, supra note 7 (discussing one reason which could attribute to women not knowing about their genetic abnormality is if these women come from poverty—Soundarajan and Semenya are both from poor families.).
21 IAAF Spokesman Nick Davies, said that whatever the gender results are for Caster Semenya, "clearly it was not her fault." Dixon, supra note 4; Olsen-Acre, supra note 12, at 218.
22 There is no mentioning of male testing in the IAAF Policy. See generally IAAF Policy on Gender Verification, IAAF, http://www.iaaf.org/mm/Document/imported/36983.pdf (last visited Nov. 8, 2009) [hereinafter Gender Policy]; see also Olsen-Acre, supra note 12, at 220.
23 Telephone Interview with Travis Tygart, Chief Executive Officer, U.S. Anti-Doping Agency (Oct. 2, 2009).
24 Pamela B. Fastiff, Note, Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games, 19 Hastings Const. L.Q. 937, 944 (1992).
25 Fastiff, supra note 24, at 944.
26 The IAAF has limits by ratio on acceptable testosterone levels for men and women. Reports are that Caster Semenya's testosterone level is three times higher than an "average" woman's testosterone level. Steve Nearman, Forget about gender; Testosterone is Issue, THE WASHINGTON TIMES, Sept. 15, 2009, http://www.washingtontimes.com/news/2009/sep/15/running-forget¬about-gender-testosterone-is-issue/.
27 Id.
28 Id.
29 Jeffrey Kessler, an attorney with Dewey & LeBoeuf, gained fame by convincing CAS to overturn an IAAF decision banning Oscar Pistorius, a South African double-amputee sprinter, from competing in the 2008 Summer Olympics in Beijing. Mr. Kessler has also been retained by Caster Semenya to represent her pro bono. Zach Lowe, The Gender Confusion Chronicles: A Fast-Paced Look at Sports and the Law, THE AMLAW DAILY, Sept. 18, 2009, http://amlawdaily.typepad.com/amlawdaily/2009/09/the-gender¬confusion-chronicles-a-fastpaced-look-at-sports-and-the-law.html.
30 Gender Policy, supra note 22.
31 Id.
32 See generally IAAF Competition Rules 2009, IAAF, http://www.iaaf.org/mm/Document/AboutIAAF/Publications/05/45/31/20 091001092345_httppostedfile_CompRules-2009-Eng_16838.pdf (last visited Nov. 8, 2009) [hereinafter Competition Rules].
33 Id. at 111 ("The Medical Delegate shall also have the authority to arrange for the determination of the gender of an athlete should he judge that to be desirable.").
34 See generally Gender Policy, supra note 22.
35 Id.
36 Id.
37 The panel includes a gynecologist, endocrinologist, psychologist, internal medicine specialist, and expert on gender/transgender issues. Id.
38 Id.
39 Id.
40 Id.
41 IAAF National Member Federations, IAAF, http://www.iaaf.org/aboutiaaf/structure/federations/index.html (last visited Nov. 8, 2009) ("An IAAF National Member Federation is a national governing body for athletics (track & field) affiliated to the IAAF. Only one Member from each country or territory may be affiliated to the IAAF and must abide by the rules and regulations of the IAAF.").
42 Gender Policy, supra note 22.
43 Id.
44 Id.
45 Id.
46 Id.
47 Id.
48 Competition Rules, supra note 32, at 212.
49 Id.
50 Id.
51 The Court of Arbitration for Sport is the default entity that handles appeals of IAAF decisions. Id.
52 Id.
53 This statement is based on two provisions in the competition rules. First, the provision concerning anti-doping allows for decisions to be appealed to CAS. Gender verification is analogous to anti-doping in various aspects, mainly because the results will determine the eligibility of the athlete. Second, the general dispute provisions also provide for decisions to be appealed to CAS. See generally id.
54 Id.
55 Id.
56 Fastiff, supra note 24, at 956.
57 See generally History - Introduction, IAAF, http://www.iaaf.org/aboutiaaf/history/index.html (last visited Nov. 8, 2009).
58 Interview with C. Paul Rogers, Professor of Law, Southern Methodist University (Oct. 2, 2009).
59 Telephone Interview with Travis Tygart, Chief Executive Officer, U.S. Anti-Doping Agency (Oct. 2, 2009).
60 There are human rights and discrimination laws that give the right of access to a sport. However, similar to other employment related issues there is not a law guaranteeing the person a right to compete in a sporting event as their career. Id.
61 The charter also states "[t]he organization [sic], administration and management of sport must be controlled by independent sports organizations [sic]." Olympic Charter, INTERNATIONAL OLYMPIC COMMITTEE, July 7, 2007, available at http://www.olympic.org/Documents/olympic_charter_en.pdf.
62 "Article 10 states that women shall have the same opportunities to participate actively in sports and physical education. Article 13 states that women shall have the right to participate in recreational activities, sports and all aspects of cultural life." Amy Burchfield, Update: International Sports Law, GLOBALEX, http://www.nyulawglobal.org/globalex/International_Sports_Law1.htm (last visited Nov. 8, 2009).
63 Id.
64 The athletes tested positive for nandrolone, a prohibited anabolic substance. Case C-519/04, Meca-Medina & Majcen v. Commission [2006] E.C.R. I-6991 165–7.
65 Initially, the suspension period was four years, but was later reduced to two years after two appeals to the CAS. Id.
66 Id.
67 Before Meca-Medina, there was a recognized "sporting exception" where EU law only applied to "economic activities" and not to rules of pure "sporting interest." Anti-doping rules were "pure 'sports rules' falling outside the scope of EU Competition law." However, post-Medina, it is no longer clear what rules fall outside the scope of the Treaty, if any, resulting in more challenges to the rules under EU law. Id.; see Gianni Infantino, Meca-Medina: A Step Backwards for the European Sports Model and the Specificity of Sport?, Feb. 2, 2006, http://www.uefa.com/multimediafiles/download/uefa/keytopics/480391_dow nload.pdf.
68 The court found the interlocutory order was really a way for the Plaintiff to challenge the validity of the bylaw without going to a full trial. Chambers v. British Olympic Ass'n [2008] EWHC 2028 (Q.B.).
69 Id.
70 Id.
71 Id.
72 Id.
73 The Olympics were to be held in Moscow, and the US government encouraged the USOC to pass the resolution not to send any Americans to compete to protest the Soviet military forces invasion and continued occupation of Afghanistan. DeFrantz v. United States Olympic Committee, 492 F.Supp. 1181 (D.C. 1980).
74 Id. at 1189.
75 Telephone Interview with Travis Tygart, Chief Executive Officer, U.S. Anti-Doping Agency (Oct. 2, 2009); Slaney v. IAAF, 244 F.3d 580, 592 (7th Cir. 2001) ("A fundamentally fair hearing is one that 'meets the minimal requirements of fairness-adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.'" (citations omitted)).
76 Id. at 580.
77 Id.
78 Id. at 591; see Stretford v. The Football Ass'n Ltd., [2007] EWCA Civ 238 (Ch.).

NOTICE:

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

LEGAL HITS

IS "SWEET BABY" ENOUGH TO GET YOU FIRED?

ESPN did just that. After 25 years, long time color man *Ron Franklin* was fired for referring to sideline reporter *Jeannine Edwards* as "sweet baby" and "a-hole" during an argument. *Tom Nesbitt,* attorney for Franklin, has challenged ABC & ESPN to honor their contract with Franklin or try the case in an Austin courtroom. *Mike Solty*, spokesman for ESPN, said "ESPN [is] confident the action we took was appropriate. A trial in the media about media figures, stay tuned.

NO BETTING ON THE JOB!

IMG, a big player in college athletics, has adopted the policy of prohibiting employees from betting on college sports including taking part in March Madness pools. In not taking the same stance with pro sports, IMG adopted the policy re college sports in the face of allegations that its chairman and CEO *Ted Frostmann* bet on college basketball and football. IMG's stance applies to approximately 3,000 employees in 30 countries. The company counts nearly 200 schools as clients for licensing, media and marketing rights. Agate Printing sued *Frostmann* claiming he and his golf partner bet on NCAA basketball and as a result Agate lost business with IMG promised to it by *Frostmann*. IMG's policy could include loss of a violator's job even if caught just playing in a pool involving the NCAA men's basketball tournament.

ROGUE SPORTS AGENTS BEWARE!

Taking aim at rule-breaking agents, legislators are upping the ante for violators. Okalahoma, among other states from Oregon to New Jersey, have increased the minimum fine from $1,000 to $10,000 and the maximum from $10,000 to $250,000 for violators. There are 8 states that have not adopted sports agent laws, but even Virginia and New Jersey, 2 of the 8, are acting to use the Uniform Athletes Agent Act to protect athletes by prohibiting agents from improper contact with student athletes. Arkansas increased violations of its agent laws from a misdemeanor to a felony. The action among states joins actions by the NFL Players Association, the NFL and the American Football Coaches Association in focusing on the problem caused by agents who improperly contact players and provide them with benefits that bring the schools and the players into the public eye as potential criminals as well as exposing the schools to loss of revenues, probation and loss of athletic scholarships. States such as Oklahoma are expanding the definition of "agents" to include financial planners even if they do not negotiate contracts.

NO DOGS ALLOWED!

Formerly disgraced now Pro Bowl quarterback for Philadelphia, *Michael Vick* is back as a pitchman. Following his successful season with the Eagles, Unequal Technologies signed *Vick* to a "sizable" contract with the football pads maker. Although the terms of the deal were not disclosed, *Vick* becomes the first corporate spokesman said Chief executive officer *Rob Vito*. Welcome back *Mr. Vick*.

REPRESENTATION SUBJECT TO PRIVILEGE!

Houston based attorney *Rusty Hardin* can remain as attorney for *Roger Clemens*, ruled U. S. District *Judge Reggie Walton*. In a Washington hearing on an unopposed motion filed by federal prosecutors, *Judge Walton* was satisfied that appropriate steps can be taken to protect Hardin's co-counsel *Michael Attanasio*, based out of San Diego. The federal prosecutors sought the ruling to determine if Hardin had a conflict of interest after at one time representing *Andy Pettitte*. *Clemens* and *Pettitte* were former teammates with the Houston Astros and New York Yankees and are now on opposite sides in the government's action against *Clemens* on charges he lied to government interrogators in the Mitchell Report in 2007 when he denied the accusations of *Brian McNamee* that *Clemens* used performance-enhancing drugs. Both pitchers were linked to the use of performance enhancing drugs but unlike *Clemens*, *Pettitte* acknowledged using the drugs. Prosecutors informed the court that they

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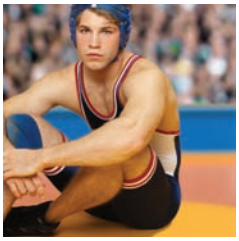
did not object to *Hardin's* representation of *Clemens* so long as *Mike Attanasio* cross-examines *Pettitte*. A former federal prosecutor, *Attanasio* joined the *Clemens* defense team to prepare for *Pettitte's* testimony. "Assuming *Michael Attanasio* [is protected] from any privileged information, and that defendant *Clemens* is willing to waive any potential conflict, the government does not object to *Mr. Attanasio* cross-examining *Mr. Pettitte*" prosecutors stated in the motion.

NEW RECORD OR BUST!

Seeking to surpass attendance records and exceed 100,000 attendees, the National Football League counted ticket holders who bought $200 seats to watch the game in an outdoor plaza. The NFL planned to additionally sell standing room only tickets for areas with limited views of the game. However, after ticket holding spectators got no seats or bad views, a class-action lawsuit was filed. Big money defendants, the NFL, the Dallas Cowboys and Cowboy owner Jerry Jones, are accused of breach of contract, fraud and deceptive trade practices by fans that had seats that were "illegitimate" or had to watch the game on TV because there were not enough seats. Waiting to just hours before kick-off the NFL disclosed that at least 1,250 temporary seats were unsafe, leaving at least 850 looking for new seats and about 400 reduced to standing at locations around the stadium. "No one is attempting to get rich from this," said attorney *Michael J. Avenatti*. A Cowboys season ticket holder based out of Los Angeles, Avenatti is representing, among others in the class, Steve Simms, who had to watch the game from a standing room area. The Steelers rooter left at halftime. Some of the temporary seats were under overhangs without a view of the giant video screen covering the playing field. Calling it "effectively in a bat cave" *Avenatti* said, "You don't take our best customers and treat them like that." The NFL as compensation gave fans an option to tickets to the 2012 Super Bowl and $2,400 cash, or a ticket to any future Super Bowl, including round-trip airfare and hotel. The lawsuit was filed in Dallas federal court and the NFL and the other defendants trying to cut their losses.

LOVE DOES NOT PAY, OR SO FOUND OUT KAREN CUNAGIN SYPHER.

Sobbing while being sentence, *Sypher* was ordered her to 87 months in prison and 2 years supervised release. *Sypher* was convicted of extorting University of Louisville basketball coach *Rick Pitino* in threatening to reveal a sexual one-night unless she was paid cash, cars and a house. *Sypher* was also convicted of lying to the FBI and retaliation against a witness. Seeking millions, *Sypher* sought to have *Pitino* to keep quiet about a sexual meeting they had in Louisville in 2003.



THE WAVE OF THE FUTURE?

Joel Northrup, gave up his dream of a wrestling state championship rather than wrestle a girl. The home-schooled high schooler said his religious beliefs would not allow him to wrestle *Cassey Herkelman*, a freshman female wrestler in the 112-pound weight class of the Iowa wrestling championships. "Wrestling is a combat sport, and it can get violent at times." *Northrup* was quoted as saying in his statement released by Linn-Mar High School in Iowa. *Herkelman* was declared the winner by default in the match and became the first female to win a match in the 85-year-old Iowa sate tournament. *Herkelman*, and Ottumwa, Iowa sophomore *Megan Black*, wrestling in the same weight class, were the first 2 females to qualify for the Iowa tournament. *Northrup*'s father, *Jamie Northrup*, a minister in the Believers in Grace Fellowship, Pentecostal church said "… the church believes young men and women shouldn't touch in a "familiar way."" He went on to say, "We believe in the elevation and respect of woman and we don't think that wrestling a woman is the right thing to do. Body slamming and takedowns, that full contact sport is not how to do that." *Black*, had a 25-13 season record going into the tournament, and *Herkelman*, had a 20-13 record coming into the tournament.

WHO'S GOT NEXT? THE NBA AND THE NEW FREE AGENCY, POST LEBRON JAMES: THE SILVER LINING IN THE NBA'S COLLECTIVE BARGAINING AGREEMENT

By Shannon A. Holmes

Shannon A. Holmes, J.D., Texas Southern University - Thurgood Marshall School of Law, December 2010; M.B.A., B.A. Economics, Texas Southern University.

INTRODUCTION

The result of the LeBron James Sweepstakes that took place from July 1, 2010 to July 8, 2010 may have redefined the way the National Basketball Association ("NBA") and the NBA players will approach free agency. To the novice or even the casual fan it may have appeared that NBA Teams were jockeying to win the services of LeBron James or that LeBron James was shopping teams in which to provide his services. However, to the more indulged basketball player or seasoned observer, it may have appeared that LeBron was considering not what city he wanted to play in, or what team he wanted to play for, but rather what players he wanted to play with. To a veteran of the basketball world LeBron's antics are reminiscent of a scene from the basketball court at a neighborhood park. Any number of thoroughly immersed basketball players can recall the countless times when one walked up to the basketball court at the local park or gym and posed one of those infamous phrases, "Who's got next?" or "Who's got the Sideline?" The phrases are synonymous and lead to the same result. The person asking wants to know who is next and how many people are waiting to play. There are various local rules that govern the courts from place to place, and no place necessarily has the same rules. The one set of court rules that most resembles NBA Free Agency are structured in this way:

> A) The player next in line gets to pick any other four people he wants to play with him in the next game. B) No player can force himself on the team and the player holding the right to play is not obligated to pick any particular person; additionally, he can pick players from the losing team or anyone waiting on the sideline. C) The winning team gets to keep playing. D) If the winning team loses a player for any reason they can choose "any" player to join them.

Now here is the tricky part! In some cases, guys will show up at the park together and choose to play together as a team. In other instances a guy will either play with the players available or he will defer his opportunity to play and wait for his preferred players to arrive at the court. Sound familiar!

So, here is the $100 million dollar question, What if NBA players started treating NBA free agency like a day at the park? What if the players started negotiating with teams based on who they wanted to play with? What if during the negotiations players deferred money or traded guaranteed money for other gain? What if the marquee players shared personal earnings or endorsement money with other players who accept lower salaries to play with that respective marquee player? As the expiration of the NBA Collective Bargaining Agreement ("CBA") nears, the NBA will need to examine the loopholes that it has created in the current CBA. As the league owners fight to reduce salaries and profit sharing with the players, parity in the league may be lost to the players' control and their ability to uniquely collaborate their talents on a few select teams. The discussion that follows below will build on the history of the NBA, the current economic state of the league, the impact of the CBA and Free Agency, and the player's ability to choose where he plays and who he plays with.

I. HISTORY

A. NBA & NBPA

The NBA was formed in 1949 when the Basketball Association of America and the National Basketball League merged.[1] The league was compromised of 12 individually and privately owned teams, each team bound by membership rules.[2] This entertainment product quickly became the premier basketball product. In 1954, Bob Cousy orchestrated the formation of the National Basketball Players Association ("NBPA").[3] In a short number of years the NBPA had persuaded the NBA owners to provide more benefits to players, increase installment payments, per diem, and a max on exhibition games.[4]

In 1967 the NBA began to encounter competition from another league competitor, the American Basketball Association ("ABA").[5] The ABA began to sign away some of the NBA's biggest stars. As a result the NBPA was able to gain even greater concessions from the leagues owners. However in 1976 the ABA was absorbed by the NBA.[6]

In the 1980's with the arrival of highly marketable players like Earvin "Magic" Johnson and Larry Bird the league began to see a surge in fan interest, ticket sales, and more lucrative contracts.[7] Owners recognized an increase in revenue but also an increase in player salaries.[8]

With revenues and players salaries on the rise, the CBA became a tool used by both the owners and NBPA to define their respective interest. In 1983 the NBA and the NBPA agreed to a salary cap, with the players sharing in between 53 percent and 57 percent of the NBA's gross revenues (i.e. gate receipts, local and national television and radio revenue and preseason and postseason revenue).[9] In 1991, discord set in over whether the NBA could exclude from its gross calculation of gross revenues those proceeds that derived from luxury suites rentals, playoff ticket sales, and arena signage.[10] Discontent arose because by eliminating these numbers from the gross revenues allowed the salary cap number to be lower than would be required if those particular numbers were included in gross income.[11] Hence, after several years of bad blood and discontent the owners agreed to lockout the players in 1995 following the NBA finals.[12]

To no ones surprise the 1995 lockout focused on the owners' concerns over exorbitant contracts demanded by rookie first round draft picks. [FN13]. Some players sought huge contracts and

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threatened to "hold out" if the teams did not meet their monetary demands. In the 1994 draft first overall pick Glenn Robinson sought a $100 million dollar contract and held out of camp until the Milwaukee Bucks agreed to sign him to a ten-year, $68.15 million contract.[14]

As one may suspect, reports surfaced suggesting that the veteran players were not pleased with the concept of unproven rookies extracting such large salaries and big pieces of the team's salary cap room.[15] In light of the rookies' aggressive salary demands and the veteran's displeasure at the escalating rookie salaries, the owners bargained for stricter parameters on rookie contracts and the veterans readily agreed as many of them would receive larger portions of the teams salary caps if rookie contracts were reduced. The two sides also agreed to the "Larry Bird Exception" to the salary cap, an exception which allowed teams to re-sign their own free agents at any price.[16] The "Larry Bird Exception" is now and will continue to be a sticking point in the CBA negotiations. The "Larry Bird Exception" allows the teams to avoid the "hard" salary cap when re-signing its own unrestricted free agents.

At the conclusion of the 1995 bargaining the two sides agreed to a rookie salary scale that was determined solely by draft position.[17] The two sides also agreed to drop the guarantee of gross income from 53 percent to 48 percent, but included as part of gross income luxury suites, international television, and arena signage.[18] The renegotiations for an updated CBA in 1998 proved unsuccessful and the NBA ultimately canceled the first four months of the 1998-1999 season.[19] The 1999 CBA set maximum dollar amounts on all player contracts.[20] The 1999 CBA also ushered in the "luxury tax".[21] Any team whose collective salaries exceed the luxury tax threshold must pay a dollar-for-dollar penalty to the league for its differential.[22]

B. THE CBA-DEFINED

The CBA is the "'supreme governing authority' concerning employment" in professional sports leagues that is created through the collective bargaining process.[23] The National Labor Relations Act (NLRA) provides for the collective bargaining process, where a professional sports league's owners and players' union can negotiate the rules and regulations of the relationship between the two sides.[24] For a CBA to be valid, both the players' union and the league must ensure that certain requirements of the collective bargaining process are met. The collective bargaining negotiations must include certain mandatory subjects of collective bargaining, including hours, wages, and working conditions.[25] The duty to bargain requires that both sides bargain in good faith.[26] Both parties must meet at reasonable times and confer on mandatory subjects of collective bargaining; the failure to do so is an unfair labor practice.[27] Finally, both sides must engage in bona fide, arms-length bargaining.[28] If these requirements are met and the players' union and the league reach agreement, the result of the negotiation process will be a finalized CBA.[29]

As one scholar has noted, "[t]here is an inherent conflict between labor laws and antitrust laws."[30] On the one hand, labor law seeks to further collective bargaining to reach agreement between unions and employees.[31] Underlying labor laws is the belief that without unionization and the collective bargaining process, workers will not be able to achieve fair market value for their services.[32] On the other hand, underlying antitrust laws is the belief that collusion among competing businesses hurts consumers as these businesses manipulate pricing and market conditions.[33] Accordingly, antitrust laws prohibit restraint on trade or commerce, including in labor markets.[34]

The most relevant exemption for professional sports leagues is the nonstatutory exemption. For the nonstatutory exemption to apply, the circumstances must meet a three-prong test. First, the restraint that would otherwise violate antitrust laws must primarily affect only the parties to the collective bargaining relationship.[35] Next, the restraint must involve a mandatory subject of collective bargaining.[36] Lastly, the collective bargaining must have been accomplished through arms-length bargaining.[37] If the restraint at issue meets all three parts of the test, it is exempt from antitrust laws.[38]

If properly negotiated, the CBA is immune from antitrust laws and it thus serves as the definitive governing document regarding the terms and conditions of players' employment.[39] The league or the players cannot unilaterally change any terms or conditions of the CBA without engaging in the collective bargaining process.[40] This dilemma helps explain the importance of the upcoming NBA CBA renegotiation and why each side is keenly interested in its respective positions.

C. NBA DRAFT, SALARY CAP, AND PLAYER TENURE

Players enter the NBA through a draft system. The NBA draft is the exclusive means by which desirable amateur players can enter the NBA.[41] The NBA currently uses a weighted system to determine which of the teams with the worst record will have the most chances to have the number one overall pick.[42] The other non-playoff teams are also eligible for the lottery.[43] The remaining teams are slotted based on overall record of the previous season barring any previous arrangements or trade agreements.[44] Once a player is drafted by an NBA team he becomes the property of that team for one season.[45] If the player is not able to reach a financial agreement with the team, the player is eligible to re-enter the draft in the following year.[46] Now, this is similar to the part of the example pointed out in the opening, where the guy at the local court passes on his "sideline" to wait on a later game or to await the arrival of certain guys at the court.

Under the current CBA a player drafted by an NBA team in the first round will receive a preset dollar amount based on draft position. The team and player can negotiate a salary within 80 to 120 percent of the slotted amount.[47] First round draft picks usually tender guaranteed contracts for three years with a team option for an additional year.[48] At the conclusion of the third season, or fourth season if the team picks up the option, a first round pick can become a restricted free agent if the team makes a qualifying offer for a fifth season.[49] Usually players selected in the second round of the NBA draft can be signed for as low as the NBA minimum.[50] The contracts for second round draft picks are typically non-guaranteed contracts for one or two years.[51] Any player not selected in either round immediately becomes an unrestricted free agent.[52]

An unrestricted free agent my sign with any team, whereas a restricted free agent can only sign with another team if the player's original team does not match the contract offer.[53] The ability of teams to match contract offers is also called the "right of first refusal".[54]

II. FREE AGENCY

Many believe that the watershed event in history of the relationship between professional athletes and team owners was the rise of free agency.[55] Free agency is grudgingly accepted, but it is also blamed for many of the perceived ills of modern professional sports.[56] The rate of increase in the compensation of professional athletes has far outpaced that of the ordinary American.[57] On the

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other end of popular culture is the perception that much of what is taking place in professional sports is an unsavory fight over money.58 A critical element lost to the players' search for the highest paycheck, the owner's resistance, and threats of labor strife is the fan's undying support. Arguably the fans have yet to accept this modern trend of players moving freely from team to team.[59] Many loyal fans long for the good old days of stable teams with their favorite players to whom they can give undying support. On the other hand, Weiler argues in *Leveling the Playing Field: How can the Law Make Sports Better For Fans*, that free agency has contributed to, rather than undermined, the competitive balance of professional sports.[60] Weiler concludes that everyone involved in professional sports, not just rich players, has greatly benefited from free agency.[61] Furthermore, Weiler suggests that free agency has contributed to a fairer distribution of revenues between players and owners.[62]

Although Weiler generally accepts the concept of free agency, he does not embrace the notion that sports should adopt an unregulated regime of free market bargaining for the relationship of players and owners.[63] In an interesting point, Wieler argues that unlike the entertainment industry, in sports the winner takes the greater share of the market.[64] This is a point that I believe has been undervalued by the NBA. A winning team with a marquee star has the necessary incentives to lure other stars and role players to the team.[65] Some teams are willing to spend to win. Other teams that do not believe that they have a chance to win do not spend. These owners will refrain from bidding for free agent players and will also dispose of his best and highest-paid talent.[66] The result is often a less competitive sports product.

In the NBA players are understandably adamant against a hard salary cap as the elimination of salary cap exceptions would prevent many of the players from receiving the most lucrative contracts.[67] The league's ultimate goal is to increase parity and competition among teams to make for a more spectator-friendly product.[68] It appears that if the salary cap remains as a percentage of league revenues, then the players will receive the benefit of the increase in merchandising, television rights, and ticket sales along with the owners.[69] Hence, while a change to the "Larry Bird Exception" or the soft salary cap does not seem to be on the horizon, the soft cap will continue to pose a threat to the integrity of the competition in the NBA.[70] This point will be examined at greater length later in the discussion. There remains a real chance in the NBA that a team with a good fortune in its choice of draft picks could conceivably lock-in a serious competitive advantage for years and years with the skillful use of the salary cap exceptions.[71] For example, this situation existed for the Chicago Bulls in the 1990's when the team won six championships in eight years (using the Larry Bird exception for Michael Jordan during that period).[72] It is conceivable that once a team captures certain talent on its roster, the team can manage the salary cap with exceptions to keep quality talent and skillfully acquire other talent to support its current stars. This is where the NBA's CBA has a loophole.

This is where the Miami Heat and LeBron James scenario enters the fold. Now that the Heat have acquired James and Chris Bosh to play alongside their previous draft pick Dewayne Wade, the Heat can manipulate their roster and cap exceptions to keep this group together. It is here where I reference a previous point made that a team with a superstar can lure other players. The Heat used Dewayne Wade to lure Chris Bosh, but more importantly, the Heat lured LeBron James for approximately $30 million dollars less than he would have received by staying with his old team the Cleveland Cavaliers.[73] In addition, the Heat convinced Zydrunas Ilgauskas, a center who has spent his 12-year career with the Cleveland Cavaliers, the last eight of those playing along side James, to join James and the Heat for the veteran's league minimum, about $2.8 million for two-years.[74] Ilgauskas states that, "I love Cleveland. At the end of the day, I decided that Miami is the best place for me to win a ring."[75] In another crafty move the Heat signed Juwan Howard ironically the leagues very first $100 million dollar player to a one-year contract at the veteran's league minimum.[76] Again, the ability to sign players at reduced salaries to a team loaded with talent and championship potential is supported by my idea that the players covet a championship more than money.[77] A player's drive to win a championship can lead to other benefits. A championship or multiple championships will produce long standing benefits for the players and the franchises. A winning team will likely see an increase in ticket sales and spurn interest on the road. The teams around the league will clamor to beat the 'Champions' and General Managers will begin to look at similar roster arrangements to make their respective teams competitive.

III. THE RECESSION: LEAGUE, FRANCHISES, FANS, PLAYERS

Matthew Parlow in his *The NBA and the Great Recession: Implications for the Upcoming Collective Bargaining Agreement Renegotiation*, examines the economic realities of the recession on the league, its owners and the players. I support Parlow's assertions and arguments, however, he fails to take into account or to explore how the NBA players can counter the potential decline in salaries by collaborating one with the other to share salaries, endorsements, and other marketing opportunities. In turn the players can provide a dominant product on the floor which will lead to an increase in league and franchise revenue. The idea is simple and spurned by that old cliché, "Everyone loves a winner!"

There is research and theoretical discussion about the overall impact of salary caps, luxury taxes, and free market systems in sports. Arguably, these discussions focus on the perspective of the league officials, the owners, and the team executives. Few, if any, of the discussions provide a viewpoint of the player who just wants to win. It has been suggested that the NBA's current CBA and business model has serious imperfections that will yield uncompetitive results and works against the leagues stated goals.78 This statement aligns with my argument that NBA players' have the ability to collaborate talent by choosing to play with select individuals at high, marginal, and some at reduced salaries to achieve championship status. The player's role in dis-mantling parity in the league may come at the expense of the leagues own measures.79 The players may have the ability to control their own destiny and carry the fate of the league with them.

A. THE LEAGUE LOSSES

The NBA like most businesses has suffered revenue loss during this worldwide economic downturn. The NBA has lost hundreds of millions of dollars over the last few seasons.80 The reality is that many teams experienced significant reductions in gate revenue for in the last few seasons.81 For example, when compared to the 2007-08 season, the following teams saw reductions in 2008-2009 of

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more than $5 million in their gate receipts: New Jersey Nets, $11.4 million; Sacramento Kings, $9.7 million; Toronto Raptors, $9.1 million, Detroit Pistons, $7.7 million; Los Angeles Clippers, $6.8 million; and Miami Heat, $5.3 million.[82] In addition, the Charlotte Bobcats, Indiana Pacers, and Washington Wizards experienced a reduction in gate receipts in excess of $4 million.[83] Five NBA teams also generated less than $500,000 in gate receipts per home game for the 2008-09 season: Atlanta Hawks, Indiana Pacers, Memphis Grizzlies, Milwaukee Bucks, and Minnesota Timberwolves.[84] The reduction in gate receipts is particularly problematic for NBA teams because ticket revenue usually constitutes up to fifty percent of a team's yearly budget.[85] Essentially, teams need to put a good product on the floor to attract fans to the arenas.

While a significant portion of teams' losses can be attributed to the reduction in gate receipts, most teams have lost revenue--or face the future loss of revenue--in other important business areas.[86] For example, while the NBA claims that its games in the 2008-09 boasted more than ninety percent capacity, this figure is somewhat deceiving as it includes tickets that teams gave away without charging for them--it includes "comp tickets" that teams gave away--and tickets that were paid for, but the ticketholder did not attend the game.[87] Moreover, some teams struggled mightily with their actual attendance numbers: the Indiana Pacers, Milwaukee Bucks, and Sacramento Kings drew less than 11,000 per game; the Charlotte Bobcats and the Minnesota Timberwolves had average attendances below 10,000; and the Memphis Grizzlies had an average of 7,570 fans per game.[88] Ironically, these teams have consistently been at the bottom of the league standings for a number of seasons. Such lackluster attendance also hurts teams' revenues, as teams depend on fans--even those with comp tickets--to pay for parking, souvenirs, and food and drink.[89]

Decreased corporate support has also hurt the NBA and its teams. For example, the NBA lost long-time corporate partners McDonald's and Toyota when both chose not to renew their sponsorship deals with the league.[90] Given the difficult economic times, teams have struggled to convince corporate sponsors to renew such agreements.[91] Obviously, this experience has placed a strain on the relationship between corporate America and the NBA. It is possible that economics maybe forcing the NBA and Corporate America to change its approach to revenue and marketing, respectively. Indeed, with many businesses looking to cut expenses due to the economic downturn, NBA teams also face new challenges selling higher-priced seating such as premium seats and luxury suites. Before the 2008-09 season, many teams experienced declining renewals for premium seat sales.[92] When originally devised, teams envisioned premium seats as providing a significant revenue source for team owners.[93] However, even before the economic downturn, NBA teams found it difficult to sell premium seats.[94] With corporations less inclined to pay for expensive premium seating, this problem has only grown worse.[95]

NBA teams also experienced similar difficulties with luxury suites. Luxury suites are private rooms within sports facilities that offer catering services, access to private clubs or lounges, a comfortable environment to enjoy the game, a private bar, and optimal views of the game. Luxury suites quickly became a favorite of team owners when building a new sports facility, as luxury suites were sold at a premium price that led to a substantial revenue stream--money that does not have to be shared under revenue sharing agreements.[96] Moreover, many teams are experiencing luxury suites going "dark," where the suites go unsold or the suite holders choose not to attend to save money on the food and drink that would have been consumed during the game.[97] The luxury suites have traditionally been a strong revenue source for franchise revenue.

All of these revenue reductions are significant for the upcoming CBA renegotiation because they directly affect the NBA's basketball related income ("BRI"), salary cap, and luxury tax threshold. The BRI is a term used in the NBA's CBA to encompass most revenues generated by the NBA and its member teams.[98] These monies include ticket sales, television revenue, sponsorship agreements, and other income derived from basketball operations.[99] A reduction in BRI has a direct impact on the league's salary cap, which equals fifty-one percent of BRI.[100] The salary cap restricts teams from having player salaries that exceed this threshold unless it meets one of the enumerated exceptions listed in the CBA--thus constituting a "soft" salary cap.[101] Therefore, a decrease in the BRI, reduces the salary cap, thus potentially limiting the ability of teams to sign new players or re-sign their existing players.

For the 2009-10 season, the NBA salary cap was $57.7 million, down from $58.68 million the season before.[102] Soon after the 2009-10 season began, predictions for the 2010-11 salary cap ranged from $50 million to $54 million.[103] In fact, just before the 2009-10 season began, the NBA league office told the NBA Board of Governors that the salary cap for the 2010-11 season would likely be around $52 million.[104] However, the salary cap for the 2010-11 season will be approximately $56.1 million, which constitutes a smaller drop than many anticipated.[105] Nevertheless, even this figure is problematic for teams.

B. FRANCHISES: PROPOSED SOLUTIONS TO THE ECONOMIC PROBLEMS

The league secured a $200 million line of credit to allow fifteen teams to borrow money to help them during these difficult economic times.[106] The NBA allowed teams to use the money for whatever purposes they wanted, and many expected teams to use it to help cover operating losses for the year.[107]

The league and its teams have also used layoffs to offset the declining revenue streams they face. In fact, the NBA was the first major professional sports league to announce that it would lay off a significant portion of its workforce.[108] In addition, many teams reduced the number of assistant coaches, scouts, and even the number of players on their roster to cut costs.[109] Finally, some teams imposed across-the-board budget cuts to their operating budgets to address the drop in revenue.[110]

C. THE FANS

To combat drops in attendance, many teams have reduced or frozen ticket prices or offered special ticket packages to maintain and attract sizable crowds. For the 2009-10 season, nineteen teams froze their season ticket prices, seven decreased their season ticket prices, and only three teams increased their season ticket prices.[111] In fact, for the 2010-11 season, the Detroit Pistons, Golden State Warriors, Miami Heat, Minnesota Timberwolves, and Sacramento Kings have already announced that they will reduce season ticket prices, while other teams--including the Oklahoma City Thunder and Phoenix Suns--have frozen ticket prices for the upcoming season.[112] In addition, many teams have stopped requiring one lump sum payment for season tickets, moving instead to payment plans that can stretch for up to twelve months--to help fans better afford tickets by paying for them over time.[113] Finally, many teams have also put

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together competitive ticket packages to draw in fans. For example, for the 2008-09 season, the Chicago Bulls had a buy-one-get-one-free promotion; the Memphis Grizzlies sold "Family Fun Packs" that included four tickets, four Pepsis, and four hot dogs for forty-eight dollars; the Indiana Pacers offered a promotion where fans could buy eleven games for the price of eight; and the New Jersey Nets sold 1,300 tickets for a package price of $440, equaling $10 per game.[114] In these regards, many teams have been forced to implement creative approaches to their ticket sales to meet their attendance and revenue goals during these challenging economic times.

The league and the individual franchises have experienced a reduction in income and are projecting losses in the coming seasons. The league's administrative offices, the franchise front-office's, and the team rosters are being purged. Collectively, the league, the teams, the fans, and the players are searching for a formidable plan to secure the success of the NBA.

D. THE PLAYERS

The teams' focus on avoiding the luxury tax led to a depressed free agent market for the summer of 2009 where marquee players had to take significant pay cuts and sign contracts for far less money than they would have before the economic downturn.[115] For example, after making more than $10 million a year for the past several years, Mike Bibby signed a three-year, $18 million contract with the Atlanta Hawks.[116] Jason Kidd signed a three-year, $25 million contract with the Dallas Mavericks after making $21.4 million that past season.[117] Rasheed Wallace took a pay cut of more than fifty percent in signing a two-year contract with the Boston Celtics.[118] Ron Artest and Trevor Ariza, players who had very successful 2008-09 seasons, would have normally been in high demand and commanded fairly lucrative multi-year contracts.[119] Instead, both players accepted five-year contracts at the mid-level exception starting at $5.854 million--contracts that many deemed to be far below their normal market value.[120]

In 2009, because the few teams seeking to sign free agents were already over the salary cap, the NBA's CBA limited the amount of money they could offer to those players. The other reason for this shift in the free agent market was that teams facing growing losses from the economic downtown were simply unwilling to pay marquee player salaries as they were already facing significant revenue losses. This reluctance to increase payroll also affected many average players' ability to obtain a guaranteed, multi-year contract.[121] Before the recent economic downturn, players that averaged five points per game or more were all but ensured a guaranteed contract and oftentimes a multi-year contract.[122] Finally, many believed that free agents during the summer of 2010 would face teams wanting to offer one-year contracts that will expire in 2011 when the NBA CBA terminates and a potential lockout by the owners might take place.[123]

Teams tend to carry a roster with the maximum fifteen players. However, in an attempt to cut costs during the difficult economic times, many teams started the 2009-10 season with fewer players on the roster.[124] Hence, as teams carry fewer players on the roster, there are fewer jobs for players in the NBA.

In order to free up salary cap space or to bring their payroll below the luxury tax threshold--whether for the current season or the following one--many teams actively sought trades where they would trade players with longer-term contracts in exchange for players with expiring contracts.[125]

Teams also have a keen interest in contracts that they can buy out because it can provide them with luxury tax relief. If a team can buy out a player's contract for less than the amount owed on it, the team's payroll is thus reduced. For teams that are slightly above the luxury tax threshold, such a reduction from a contract buyout can lower their payroll to the point where they avoid paying the dollar-for-dollar luxury tax.[126] For many players who are traded, the option of a contract buyout can be attractive as they can then sign with another team that may provide opportunities for more playing time, a long-term contract, and/or the possibility of playing for a championship. Playing for a championship is a real incentive for players.

In fact a free agent player retains the option to join a team that has the talent and legitimate potential to win an NBA championship. This is where players will wield their right to join certain players. I believe that with a bit of creative thinking a player that foregoes a high paying contract can achieve a respectable amount of money and he can also play with a real contender.[127]

The changes in the market for NBA player services has not only negatively impacted players' salaries and opportunities, they have also potentially exacerbated an existing divide within the NBA. The teams that are experiencing success on the basketball court are also the teams that are doing the best financially. The haves are in a financial position to take on the longer-term contract with guaranteed money because they are in healthier financial shape and are likely seeking to improve their chances of winning a championship. Due to their financial challenges, the have-nots must trade superior talent for inferior talent to gain payroll relief--and possibly luxury tax relief--for either that season or the next season.[128]

Moreover, because of the depressed free agent market, teams like the Los Angeles Lakers can afford to not only use their mid-level exception to sign a player despite being over the salary cap and luxury tax threshold, but they can sign an elite player like Ron Artest because of the lack of demand for his services by financially struggling teams. Consequently, the better and more financially sound teams in the league create a greater gap between their talent level and that of the have-nots, who must make trade and free agent decisions based largely on economic concerns rather than on competitive ones.[129] Historically, the teams have dictated the roster based on payroll. The current trend suggests that the marquee players have a real opportunity to help sway roster decisions based more on winning than on salaries.

In fact, because of the salary cap and its imperfections, franchises are forced to balance between economics and the opportunity to win. The players can affect the swing of the pendulum toward winning by forging alliances between one another like the Heat players have done for the upcoming 2010-2011 season.[130]

IV. LIKELY PROPOSALS DURING 2011 NBA CBA NEGOTIATIONS

Based on the economic problems detailed above, NBA Commissioner David Stern and team owners want to reduce the amount of revenue devoted to players' salaries, cut back player salaries, and shorten the length of players' contracts.[131] The league also proposed reducing the maximum salary guarantees for veterans and rookies by nearly a third of what players are eligible for under the current CBA.[132] In recent years, some maximum veteran contracts have totaled more than $100 million.[133] Under the league's proposal, the maximum veteran contract would be worth less than $60 million--significantly less than what players currently enjoy.[134] Moreover, under the league's proposal, only half of a player's contract would be guaranteed--also a major shift from the fully guaranteed contracts

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the players currently enjoy.[135] In their proposal, the league suggested implementing a "hard" salary cap--where a team's total player salary cannot exceed the salary cap for any reason. This proposed hard salary cap would eliminate the "Larry Bird Exception"--which allows teams to exceed the salary cap to resign its own players--and other exceptions, such as the mid-level exception, that currently allow teams to sign players to contracts above the soft salary cap threshold.[136]

From the teams' perspective, a hard salary cap ensures a ceiling for payroll costs--thus minimizing the chances for the type of financial difficulties that many teams are currently facing. Finally, the league seeks to retroactively modify existing long-term contracts to comport with its proposed structure.[137] The NBPA has called the league's proposal "oppressive" and "rash" and "unfair."[138] The players' union has also made it clear to the league that it would not accept a hard salary cap as a starting point for negotiations.[139]

A lock-out is looming. This may be attributed, in part, to the fact that the NBA's television contracts with ABC and Turner Sports will pay $900 million for the season--approximately $30 million per team--regardless of whether the NBA plays any games or not.[140] With no player payroll, many owners--if not all-- may make money on the television revenues alone.[141] Team owners must be mindful of the potential long-term negative impact that a sustained lockout could inflict on the league.[142]

A balancing act is constantly required to provide a product that meets the interest of players and owners respectively, a product that will be profitable to both parties and simultaneously enjoyed by fans. "Soft" cap or "hard" cap, free agency or arbitration, professional sports continue to represent one of the most popular forms of entertainment and most passionate outlets for fans across the country and around the world. Meanwhile the struggle to maintain competitive balance continues, and the face of sports continues to evolve with each new CBA.[143]

V. THE PLAYERS TAKE CONTROL OF THEIR DESTINY VIA FREE AGENCY AND THE CBA.

In the early days of the NBA, the teams controlled the players and their rights to play on select teams. Over time as the league developed so did the rights of the players to choose where they wanted to play. The early dynasties like the Boston Celtics of the late 1950's and 1960's were built by through management decisions, drafts, and trades.[144] Likewise, so were the championship teams of the Los Angeles Lakers in the 1980's.[145] However, the emerging champions of the early nineties and beyond were built by a combination of drafts, trades and a new trend, free agency.[146]

In fact, an examination of the teams that claimed the NBA crown from 1990 thru the 2010 season all displayed the trend of building around an incumbent leading man, key free agent acquisitions, and role players playing at or near the league minimum. It is an easily identifiable trend that has largely gone unnoticed by the media and the fan. The recent signings by the Miami Heat of the incumbent Dewayne Wade, free agents LeBron James and Chris Bosh, along with role players Zyrunas Ilgauskas and Juwan Howard further highlight the typically unnoticed practice of players sacrificing money to play together in hope of securing a championship and potential dynasty.[147] A quick look at similar decisions made by management and players reveal the following:

2009-2010 Los Angeles Lakers, Marquee - Kobe Bryant, Free agent (FA) Ron Artest,

2007-2008 Boston Celtics, Marquee - Paul Pierce, FA's Ray Allen and Kevin Garnett

2005-2006 Miami Heat, DeWayne Wade, FA Shaquille O'Neal

1990's Chicago Bulls, Michael Jordan, FA Dennis Rodman

Notwithstanding, the "Larry Bird Exception" allows teams to re-sign its own players to the maximum amount allowable without any salary cap penalty. This one exception opens the door for teams to keep the central piece of the team at any allowable amount while attracting his "friends" and "colleagues" to join him, some at max contracts and others at league minimums.[148]

VI. EMERGING CONCEPTS

Traditionally endorsements were limited to a few elite players. Now with the advent of mass media, digital and interactive media, advertising with player likenesses are at an all time high.[149] Players are even allowing their likeness to be used in foreign countries for non-american products.[150] But even with a few more players securing endorsement deals there is still an income gap between many players and the amount of money earned on endorsements.[151] Likewise there are guys who have signature shoe deals which include a show named after them and there are guys who are only paid for wearing a shoe brand.[152]

Hence, as marquee players such as Kobe Bryant, LeBron James, Dewayne Wade, and Paul Pierce consider their team roster and the plight to win a championship, they have to consider the franchise and the salary cap issues. It is possible that these players are in position to defer money or to take a cut in pay, but they are also in position to supplement the income of free agents or trade acquisitions through marketing and endorsement opportunities. It is certainly conceivable that marquee players can establish partnerships and endorsements for friends and teammates. It is a reality for guys who sign with the Jordan Brand.[153] Now it is an evolving reality for the guys who sign with LeBron James's marketing firm LRMR.[154] The reality is that James can not take everything that is offered to him. But, he can certainly assist his clients in securing many of those opportunities. In early July, James lured Chris Paul, the star point guard of the New Orleans Hornets, to LRMR.[155] Paul's association with James at CAA (sports agency) aligns him with Dewayne Wade, Chris Bosh, Carmelo Anthony, and Tony Parker.[156] It has been rumored that 2010 first overall pick John Wall is considering signing with James and LRMR.[157]

While it is not unusual for several sports stars to be represented by a single agency, it is unusual for an active player to be the owner of the agency.[158] Further, in light of the current trend of athletes positioning themselves to challenge for the NBA crown it is intriguing to think about the possibilities of players sharing non-team income. For instance, a marquee player with a $100 plus million dollar guaranteed contract and an additional $25-$100 million a year in endorsements can sign a potential teammate to a marketing contract with multiple options.[159] Here the marquee player can guarantee the teammate a non-basketball contract for a specific dollar amount. In addition, the player may receive income through actual endorsement opportunities provided by the marketing agency. Essentially, a marquee player can share his basketball and non-basketball revenue with players who are willing to accept lower team salaries and not likely to receive the same lucrative endorsement opportunities as the big name players. Why would a

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marquee player be willing to defer money or share earned money with other players? The answer is simple. Winning a championship pays big dividends.

Marketing consultant Interbrand ran through 50,000 computer models of a potential LeBron James career, using more than 200 variables like individual performance, fan demographics and championships.[160] The report suggested LeBron had a 50% chance of earning at least $1 billion in New York.[161] The study put a 0% chance of LeBron making $1 billion playing in Miami.[162] Interbrand's math suggested the following; an NBA title in New York could be worth $240 million to LeBron, about $180 in Cleveland, and $120 million in Chicago.[163] Obviously there is not an exact science to determining future income; it is clear that winning and specifically winning championships increases marketability for the franchise and the players.

VII. CONCLUSION

Winning keeps teams together, increases fan support and drives fan loyalty, ticket sales, attendance, souvenir sales, and the like. Players collaborating to play together, to avoid salary cap issues, to share non-basketball income, and to stay together could change the effects of the CBA and free agency. NBA Players may very well use the CBA, Free Agency, and non-team revenue to build rosters of their choosing and begin competing for multiple championships. It is possible that LeBron James' decision this past summer may have opened the door to a new wave of dynasties hinging more on "friendship" and "winning" than on "management decisions". It was July 1, 2010 and it was LeBron James' "SIDELINE", he chose his friends as teammates and like an afternoon at the park they may just run the court until they decide otherwise.

FN1. Michael A. McCann, Illegal Defense: The Law and Economics of Banning High School Players From the NBA Draft, 1 Va. Sports & Enter. L. J. 295 (2002).
FN2. Id.
FN3. Id.
FN4. Id.
FN5. Id.
FN6. Id.
FN7. Id.
FN8. Id.
FN9. Id.
FN10. Id.
FN11. Id.
FN12. Id.
FN13. Id.
FN14. Id.
FN15. Id.
FN16. The basic rule of the salary cap is that a team's team salary may not be above the cap at any time unless the team is using an exception. In a system with a soft cap, an exception is the mechanism that allows a team to function while above the cap. LARRY BIRD EXCEPTION -- This is the best known exception. Players who qualify for this exception are called "Qualifying Veteran Free Agents" in the CBA, and this exception is formally a component of the Veteran Free Agent exception. This exception enables teams to exceed the salary cap to re-sign their own free agents, up to the player's maximum salary. To qualify for this exception the player essentially must play for three seasons without being waived or changing teams as a free agent (although there are nuances to this rule, which are explained in question number 26). This means a player can obtain "Bird rights" by playing under three consecutive one-year contracts, a single contract of at least three years, or any equivalent combination. It also means that when a player is traded, his Bird rights are traded with him, and his new team can use the Bird exception to re-sign him. These contracts can be up to six years in length. A player can receive raises up to 10.5% of the salary in the first season of the contract. The 1983 CBA introduced the modern salary cap, and with it the provision allowing teams to exceed the cap to re-sign its own players. It is commonly believed that this exception acquired its common moniker because Larry Bird was the first such player to be re-signed. However, this appears to be apocryphal, as Bird signed a seven-year contract in 1983 (before this provision took effect), and did not sign another until 1988. There is one more limit to the maximum salary that can be given using the Larry Bird exception. If the player was a first round draft pick, just completed the third year of his rookie scale contract, and his team did not invoke its team option for the fourth season (see question number 42), then this exception cannot be used to re-sign him to a salary greater than he would have received had the team exercised its option. In other words, teams can't decline an option year in order to get around the salary scale and give the player more money. http://members.cox.net/lmcoon/salarycap.htm#Q12
FN17. See Id. at 15.
FN18. Id.
FN19. Id.
FN20. Id.
FN21. Id.
FN22. Matthew J. Parlow, The NBA and The Great Recession: Implications for the Upcoming Collective Bargaining Agreement Renegotiation, 6 DePaul J. Sports L. & Contemp. Probs. 195, (2010).
FN23. Id.
FN24. 29 U.S.C. § 151-169; see also 29 U.S.C. § 159(d) ("to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to…confer in good faith").
FN25. Id. at 22.
FN26. Walter T. Champion, Jr., Sports Law, (2005).
FN27. Id.
FN28. Id. at 22.
FN29. Id.
FN30. Id.
FN31. Id.
FN32. Id.
FN33. Id.
FN34. Id.
FN35. Id.
FN36. Id.
FN37. Id.
FN38. Id.
FN39. Id.
FN40. The National Labors Act that governs the CBA and the CBA requires that the parties engage in collective bargaining to determine any changes to the terms and conditions of the CBA.
FN41. The NBA's draft is supported by the CBA. However, amateur players that are not selected in the NBA draft are eligible to sign with any team.
FN42. See Nat'l Basketball Ass'n & Nat'l Basketball Players Ass'n, Collective Bargaining Agreement (executed July 29, 2005), available at http://www.nbpa.org/cba/2005 [hereinafter NBA CBA]
FN43. Id.
FN44. Teams may acquire various draft picks via previous trade agreements or other executed transactions.
FN45. NBA CBA (Art X)(3)(a)
FN46. NBA CBA (Art X)(5)(a) Amateur players (i.e. players that have remaining college eligibility) can submit their name for inclusion in the NBA draft and are eligible for the draft. If the player does not sign with an agent and is not satisfied with his draft position the player can remain an amateur and return to his university team.
FN47. See Id. at 42. (NBA CBA.)
FN48. See Id. at 42.
FN49. Id.
FN50. Id.
FN51. Players selected early in the second round are more likely to receive two year contracts than those selected later in the round. Gary Lambrecht, Hope Glimmers for a Fallen Star, Balt. Sun, June 22, 2001, at 1D.
FN52. Unrestricted free agent. See NBA CBA Art. X(3)(c).
FN53. Id.
FN54. Id.
FN55. Richard P. Cole, Law, Sports, and Popular Culture: The Marriage of a Relationship Scorned, "Review of Paul Weiler, Leveling the Playing Field: How the Law Can Make Sports Better for Fans", 23 W. New En. L. Rev. 431, (2000).
FN56. Id.
FN57. Id.
FN58. Id.
FN59. Id.
FN60. Paul Weiler, Leveling the Playing Field: How the Law Can Make Sports Better for Fans (2000).
FN61. Id.
FN62. Id.
FN63. Id.
FN64. Id.
FN65. Historically teams like: the Boston Celtics with Bill Russell, Los Angeles Lakers with George Milkan, Chicago Bulls with Michael Jordan, Miami Heat with Dewayne Wade; have been able to use their marquee stars to attract other high quality players.
FN66. Id. at 64.
FN67. Ryan T. Dryer, Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition, J.Disp. Resol. 267 (2008).
FN68. Id.
FN69. NBA CBA Art. XX § 3
FN70. Id. at 67.
FN71. The Chicago Bulls are the best example of this statement. The Bulls drafted Michael Jordan with their first pick in 1984 draft. Jordan became the Bulls and NBA's marquee player. The Bulls then drafted a little known player by the name of Scottie Pippen in a subsequent draft who became Jordan's sidekick. The Bulls then used the "Larry Bird Exception" to keep Michael Jordan and Scottie Pippen paid among the NBA's elite salaries. See NBA CBA Art XX § (2)(b).
FN72. Id. at 67.
FN73. LeBron James accepts less money to play with friend Dewayne Wade in Miami. See - http://sports.espn.go.com/nba/news/story?id=5365165; http://online.wsj.com/article/SB10001424052748704111704575355162960155010.html
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FN76. See Howard Signs with Heat – Again, http://sports.espn go.com/espn/print?id=5396136&type=story
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FN79. The league allows teams to sign its own free agents under the "Larry Bird Exception"; in addition the teams can sign other free agents to max contracts; and subsequent free agents to minimum contracts (at the players' wishes). See also Id. at 16.
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FN89. Id.
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THE NFL NETWORK VERSUS CABLE PROVIDERS: THROWING A PENALTY FLAG ON THE FANS

By Andrew B. Delaney

Andrew B. Delaney, 2010 Juris Doctorate, Vermont Law School and
Co-Founder of the National Sports & Entertainment Law Society.

But compromise, if not the spice of life, is its solidity. It is what makes nations great and marriages happy.[1]

INTRODUCTION

During economic crises, most businesses feel a pinch.[2] One of the very few businesses that appear unaffected is professional sports.3 Professional football—the American version—is one of the most lucrative professional sports enterprises in the world.[4] On any given Monday night during the football season, it is likely more Americans are watching Monday Night Football than any other sporting event on television.[5]

"The NFL Network was launched in 2003 as a vehicle to broadcast films, clips, and thousands of hours of footage owned by the NFL."[6] In other words, the NFL Network is a "premium" football channel.[7] Football is already widely watched, and the NFL Network tries to attract the huge fan base.[8]

So what exactly is the NFL Network? In its words: "It is every football fan's dream. Seven days a week, 24 hours a day, 365 days a year, a television network solely devoted to the most popular sport in America, professional football."[9] While that is not entirely true—after all, commercials do take up some airtime—the Network is indeed devoted to "All Things Football."[10]

The "NFL Network launched on Nov. 4, 2003,"[11] and within two years, expanded its viewership rapidly.[12] According to the Network, "Both AT&T and Verizon now offer video service and make NFL Network available as part of their expanded basic package. NFL Network in 24 months reached subscriber totals on par with other successful networks in their fifth year."[13] According to its own data, the Network has been successful in its short history.[14] "Counting all cable channels launched, the average subscriber numbers at the end of five years is 30.3 million. NFL Network reached this number in less than two years."[15] But the success has not been without conflict. And a battle with the cable companies wages on in court.

As will be discussed in more detail later in this Note, the Network and the cable companies have been battling over carriage and contract issues.[16] The most contentious relationship appears to be between the Network and Comcast Cable.[17]

The dispute between the Network and Comcast grows increasingly bitter. The NFL[18] has even set up a webpage where fans can contact government officials and complain about cable companies—like Comcast—that do not offer NFL Network as part of basic or expanded basic programming.[19] The page also assists fans in switching to a programming provider that provides the NFL Network free of additional charge.[20] The page provides links to recent news articles concerning the NFL Network, and numerous other links that arguably vilify the cable industry and downplay the NFL's role in the lack of carriage.[21] Just visiting the page could make football fans a little peeved with the cable provider who fails to provide the NFL Network free of charge.

But is the NFL Network really doing all it can to bring its programming to viewers? The Network would certainly like us to think so. But the truth is the NFL charges certain cable providers a substantial fee to receive its programming.[22] Granted, it is not an astronomical fee,[23] but cable providers are not likely to provide something they get charged for at no cost to the consumer—economics 101, my friends.[24] Unlike HBO or Showtime, whose costs are passed on to consumers who opt to receive the programming, the NFL Network expects to be carried on basic tiers and to be paid a hefty persubscriber fee.[25]

The NFL Network is the exclusive provider for certain games,[26] and based on where "home" games are, the Network lets basic broadcast channels in "home markets" carry the games.[27] But "home markets" connotes much broader coverage than fans actually realize.[28]

During late 2007, when the New England Patriots were vying "for a historic perfect regular season," fans and legislators were able to pressure the NFL into providing one of the team's final games against the New York Giants on free broadcast television.[29] According to the NFL, "home market" ordinarily includes only the team's associated city—the game mentioned above would only have been broadcast on the NFL Network and in the teams' "home cities" of New York and Boston.[30] Although fans and legislators were successful in pressuring the NFL to relinquish its control for that one game, the NFL had indicated that this would not happen again.[31] The basic thrust of the NFL's position is that the cable companies are to blame for limited coverage because the cable providers refuse to carry the network on basic or expanded basic tiers.[32]

This Note proposes that the NFL Network work with the cable companies in order to provide coverage to consumers who choose to optin. In order to provide wide coverage, the cable companies need not offer the Network for free, but could implement a reasonable percustomer surcharge for NFL Network access based on the number of subscribers who opt to receive the service. Because the NFL charges seventy to eighty cents per subscriber, the proposed solution places less of a burden on consumers who are not interested in the NFL Network. If the NFL Network is placed on basic cable, then consumers—many who might have not the least interest in football or the NFL Network—will have to pay for the network, whether that want it or not. By placing a reasonable surcharge on NFL Network service—as opposed to including it on basic cable—the cable companies will be able to provide more personalized service without having to transfer unwanted costs to subscribers. People who want just the NFL Network in addition to their basic cable would be able to get it without paying for an entire sports package. Similarly, the NFL Network can also be included—as it currently is by some providers—in a sports package for those who want extensive sports coverage.

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Part I of this article discusses the NFL's exemption from antitrust law as far as selling pooled rights to broadcasters and analyzes the NFL's contracts with Comcast, which have been one of the primary sources of the controversy between the parties. Part I also discusses the history and current state of the NFL's litigation with the cable companies to provide the reader with useful background. Part II develops the reader's understanding of the issues by discussing the various social and economic considerations at play, and some of the external pressures—from consumers, legislators, and commentators—that have played a part in this controversy. Part III suggests possible solutions and weighs the strengths and weaknesses of each approach.

I. BACKGROUND

A. The NFL's Unique Position

Like many businessmen of genius he learned that free competition was wasteful, monopoly efficient. And so he simply set about achieving that efficient monopoly.[33]

Although the quote beginning this section is from a fictional work about a Mafia family, some have argued that the NFL is a statesanctioned or even an illegal monopoly.[34] Section One of the Sherman Act[35] prohibits any "contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ."[36] "The Sherman Act forms the basis of our antitrust laws and contains . . . basic prohibitions against monopoly and monopolization."[37] At first blush, it might seem that an agreement between several professional sports teams to pool their broadcast rights and sell those rights to the highest bidder is precisely the kind of restraint on trade that the Sherman Act prohibits. But such is not the case.

Under the Sports Broadcasting Act of 1961[38] and the 1966 AFL–NFL Merger Act,[39] the NFL can claim an exemption to antitrust law when it sells "package deals to broadcasting companies for the exclusive telecast or transmission of league games."[40] This puts the NFL (and other professional sports leagues) in a truly unique and enviable position. One commentator has argued the Sports Broadcasting Act is no more than "special interest legislation meant to protect the professional sports leagues for which it was passed."[41]

The Sports Broadcasting Act was Congress's response to a federal district court's rulings in two cases that—for a shortlived period—would have subjected the NFL's pooling of broadcast rights to antitrust law.[42] The case that set the stage was decided in 1953 by Judge Alan K. Grim of the United States District Court for the Eastern District of Pennsylvania, and "allowed contractual restriction on the telecasting of games into a member club's 'home territory' when that team played at home."[43] Eight years later, expanding on his 1953 decision, Judge Grim ruled that the NFL "was prohibited from entering into an agreement to sell the pooled rights of its member clubs."[44] Judge Grim's ruling invalidated a contract negotiated by newlyelected NFL commissioner Alvin Rozelle that "eliminated television competition among NFL teams and, instead, divided television income equally among league members."[45]

"The NFL quickly appealed to Congress for legislation to negate Judge Grim's antitrust ruling."[46] Congress was compliant, and quickly passed the Sports Broadcasting Act of 1961.[47] The Act gives the NFL and other professional sports leagues a taste of the antitrust exemption that Major League Baseball has enjoyed since 1922.[48]

Some of the congressmen who passed the Act may have thought they were helping to protect collegiate sports because the Act "prohibited the pros from playing on Friday night and Saturday afternoon, the traditional times for college football."[49] This meant, theoretically, that the NFL's televised games would not detract from the collegiate fan base.[50] Although the restriction on game times may have softened the effect of the "legal television monopoly for professional football" created by the act, most agree that the Act was "legislation written for the benefit of pro football . . . ."[51]

Based on his interpretation of legislative intent at the time the Sports Broadcasting Act was passed, Stephen F. Ross, a leading sports law and antitrust scholar, surmises that "Congress acted to promote, not restrict, viewership of games—especially the games fans care about most, those of their local teams."[52] From this premise, Ross argues that the Act was intended to apply to overtheair broadcast television, and that pooling contracts between sports leagues and cable channels should not receive an automatic exemption under the Act, but should be subject to ruleofreason analysis.[53] In other words, a pooling contract—such as the NFL makes with various entities to televise its games—would be exempted from antitrust law only if it effectively increased viewership.

While Ross's analysis certainly has merit, it has not been adopted generally.[54] The rule remains that a professional sports league may pool its teams' broadcasting rights and sell those exclusive rights to the highest bidders.[55] In this regard the NFL has a unique bargaining chip—it holds a product in high demand and it is the only entity that can sell it, apparently. Thanks to the Sports Broadcasting Act of 1961 and the 1966 AFL–NFL Merger Act, what might otherwise be an illegal monopoly is a perfectly lawful business.

B. The Contracts

On the road from the City of Skepticism, I had to pass through the Valley of Ambiguity.[56]

The NFL's contracts with Comcast should serve as something of a cautionary tale. As most people familiar with contract law know, "different standards in different agreements can create a problem."[57] And create a problem they will—especially when the parties have different ideas about what provisions constitute the agreement.

The NFL approached Comcast in 2004 "with an offer which culminated in two letter agreements, both entered on August 11, 2004."[58] The two letter contracts—an "OutofMarket Package Letter of Understanding" (Letter of Understanding) and an "NFL Network Affiliation Agreement" (Affiliation Agreement)—were not necessarily straightforward.[59] The two agreements dealt "with both the distribution of the NFL Network by Comcast, and Comcast's potential rights to negotiate to acquire telecast rights to live football games."[60]

The Affiliation Agreement contained a provision that—arguably— allowed Comcast to place the NFL Network on a sports tier.[61] The relevant paragraph stated that if the parties did not reach an agreement "on or before July 31, 2006," then Comcast would not be obligated to distribute the NFL Network on a basic tier, and could distribute the NFL Network on a premium tier.[62] Paragraph five of the Letter of Understanding contemplated an agreement where Comcast would carry the NFL Network on a percustomer surcharge basis.[63] Comcast argued that at the time of the agreements, the NFL Network had "limited commercial appeal."[64] However, Comcast saw the

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opportunity to broadcast live NFL games as "extremely valuable, as only broadcasters . . . , ESPN and DirecTV, owned such rights."[65] Comcast maintained that the Affiliation Agreement was intended to reward Comcast for its "help in 'launching' the NFL Network."[66]

After the two letter agreements were executed, the parties "commenced negotiations to permit" one of Comcast's channels to broadcast "a package of live, regular season, NFL games."[67] The parties never reached an agreement, and "in January 2006, NFL licensed the games package to its own NFL Network."[68] Although the parties were not able to come to an agreement that would permit Comcast to broadcast games on a Comcastowned channel, they continued to negotiate.[69]

"On June 15, 2006, the NFL sent Comcast a letter" offering to license an NFL Network games package to Comcast on a percustomer surcharge basis.[70] The letter included a thirtyday expiration period, and Comcast asked for an extension to consider the offer.[71] The NFL agreed to the extension in a July 14, 2006, letter noting that "'[a]ll terms, conditions and definitions in the Affiliation Agreement and the June 1, 2006 Offer letter remain in effect.'"[72] Comcast accepted the offer on July 28, 2006, and both parties appeared to understand that the terms and conditions of the Affiliation Agreement would "'remain in full force and effect.'"[73]

Essentially, Comcast argued that the Affiliation Agreement must be read to include the Letter of Understanding and that paragraph five of the Letter contemplated a separate deal—from that contemplated by paragraph three of the Affiliation Agreement—and that Comcast was therefore not obligated to distribute the NFL Network on a highpenetrating tier.[74] The NFL basically argued that the agreement on July 28, 2006, rendered the exception in Paragraph Three void because the parties had come to an agreement on one of the conditions contemplated before the deadline in the clause.[75] Perhaps this was a situation where one of those "grammatical abominations"[76] like "and/or" could have saved the parties a lot of time and money.

C. The Litigation and the FCC

Litigation: A machine which you go into as a pig and come out of as a sausage.[77]

Like sausage, the litigation between the NFL Network and cable companies is a little messy. First, the NFL sued Comcast in New York state court in 2006 when Comcast placed the NFL Network on a sports tier.[78] Comcast moved—and the NFL crossmoved—for summary judgment.[79] In an unpublished decision, New York Supreme Court[80] judge Bernard J. Fried granted summary judgment for Comcast, and denied the NFL's crossmotion.[81] Judge Fried found Comcast's argument more persuasive, and ruled that the two letter agreements—because they contained similar language and were entered into on the same day—"must be read as one agreement" as a matter of law.[82]

Further, Judge Fried found that the language in paragraph three[83] contemplated an agreement for carriage of NFL games by Comcast on a Comcastowned channel, not carriage of the NFL Network.[84] Judge Fried did "not find any ambiguity in the various agreements."[85] Thus, Judge Fried held that the carriage agreement was made under paragraph five of the Letter of Understanding and that no agreement contemplated by paragraph three of the Affiliation Agreement was ever made.[86] Comcast gains five yards—second down.

The NFL immediately appealed the decision.[87] In contrast to Judge Fried's findings, the Appellate Division of the New York Supreme Court[88] found that the agreements were "ambiguous with respect to the scope of the tiering provision and that neither party ha[d] established a definitive interpretation as a matter of law."[89]

Again, the NFL argued that the July 28, 2006, agreement fell "within the class of agreements that extinguish Comcast's tiering rights" under the Affiliation Agreement.[90] Comcast maintained that the two letter agreements must be read together.[91] The court found neither argument persuasive.[92] The court found "the two agreements . . . substantively different" and noted "obvious textual inconsistency" between the Affiliation Agreement and the Letter of Understanding.[93] The court noted that while paragraph five of the Letter of Understanding contemplated a deal for broadcasting on a "Comcastowned network," paragraph three "of the Affiliation Agreement include[d] no such limitation."[94] The court modified the judgment on the law and remanded the case to Judge Fried for further proceedings.[95] As of this writing, the case is in mediation.[96] In the meantime, Comcast sued the NFL—in New York state court—for breach of contract.[97] Comcast alleged that "the NFL has been encouraging its customers to drop its service, essentially 'destroying' Comcast's right to put the channel on the sports tier, which the NFL agreed to in its contract."[98] As noted above, whether the parties actually agreed to this remains in dispute.[99] Comcast also cited mass emailings that the NFL Network sent out encouraging consumers to switch from Comcast to cable providers that provide the network for free.[100] This case is also pending.[101]

During the New York state court proceedings, the NFL also brought a complaint against Comcast with the Federal Communications Commission (FCC).[102] The NFL alleged that Comcast: (1) discriminated against the NFL Network in favor of its own channels in violation of FCC rules;[103] and (2) "required a financial interest in the NFL's programming as a condition for carriage of the NFL Network, in violation of" FCC rules.[104] Although Comcast argued that the case should be dismissed on four procedural grounds,[105] the FCC rejected the procedural arguments and found that the NFL had presented sufficient evidence to establish a prima facie case.[106] The Media Bureau Chief ordered an Administrative Law Judge (ALJ) to hold a hearing on both claims and "return the matter to the Commission within 60 days."[107]

The matter was sent to ALJ Arthur I. Steinberg, who ruled[108] that the case could not be resolved within the time frame mandated by the Media Bureau Chief.[109] The various defendants[110] argued that the time frame dictated by the Media Bureau Chief was unfair.[111] In his memorandum opinion, Judge Steinberg notes that the sixty-day deadline "cannot be achieved. This is an extremely complex proceeding involving six separate program carriage complaints, three Complainants, and four Defendants."[112] Steinberg also said that "it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60day timeframe."[113] The defendants argued that the timeframe was "unrealistic, inconsistent with past practice, and insufficient."[114] Some saw Steinberg's ruling as a win for Comcast. [115] And so it goes—the court and administrative battles wage on as the fans wonder why some games are not on certain channels.

Just five days after Steinberg's ruling it was announced that he would resign from the FCC in January 2009, after fortytwo years of service.[116] "Steinberg is resigning effective [January 3, 2009], but chief administrative law judge Richard Sippel is taking over the ComcastNFLN dispute, as well as several others, immediately."[117] One might have difficulty believing that Steinberg's resignation was anything but political.

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"The announcement came less than a week after Steinberg made important rulings in favor of Comcast that pushed back against FCC chairman Kevin Martin's apparent attempt to tilt the dispute in the NFL Network's direction."[118]

Martin has been criticized as having an "anticable bias"[119] and was targeted in a congressional probe that inquired into whether Martin was abusing his authority.[120] Martin declined repeated invitations to talk with the congressmen overseeing the investigation, even when the congressional report was due to be released.[121] Some FCC staffers said that Martin "suppressed reports that didn't support his agenda to change media ownership rules and purposely delayed meetings for several hours to pressure other commissioners."[122] Others alleged that Martin "rushed through" controversial reforms and a program overhaul.[123]

After a year of investigation, in December 2008, the House released its report on Martin.[124] The Report states that there were "instances in which the Chairman manipulated, withheld, or suppressed data, reports, and information."[125] The Report also suggests that Martin took a heavyhanded approach to managing the FCC and likely abused his power.[126]

Given Martin's alleged bias toward cable providers and Sippel's immediate takeover of Steinberg's cases, eyebrows might be raised. Could Martin have "encouraged" Steinberg to step down? Only time will tell.

Martin advocated for an à la carte cable scheme—letting customers pick and choose which channels they want to subscribe to instead of paying for a bulk package.[127] This kind of structure would probably not be a great solution across the board, and in fact, Martin's proposals have drawn ire from legislators[128] and harsh criticism from network executives.[129] Yet à la carte may be the best choice on the menu for both cable providers and the NFL Network. This solution will receive greater discussion in Part III.

With a new administration in Washington and a formal nomination for Julius Genachowski as the new FCC Chief already made,[130] it is unclear how the dispute before the FCC will pan out. Cable executives are generally pleased with Genachowski's appointment and the sentiment seems to be that "anyone is better for cable than outgoing Chairman Kevin Martin."[131]

II. A SOCIAL AND ECONOMIC BREAKDOWN

A. The Public Reaction

So tell me what you want, what you really, really want. [132]

This section will focus primarily on the public reaction to the ongoing feud between the NFL Network and the cable companies. Popular opinion can have an influence on the law,[133] and because here the consumer is directly affected, legislators and judges should take heed of the public's reaction to the dispute.

Many commentators have taken sides in the issue. One sports commentator writes: "It just doesn't make sense to me, with all the money the NFL makes, that they feel the need to monopolize the market even more, by forcing viewers to purchase their TV station."[134] Another commentator writes: "I have been waiting for the NFL Network and have been pretty offended that Comcast actually wanted me to pay more money to have it."[135] The public reaction is mixed, although more people appear to side with the NFL Network.[136] This could be due in part to the NFL Network's hardhitting approach with its website and its overthetop public relations strategy.[137] But one wonders if the fans who side with the Network's position have the whole story.[138] So who is right? Both sides of the argument have merit. On the one hand Comcast can be seen as unreasonable because it is requiring customers to pay for several channels—some of which the customers may have no interest in—in order to get NFL Network programming.[139] On the other hand, the NFL Network is being unreasonable because it is charging Comcast for the programming and expects Comcast to distribute it to consumers at no cost.[140] The NFL Network—even though it charges Comcast on a persubscriber basis—also wants Comcast to distribute the NFL Network as part of Comcast's basic programming.[141] And who ends up paying for the dispute in the end? The fans do.

B. The Legislative Voice

A child can go only so far in life without potty training. It is not mere coincidence that six of the last seven presidents were potty trained, not to mention nearly half of the nation's state legislators.[142]

All joking aside, the legislature has been involved with this issue. Several Senators, Congressmen and Congresswomen have written letters and voiced opinions about the feud.[143] The NFL Network recently responded to legislative pressure, and "the NFL has slightly widened its carriage policy for its network's primetime games."[144] Starting November 20, 2008, the NFL "opened up [its] presentation to areas served by the overtheair stations" covering NFL Network games.[145] Previously, while the NFL Network had allowed overtheair channels in home markets to broadcast the games, when the channels were carried by cable providers "the games were blacked out in . . . outer areas."[146] This small concession indicates that the legislative voice is having an effect.

And Comcast has been busy lobbying lawmakers.[147] In fact, Comcast spent over $3.8 million lobbying in its fourth financial quarter in 2008, a majority of the spending related to the conflict with the NFL Network.[148] While the NFL has been focusing on swaying consumer sentiment, it seems that Comcast has taken a behindthescenes approach.

Perhaps the first "real" concession the NFL Network made to legislative pressure was at the end of the New England Patriots historic undefeated 2007–08 season.[149] The last game of the regular season between the Patriots and the New York Giants—who would eventually win the Super Bowl against the Patriots[150]—prompted significant protest from fans and legislators when they learned that the game might only be available on the NFL Network, except in Boston or New York City.[151]

Massachusetts Senator John Kerry sent letters to NFL Commissioner Roger Goodell, Comcast Executive Vice President David L. Cohen, and Time Warner President Glenn A. Britt asking that "representatives from the NFL, Time Warner and Comcast" meet with Kerry in Washington to discuss a solution to the carriage issue.[152] Several other legislators weighed in on the issue and encouraged the NFL to broadcast this particular game beyond its traditionally defined "home market" area.[153]

It was not just lack of coverage for the Patriots' last game that had legislators upset, however. The NFL managed to convince a number of legislators that the network was being discriminated against by the cable companies. On December 18, 2007, fourteen members of the House of Representatives sent a letter to Chairman

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Martin of the FCC.[154] The letter stated that the legislators were "concerned" that the cable companies were "refusing to carry the NFL Network and other popular independently owned programming on a broadly distributed tier of service."[155] The letter also cited a dispute resolution program that had "benefited consumers . . . in the Washington, DC market," and asked the Commissioner to implement the "same approach" in dealing with the standoff between the NFL Network and the cable providers.[156]

The NFL decided to allow coverage of the Patriots–Giants matchup to extend beyond the home market coverage area for the final game of the regular season.[157] But then, at the beginning of the 2008–09 season, it looked as if many fans who did not live within the home market area would again go without coverage of their "home team"—unless they paid for the NFL Network.[158]

In a promising trend, the NFL Network expanded coverage slightly beyond its traditional definition of home market beginning November 20, 2008.[159] It appears the legislative voice is being heeded. Perhaps, if Senate and House members continue to weigh in the issue, the fans might get to watch NFL Network games next season.

C. The Economics

Football incorporates the two worst elements of American society: violence punctuated by committee meetings.[160]

Various economic considerations drive this controversy. For one, Comcast claims that the NFL is trying to force it into making consumers pay for unwanted programming. [161] This argument has some merit. The NFL wants Comcast to distribute the NFL Network as part of basic or expanded basic cable.[162] But the NFL still wants Comcast to pay for the programming on a percustomer basis.[163] This has the effect of forcing customers who may never watch football pay for football programming.[164] Granted, most cable customers pay for some programming they never watch, but generally, because of the cablebilling structure, the unwatched programming is low-cost or mostly advertising supported.[165] This is not to say the cable companies are innocent victims being bullied by the NFL, but the cable companies may not be quite as greedy as the NFL makes them out to be.

The cable companies are being greedy, however, in requiring customers to pay for an entire sports package as opposed to offering the NFL Network on a single channel subscription. Comcast charges about five dollars more per month for its "digital sports package."[166]

This Note proposes that although five dollars a month might seem like a lot to pay just for football, most diehard football fans would be willing to spend an extra dollar or so a month for the NFL Network. If Comcast were to sell NFL Network at a reasonable per-customer surcharge[167] per month, viewership would likely increase, and both sides might benefit. The NFL would be closer to getting the viewership it seeks and Comcast would not have to shift the cost burden to unwilling customers or cut its profit margin to offer the Network widely. Additionally, retaining a sportstier structure that includes the NFL Network would be attractive to those who desire extensive sports programming.

The NFL has argued that Comcast discriminates against the network in favor of its own channels.[168] Although this may be true on some level, simple economics dictate such a result. Some estimate the cost to the cable companies of one NFL Network game at about $100 million.[169] Given the high cost—and the NFL's proposed lack of a return—there is not a great incentive for Comcast to include the NFL Network in its basic programming.

One cannot help but wonder how much all the litigation between the NFL and the cable companies costs. A top New York attorney can bill in excess of $1000 an hour.[170] Although it is unlikely Comcast or the NFL is paying that kind of hourly rate, litigation is never a bargain and one can only guess how much has already been and will be spent on this battle. In the end, of course, consumers will get stuck with the bill.

III. LET'S MAKE A DEAL

I don't know how much time and effort I wasted before discovering that deals aren't usually blown by principals; they're blown by lawyers and accountants[171] *trying to prove how valuable they are.*

Considering the current court battles, the hard lines drawn on both sides, and general animosity between the parties, an amicable settlement seems unlikely. This section will briefly look at the strengths and weakness of possible solutions to the issue.

A. The Stalemate

If neither side is willing to budge, what happens? Considering the speed with which disputes move through the court system, a judicial resolution is not likely to come any time soon. The FCC is restructuring with the new administration, and in the meantime—however much outgoing Chairman Martin might want to push the NFL Network case through the FCC administrative court system—the FCC should be pretty busy switching television over to the new digital format.[172] And the Senate has told Chairman Martin to concentrate on just that, no more warring with the cable companies.[173]

Fans on either side are angry. If the parties refuse to budge and continue to litigate, appeal, and try to force the other side to concede, we could be looking at several years in court. In the meantime fans are likely to become increasingly frustrated with both sides. Some fans might switch to a cable provider that provides the NFL Network for free. Some fans might avoid the NFL Network out of disgust. If the baseball strike of 1994–95 taught us anything, it is that professional sports can lose a lot of their fanbase when they put financial matters over the fans.[174] A stalemate has consequences for both sides—by the time the parties finally settle and are ready to put the programming out there, those LaZBoys may be cold and empty.

B. Making It Basic, Making It Free

One option the NFL might consider for getting the distribution it wants without charging a premium would be to make the channel more advertising supported. Because football games have such high viewership, additional advertising revenue should be easy to obtain and could help defray production and distribution costs. Comcast and other companies could also seek advertising dollars to keep costs down—a promise of an advertisement during high viewership times could command a substantial investment from companies looking to reach the football fan demographic.

Despite extensive research, it remains unclear why the Network has to charge such a high price per subscriber. It also remains unclear why the NFL Network is unable to offer its programming at a reduced rate with its alreadyexisting advertiser support.[175]

In the past, advertising support has enabled independent television channels to "work with much lower capitalization" than is needed when programming and development costs are absorbed by the entity itself.[176]

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Sadly, with all the time and effort both parties have invested in their respective positions, relying on advertising support to finance the Network would probably be more of a "win" for the cable companies than the NFL Network would be willing to settle for—and vice versa. Still, in combination with a minor surcharge, advertising dollars could help to ease the burden on both sides and get the parties to a settlement sooner rather than later.

C. And the Winner is . . .

The best solution is to institute an à la carte option for cable subscribers who actually want the NFL Network's programming. Millions of people in the United States watch football on television.[177] This means that there is a ready market for the NFL Network. This ready market can be best accessed by an à la carte cable scheme for the NFL Network. If the NFL Network is going to charge on a persubscriber basis, should not Comcast offer the channel on an optional persubscriber basis? For a specialty channel like the NFL Network, it is unfair to make cable subscribers who have no interest in football to subscribe to a network whose mantra is "All Things Football." [178] Neither is it fair to make a football fan pay for extra sports programming when all he or she wants to watch is football. Neither side is going to gain any ground by resisting the inevitable. At some point, each side is going to have to give a little to get a little.

The economic implications are lessened by the à la carte scheme. While cable providers have long resisted an à la carte programming structure, perhaps the time has come where it would not be so burdensome. Cable subscribers who were already willing to pay for an entire sports programming package are unlikely to change to a single sports channel or a few channels. If the cable companies offer programming on an à la carte basis, discounting packages when several channels are purchased together, viewership and revenue are likely to increase, not decrease. The people who want all the sports will still buy the package, and the people who just want one or two sports will be more willing to pay for those one or two channels. Having the option to choose can increase customers' sense of value, even when the "value" is largely illusory. It is the prospect of paying for something one does not want that likely discourages many wouldbe customers from purchasing "package" deals. Rather than having a detrimental effect on revenue and subscription rates, à la carte is likely to have a positive effect. Both the NFL and Comcast will be able to cover the cost of the programming without placing a burden on disinterested customers. Advertising revenue can help to alleviate some of the production and distribution costs as well. At this point the battle has become pointless—if there ever was point in the first place. The parties have to work together if they want to stop wasting resources.

The question then becomes how to implement an à la carte scheme. An old argument against à la carte is that the arrangement imposes more costs on consumers and cable providers because it requires a switch to digital format.[179] With digital format being the preferred—and soon to be mandatory—medium for even overtheair broadcasts, this concern is no longer present.[180]

Perhaps the FCC should rule that Comcast has discriminated against the Network. Perhaps the New York courts should in turn rule in favor of Comcast, finding that Comcast has a contractual right to tier the Network. But someone also needs to remember the fans. Most fans are not going to care whether Comcast violated an FCC regulation or whether the NFL contracted away distribution on basic cable. Most fans just want to see their favorite teams play.

The issues that have arisen from the disputes between the NFL and the cable companies could likely have been resolved without getting courts and regulators involved. For example, the NFL and the cable companies could have spent a little more time drafting their contracts and ensured that everyone was clear on exactly what was expected. Such a statement might seem sophomoric, but oftentimes the simplest solutions are the most effective. In the end, the free market should determine whether or not the NFL Network is viable—not regulators or judges. Neither the Network nor the cable companies deserve to be subsidized by the government. Consumers should be free to choose whether they want the NFL Network or not.

IV. CONCLUSION

The battle between the NFL and the cable companies has been playing in various theaters for several years now. Neither side is entirely correct, although both sides claim innocence. The dispute seems much like a fight between overgrown and precocious children who have not yet realized that their audience is slowly but surely dwindling. Though the NFL paints Comcast as greedy and anti-footballfan, the NFL's own greed may be getting in the way of its judgment, and some fans are starting to see the NFL's actions as entirely selfserving. Unless both sides work toward an equitable solution, they may both end up alienating the people who justify their very existence—the fans.

1. PHYLLIS MCGINLEY, A SHORT WALK FROM THE STATION 13 (1952).
2. See Press Release, U.S. Post Office, Madison Post Office Announces Route Changes (Mar. 9, 2009), available at http://www.nbc15.com/home/headlines/40964297.html ("The current economic downturn has affected every business in the country.").
3. See Matt Jaffe, Is the Sports Business Recession Proof?, ABC NEWS.COM, Mar 5, 2009, http://abcnews.go.com/Business/Economy/story?id=7010282&page=1 (noting that even as offthefield layoffs continue, players are recording multimillion dollar contract deals).
4. See, e.g., MARK YOST, TAILGATING, SACKS AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY 1 (2006) (noting that league revenues at the start of the 2005 season were $5.2 billion; additionally, merchandising was worth $3.4 billion, and the League had just entered four new television contracts worth an estimated $3.75 billion per year). See also MICHAEL ORIARD, BRAND NFL 166 (2007) (noting that by the winter of 2005–2006, league revenues were close to $6.0 billion).
5. See, e.g., Street & Smith's Sports Business Daily, Final Nielsen Ratings from Recent Sports Events, Sept. 26, 2008, http://www.sportsbusinessdaily.com/article/124293 (showing that televised NFL events had a larger market share and more viewers than any other sporting events for the week of September 20, 2008, and noting that the lowest rated football game in recent history (23.4 HH Nielsen rating) easily outperformed one of the highest rated New York Mets games in recent history
6. (5.73 HH Nielsen rating)). Monday Night Football had 18.6 million viewers compared with 3.07 million viewers for a New York Yankees versus Baltimore Orioles game. Id. One explanation is that the coverage area correlates directly with viewership, but NFL games appear to draw more viewers per capita regardless, GIL FRIED, TIMOTHY J. SHAPIRO & TIMOTHY D. DESCHRIVER, SPORT FINANCE 259 (2d ed. 2007).
7. Wilton D. Alston, The NFL Network: You're Kidding, Right?, Dec. 12, 2007, STRIKE THE ROOT, http://www.striketheroot.com/72/alston/alston4.html.
8. Street & Smith's, supra note 5.
9. NFL.com, Inside the NFL Network, http://www.nfl.com/nflnetwork/about (last visited Mar. 6, 2009).
10. See e.g., Curtis Eichelberger, NFL Network Expanding Beyond Pro Football to College, Preps, NORTHWEST HERALD (Ill.), July 17, 2007, http://www.nwherald.com/articles/2007/07/11/sports/nfl/doc4694c3865e8c9364750208.txt (Charles Coplin, vice president of programming for the NFL Network, commenting that "the college preview show is an extension of the network's 'All Things Football' mantra and a harbinger of its expansion into college and high school programming").
11. NFL.com, supra note 9.
12. Id.
13. Id.
14. Id.
15. NFL.com, About NFL Network, http://www.nfl.com/nflnetwork/fastfact (last visited Mar. 6, 2009).
16. See discussion infra Part I.C.
17. Id.
18. Throughout this Note, textual references to "NFL" should be taken to refer to NFL Enterprises, LLC—the parent company of the NFL Network—unless otherwise indicated.
19. NFL Enterprises, LLC, I Want My NFL Network!, http://iwantnflnetwork.com/ (last visited Mar. 6, 2009).
20. Id.
21. Id.
22. See Shira Springer, Pressure from Fans, Legislators got NFL to Act, BOSTON.COM, Dec. 27, 2007, http://www.boston.com/sports/football/patriots/articles/2007/12/27/pressure_from_fans_legislators_got_nfl_to_act/ (noting that the NFL Network charges cable companies about seventy cents per subscriber for the service); Alston, supra note 7 (noting that the fee, estimated at eighty cents per customer, would make the NFL Network "the 5th most expensive cable channel out of the over 150 that currently exist").
23. Springer, supra note 22.
24. See, e.g., HENRY CLAY, ECONOMICS: AN INTRODUCTION FOR THE GENERAL READER 113 (1920) (explaining the basic supply and demand dichotomy).
25. See Alston, supra note 7: The league not only wants to have its own cable network, it wants to be paid $0.80 per cable subscriber. That amount— according to a recent USAToday piece—would make the NFL Network the 5th most expensive cable channel out of the over 150 that currently exist. However, here's the real "kicker"—pardon the pun—the NFL wants cable suppliers to package the NFL network in their normal offerings. Id.
26. See, e.g., Danielle Leigh, Broncos Game Limited to NFL Network, KXRM FOX21.COM, Nov. 8, 2008, http://www.kxrm.com/news/news_story.aspx?id=219168 (explaining that the NFL Network has exclusivity over certain games during the football season).
27. Id.
28. See id. (Denver is the only "home market" for the Broncos); John Eggerton, Vermont Legislators ask NFL to Widen Market, BROADCASTING & CABLE, Dec. 17, 2007, http://www.broadcastingcable.com/article/CA6513390.html (explaining that Massachusetts and Vermont Legislators had asked the NFL to expand coverage of what they call the NFL's "unduly narrow" homemarket definition).
29. See Springer, supra note 22 (noting that the NFL had agreed to "an unprecedented threeway (NFL Network, CBS, NBC) national simulcast of the game"). Interestingly, this event led EchoStar, the parent company of Dish Network, to drop the NFL Network to a lower tier. Linda Moss, Judge: Amended Dish Carriage Deal Lead [sic] to Live Game Package for NFL Network, MULTICHANNEL NEWS, Jan. 16, 2009, http://www.multichannel.com/article/162263-Judge_Amended_Dish_Carriage_Deal_Lead_To_Live_Game_Package_for_NFL_Network.php. This meant the Network lost about four million subscribers. Id.
30. See Letter from Christopher Dodd (DConn.) and five other U.S. Sens. and Cong. Reps. to Roger Goodell, Comm'r, Nat'l Football League, Dec. 19, 2007, available at http://courtney.house.gov/UploadedFiles/NFL_Letter.pdf (noting that Patriot fans in Boston and Giants fans in New York City would be able to view the game, but Connecticut fans of either team would not be able to without subscribing to the NFL Network).
31. Greg Bishop, In Letter, Goodell Blames Cable Operators for Impasse, N.Y. TIMES, Nov. 5, 2008, at B18, available at http://www.nytimes.com/2008/11/05/sports/football/05nfl.html.
32. Id.
33. MARIO PUZO, THE GODFATHER 213 (1969).

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34. See Sanjay Josè Mulick, Browns to Baltimore: Franchise Free Agency and the new Economics of the NFL, 7 MARQ. SPORTS L. J. 1, 25 (1996) ("The reason the professional football teams exert such inordinate leverage over cities today is because the NFL is a monopoly, a monopoly sanctioned by Congress."); John A. Gray & Stephen J.K. Walters, Is the NFL an Illegal Monopoly?, 66 U. DET. L. REV. 5, 30–32 (1988–89) (discussing the NFL's monopolylike power and accompanying arguments, but concluding that the NFL is not an illegal monopoly).
35. 15 U.S.C. § 1 (2006).
36. Id.
37. STANLEY EUGENE BOYLE, THE ARTIFICIAL RUBBER INDUSTRY IN THE UNITED STATES 235 (1959).
38. 15 U.S.C. §§ 1291–1295 (2006).
39. Id. § 1291.
40. David L. Anderson, Sports Broadcasting Act: Calling It What It is—Special Interest Legislation, 17 HASTINGS COMM. & ENT. L.J. 945, 946 (1995).
41. Id. at 947.
42. RONALD A. SMITH, PLAYBYPLAY: RADIO, TELEVISION, AND BIGTIME COLLEGE SPORT 95 (2001) (discussing the events leading to the Sports Broadcasting Act).
43. Anderson, Sports Broadcasting, supra note 40, at 946 (quoting United States v. Nat'l Football League, 116 F. Supp. 319, 325 (E.D. Pa. 1953)).
44. Id. at 946 (citing United States v. Nat'l Football League, 196 F. Supp. 445 (E.D. Pa. 1961)).
45. SMITH, supra note 42, at 95.
46. Id. at 195–96.
47. 15 U.S.C. §§ 1291–1295 (2006). SMITH, supra note 42, at 95.
48. See Federal Baseball Club of Baltimore v. Nat'l League of Professional Base Ball Clubs, 259 U.S. 200, 209 (1922) (holding that baseball games are not interstate "trade of commerce in the commonly accepted use of those words" and thus not subject to antitrust law).
49. SMITH, supra note 42, at 96.
50. Id.
51. Id. See also Anderson, supra note 40, at 946.
52. Stephen F. Ross, An Antitrust Analysis of Sports League Contracts with Cable Networks, 39 EMORY L.J. 463, 469 (1990).
53. Id. at 476–82.
54. Only one case has cited Ross's article favorably, and that case was reversed within a year. Postema v. Nat'l League of Prof'l Baseball Clubs, 799 F. Supp. 1475 (1992), rev'd, 998 F.2d 60 (1993).
55. See U.S. Football League v. Nat'l Football League, 634 F. Supp. 1155, 1163 (S.D.N.Y. 1986) (discussing the Sports Broadcasting Act's legislative intent and finding that the NFL can sell pooled rights to more than one broadcaster without violating federal antitrust law).
56. ADAM SMITH, POWERS OF MIND 207 (1976).
57. TINA L. STARK, DRAFTING CONTRACTS 253 (2007).
58. NFL Enters., LLC v. Comcast Cable Commc'ns, LLC, No. 603496/09, 2007 WL 1299412, *1 (N.Y. Sup. Ct., N.Y. Cty., May 4, 2007) (unpublished decision), aff'd in part, modified in part, 851 N.Y.S.2d 551 (N.Y. App. Div. 2008), available at http://decisions.courts.state.ny.us/fcas/fcas_docs/2007may/300603469206002sciv.pdf.
59. Id.
60. Id.
61. Id. The relevant provision in paragraph 3 read: In the event that [Comcast] or a Comcast Company does not reach an agreement with [NFL] or an NFL Company concerning carriage of (i) any package of live, outofmarket regular season NFL games (each such package, an "OutofMarket Package") or (ii) any package of live, nationallytelecast NFL games (each such package, an "Additional Cable Package") on or before July 31, 2006, then: (a) [Comcast] shall not be obligated to distribute the [NFL Network] on D2 (or any higherpenetrating level of service) on any System, and may distribute [the NFL Network] on any System as part of any tier, package, or level of service (including a Sports Tier). . . . Id. (alterations in original).
62. Id.
63. Id. at *2.
64. See id. (quoting Comcast brief at 8).
65. See id. (omission is simply a parenthetical listing of broadcasters, i.e., ABC, CBS, and Fox).
66. See id. (quoting Comcast brief at 8).
67. Id. at *2.
68. Id.
69. Id.
70. Id.
71. Id. at *2–3.
72. See id. (quoting Carroll Affidavit, Ex. 7) (alteration in original).
73. See id. (quoting Carroll Affidavit, Ex. 9).
74. Id. at *3–4
75. See id. (outlining Comcast's and the NFL's basic arguments). See also text accompanying note 61 (text of the relevant paragraphs as altered by the trial court).
76. BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 1.80 (2d ed. 2006).
77. See ANTHONY L. DEWITT, THE RESPIRATORY THERAPIST'S LEGAL ANSWER BOOK 325 (2005) (quoting Ambrose Bierce, 20th Century American author and satirist).
78. NFL Enters., 2007 WL 1299412, at *1.
79. Id.
80. Lest there be any confusion, New York's general civil trial courts are "Supreme Courts," its intermediate appeals courts are "Appellate Terms of the Supreme Courts, 1st & 2nd Departments," followed by "Appellate Divisions of the Supreme Courts": New York's highest court is the "Court of Appeals." N.Y. State Unified Court System, Court Structure, http://www.courts.state.ny.us/courts/structure.shtml (last visited Mar. 6, 2009).
81. NFL Enters., 2007 WL 1299412, at *7.
82. Id. at *6.
83. Id. at *1. See also text of note 61, supra (text of relevant paragraphs of the Affiliation Agreement).
84. NFL Enters., 2007 WL 1299412, at *6.
85. Id.
86. See id. (noting that "there is nothing to indicate that Paragraph 3 is meant to incorporate agreement under Paragraph 5").
87. NFL Enters., LLC v. Comcast Cable Commc'ns, LLC (NFL Enters. 2), 851 N.Y.S.2d 551 (N.Y. App. Div. 2008).
88. See supra note 80. (N.Y. Court System).
89. NFL Enters. 2, 851 N.Y.S.2d at 551–52.
90. Id. at 554.
91. Id. at 555.
92. Id. at 555–58 (discussing the parties' claims).
93. Id. at 555.
94. Id.
95. Id. at 557–58.
96. Ted Hearn, Comcast, NFL Seek Mediation, MULTICHANNEL NEWS, July 7, 2008, http://www.multichannel.com/article/CA6575978.html.
97. John Eggerton, Comcast Sues NFL Alleging Breach of Contract, BROADCASTING & CABLE, Dec. 13, 2007, http://www.broadcastingcable.com/article/CA6512850.html?industryid=47170 ("Comcast filed a breach of contract suit against the National Football League in the New York State Supreme Court.").
98. Id.
99. Id.
100. Id.
101. Id.
102. In re Herring Broad., 46 F.C.C.R. 104, 2008 WL 4567148 (Oct. 10, 2008) (memorandum opinion and hearing designation order) modified by erratum (Oct. 15, 2008).
103. Id. ¶ 2. The first section of the FCC rule that Comcast allegedly violated is 47 C.F.R. § 76.1301(c) (2008), which reads:
Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors. Id.
104. Herring Broad., 46 F.C.C.R. 104, ¶ 2. The other section of the FCC rule that Comcast allegedly violated is 47 C.F.R. § 76.1301(a) (2008), which reads: "Financial interest. No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems." Id.
105. Id. ¶ 68. Comcast argued that the case should be dismissed (1) as "barred by the program carriage statute of limitations"; (2) because of the pending litigation in New York state court; (3) because the NFL's complaint did not state "with specificity" the relief sought, (quoting 47 C.F.R. § 76.6(a)(1) (2008)); and (4) because the complaint did not comply with "signature and verification requirements" applicable to the claim. Id. ¶¶ 69–74.
106. Id. ¶¶ 85, 89.
107. Id. ¶¶ 85, 89.
108. In re Herring Broad., Inc. (Steinberg Ruling), No. FCC 08M47 (F.C.C. Nov. 20, 2008) (memorandum opinion and order, advance copy, on file with author).
109. Matthew Lasar, Judge Throws Comcast/NFL Network Mess Back at FCC, ARS TECHNICA, Nov. 20, 2008, http://arstechnica.com/news.ars/post/20081120judgethrowscomcastnflnetworkmessbackatfcc.html.
110. The various defendants are Time Warner Cable, Inc., Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corp. Steinberg Ruling, No. FCC 08M47. Various plaintiffs— Herring Broadcasting, Inc. d/b/a WealthTV, NFL Enterprises LLC, and TCR Sports Broadcasting Holding, L.L.P., d/b/a MidAtlantic Sports Network—are involved. Id. However, this article is specifically concerned only with the NFL–Comcast portion of the case.
111. Steinberg Ruling, No. FCC 08M47, ¶ 2.
112. Id. ¶ 7.
113. Id.
114. Id. at ¶2.
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Why would an advocate of freedom care? I care because the NFL's preferred option amounts to TV socialism, plain and simple. It's not like the NFL is new to this territory, though. This is virtually the same economic model NFL franchise owners use when they get municipalities to pay for new stadiums. All the inhabitants of a region pay for a venue that enriches a scant few and entertains a minority. Nice racket.

Let me be very clear on one other point. I feel no love for cable suppliers. They are the direct beneficiaries of poorly-planned and fundamentallyflawed regulation that creates a market where only one or two companies provides a service used, if not needed, by virtually everyone in a geographical region. Cable suppliers are sucking the government teat like a greedy pig just back from a vigorous romp in the mud. It is only because of the State that so few cable companies exist. Make no mistake about that.
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CONTROLLING THE MEDIA FRENZY AROUND A SENSATIONAL CASE: LESSONS LEARNED

By Miranda Sevcik, Principal, Media Masters

Miranda Sevcik is a former television journalist and current principal of Media Masters, a Houston-based litigation communications and legal PR firm that caters exclusively to lawyers and legal professionals. Miranda is currently working with defense attorney Ed Chernoff as the media liaison and spokesperson for the defense of Dr. Conrad Murray. http://www.mediamastersonline.net

A family physician blamed for the death of the King of pop, a little boy from a fame-craving family in an escaped balloon, a seemingly perfect sports star caught up in the most imperfect of sex scandals. Much has been said about the public's fascination with digesting every last tidbit of these stories. Will the outcome of these events affect the average person's day-to-day lifestyle? Of course not, but the public is voracious and the media beast must be fed.

High profile public castigation is attributed by some sociologists to schadenfreude, or deriving joy from watching another person's suffering. An individual once-revered brought down to size seems to be irresistible to most people. In a country beset by so many economic, environmental, and social problems, convicting people of misdeeds in the public arena almost equates to a vacation from one's own problems; a chance to say, 'My life isn't all I want it to be, but at least I'm not THAT guy."

Whatever it is that compels us to devour every last morsel of a high profile person's misfortune, often the event lands in the legal arena. A ruling in the court of public opinion can be just as important as a ruling in the court of law because it's a person's reputation and therefore future that's at stake.

Questions equal suspicion in the media world. Inconsistent answers feed the flame of guilt. A central figure with a background of shameless self-promotion and an inability to take responsibility is pretty much the nail in the coffin of sentencing in the court of public opinion. In the balloon boy family's case, that inconsistency was only the beginning of their problems.

BALLOON BOY SAGA GOES BUST

A Larry King producer spoke of the surreal atmosphere she experienced as she was sitting in the living room of the family home waiting to get them on air for her show. This was of course, the infamous interview when Falcon Heene spilled the beans that the stunt was "for the show". The producer said she was amazed at the media's jackal-like attack of the Heenes. "I know it's so ironic," she admitted. "I mean, I know these journalists, we see each other all the time at these things but it seemed in this case, because there was no lawyer or PR person to create a buffer between us and them, it was out of control, like a feeding frenzy."

The producer admitted morning show producers were arguing with each other, jockeying for which media outlet would get the first interview with the family the next day. Reporters were refusing to leave the Heene home for fear they wouldn't be let back in. A neighbor friend was charged with guarding the Heene front door to keep out the curious. Her story reminded me of the first fatal mistake many individuals make when faced with a high-profile case: inattention to control.

TIGER'S SUV WASN'T THE ONLY THING DESTROYED

Inattention to control revealed itself in the case of Tiger Woods as well. When his fender bender/golf club accident was initially reported, Woods blasted the media by saying through a statement on his website; "Although I understand there is curiosity, the many false, unfounded and malicious rumors that are currently circulating about my family and me are irresponsible."

The next day when it was made public an alleged mistress of Tiger's had sold a voicemail she received from the golf great begging her to erase her name from his phone, Woods released a contradictory statement.

"I have let my family down and I regret those transgressions with all of my heart. I have not been true to my values and the behavior my family deserves. I am not without faults and I am far short of perfect. I am dealing with my behavior and personal failings behind closed doors with my family."

In the statement's entirety Tiger shared one small paragraph admitting culpability and then another 4 paragraphs admonishing the public for being interested in a scandal that he himself created. According to US Weekly, the first tabloid magazine to get the scoop from one of Tiger's alleged mistresses, Woods' agent did not return calls from the magazine about the alleged affair for a week and a half. Obviously Team Tiger didn't feel prioritizing public image was important. As a result it is estimated in a recent UC Davis study that shareholders of major companies that sponsor Tiger Woods have probably lost a collective $5 to $12 billion because of the golf great's handling of his marital mess. Accenture, which was the first company to swiftly dump Woods as a spokesman didn't seem to lose any money at all.

OLD SCHOOL LAW AND NEW SCHOOL MEDIA

In the old days of litigation public relations the stock response to any query from a reporter about ongoing cases was simply, 'we don't comment on current litigation', or the lofty answer that 'we aren't going to try this case in the court of public opinion'. These days traditional media: TV, radio, newspaper and non-traditional

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media: bloggers, online magazines, and social networking websites tend to bleed their influence over into the courtroom. It's the ultimate reality show, tragic, compelling and best of all, cheap to produce.

Good litigation public relations involves tools that help ensure control, strategy and relationships. The basic ingredient for all three is covering the bases with a lot of prep work.

MICHAEL AND MURRAY MANIA

In a media feeding frenzy it's important to control what you can as soon as you can, and that starts with the spokesperson. After Michael Jackson died, the media seized on the idea that a single person was responsible, and that person was the doctor with him at the time of his death. Almost immediately the media began calling Dr. Conrad Murray, Dr. Demerol. That moniker, no matter how inaccurate, is an example of what can stick to a defendant indefinitely if there is no opposing view presented in the first 48 hours. In this case the legal team decided it was imperative to choose one person to talk about what could be said, namely, that Dr. Murray never gave Michael Jackson Demerol.

Houston criminal defense attorney Ed Chernoff appeared on Dateline in the hours after the initial police interview and then the following Monday spoke on as many news programs as he could to level the playing field as much as he could for his client. To prepare Chernoff for this feat, the team anticipated questions and grilled him ahead of time with any possible questions that could come up. We also armed him with messaging points to stick to during the interview.

Anticipation of what could possibly be revealed in an upcoming interview is achieved through a vulnerability audit of the client. Asking the client, 'What could possibly come up in the course of this media campaign we will have to answer to?' and planning a response in an excellent method of maintaining control. It also helps to restrict interviews to one reporter at a time- avoiding press conferences at all costs as they are impossible to control. This is a simple fact that is easily forgotten in the thick of battle- choosing to grant interviews needs to be based on what is best for the client's purposes, not the media's. If it won't benefit the client to talk on camera, distribute a written or taped statement instead.

Establishing boundaries is the first job. Restricting interviews, access and yet at the same time sharing information as it relates to the case and issue at hand via an online pressroom is very effective. Strategizing what will be said begins by choosing three themes and speaking to only those themes. These messaging points should be agreed-upon by the legal team and client as well. The themes may change depending on the stage of the litigation or developments in the story being dealt with. Often court cases only make headlines three times in their life cycle; when the suit is filed, when the trial begins and when the decision is reached.

Cherry-pick the outlets considered the most friendly and sympathetic and grant them an interview ONLY when there is something tangible to say and it clearly benefits the client to say it.

USING YOU TUBE AND ONLINE TOOLS

Establishing a good online pressroom is a great way to disseminate information. Pressrooms put control in the hands of the proper player. Be sure to include information on the pressroom that is useful and correct. Do not embellish or exclude pertinent information that can be shared. A well-organized pressroom can be an invaluable resource for a journalist as it is available to them for fact-checking 24 hours a day. A good pressroom should include biographical information on the client and the lawyers, the names and numbers of current friends and family available for interviews, a frequently asked questions page, all press releases, and a photo gallery if needed. On every page should be a contact name and number for additional questions. The pressroom created for Dr. Conrad Murray is a good example of an effective but no-frills website.

According to new research the number one reason people visit the Internet is to watch a video. The beauty of this for attorneys is, they don't have to rely on a traditional media outlet to pick up the news story of a case. If a self-produced video benefits the client attorneys should create one and post it on You Tube. In the Dr. Conrad Murray case, we produced a short two-minute video of the doctor thanking his supporters and friends. This video took the pressure off the doctor and his family for the first images of the man accused of killing Michael Jackson. It also presented to the public the image of a real person, not some shadowy figure hiding from suspicion.

Attorneys can also use You Tube to share information about a case they are currently working on to benefit the audience. This video about a recall of Triad alcohol prep pads helped to educate the public about the issue in a way that doesn't run afoul of State Bar Advertising Review rules because it is presented as editorial opinion absent of a call for business.

MAKING FRIENDS WITH THE MEDIA

Good mutually beneficial relationships with the media are essential for a positive outcome. Respecting a reporter's deadline goes a long way. If it has been promised to answer a reporter's questions, follow through with the interview on time. Return all phone calls even if the answers to be given are limited.

Information follow-up and interview organization is one of the most neglected and yet important aspects of media relations. When it is impossible to answer all media questions make sure to explain why and follow-up with an offer to share the information later when possible. On the flipside, if a reporter or media outlet continually misquotes a spokesperson or prints information either blatantly wrong, or over-blown do not feel compelled to reciprocate with future interviews or information.

Finally- never forget the end game. Any future litigation action could be jeopardized by media communication decisions made today. The media tends to believe a story that doesn't change. Keep the team's messaging consistent, immediate and proactive and the court of public opinion has a very good chance of ruling in your client's favor.

The Texas Star Award

D'Lesli Davis, Immediate Past Chair of the Section, and Steve Winogradsky, of the Planning Committee, presented the Texas Star Award to Mike Tolleson in October, 2010 at the 20th Entertainment Law Institute in Austin.

SAVE THE DATE

OCTOBER 2011

The 21ST Annual ENTERTAINMENT LAW INSTITUTE

at the HYATT REGENCY HOTEL in AUSTIN

Check the website for updates on the exact dates and time.

NOTICE

The next TESLAW council meeting will be on October 7th at the Radisson Hotel, 111 East First Street, in Austin at 5:30 p.m., immediately following the Entertainment Law Institute. You are cordially invited to attend, and we also hope you take advantage of the excellent CLE program offered at ELI.

For future planning purposes, we will also have a meeting in March, 2011, during SXSW (date to be announced) and another scheduled meeting during the State Bar Convention in San Antonio next June."

RECENT CASE OF INTEREST

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

UNITED STATES V. BONDS: A CASE SUMMARY

In 2003, the IRS began investigating BALCO, a company engaged in blood and urine analysis. The IRS believed that BALCO was distributing illegal performance enhancing drugs and then laundering the money. The government raided BALCO and found evidence of blood and urine test records that linked the defendant, Barry Bonds ("Bonds") to his trainer Greg Anderson ("Anderson"). Furthermore, this evidence allegedly showed that Bonds tested positive for steroids in 2001. Bonds crushed 73 homeruns in 2001, breaking the single season homerun record. This evidence not only brought into question the legitimacy of this record, but also questions of perjury because Bonds had sworn under oath that he did not take performance enhancing drugs. United States v. Bonds, 608 F.3d 495, 499 (9th Cir. 2010).

In December of 2008, the United States government indicted Bonds on ten counts of perjury and one count of obstruction to justice. The complaint alleged that Bonds "lied when he (1) denied taking steroids and other performance enhancing drugs, (2) denied receiving steroids from Anderson, [and] (3) misstated the time frame of when he received supplements from Anderson." Id. Subsequent to the indictment, Bond filed a motion in limine to exclude evidence that would link him to steroid use. The two categories of evidence that Bonds wished to exclude were "the laboratory blood and urine test results, and the BALCO log sheets of test results." Id. at 500.

Anderson refused to testify and was imprisoned for contempt of court. Anderson's refusal to testify protected Bonds because the government would have trouble introducing evidence of Anderson's statements to BALCO's Director of Operations, James Valente ("Valente"). According to the government's investigation, Anderson told Valente that the blood and urine samples were those of Bonds when he delivered them. Id. Bonds argued that allowing this evidence was inadmissible hearsay. Id.

By contrast, the government claimed that these circumstances fit a hearsay exception under Federal Rules of Evidence ("FRE") 802, the federal hearsay rule regarding admissibility of evidence. The government argued that Anderson's statements were admissible because they were statements by a co-conspirator (Anderson) against his penal interest, and also under the residual exception. Id. at 501. They also presented two alternative theories to admit Anderson's statements: (1) as statements authorized by a party (Anderson's statements authorized by Bonds) or (2) as statements of an agent (Anderson as Bonds' agent). Id. The lower court found that the government had failed to prove, by preponderance of the evidence, that any of these exceptions applied. Id.

The government also tried to introduce log sheets from BALCO that showed Bonds urine tested positive for steroids. Id. The government argued that these log sheets were admissible because they were "business records, or as statements of a conspirator, as statements against penal interest, or admissible under the residual exception to hearsay." Id. The lower court again ruled in favor of Bonds noting that they were not admissible under the exceptions. Id.

The government appealed and argued that FRE 807 (the residual exception) or FRE 801's exceptions for authorized statements (d)(2)(C) or for statements by an agent (d)(2)(D) applied. Id. The Ninth Circuit found that the statements by Anderson were inadmissible under FRE 807. Id. The Court found they did not meet the standards of "exceptional circumstances" because Anderson was not an available witness. Id. FRE 807 also requires that the statements have "trustworthiness" and the court found Anderson's statements untrustworthy, since Valente admitted mislabeling a sample when requested by Anderson. Id.

The Court analyzed FRE 801(d)(2)(C) and interpreted it to mean that Anderson needed specific authority from Bonds to discuss his blood and urine samples. Id. The court found that no explicit authorization existed between Bonds and Anderson that allowed Anderson to speak on Bonds behalf. Id. at 503. The Court also rejected the government's contention that an implied authorization existed between Bonds and Anderson holding that an athletic trainer, as opposed to an attorney, is not authorized to speak on his client's behalf. Id.

The Court then analyzed Anderson's statements under FRE 801(d)(2)(D), which states that a statement is not hearsay if made by a party's agent or by an employee. Under this theory, Anderson would have needed to be Bonds' employee or agent in order for the evidence to be admissible. Id. at 504. The court dismissed the government's arguments that Anderson met these requirements finding that Anderson was an independent contractor because Bonds did not direct or control any of Anderson's actions and did not control the scope of the testing. Id. at 505. Not only did Anderson's classification as an independent contractor defeat the employee argument, it also negated the contention that Anderson acted as Bond's agent because independent contractors are very rarely agents. Id.

After ruling that Anderson's statements would be inadmissible hearsay, the court tackled the issue of whether the log sheets would be admissible. The court found that the log sheets were inadmissible even if they were business records because the government could not prove that the samples actually came from Bonds. Id. at 508. The court reasoned that these log sheets, if admitted, actually created another type of hearsay, rather than proving the nonexistence of one. Id.

In conclusion, the court held that the lower court properly deemed both Anderson's statements and the log sheets were inadmissible hearsay, according to the Federal Rules of Evidence. Id.

By Maverick Ray

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