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Sports Law and Regulation: Cases, Materials, and Problems (3d ed.)

By

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Chapter 1  An Introduction to the Study of Sports Law

Replace the first sentence of the third paragraph on page 6 with:

The designation of an activity as a sport is not merely a matter of intellectual curiosity, and it can have wide-ranging real world implications. For instance, in 2013 the United States Government was faced with determining whether individuals who compete in tournaments involving the popular video game “League of Legends” should be considered professional athletes and whether foreign players should therefore be eligible for visas to enter the United States and compete as international athletes. See Adi Robertson, US visa bureau says ‘League of Legends’ is a professional, The Verge, July 23, 2013, http://www.theverge.com/2013/7/13/4520188/us-citizenship-immigrations-to-give-league-of-legends-players-sports-visas. While the rapid movement of fingers on a video controller and eyes on a video monitor arguably fail to meet the definition of sport set out above, United States immigration services determined that “League of Legends” players are, indeed, athletes engaged in a sport. Administrators at Robert Morris University in Chicago, Illinois, made the same determination in 2014, allocating roughly thirty athletic scholarships for talented “League of Legends” gamers. See John Keilman, College recruiting gamers as athletes, ChicagoTribune.com, June 23, 2014, http://www.chicagotribune.com/news/local/ct-video-game-scholarship-20140623,0,4334654.story. Both determinations were limited to “League of Legends” and those who play it, but they could logically extend to hundreds of other video games, which would challenge, and perhaps drastically alter, commonly held notions of what constitutes sport.

Is video gaming more reasonably viewed as a sport than cheerleading?

Replace the last sentence of the third paragraph on page 6 with:

Like the United States’ designation of “League of Legends” as a sport, the Second Circuit’s determination that cheerleading is an activity rather than a sport has substantial implications – in this case, gender equity implications – in light of Title IX requirements, which we explore in great depth in Chapter 10.

Chapter 2  Regulating Interscholastic (High School) Athletics

Add to the end of the paragraph spanning pages 24 and 25:

In 2012-2013 (the latest reported participation rates), participation for boys dropped from the all-time high in 2010-11 of 4,494,406 to 4,490,854. Participation by girls went up, however, from 3,173,549 in 2010-11 to 3,222,723 in 2012-13. An additional 15,190 girls participated in high school sports last year, when compared to 2011-12, marking the 24th consecutive year of an increase among girls. According to the National Federation of High School Associations, “eight of the top 10 girls sports registered increases in participation in 2012-13, led by competitive spirit squads (8,201), outdoor track and field (4,172), and swimming and diving (3,536). . . .
Girls sports outside the top 10 that recorded increases in participants and could be emerging sports for females are bowling (25,450 participants in 2012-13), ice hockey (9,447), wrestling (8,727) and flag football (7,019).” Overall participation rates went up from 7,667,955 in 2010-11 to 7,713,577 in 2012-13. Nevertheless, participation rates for girls in many schools is far below that of boys. See, infra, at 775 for data indicating the significant difference in participation levels between boys and girls at the interscholastic level.

Add as a new Note between Note 2 and Note 3 on page 48:

A Less Deferential Approach. In Scott v. Oklahoma Secondary School Activities Association, 2013 OK 84 (Oct. 2013), the Oklahoma Supreme Court seemed to disavow its decision in the Morgan case (see citation in note 2 above) and found that the OSSAA had acted in an arbitrary and capricious manner in sanctioning a student athlete, without clearly indicating which rules the student athlete had violated, particularly where those sanctions involved monetary penalties. The sobering closing paragraphs in the seven justice majority decision in Scott are indicative of a far less deferential judicial view of the role of high school athletic associations than has prevailed in most jurisdictions, including Oklahoma, in the past:

This Court has permitted the OSSAA, in the guise of a voluntary association, to govern the affairs of secondary school athletics in Oklahoma with near impunity. No more. An organization interwoven so tightly with the public school system and the statutes of Oklahoma, in which membership is functionally required to participate in nearly all extra-curricular activities, is not truly voluntary. We will, when necessary, examine its actions with the same careful depth we use in examining the decisions of state agencies. This examination should not be withheld from the prevailing party - nor should similarly situated litigants who have preserved the issue on appeal be bypassed, and left unaffected and unprotected in the appellate pipeline. To that end, our decision shall apply to this case, to cases now pending before judicial or administrative tribunals or in the appellate litigation process, as well as to all judicial review of OSSAA actions after this opinion is promulgated.

However, under any standard of review, the OSSAA has never been permitted to act in an arbitrary and capricious manner in interpreting and enforcing its own rules. We are left in this instance with little doubt that it has done so. While it is true that the events for which Scott sought the permanent injunction have passed, and that while this type of conduct has up until now been capable of repetition, we trust this will be the last time. To the extent any monetary penalties were leveled, such as the demand to repay the costs for camps allegedly attended in violation of the OSSAA's policies or for reimbursement of attorney fees, those penalties are reversed.

Competition in sports is more than a mere passing enjoyment for students. Particularly in rural areas, athletic teams are the glue which holds the community
together. The college and post-college careers of student athletes often have their genesis at the secondary school level, and for some provide the only path to higher education. The OSSAA wields too much control over their future to be allowed to act in an arbitrary and capricious manner in applying its rules. It must be reasonable, it must be conscientious, and it must be fair. From now on, we trust, it will be.

It will be interesting to see whether this far less deferential approach will be followed by other jurisdictions. The Oklahoma Supreme Court’s recognition of the importance of athletics to communities and student athletes is also worthy of note and may be a step in the direction of recognizing that participation in sport is more than a mere privilege that is subject to judicial deference to association and institutional decisions that implicate student athletes and coaches.

Certainly, reading the full Scott decision will help students better understand the tensions that underlie these cases: highly deferential associational and institutional authority under a participation in sport as a privilege model (the historic approach) v. a heightened sensitivity to participation in sport as more than a mere privilege evidenced in Scott.

Add to the end of Note 5 on page 49:

Courts may be reluctant to enforce restitution rules, because they are reluctant to penalize schools or individuals for abiding by a court decision. In Mann v. Louisiana High School Athletic Association, Inc.; 2013 U.S. Dist. LEXIS 131104 (M.D. La Sept. 13, 2013), the federal district court concluded that the plaintiff student-athlete did not want the school to be “penalized ... for following this court’s order and allowing [Mann] to participate in football games. The court will honor that request and reiterate that LHSAA may not apply the restitution rule against Dunham (the school).”

Add the following case after the Davenport case on page 77:

**Hayden v. Greensburg Community School Corp.**

743 F.3d 910 (7th Cir. 2014)

ROVNER, Circuit Judge. [The parents of A.H., a boy desiring to play interscholastic basketball] challenge a policy which requires boys playing interscholastic basketball at the public high school in Greensburg, Indiana, to keep their hair cut short. The Haydens make two principal arguments: (1) the hair-length policy arbitrarily intrudes upon their son’s liberty interest in choosing his own hair length, and thus violates his right to substantive due process, and (2) because the policy applies only to boys and not girls wishing to play basketball, the policy constitutes sex discrimination. The district court rejected both claims and granted judgment to the defendants... We reverse in part...

A.H.’s home is in Greensburg, Indiana... The Greensburg Community School Corporation comprises an elementary school, a junior high school, and a senior high school, which combined have an enrollment of 2,290 students.
The board of trustees [in Greensburg, Indiana where A.H. plays adopted] Policy 5511, entitled “Dress and Grooming”—which in relevant part directs the district superintendent to “establish such grooming guidelines as are necessary to promote discipline, maintain order, secure the safety of students, and provide a healthy environment conducive to academic purposes” . . . The district guidelines implementing this directive leave it to the individual principal of each school, in consultation with staff, parents, and/or students, to develop and enforce appropriate dress and grooming policies.

Greensburg Junior High School (which serves students in the sixth through eighth grades) has established an athletic code of conduct which includes the following provision regarding hair styles:

**Hair Styles which create problems of health and sanitation, obstruct vision, or call undue attention to the athlete are not acceptable. Athletes may not wear haircuts that include insignias, numbers, initials, or extremes in differing lengths. Mohawks are not acceptable, and hair coloring is not permitted. Each varsity head coach will be responsible for determining acceptable length of hair for a particular sport. Ask a coach before trying out for a team if you have a question regarding hair styles.**

[The court assumed that there was a similar provision for athletes at the senior high school level]. Stacy Meyer, the head varsity basketball coach at Greensburg High School, has established an unwritten hair-length policy which applies to the boys basketball teams. That policy provides that each player’s hair must be cut above the ears, eyebrows, and collar. Coach Meyer has explained the policy as one that promotes team unity and projects a “clean cut” image. The boys baseball teams have a similar hair-length policy, whereas the boys track and football teams do not. No girls athletic team is subject to a hair-length policy. . .

A.H. . . . currently is a junior in high school. He wishes to play basketball, but he also wishes to wear his hair longer than the hair-length policy permits. During the 2009–2010 school year, when he was in the seventh grade, A.H. cut his hair in compliance with the policy so that he could play for the junior high school boys team, but he “didn’t feel like himself” with the short haircut. The following year, he declined to cut his hair and his parents protested the hair-length policy as unconstitutional. He was permitted to practice with the boys team while the school and district entertained the objection. But the school principal and district superintendent ultimately sustained the policy and, when A.H. refused to cut his hair, he was removed from the team.

In the Fall of 2012, when A.H. again tried out for the boys team, his hair was longer than the hair-length policy allowed, and he was reminded that he would have to comply with the policy in order to practice with the team. Shortly thereafter, A.H. again took up residence with his maternal grandparents and attended Norwell High School in Ossian. He remains enrolled at Norwell High School to date, but his parents have indicated that they may allow him to return to Greensburg. A.H.’s intent, however, is to continue wearing his hair longer than the hair-length policy allows, and there is no question that this would disqualify him from playing on the boys basketball team.

After A.H. refused to cut his hair and was removed from the boys junior high school basketball team in the Fall of 2010, his parents sued the Greensburg Community School Corporation, its governing school board, and various district and school officials, alleging that
the hair-length policy violated multiple state and federal constitutional and statutory provisions…

II.

A. Substantive Due Process

The Haydens contend that A.H. has a fundamental liberty interest in wearing his hair at the length of his choosing and that the hair-length policy, by compelling him to forgo that liberty and keep his hair short if he wishes to play interscholastic basketball at Greensburg High School, violates his Fourteenth Amendment right to substantive due process. . .

The notion that one’s hair length is an aspect of personal liberty so important that it constitutes a fundamental right is hard to square with the Supreme Court’s later opinion in Glucksberg, which describes fundamental rights as those which are “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” 521 U.S. at 720–21, 117 S. Ct. at 2268 (internal quotation marks and citations omitted). The Court in Glucksberg noted that in addition to the freedoms expressly protected by the Bill of Rights, it had held the due process clause to protect such non- enumerated rights as “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” Id. at 720, 117 S. Ct. at 2267 (citations omitted). The Court called for the “utmost care” in adding to this short list of fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.”

Although hair length is not a fundamental right, there is a residual substantive limit on government action which prohibits arbitrary deprivations of liberty by government...(Citations omitted) This rational-basis variant of substantive due process differs little, if at all, from the most deferential form of equal protection review… (Citations omitted)

The Haydens have made no genuine attempt to demonstrate that the hair-length policy fails rational-basis review. . . It is the Haydens who must demonstrate that the hair- length policy lacks a rational relationship with a legitimate government interest; it is not the school district’s obligation to prove rationality with evidence. The Haydens’ burden in this respect is a heavy one: So long as there is any conceivable state of facts that supports the policy, it passes muster under the due process clause; put another way, only if the policy is patently arbitrary would it fail. We therefore express no opinion on whether the policy would survive rational basis review. Apart from that, it is not our place to pass judgment on the wisdom of the policy.

B. Equal Protection

A more meritorious contention is that the hair-length policy deprives A.H. of equal protection because it discriminates against him on the basis of his sex. Because A.H. is a boy, he must cut his hair in order to play interscholastic basketball at Greensburg; were he a girl, he would not be subject to that requirement, as the girls team has no hair-length policy. . .The equal protection clause of the Fourteenth Amendment protects individuals against intentional, arbitrary discrimination by government officials…Gender is a quasi-suspect class that triggers intermediate scrutiny in the equal protection context; the justification for a gender-based classification thus must be exceedingly persuasive.
Whether and when the adoption of differential grooming standards for males and females amounts to sex discrimination is the subject of a discrete subset of judicial and scholarly analysis. This line of authority—much of it pre-dating the Supreme Court’s decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 109 S. Ct. 1775, 1790–91 (1989) (plurality) (employer may not demand that employee’s appearance and deportment match sex stereotype associated with her gender) . . . developed in the employment context, but it has a parallel in the school context as well… The relevant and dispositive point here is that this line of precedent has been ignored entirely in this appeal.

The parties have litigated the hair-length policy in isolation rather than as an aspect of any broader grooming standards applied to boys and girls basketball teams. We were told, when we raised the subject at oral argument, that male and female athletes alike are subject to grooming standards; and indeed the parties jointly stipulated below for purposes of the preliminary injunction hearing that whereas only the boys basketball and baseball teams have hair-length policies, the other school athletic teams do have grooming policies. R. 34. But the content of those grooming policies has never been established, and the fact that there are grooming standards for both girls and boys teams was not even mentioned in the stipulated facts submitted to the district court for purposes of resolving the case. The stipulated facts reveal only that there is a hair-length policy for the boys basketball team but for not for the girls basketball team (or, for that matter, any other girls team). [T]he stipulated facts indicate that a boy wishing to play basketball at Greensburg is subject to a requirement, impinging upon a recognized liberty interest, [but] a girl is not.

The defendants argue that this is not sex-based discrimination because the hair-length policy applies to only two of the boys athletic teams. Boys wishing to compete on the football or track teams, for example, would be free to do so without having to keep their hair cut short. [Defendants argue] that the policy does not apply to all boys teams demonstrates that the policy does not categorically discriminate against boys. The district court agreed.

The argument is untenable. That the policy is not universally applied to boys does not negate the fact that it is based on sex: Again, boys wishing to play basketball (or baseball) are subject to a requirement that girls are not. . . The equal protection clause protects the individual rather than the group, and the individual plaintiff in this case wishes to play basketball… He is subject to a burden that a girl in the same position is not.

Equally problematic is the school district’s alternative contention that the sex discrimination claim fails for lack of proof that any such discrimination is intentional. . . This is a case of disparate treatment rather than disparate impact; the hair-length policy, being applicable only to boys teams, draws an explicit gender line. The intent to treat boys differently from girls is therefore evident from the one-sided nature of the policy. . .

The problem for the defendants is that this case was jointly submitted to the district court for final judgment based on a set of stipulated facts. Those facts, if they are read to include the parties’ prior stipulation that both male and female athletes are subject to grooming standards, reveal nothing that would permit a court to assess whether the standards are comparable, notwithstanding the disparity in the hair-length component of the grooming standards.

The Haydens plainly have made out a prima facie case of discrimination. The hair-length policy applies only to male athletes, and there is no facially apparent reason why that should be so. Girls playing interscholastic basketball have the same need as boys do to keep their hair out
of their eyes, to subordinate individuality to team unity, and to project a positive image. Why, then, must only members of the boys team wear their hair short? Given the obvious disparity, the policy itself gives rise to an inference of discrimination. To defeat that inference, it was up to the school district to show that the hair-length policy is just one component of a comprehensive grooming code that imposes comparable although not identical demands on both male and female athletes… [A]bsent any evidence as to the content of the grooming standards that are applicable to female athletes, we are not prepared to simply assume that an otherwise facially-discriminatory rule is justified.

The dissent looks to the parties’ stipulation that there are grooming standards for all teams, coupled with the hair-style provision of the athletic code of conduct… as proof that male and female athletes are in fact subject to comparable grooming standards. . . Yet, the mere stipulation that there are grooming standards applicable to girls as well as boys teams does not establish the content of those standards. Nor does the hair-style provision fill that void… [T]he policy delegates to each varsity head coach the responsibility to determine “acceptable” hair lengths for his or her respective sport, which does not explain why short hair may be thought necessary for boys who play basketball but not girls.

[W]e know virtually nothing about the grooming standards to which female athletes at Greensburg are subject. May they wear earrings or other types of jewelry, for example, and if so, what if any restrictions are imposed on these items? If the goal for all interscholastic athletes is a neat, clean-cut appearance, which is one of the reasons that Coach Meyer gave for the hair-length policy, are girls required to maintain their hair to particular standards? Beyond the limits on mohawks and other extreme hairdos set forth in the hair-style provision, are there any limits on the manner in which girls may style their hair? Although girls can evidently wear their hair as long as they wish, could a female basketball player wear her hair in an extremely short “buzz-cut,” which might literally qualify as “clean cut” but perhaps not in the sense that Coach Meyer means it and perhaps not in synch with local norms?...

[With regard to community standards], a principle that emerges from the Title VII and other cases we have cited is that sex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike. As our colleague’s dissent points out, some of the cases in that line sustained workplace hair-length restrictions on male but not female employees… [citations omitted] We would reiterate that each of those cases relied on the fact that female employees, although not subject to hair-length restrictions, were subject to comparable grooming requirements…But it is worth noting that the community standards which may account for the differences in standards applied to men and women, girls and boys, do not remain fixed in perpetuity. See Jespersen, 444 F.3d at 1118 (Kozinski, J., dissenting). It is also worth reiterating that Coach Meyer’s policy prohibits far more than an Age-of-Aquarius, Tiny-Tim, hair-crawling-past-the- shoulders sort of hair style—it compels all male basketball players to wear genuinely short hair. In 2014, it is not obvious that any and all hair worn over the ears, collar, or eyebrows would be out of the mainstream among males in the Greensburg community at large, among the student body, or among school athletes. . (Even one or two men on this court might find themselves in trouble with Coach Meyer for hair over the ears.) We certainly agree that the pedagogical and caretaking responsibilities of schools give school officials substantial leeway in establishing grooming codes for their students generally
and for their interscholastic athletes in particular. But that leeway does not permit them to 
impose non-equivalent burdens on school athletes based on their sex. So far as this record 
reveals, that is exactly what the school district has done.

What we have before us is a policy that draws an explicit distinction between male and 
female athletes and imposes a burden on male athletes alone, and a limited record that does not 
supply a legally no justification for the sex-based classification...But there is no 
suggestion that A.H. wishes to wear his hair in an extreme fashion, let alone that hair worn over 
a boy’s ears or collar or eyebrows is invariably problematic. The record also tells us that Coach 
Meyer offered two reasons for the policy: promoting team unity, by having team members wear 
their hair in a uniform length, and projecting a “clean-cut” image...What is noteworthy, for 
purposes of the Haydens’ equal protection claim, is that the interests in team unity and projecting 
a favorable image are not unique to male interscholastic teams, and yet, so far as the record 
reveals, those interests are articulated and pursued solely with respect to members of the boys 
basketball team. If there is an argument that the goals of team unity and a “clean-cut” image are 
served through comparable, albeit different, grooming standards for female athletes, it has 
neither been advanced nor supported in this case. And the fact that other boys teams are not 
subject to a hair-length policy casts doubt on whether such an argument could be made.

The parties consented to the entry of final judgment on the record as it stands, and that 
record entitles the Haydens to judgment on the equal protection claim. The policy imposes a 
burden on only male athletes. There has been no showing that it does so pursuant to grooming 
standards for both male and female athletes that, although not identical, are comparable. Finally, 
no rational, let alone exceedingly persuasive, justification has been articulated for restricting the 
hair length of male athletes alone.

C. Title IX

Section 901(a) of Title IX provides that “[n]o person in the United States shall, on the 
basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to 
discrimination under any education program or activity receiving Federal financial assistance...” 
20 U.S.C. § 1681(a). There is no dispute that the Greensburg school district receives federal 
funds and that the district, including its interscholastic athletic programs, is subject to the Title 
IX’s ban on sex discrimination. Violations of the statute are subject to a private suit for both 
equitable relief and damages. Cannon v. Univ. of Chicago, 441 U.S. 677, 717, 99 S. Ct. 1946, 

The Haydens are entitled to judgment on their Title IX claim for the same reasons we 
have already discussed with respect to the equal protection claim...The hair-length policy is 
applied only to the boys team, with no evidence concerning the content of any comparable 
grooming standards applied to the girls team. The discrimination must also be intentional in 
order to support a claim for damages under Title IX. E.g., Smith v. Metro. Sch. Dist. Perry Tp., 
128 F.3d 1014, 1028 (7th Cir. 1997)... The discrimination at issue here takes the form of a 
school policy. The policy was instigated by Coach Meyer, but he did so pursuant to the authority 
expressly delegated to him and other varsity coaches to set hair standards for their respective 
sports. [W]hen Mrs. Hayden protested the policy up through the district’s chain of command, the 
policy was sustained and remained in place unmodified. The intent to discriminate is thus 
attributable to the school district.
III.

For the reasons discussed in this opinion, the district court’s judgment in favor of the defendants on the Haydens’ substantive due process claim is affirmed. However, the judgment in favor of the defendants on the equal protection and Title IX claims is reversed. . . The case is remanded to the district court to determine appropriate relief on these claims. The parties shall bear their own costs of appeal. . . .

MANION, Circuit Judge, concurring in part and dissenting in part.

Having ruled against A.H.’s primary argument, the court decides this case on equal protection arguments that A.H. did not make, rooted in authority he did not cite. However, the court does not actually tell us why the policies here are not comparable under the correct standard. Rather, the court decides that the school loses by default because the record is missing some of the grooming provisions that are applicable to female athletes. But there is enough in the record to compare the grooming policies applicable to male and female athletes, and if anything that is missing were included, it would only make the burden of the grooming policy applicable to male athletes even more clearly balanced out by the burden on female athletes. Although I agree with the court’s general summary of the law of equal protection, I write separately because the record does not establish any violation of the Equal Protection clause or Title IX...

As the court recognizes, sex-based equal protection analysis is much more nuanced than a simple “but for” test. . . Discrimination based on sex violates the Equal Protection clause unless the state has an exceedingly persuasive justification. United States v. Virginia, 518 U.S. 515, 533 (1996). However, maintaining different grooming standards for men and women is not usually discrimination. As the court points out, there is a line of authority which addresses differing grooming standards for men and women in the workplace. . . From that line of authority, a rule emerges that differing grooming standards are not discrimination if they are comparable; for the standards to be comparable, they must “find some justification in commonly accepted social norms” or “generally accepted community standards,” be reasonably related to a legitimate interest, and be applied evenhandedly, not imposing an unequal burden. . .

With this context, the grooming decisions reveal a common thread: as long as a grooming or appearance policy applies to both men and women, the fact that it has different provisions based on different social norms or community standards for men and women (or based on different athletic traditions) is acceptable. Distinction is not discrimination. The court and I agree that the rule permits a policy that is different for men and women so long as it is comparable...

Accordingly, the record indicates that the policies for the boys and girls basketball teams are the same except for hair length. Only the hair length component is delegated to the coaches, and the stipulation indicates that only the boys baseball and basketball teams have imposed a hair-length requirement...

But A.H.’s only argument—only allegation—is that the hair length standard is unfair, and the school has produced the hair style provision of the athletic code, and the coaches’ decisions that the boys basketball team has to cut its hair to a certain length and the girls basketball team does not (the only decisions delegated to the coaches). Yet the court says the school has not produced enough, while leaving the school guessing about what is enough content. Must the school produce every provision tangentially related to female grooming? Perhaps it would have
been better had the school done this. But the only thing the content of any other female grooming provision could provide is evidence of more burdens for female athletes, which would make the policies more comparable. The omission of any grooming provisions applicable to female athletes is, at worst, immaterial.

With enough of the policy to compare, the school’s burden to produce is satisfied and we continue with the normal routine. The burden of persuasion rests always with the plaintiff, who must now show that a comparison of the policies reveals disparities that amount to sex discrimination. If he does so, then it is the school’s burden to prove a justification...

The stipulations in this case indicate that there is an athletic “hair style” policy that applies to both male and female athletes, with a “cut” requirement that applies only to (some) male athletes (and there may be other provisions applicable to female athletes, but we assume there are not to A.H.’s favor). Even with no additional grooming provisions applicable to female athletes, and therefore no additional burdens on females athletes (besides the athletic code’s hairstyle provision), the policies are comparably burdensome...

The main controversy throughout this case . . . has been whether there is a fundamental right to choose the length of one’s hair. I agree with the court that there is not, so a student challenging a school rule regarding hair length bears the burden of proving it is not rationally related to a legitimate state interest—something A.H. has not done. . . However, if we do address equal protection on the current record of stipulations, we should still affirm. The parties have stipulated that a grooming policy applies to both boys and girls. They have supplied an example in the junior-high grooming policy, which is identical for boys and girls. A.H. has only pointed out a single difference—hair length—which precedent says is a legitimate, nondiscriminatory distinction. A.H. has only argued that the policies are not identical, but that is not enough. On the record we have, A.H. cannot meet the burden of proving an argument he has not made—that the policies are not comparable. Based on the stipulations, the policies are comparable. Because A.H. has failed to either argue or prove sex discrimination, his equal protection claims should fail. Since his Title IX claims depend on his proving sex discrimination, they fail as well.

Replace Note 1 on page 77 with this new Note 1:

Constitutionality and Title IX status of Grooming Regulations. The courts in Davenport and Hayden come to differing conclusions regarding the constitutionality of grooming regulations. Which court do you think is right and why? Courts are generally deferential to school districts in such matters. Should they defer in grooming cases? What test should be applied? What kinds of grooming differences should be acceptable as between male and female athletes?

Delete Note 2 on page 78:

Add as new Section 3 on page 79:

3. Review of Game Results

With the increasing use of instant replay to confirm or overrule on-the-field decisions by referees, judicial reconsideration of on-the-field decisions by referees, where instant replay is not
in use, may become more common. While it is likely that courts will continue to be deferential to
state athletic associations in their handling of such incidents, cases of this sort raise interesting
legal and moral issues, as evidenced by a recent case in Oklahoma. With 64 seconds remaining
in the Oklahoma playoff game in November of 2014, Douglass High School took a 25-20 lead
over Locust Grove. The receiver for Douglass High caught a short pass and ran for over 50 yards
to the end zone. Video depicted a Douglass coach running excitedly along the sideline, appearing
to unintentionally bump one of the referees. The referee threw a flag and invalidated the
touchdown. Under Association rules, however, the violation is minor, calling for a 5-yard
penalty to be assessed on the extra-point attempt or the ensuing kickoff. Locust Grove went on to
win the game.

The Oklahoma Secondary School Activities Association later apologized to Douglass High,
labeling the referees’ mistake “inexcusable.” Nevertheless, the association found that state and
national bylaws do not permit protesting the outcome of a game because of an official’s error on
the field. Oklahoma City public school officials disagreed and are seeking in court to have some
or all of the game replayed. Questions of racism were also raised by fans from Douglass High, an
inner-city school with a team made up of predominantly players of color.

Judge Bernard M. Jones II, an African-American jurist, serving on the District Court in
Oklahoma City initially issued a temporary restraining order, prohibiting Locust Grove from
playing its scheduled semifinal playoff game. The Oklahoma City school district supported
Douglass High, arguing that fairness justified overruling a correctable mistake. Brandon Carey,
general counsel for Oklahoma City public schools, argued that the Douglass case presented a
unique case because the District was not questioning the judgment of the referee; rather, it was
seeking relief in an instance in which the referee made a mistake based on his misunderstanding
of the penalty prescribed by the rule. Judge Jones ultimately denied the District’s request to have
all or part of an Oklahoma high school football playoff game replayed after a critical mistake by
the referees negated a late touchdown. Judge Jones noted that he was aware of no precedent
allowing a court to order the replay of a high school football game, and expressed concern that
there was no way to ensure that a replay would be fair to both teams, because the conditions of
the disputed contest could not be replicated. The judge expressed concern that a “slippery slope
of solving athletic contests in court instead of on campus will inevitably usher in a new era of
robed referees and merit-less litigation due to disagreement with or disdain for decisions of
gaming officials.” Judge Jones added that the referees’ error “could be considered by many as a
tragedy,” but deferred to the Association given that both teams agreed to be bound by the rules of
the state high school activities association. School officials declined to appeal the decision.

judge-says-disputed-high.html

NOTES AND QUESTIONS
Does fairness dictate that the game be replayed? Does the case involve a slippery slope that
would lead to litigation and judicial oversight of referees’ decisions or is the District right in
asserting that this is a unique case that warrants judicial intervention? Did the high school
association make the right decision? Was the judge’s deference in this case appropriate?
Professor Paul Cassell argued that the Judge Jones made the correct judicial decision, but argued that, in the interests of sportsmanship, Locust Grove should have agreed to replay the game. In doing so, Locust Grove would teach its coaches players an important lesson – that sportsmanship matters and that they should do the right thing. In supporting this position, Cassell referred to the following statement by Berry Tramel, a reporter for the Oklahoman:

“This isn’t about who’s right. This is about what’s right. This is about freeing the Locust Grove players from a lifetime of what-ifs. Freeing them from the gnawing feeling of ill-gotten gain. Giving them the precious gift that there are more important things than finishing first and having the most toys. What an opportunity to show, instead of tell. What an opportunity to instill those life lessons. . . . [W]hile winning a state championship would be great for Locust Grove, even greater would be teaching a bunch of teen-agers that doing the right thing is never a wrong way to go.”

If you represented Locust High or its school district, what would you do? How would you communicate your decision to the student-athletes? Can you conceive of an instance which the court should intervene? If the referee acted out of racial bias, as some argued, should his erroneous call be overruled by the association, the court, or Locust Grove?

Change Section 3, First and Fourth Amendment Constitutional Rights Issues to Section 4 on page 79.

Add to the end of Note 1 on page 92:

In the fall of 2013, a high school football player and wrestler in Minnesota sued his school which had suspended him indefinitely from participation in athletics for sending the following message to a fellow student regarding an upcoming football practice on his Twitter account: “Im boutta drill my ‘teammates’ on Monday.” The school believed the message to be a threat. The student argued it was just his way of saying that he would be aggressive in football practice. The student was not permitted to participate in football and initially was not permitted to wrestle either. The student, who has a chance of obtaining a wrestling scholarship at the collegiate level, eventually dropped the suit when the school permitted him to wrestle as part of a settlement worked out during mediation. Such settlements are common, and the case illustrates the kinds of issues that can arise and how they are often handled. The case was chronicled in The Minneapolis Star Tribune. See Pat Phiefer, Suspended over tweet, Shakopee High wrestler files a lawsuit, Star Tribune, Oct. 24, 2013, http://www.startribune.com/local/south/228872691.html.

New Jersey has also limited expression by adopting a limit on “trashing talking” and other offensive or negative language, by players and fans, in the high school athletic context. Before each interscholastic game in New Jersey, the following statement is read by officials to coaches and team captains: “There will be no tolerance for negative statements or actions between opposing players and coaches. This includes taunting, baiting, berating opponents, trash-talking or actions which ridicule or cause embarrassment to them. Any verbal, written or physical conduct related to race, gender, ethnicity, disability, sexual orientation or religion shall NOT be tolerated, could subject the violator to ejection, and may result in penalties being assessed against
your team. If such comments are heard a penalty will be assessed immediately. We have been instructed not to issue warnings. It is your responsibility (Coaches and Captains) to remind your team of this policy.” In some instances, this statement is read to all players. Where public address systems are available, a similar announcement is to be made to spectators at athletic events to help combat negative language stemming from unruly fans. For a discussion of this issue, see Victoria Cavaliere, New Jersey takes the trash talking out of high school sports, Reuters.com, Sept. 23, 2013, http://www.reuters.com/article/2013/09/23/us-usa-newjersey-trashtalk-idUSBRE98M12N20130923. Does this New Jersey rule violate the freedom of speech and expression? Should other states adopt a similar rule?

In a case decided on December 12, 2014, Bell v. Itawamba Cnty. Sch. Bd., 2014 BL 349852, the court held that a school board in Mississippi violated a student’s First Amendment free speech rights when it suspended the student for posting a rap song accusing two coaches of sexual harassment, without providing any evidence that the posting was in fact disruptive. In a partial dissent, Judge Rhesa Hawkins argued that the majority’s decision was “absurd,” particularly in light of recent school shootings which ought to provide school district’s with broad latitude in addressing language by a student that they found to be threatening or harassing. Who is right, the majority or the dissent?

Add after the third paragraph of Note 1 on page 95:

On February 12, 2014, Judge Kane of the United States District Court for the Middle District of Pennsylvania issued a memorandum order in Chapman v. Pennsylvania Interscholastic Athletic Association, 2014 WL 580212 (N.D Pa., Feb 12, 2014), holding that a homeschooled student who was ineligible to play sports for a year did not suffer irreparable harm that would warrant the granting of an expedited hearing in a preliminary injunction action. The court held that the fact that the student would not be able to participate for a year does not constitute irreparable harm and added that the athletic association would be harmed because it would not have sufficient time to prepare for an expedited hearing, and the Court ultimately dismissed the free exercise and parental rights claims of the plaintiffs, holding that a rational basis standard applied and was met. Id. at *2.

Chapter 3 Regulating Intercollegiate Athletics

Add before the first full paragraph on page 104:

State governments and the Federal government have recognized the concern and weighed in. On August 1, 2013, Representatives Charlie Dent (R-Pennsylvania) and Joyce Beatty (D-Ohio) introduced the National Collegiate Athletics Accountability Act (H.R. 2903), which illustrates a willingness on the part of some members of Congress to act at the national level in a manner reflective of the actions taken in California. The Act would halt Title IV federal funding for qualifying colleges and universities refusing to protect their student-athletes in accordance with the provisions of the Act. HR 2903, if adopted, would provide for: mandatory annual baseline concussion tests for student-athletes participating in contact or limited-contact sports; an
irrevocable four-year scholarship for student-athletes participating in contact sports (the scholarship would be guaranteed in the event of loss of athletic skill or injury); and a specific prohibition against any NCAA institution from implementing a policy which does not permit the payments of stipends to covered student-athletes. In response to the NCAA’s sanctioning of Penn State without a formal hearing, the Act would also guarantee that all student-athletes and universities will have the opportunity for a formal administrative hearing prior to the implementation of any NCAA punishment for an alleged rules violation. It is not clear that this Act will be adopted, but it does evidence a willingness on the part of members of Congress to hold the NCAA accountable.

Add after the second full paragraph on page 104:

Another significant issue that has affected highly commercialized intercollegiate athletics programs is conference realignment, with many institutions leaving a conference with which they had historic and often regional ties, to join another conference, largely for economic reasons. The University of Maryland, for example, which was a founding member of the Atlantic Coast Conference in 1953, move to the Big Ten in July of 2014. Maryland’s President, Wallace Loh, was candid in indicating why they were making this move: “Membership is in the strategic interest of the University of Maryland. We will be able to insure the financial sustainability of Maryland athletics for years to come.” Gary Mihoces, Maryland leaves ACC for more money, USA Today.com, Nov. 20, 2012, http://www.usatoday.com/story/sports/college/2012/11/19/maryland-leaves-acc-for-big-ten/1715635/. Maryland and other universities moving from one conference to another may, however, have to pay a high price for the move. Maryland, for instance, was sued by the Atlantic Coast Conference (ACC), and late in 2013, an appeals court in North Carolina refused to dismiss the ACC’s lawsuit. As reported in the Associated Press, “That lawsuit came after the ACC voted to increase the exit penalty to three times the conference's operating budget, which the appeals court calculated at nearly $52.3 million.” Court rejects Maryland's appeal of $52 million fee to leave, USA Today.com, Nov. 19, 2013, http://www.usatoday.com/story/sports/college/2013/11/19/maryland-acc-exit-fee-52-million-court-appeal-denied/3640547/.

By the summer of 2014, conference realignment had largely come to an end. On July 24, 2014, PAC-12 Conference Commissioner Larry Scott stated, “I think nationally things have settled down with expansion because long-term TV deals are in place, most conferences have kind of locked in their schools for some time, and I think we reached kind of an equilibrium.” Dirk Facer, PAC-12 commissioner 'delighted' that his conference's teams are scheduling BYU, Deseret News.com, July 14, 2014, http://www.deseretnews.com/article/865607494/Pac-12-commissioner-delighted-that-his-conferences-teams-are-scheduling-BYU.html.

With realignment of conferences relatively stabilized, due in part to long term television contracts that make it much less profitable to add teams, the power five conferences began to consolidate and seek more independence. In late July of 2014, the NCAA Division I steering committee released its proposal for a new governance structure that, if adopted, will give the five
major conferences more autonomy and greater voting power. The new model sets forth two ways in which autonomous legislation (legislation that applies only to the five conferences) can be passed: 1) When 60% of all member institutions in the power conferences (48 votes) and a majority of institutions in three of the power five conferences vote for the proposal; or 2) When a simple majority of all institutions in the power conferences vote for the proposal and a simple majority of institutions in four of the five power conferences vote for the proposal. Jim Delaney, the Big Ten commissioner and a major proponent of this effort to provide the power conferences with more autonomy, praised the effort, saying, “[t]he most important thing for us was to have a pathway in the autonomy structure to address student-athlete welfare issues, and we got that. I think we also got a reasonable bar for passage. We also got student-athlete engagement.” Dan Wolken, *Power 5 conferences get what they want in NCAA governance proposal*, USA Today.com, July 18, 2014, http://www.usatoday.com/story/sports/college/2014/07/18/ncaa-governance-proposal-autonomy-power-5-conferences/12830313/.

On July 9, 2014, the Senate Commerce Committee, under the leadership of chairman Jay Rockefeller (D-W. Va.), conducted a vigorous hearing regarding college athletics, in which Senator Rockefeller and his colleagues expressed strong concerns regarding problems in college athletics, ranging from sexual abuse and violence to assertions that college athletes in highly commercialized sports, particularly men’s basketball and football, are being exploited. President Mark Emmert, testifying for the NCAA, acknowledged that there are pressing needs that must be addressed. He recommended, for example, scholarships for life, so that the NCAA and its member institutions can maximize the opportunity for student-athletes to graduate. It was clear that the committee expected change to come and reasserted its intention to exercise oversight regarding intercollegiate athletics. Senator Cory Booker (D-N.J.), who had played football at Stanford University, was among members of the committee pressing for a follow-up hearing involving major university presidents. See, e.g., Steve Berkowitz, *NCAA’s Mark Emmert get grilling from senate committee*, USA Today.com, July 10, 2014, http://www.usatoday.com/story/sports/college/2014/07/09/senate-commerce-committee-ncaa-mark-emmert/12409685/.

On August 7, 2014, the NCAA Division I Board of Directors adopted a new voting or governance model giving the five major conferences more legislative power and voting rights for their student-athletes. The weighted voting breakdown is as follows: 37.5 percent for the Power 5 conferences; 18.8 percent for the five remaining FBS conferences; 37.5 percent for the FCS and non-Division I football conferences; 3.1 percent for college athletes; and 3.1 percent for faculty athletic representatives. The Council – formerly the NCAA Leadership and Legislative councils - - consists of 32 conference representatives, four conference commissioners, two faculty members and two student-athletes.

On December 15, 2014 the NCAA released their Official Autonomy of Proposals for the Power 5 Conferences which will be discussed at the January 17, 2015 Business Session. If this proposal is accepted, significant changes proposed by the Power 5 conferences will take effect August 1, 2015.
It is clear that these proposed changes will dramatically impact college athletics. The Power 5 conferences are assuming significant additional expenses, and it is not clear whether other less economically powerful conferences will be able to follow suit. If they do not, the distance between the Power 5 and other conferences will increase significantly, with ramifications for institutions, coaches and their student-athletes and for governance generally.

Add as new Note 4 on page 105:

The Arrington Case and the Problem of Head and Related Injuries in Intercollegiate Athletics. President Barack Obama expressed concerns that have been widely expressed by the public when he declared, “You read some of these stories about college players who undergo some of these . . . problems with concussions and so forth and then have nothing to fall back on. That’s something that I’d like to see the NCAA think about.” See Franklin Foer & Chris Hughes, O², New Republic, February 11, 2013, at 22, 29 (statement of President Obama). President Obama also noted that, “[I]f I had a son, I’d have to think long and hard before I let him play football. And I think that those of us who love the sport are going to have to wrestle with the fact that it will probably change gradually to try to reduce some of the violence.” Id.

In late July of 2014, the NCAA reached a settlement agreement with a class of plaintiffs led by former Eastern Illinois football player Adrian Arrington, which resolved the plaintiffs’ concussion-related lawsuit. The agreement can be found here: http://www.ncaa.org/sites/default/files/NCAA%20MDL%20-%20Final%20Settlement%20Agreement%20-%2075%20million.pdf. Notably, Judge Lee of the United States District Court for the Northern District of Illinois must approve the settlement before it can be effectuated.

The settlement “establishes a 50-year medical monitoring program for all current and former NCAA athletes in any sport – a class which includes several million people – with $70 million going for screening for long-term damage and $5 million going to research.” Rachel Axon, NCAA has settlement agreement in concussion lawsuit, USA Today.com, July 29, 2014, http://www.usatoday.com/story/sports/college/2014/07/29/ncaa-concussion-lawsuit-settlement-75-million/13309191/.

The settlement also requires member institutions to strengthen their concussion management and related programs designed to protect student-athletes. As reported in USA Today:

- Among the changes agreed to in the settlement were several mandates for member schools:

  -- Preseason baseline testing for every athlete for each season in which he or she competes.
-- Prohibition from return to play on the same day an athlete is diagnosed with a concussion. Generally accepted medical protocols recommend athletes not return to play the same day if they exhibit signs of a concussion or are diagnosed with one, but a 2010 survey of certified athletic trainers conducted by the NCAA found that nearly half reported that athletes had returned to play the same day.

-- Requirement that medical personnel be present for all games and available for practices for all contact sports, defined in the settlement as football, lacrosse, wrestling, ice hockey, field hockey, soccer and basketball. Those personnel must be trained in the diagnosis, treatment and management of concussions.

-- Implementation of concussion tracking in which schools will report concussions and their resolution.

-- Requirement that schools provide NCAA-approved training to athletes, coaches and athletic trainers before each season.

-- Education for faculty on the academic accommodations needed for students with concussions.

*Id.*

The settlement does not provide any funds for treating injured former student-athletes, but it does provide funding for monitoring and testing, while permitting all class members to sue individually (but not as a class) for damages. Institutions, therefore, at all levels and in all sports, remain vulnerable to litigation. Has the NCAA simply shifted the costs and damages awards of future litigation to its member institutions and conferences? With the move toward autonomy for the five major D-I conferences, should those conferences collectively develop a policy to deal with the threat of such cases? Should the NCAA have also created an enforcement mechanism that could impose strict penalties on coaches and personnel who disregard, or are negligent regarding, the welfare of their student-athletes? Is it appropriate for the NCAA to vigorously enforce recruiting rules, but fail to enforce health and safety rules and to impose sanctions for violations? See Rodney K. Smith, *Head Injuries, Student Welfare, And Saving College Football: A Game Plan for the NCAA*, 20 Pepperdine Law Review 267 (2014), for a discussion of enforcement and other steps that the NCAA or its members and conferences might consider taking to avoid the high potential costs that may be associated with such litigation.

On December 17, 2014, the court refused to grant preliminary approval of the proposed settlement. While calling the settlement "a significant step in trying to arrive at a resolution of this highly complex matter," District Court Judge John Z. Lee expressed several concerns including: the settlement’s “ability to address the needs of a class consisting of all current and former NCAA athletes when contact and non-contact sports are treated differently under the terms, whether the $70 million was sufficient to fund the medical monitoring program and whether the ability to notify at least 80 percent of the class was plausible.” Rachel Axon,

Add as new Note 5 on page 105:

Changing the Intercollegiate Model for Commercialized Intercollegiate Sports. As you study developments in intercollegiate athletics, think about how the present model should be changed. As you do so, think about the legal (e.g., Title IX), revenue or economic and policy impediments that will influence any such change. Professor Josephine Potuto, who has served as chair of the NCAA Committee on Infractions, as the Faculty Athletic Representative (FAR) at the University of Nebraska, and as a member of the NCAA Management Committee argues that “[t]he NCAA has three choices: 1. Do nothing. Hope the noise goes away. Bet that neither college athlete unions nor Congress will step in to fill the void. 2. Give up on the collegiate model, go pro, and pay college athletes. 3. Recalibrate the collegiate model to get closer to what colleges and campuses are all about while finding ways to enhance services and benefits to college athletes.” Josephine Potuto, Professors Need Not Apply, Inside Higher Education, May 19, 2014, http://www.insidehighered.com/views/2014/05/19/new-ncaa-governance-structure-marginalizes-faculty-members-essay#sthash.VLjXJ2bz.dpbo. It is generally conceded by those who work in the area that the NCAA is likely to take the third approach. Think, again, about how student-athlete needs, particularly in the major revenue generating sports, can be met while retaining significant vestiges of the historic collegiate model.

Add to the end of Note 2 on page 112:

See Milo v. University of Vermont, 2013 WL 4647782 (D. Vt., Aug. 29, 2013) (recognizing the contractual nature of the student-athlete and university relationship, the court rejects various theories asserted by an athlete (e.g., duty of good faith and deprivation of due process) in upholding a coach’s discretion not to renew the athlete’s one-year scholarship).

Add to the end of Note 7 on page 121:

Hairston v. Southern Methodist University, 2013 WL 1803549 (Tex. App., Apr. 20, 2013) (student-athlete alleging breach of a coach’s oral promise of a scholarship was subject to dismissal by virtue of the one- or four-year statute of limitation; the promissory estoppel exception to the statute of frauds that arises when a party promises to sign a writing reflecting an oral contract was inapplicable because no written contract existed at the time of the alleged promise).

Add as new Note 10 on page 123:

Student-Athlete Bill of Rights and Enhanced Benefits. A June 2014 statement by the presidents and chancellors of Big Ten Conference universities is representative of the change initiatives supported by the major athletics conferences. Although opposed to compensating athletes, these
leaders favor providing “academic security and success” for their student-athletes at Big Ten universities. George Schroeder, Big Ten Presidents Call for Expanded Athlete Benefits, USA Today.com, June 24, 2014, http://www.usatoday.com/story/sports/ncaaf/2014/06/24/big-ten-jim-delany-presidents-statement-ncaa-autonomy/11321741/. Proposed measures include guaranteeing student-athletes four-year athletic scholarships; honoring scholarships of former student-athletes who return to campus to complete their degrees after the completion of their professional careers; providing improved medical care to student-athletes; and ensuring that scholarships cover the full cost of attendance (if such legislation is approved by the NCAA). Id.

On June 27, 2014, the University of Indiana announced a ten-point student-athlete bill of rights, which mirrors many of the rights proposed by the Big Ten, including four-year athletic scholarships that cannot be cancelled due to injury or illness; the use of career placement services following graduation; comprehensive medical exams for walk-on athletes, not just scholarship athletes; and access to cutting edge technology including providing student-athletes with their own electronic tablets. See Indiana University Student-Athlete Bill of Rights (June 2014), http://grfx.cstv.com/photos/schools/ind/genrel/auto_pdf/2013-14/misc_non_event/BillOfRights.pdf. Following Indiana’s actions and that of other schools, including Maryland, South Carolina and Southern California, the Big Ten’s 14 member institutions became the first conference to “generally guarantee” multi-year and full-cost of attendance scholarships. Steve Berkowitz & Daniel Uthman, Big Ten Guarantees Graduation Opportunity for its Athletes, USA Today.com (Oct. 8, 2014), http://www.usatoday.com/story/sports/college/2014/10/08/big-ten-graduation-opportunity-guarantee/16945187/. Thereafter, the Big 12 and Pac-12 conferences took the same action.

Legislation proposed in the aftermath the NCAA’s adoption of a governance structure, which grants member institutions of the five major athletic conferences increased flexibility to propose and adopt legislation, will likely enhance the benefits available to student-athletes. For example, in December 2014, the ACC proposed legislation, which inter alia, will address multi-year scholarships, redefining financial aid so as to meet student-athletes’ costs of attendance needs, enhancing student-athlete career related insurance options, and providing institutional educational support for former student-athletes. Nick Martin, ACC Announces Three Proposals for January NCAA Autonomy Meeting, Duke Chronicle.com (Dec. 2, 2014), http://www.dukechronicle.com/articles/2014/12/02/acc-announces-three-proposals-january-ncaa-autonomy-meeting#.VJJQq8B0MA. The MAC and Boise State have stated that if the five power conferences adopt this permissive legislation in January 2015, they too will support paying athletes’ full cost of attendance. Jon Solomon, MAC, Boise State Support Paying Cost of Attendance, CBS Sports.com (Oct. 28, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24772664/mac-boise-state-support-paying-cost-of-attendance.

Add at the top of page 136 following parenthetical discussion of Hall v. NCAA:

; Accord McAdoo v. Univ. of North Carolina at Chapel Hill, 736 S.E.2d 811, 823-24 (N.C. Ct. App 2013), rev. denied, (special damages, loss of future income as NFL player, allegedly
resulting from a university’s determination that a student-athlete was ineligible to play football his senior year, were too speculative to afford player standing to assert contract-based claim).

Insert into Note 4 at the bottom of page 137 following the parenthetical discussion of Marsh v. Delaware State Univ.;

Mattison v. E. Stroudsburg Univ., 2013 WL 1563656 (M.D. Pa. 2013) (a college baseball player, who accepted sanctions delineated in a disciplinary notification for violations of school rules including marijuana use, alleged the university’s failure to notify him that he could also be suspended from baseball team violated his due process rights; in denying the player’s request for a preliminary injunction, the court found that a student possesses no property interest in extracurricular or sporting activities, the university provided the athlete with “notice and a hearing,” and the university was not required to provide plaintiff with notice of all potential penalties).

Replace Title of section 4 on page 139 with:

4. Student-Athletes as Employees: Eligibility for Workers’ Compensation Benefits and Unionization

Add as a new Note between Note 6 and Note 7 on page 148:

Student-Athlete Unionization. In Northwestern University and College Athletes Players Association (CAPA), Case 13-RC-121359 (National Labor Relations Board Region 13, March 26, 2014), a regional office of the National Labor Relations Board found that scholarship football players at Northwestern University, who had not exhausted their athletic eligibility, are employees as defined by the NLRA and therefore may decide whether or not to be represented for collective bargaining purposes (i.e., unionize). In reaching the result the Regional Director deemed the grant-in-aid received by scholarship athletes as compensation. The ruling also focused on the control Northwestern exercises over its scholarship football players.

The decision states that coaches and universities exercise extensive control over almost every aspect of the scholarship players’ lives, including: 1) the pre- and in-season training regime that dictate players’ activities; 2) monitoring players’ behavior and adherence to NCAA and team rules which includes the power of coaches to discipline players for violations; 3) control over players’ private lives that manifest either in restrictions or requiring players to obtain permission from coaches on matters ranging from players’ making living arrangements, applying for outside employment, making posts on social media, using of drugs and alcohol and traveling off campus; 4) and making academic decisions.

The ruling’s characterization of student athletes as employees is antithetical to the NCAA’s conceptualization of amateurism. Northwestern has appealed the ruling to the NLRB. On July 3, 2014, the NCAA filed a brief supporting Northwestern’s appeal of the ruling. In the NCAA’s press release, Donald Remy, the NCAA’s chief legal officer noted, “Over [sic] past 70 years,
more than a million student-athletes have received athletics scholarships, and no legal entity has determined that these scholarships transform students into employees under the National Labor Relations Act. . . . There is no legitimate reason that they should be considered such today. While there certainly are improvements to be made to the college model of sports, transforming the relationship between students and their university is not the answer. . . . Affirming the Regional Director’s decision will negatively impact all football players at Northwestern, the hundreds of student-athletes who are not football players, and potentially millions of present and future student-athletes in all sports across America.” NCAA files brief opposing union, NCAA.com, July 3, 2014, http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-files-brief-opposing-union/.

If affirmed, how might the decision harm student-athletes? Would the decision transform the relationship between students and their universities? Remy acknowledges improvements should be made to the model. What do you think he and the NCAA have in mind, in terms of changes?

In Sackos v. NCAA, Civil Action No. 1:14-CV-1710 WTL-MJD (S.D. Ind., filed October 20, 2014), the plaintiff, a former female volleyball player at the University of Houston, alleged that the NCAA and its Division I universities conspired to violate the Fair Labor Standards Act by failing to pay Division athletes at least the current federal minimum wage of $7.25/hour for their athletic playing services, which constitute part-time employment because they “engage in non-academic performance for no academic credit in athletic competition” on behalf of their respective universities. Do you agree with the plaintiff’s characterization of Division I student-athletes’ playing services? If the court agrees that playing intercollegiate athletics constitutes part-time employment, what are the potential implications?

Add as a new Note between Note 5 and Note 6 on page 183:

The University of Miami Case. On October 22, 2013, the NCAA Committee of Infractions (COI) rendered its decision in a case involving the University of Miami that had garnered significant public attention, particularly due to the fact that the NCAA enforcement staff had improperly obtained information for its case. NCAA President, Mark Emmert acknowledged that the manner in which evidence in the Miami case was obtained was “shocking.” In evaluating the facts and imposing sanctions, the NCAA noted that, “the [Committee on Infractions] only considered information obtained appropriately during the investigative process and presented at the hearing. . . . [The case involved serious violations of NCAA rules] including 18 general allegations of misconduct with 79 issues within those allegations. These were identified through an investigation that included 118 interviews of 81 individuals. Additionally, the committee had the responsibility of determining the credibility of individuals who submitted inconsistent statements and information provided by a booster who is now in federal prison. In reaching its conclusions, the committee found, in most instances, corroboration through supporting documentation and the statements of individuals other than the booster.”

In sanctioning Miami, the COI acknowledged that the University had cooperated in the investigation and had self-imposed major sanctions, including bowl and league championship bans. After concluding that the University “lacked institutional control” for over a decade in many of its programs by failing to monitor a major booster, coaches and student-athletes, the COI censured and then sanctioned the University with three years of probation, a loss of twelve scholarships (9 in football and 3 in basketball), and numerous other lesser sanctions to men’s football, basketball, baseball and track and field and to women’s swimming and diving, basketball, soccer, track and field, rowing and tennis. Two former assistant football coaches and one assistant basketball coach received 2-year orders to show cause. Even the former associate athletics director for compliance received a letter of admonishment.


The COI was criticized for inconsistency in applying its sanctions after the Miami case. In an ESPN report on the decision, the University of Southern California’s athletics director, Pat Haden, for example, is quoted as having responded to the COI’s decision by stating, “[w]e have always felt that our penalties were too harsh. This decision only bolsters that view.” Andrea Adelson, No bowl ban for Miami Hurricanes, ESPN.com, Oct. 23, 2013, http://espn.go.com/college-sports/story/_/id/9861775/miami-hurricanes-avoid-bowl-ban-lose-nine-scholarships-part-ncaa-sanctions. Is Haden right? Were the penalties imposed on USC too harsh? If so, why do you think the COI responded in the way that it did? What lessons can be learned from the Miami decision? Are the new enforcement standards bringing more consistency to the NCAA’s enforcement system?

The New York Times report on the lack of institutional control problem at Miami concluded as follows:

Frank Haith, the former men’s basketball coach who is now at Missouri, was suspended for the first five regular-season games of the coming season. The N.C.A.A., which did not refer to him by name, found that he attempted to cover up the booster’s threats to disclose incriminating information. Haith discussed his feelings about college basketball recruiting with N.C.A.A. enforcement staff during an interview in September, cautioning that people should not be ‘naïve’ – ‘our business is corrupt.’
The problems in the Miami case led to a major shake-up in the enforcement staff at the NCAA, and the lack of any major infractions hearings for months following the shake-up and the decision in the Miami case have led to major concerns. In late July of 2014, at the same time the autonomy legislation was gaining momentum and President Emmert was appearing before the Senate Commerce Committee, Commissioner Bob Bowlsby of the Big 12 Conference, attacked the NCAA enforcement process stating, “Enforcement is broken. . . The infractions committee hasn’t had a hearing in almost a year [since the decision in the University of Miami case], and I think it’s not an understatement to say that cheating pays presently. If you seek to conspire to certainly bend the rules, you do it successfully and probably do not get caught on most occasions.” See Big 12 Commissioner Blasts Lack of NCAA Enforcement, Insider Higher Education, July 22, 2014, http://www.insidehighered.com/quicktakes/2014/07/22/big-12-commissioner-blasts-lack-ncaa-enforcement. Responsible parties in the NCAA quickly responded. Jonathan Duncan who had been hired to direct the enforcement division, after the improprieties in the University of Miami case, noted, “We don’t pretend to be able to catch every violation in a given year. [But] the people who violate rules will be found out and we will report them back to the committee on infractions.” Duncan added that there could be more than 20 major infraction cases heard during the coming year. NCAA enforcement chief fires back, ESPN.com, July 24, 2014, http://espn.go.com/college-football/story/_/id/11256975/ncaa-enforcement-director-jonathan-duncan-defends-investigators. See Timothy Davis & Christopher Todd Hairston, Majoring in Infractions: The Evolution of the National Collegiate Athletic Association’s Enforcement Structure, 92 Oregon L. Rev. 979 (2014) (discussing changes to the NCAA’s enforcement processes).

Is the highly commercialized intercollegiate sport business corrupt? Is the NCAA fighting an uphill battle in its efforts to regulate the intercollegiate sports industry? What if anything can and should be done?

Add to the end of Note 5 on page 183:

On June 30, 2014, the NCAA released the following statement regarding the University of North Carolina, Chapel Hill case:

The University of North Carolina, Chapel Hill, was cited by the Division I Committee on Infractions in 2012 for violations in its athletics program, including academic misconduct. As with any case, the NCAA enforcement staff makes clear it will revisit the matter if additional information becomes available. After determining that additional people with information and others who were previously uncooperative might be willing to speak with the enforcement staff, the NCAA has reopened its investigation. The enforcement staff is exploring this new information to ensure an exhaustive investigation is conducted based on all
available information. The NCAA will not comment further to protect the integrity of the investigation.


Add as a new Note between Note 5 and Note 6 on page 183:

The University of Oregon Case and Recruiting Service Providers. According to the NCAA report in an infractions case involving the University of Oregon released on June 26, 2013:

The University of Oregon used a recruiting service provider, who became a representative of the university’s athletics interests, to assist the school with the recruitment of multiple prospective student-athletes, according to findings by the Division I Committee on Infractions. . . . The representative provided cash and free lodging to a prospect and engaged in impermissible calls and off-campus contacts with football prospects, their families and high school coaches. Additionally, the football program allowed staff members to engage in recruiting activity, which resulted in the football program exceeding coaching limits. Both the former head football coach and the university agreed they failed to monitor the football program. . . . Penalties in this case, many of which were self-imposed, include a three-year probation period, a ban on the use of recruiting services, a disassociation of the recruiting service provider and a reduction of scholarships and evaluation days. Additionally, the former head football coach received an 18-month show-cause order and the former assistant director of operations received a one-year show-cause order.


Add as a new Note between Note 2 and Note 3 at the top of page 189:

Executive Committee Reduction in Sanctions Based on the Penn State Consent Decree. On Sept. 24, 2013, the NCAA reported that:

Due to Penn State University’s continued progress toward ensuring athletics integrity, the NCAA Executive Committee is gradually restoring football scholarships the university lost because of sanctions more than a year ago. These changes were endorsed by the Division I Board of Directors and based on the recommendation of George Mitchell, the independent Athletics Integrity Monitor for Penn State and former U.S. Senator. . . . Beginning next academic year (2014-15), five additional initial scholarships will be restored to the university’s football
team. This amount will continue to increase until they reach the full allocation of 25 initial in 2015-16 and 85 total football scholarships in 2016-17. ‘While there is more work to be done, Penn State has clearly demonstrated its commitment to restoring integrity in its athletics program,’ said Mitchell. ‘The university has substantially completed the initial implementation of all the Freeh Report recommendations and its obligations to the Athletics Integrity Agreement, so relief from the scholarship reductions is warranted and deserved.’ . . . Consistent with Mitchell’s recommendation, the Executive Committee agreed the existing postseason ban [and] $60 million fine to help fund child abuse programs and other sanctions outlined in the consent decree will remain in effect. However, the group may consider additional mitigation of the postseason ban in the future depending upon Penn State’s continued progress.


Does the decision in the Penn State case constitute a precedent that can be used in other cases in which an institution can make a case that sanctions should be reduced, or is the Penn State case really sui generis, a special case, based on the fact that Penn State did not receive a formal hearing? Was the decision to reduce sanctions a wise one, or was it simply a response to continuing criticism of the consent decree and the process that generated that decree?

Add as a new note between Note 2 and Note 3 on page 189:

Cases and Legislation Involving the Penn State Decree. The estate of Joe Paterno, together with some University trustees, faculty members, and former coaches and players, have filed a lawsuit claiming that the NCAA unlawfully imposed sanctions on Penn State without following its own rules and enforcement procedures. See Matthew J. Mitten, The Penn State ‘Consent Decree’: The NCAA’s Coercive Means Don’t Justify its Laudable Ends, But is There a Legal Remedy, 41 Pepp. L. Rev. 321 (2014). Does this claim have merit? If you were representing the NCAA, what would you argue as a legal matter? As a policy matter?

In an apparent response to the Penn State consent decree, the Commonwealth of Pennsylvania enacted the Institution of Higher Education Monetary Penalty Endowment Act that requires the fine assessed against Penn State to be paid to the treasury of Pennsylvania. A suit was filed and the NCAA defended its actions. Later, the NCAA relented, and in September of 2014, dismissed its challenge to the case. The NCAA noted that its “legal case is strong, but we believe even more strongly in preventing child sexual abuse and aiding survivors. This is also an important step toward Penn State’s fulfillment of its obligations under the contractual consent decree it entered into with the NCAA.” http://www.nca.org/about/resources/media-center/press-releases/ncaa-statement-corman-lawsuit
Add after the Pocono Invitational Sports Camp case on page 249:

; Bleid Sports v. NCAA, 2013 WL 5410988 (E.D. Ky.) (NCAA enforcement of its recruiting rules prohibiting a university from hosting, sponsoring or conducting “a nonscholastic basketball practice or competition in which men’s basketball prospective student-athletes ... participate on its campus” is noncommercial activity not subject to antitrust challenge)

Add to the end of Note 1 on page 249:

In Commonwealth of Pennsylvania v NCAA, 2013 WL 2450291(M.D. Pa.), the court granted the NCAA’s motion to dismiss this suit because “the complaint is devoid of allegations that [the NCAA] sought to regulate commercial activity or obtain any commercial advantage for itself by imposing sanctions on Penn State.” Initially, the court observed that “Penn State is not a party to this action and takes no position in this litigation” and that “the complaint limits [its] review to the question of whether [Governor Corbett] has articulated a violation of federal antitrust law.” It explained that the complaint “must point to harm directed at commercial activity of the type the Sherman Act is designed to address for §1 to apply to the NCAA’s challenged conduct. It ruled this requirement is not satisfied merely by the Governor’s allegations that the NCAA sanctions will cripple the ability of Penn State’s football program to compete on the playing field or reduce its ability to generate revenues for the university.

Add to the end of Note 3 on page 252:

Applying Agnew, in Rock v NCAA, 2013 WL 4479815 (S.D. Ind.), the court ruled that an antitrust challenge to current NCAA limits on the maximum number of Division I football scholarships its member universities could award (85 for FBS teams, and 63 for FCS teams) and former prohibitions against multi-year scholarships constitute commercial activity subject to §1:

Agnew held that ‘[i]t is undeniable that a market of some sort is at play in this case. A transaction clearly occurs between a student-athlete and a university: the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board.’ In analyzing whether that exchange is commercial in nature, the Seventh Circuit concluded that ‘[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program. Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a result of these transactions.’

In Rock, a former FCS football player sought damages for the non-renewal of his athletic scholarship after his junior year based on his allegation that “in a competitive market not subject to the NCAA’s prohibition on multi-year scholarships and the cap on the total number of
scholarships per team, he would have received additional or enhanced scholarship offers, including a multi-year scholarship.” The court determined he adequately alleged the subject NCAA bylaws had the requisite anticompetitive effects in a relevant market defined as “the nationwide market for the labor of Division I football student athletes” by “reduc[ing] the overall supply of football scholarships available to student-athletes thereby forcing them to accept far less compensation than they would have received for their labor.” It held he had standing to challenge both the FCS and FBS scholarship limits because of his allegation that “he would have received more scholarship offers, including from FBS teams.” The court explained:

The NCAA again argues that professional football could be a plausible substitute for Division I football, but the Court has previously rejected that argument because there has been no assertion that professional football offers an opportunity for the participant to obtain a bachelor’s degree, which is a key part of the market allegations at issue in this litigation. Likewise, it does not appear that junior colleges are a plausible substitute because as Mr. Rock alleges, and the NCAA does not dispute, unlike Division I schools, junior colleges cannot award bachelor's degrees. To the extent that the NCAA proposes Division III football as a potential substitute for Division I football, that argument fails because Division III schools abide by an NCAA bylaw, which the Court has already upheld as a matter of law, prohibiting them from awarding athletics-based scholarships. That is a material distinction for purposes of this litigation, given that Mr. Rock's lawsuit revolves around obtaining athletics-based scholarships. . . .

Mr. Rock has pled the rough contours of a relevant market that is plausible on its face. Specifically, the NCAA’s structure classifying FBS and FCS football as part of the same division, the interaction between the FBS and FCS subdivisions, and Mr. Rock’s assertions regarding his recruiting experience and the alleged anticompetitive effects of the challenged rules on both subdivisions persuade the Court that given the procedural posture of the case, the market as plead is facially plausible. Moreover, Mr. Rock has alleged adequate factual allegations supporting his argument that Division II and NAIA football are not reasonable substitutes for Division I football and, thus, not part of the same relevant market.

However, the court emphasized “that these conclusions are not an endorsement that Mr. Rock's market as pled will withstand the higher burdens of proof that accompany summary judgment or trial, where his factual allegations will not be accepted as true without supporting evidence.”

Add to the end of Note 4 on page 254:

In In re NCAA Student–Athlete Name & Likeness Licensing Litigation, 2013 WL 5778233 (N.D. Cal.), the court denied the NCAA’s motion to dismiss claims by a group of current and former men’s football or basketball student-athletes alleging that the NCAA violated federal antitrust law by conspiring with Electronic Arts and Collegiate Licensing Company (who settled all of plaintiffs’ claims against them, including their right of publicity claims, for $40 million) to
restrain competition in the market for the commercial use of their names, images, and likenesses “in game footage or in videogames.” It rejected the NCAA’s argument that their claims are “nothing more than a challenge to the NCAA’s rules on amateurism” and therefore must be dismissed under NCAA v. Board of Regents, which stated in dicta “[i]n order to preserve the character and quality of the [NCAA’s] ‘product,’ athletes must not be paid.” The court explained:

This statement does not preclude Plaintiffs’ claims here. As explained above, Board of Regents focused on a different set of competitive restraints than the rules challenged in this case. Indeed, the Supreme Court never even analyzed the NCAA’s ban on student-athlete compensation under the rule of reason nor did it cite any fact findings indicating that this ban is the type of restraint which is ‘essential if the [NCAA's] product is to be available at all.’ More importantly, the Court never examined whether or not the ban on student-athlete compensation actually had a procompetitive effect on the college sports market, despite its own statement that naked restraints on price or output “place upon [the defendant] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.”

Even if the Court had examined the compensation ban under the rule of reason, Plaintiffs have plausibly alleged that the ‘business of college sports’ has changed dramatically over the three decades since Board of Regents was decided. . . . Thus, Board of Regents offers limited guidance in determining the impact of the NCAA's ban on student-athlete pay on the demand for college sports today.

Is this an appropriate interpretation of Board of Regents regarding its application to the claims of the current men’s football or basketball student-athletes?

Subsequently, the court held that whether the challenged restraint increases the popularity of Division I sports by promoting amateurism is a fact question to be resolved at trial because the evidence is conflicting. The NCAA’s experts contended that historically “consumers generally favor the amateur nature of college sports,” and 68.9% of consumers in a recent survey were opposed to paying college football and basketball players. Plaintiffs’ evidence suggests that the popularity of college sports is unrelated to the NCAA’s amateurism rules. In re NCAA Student–Athlete Name & Likeness Licensing Litigation, 2014 WL 1410451 (N.D. Cal.)

Add to the end of Note 5 on page 254:

In In re NCAA Student–Athlete Name & Likeness Licensing Litigation, 2014 WL 1410451 (N.D. Cal.), the court ruled the NCAA will have to present evidence that its rules prohibiting student-athletes from commercially exploiting use of their names, images, and likenesses in broadcasts and video games “promotes a level of competitive balance that (1) contributes to consumer demand for Division I football and basketball and (2) could not be achieved through less restrictive means.”
Other Justifications for NCAA Amateurism Rules. In *In re NCAA Student–Athlete Name & Likeness Licensing Litigation*, 2014 WL 1410451 (N.D. Cal.), the court explained “to justify a challenged restraint under the rule of reason, an antitrust defendant must show that it actually promotes competition in a relevant market.” Although the NCAA’s objective of promoting the integration of education and athletics through its amateurism rules “may be worthwhile goals, they are not procompetitive.” The court observed: “the NCAA has not explained how the challenged restraint in this case—which limits, rather than increases, the financial benefits provided to college students—would enhance consumer choice in the markets Plaintiffs have identified. It has also failed to present any evidence showing that the integration of athletics and education actually benefits Division I college sports fans or student-athletes.”

Based on similar reasoning, the court rejected the NCAA’s defense that these rules enable its member schools to offer and fund women’s sports and less popular men’s sports because it “is not a legitimate procompetitive justification.” “The NCAA cannot restrain competition in the ‘college education’ market for Division I football and basketball recruits or in the ‘group licensing’ market for Division I football and basketball teams’ publicity rights in order to promote competition in those markets for women’s sports or less prominent men’s sports.” It ruled this defense also fails because financial support for these sports could be provided through less restrictive alternatives such as mandating “Division I schools and conferences redirect a greater portion of the licensing revenue generated by football and basketball to these other sports.”

On the other hand, the court held that increasing “the total ‘output’ of Division I football and basketball, as measured by the total number of teams, players, scholarships, and games . . . is potentially procompetitive because it increases output in the relevant market.”

Do you agree with the court’s rulings regarding which of the NCAA’s proffered defenses are procompetitive and may justify any proven anticompetitive effects of its amateurism rules?

See also *Marucci v. NCAA*, 751 F.3d 368 (5th Cir. 2014) (dismissing aluminum bat manufacturer’s antitrust claim because it fails to demonstrate that NCAA’s Bat–Ball Coefficient of Restitution Standard injures competition in the market for non-wood baseball bats).

See also Matthew J. Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 Ore. L. Rev. 837, 844 (2014) (Advocating “establishment of an independent federal regulatory commission, which would provide an inclusive and transparent rule-making process readily accessible to all intercollegiate athletics stakeholders and the public. To ensure that its rules have a reasonable
basis, we propose independent review through arbitration. Although the commission’s rules would not be legal mandates, their voluntary adoption by the NCAA and its member institutions would immunize anticompetitive restraints in connection with big-time college sports from judicial scrutiny under federal and state antitrust laws.”

Add as a new principal case after Note 7 on page 254:

O’Bannon v. National Collegiate Athletic Association
7 F.Supp.3d 955 (N.D. Cal. 2014)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLAUDIA WILKEN, United States District Judge.

INTRODUCTION

Competition takes many forms. Although this case raises questions about athletic competition on the football field and the basketball court, it is principally about the rules governing competition in a different arena—namely, the marketplace.

Plaintiffs are a group of current and former college student-athletes. They brought this antitrust class action against the National Collegiate Athletic Association (NCAA) in 2009 to challenge the association’s rules restricting compensation for elite men’s football and basketball players. In particular, Plaintiffs seek to challenge the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes’ names, images, and likenesses in videogames, live game telecasts, and other footage. Plaintiffs contend that these rules violate the Sherman Antitrust Act. The NCAA denies this charge and asserts that its restrictions on student-athlete compensation are necessary to uphold its educational mission and to protect the popularity of collegiate sports. . . .

FINDINGS OF FACT

II. The Relevant Markets

A. College Education Market
The evidence presented at trial, including testimony from both experts and lay witnesses, establishes that FBS football and Division I basketball schools compete to recruit the best high school football and basketball players. Trial Tr. 9:1–7 (O’Bannon); 114:21–117:17 (Noll); 831:8–11 (Rascher); 1759:21–22 (Emmert); Ex. 2530. Specifically, these schools compete to sell unique bundles of goods and services to elite football and basketball recruits. The bundles include scholarships to cover the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services. Trial Tr. 40:2–20 (O’Bannon); 582:6–18 (Prothro); 1741:10–20 (Emmert); Ex. 2340 at 207. They also include access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at
the highest level of college sports, often in front of large crowds and television audiences. Trial Tr. 13:4–12 (O’Bannon); 556:8–558:2 (Prothro); 1157:20–1158:7 (Staurowsky); 1721:3–1722:19 (Emmert). In exchange for these unique bundles of goods and services, football and basketball recruits must provide their schools with their athletic services and acquiesce in the use of their names, images, and likenesses for commercial and promotional purposes. Id. 109:5–110:12 (Noll). They also implicitly agree to pay any costs of attending college and participating in intercollegiate athletics that are not covered by their scholarships. See Ex. 2340 at 207.

The evidence presented at trial demonstrates that FBS football and Division I basketball schools are the only suppliers of the unique bundles of goods and services described above. Recruits who are skilled enough to play FBS football or Division I basketball do not typically pursue other options for continuing their education and athletic careers beyond high school. . . .

III. The Challenged Restraint

NCAA rules prohibit current student-athletes from receiving any compensation from their schools or outside sources for the use of their names, images, and likenesses in live game telecasts, videogames, game re-broadcasts, advertisements, and other footage. . . .

The NCAA imposes strict limits on the amount of compensation that student-athletes may receive from their schools. Most importantly, it prohibits any student-athlete from receiving “financial aid based on athletics ability” that exceeds the value of a full “grant-in-aid.” Ex. 2340 at 208. The bylaws define a full “grant-in-aid” as “financial aid that consists of tuition and fees, room and board, and required course-related books.” Id. at 207. This amount varies from school to school and from year to year. Any student-athlete who receives financial aid in excess of this amount forfeits his athletic eligibility. Id. at 208.

In addition to this cap on athletics-based financial aid, the NCAA also imposes a separate cap on the total amount of financial aid that a student-athlete may receive. Specifically, it prohibits any student-athlete from receiving financial aid in excess of his “cost of attendance.” Ex. 2340 at 208. Like the term “grant-in-aid,” the term “cost of attendance” is a school-specific figure defined in the bylaws. It refers to “an amount calculated by [a school]’s financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance” at that school. Id. at 206. Because it covers the cost of “supplies, transportation, and other expenses,” the cost of attendance is generally higher than the value of a full grant-in-aid. The gap between the full grant-in-aid and the cost of attendance varies from school to school but is typically a few thousand dollars.

The NCAA also prohibits any student-athlete from receiving compensation from outside sources based on his athletic skills or ability. Thus, while a student-athlete may generally earn money from any “on- or off-campus employment” unrelated to his athletic ability, he may not receive “any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.” Id. at 211. Student-athletes are also barred from endorsing any commercial
product or service while they are in school, regardless of whether or not they receive any compensation to do so. *Id.* at 86.

Dr. Noll testified that these rules restrain competition among schools for recruits. If the grant-in-aid limit were higher, schools would compete for the best recruits by offering them larger grants-in-aid. Similarly, if total financial aid was not capped at the cost of attendance, schools would compete for the best recruits by offering them compensation exceeding the cost of attendance. . . .

**CONCLUSIONS OF LAW**

**I. Legal Standard under the Section 1 of the Sherman Act**

Section 1 of the Sherman Act makes it illegal to form any “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1. To prevail on a claim under this section, a plaintiff must show “‘(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a *per se* rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.’ ” *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir.2001) (citing *Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1318 (9th Cir.1996)).

In this case, Plaintiffs allege that the NCAA’s rules and bylaws operate as an unreasonable restraint of trade. In particular, they seek to challenge the set of rules that preclude FBS football players and Division I men’s basketball players from receiving any compensation, beyond the value of their athletic scholarships, for the use of their names, images, and likenesses in videogames, live game telecasts, re-broadcasts, and archival game footage. The NCAA does not dispute that these rules were enacted and are enforced pursuant to an agreement among its Division I member schools and conferences. Nor does it dispute that these rules affect interstate commerce. Accordingly, the only remaining question here is whether the challenged rules restrain trade unreasonably.

“The rule of reason is the presumptive or default standard” for making this determination. *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir.2011) (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006)). . . .

“A restraint violates the rule of reason if the restraint’s harm to competition outweighs its procompetitive effects.” *Tanaka*, 252 F.3d at 1063. Courts typically rely on a burden-shifting framework to conduct this balancing. Under that framework, the “plaintiff bears the initial burden of showing that the restraint produces ‘significant anticompetitive effects’ within a ‘relevant market.’ ” *Id.* (citing *Hairston*, 101 F.3d at 1319). If the plaintiff satisfies this initial burden, “the defendant must come forward with evidence of the restraint’s procompetitive effects.” *Id.* Finally, if the defendant meets this burden, the plaintiff must “show that ‘any legitimate objectives can be achieved in a substantially less restrictive manner.’ ” *Id.* (citing *Hairston*, 101 F.3d at 1319).
II. Anticompetitive Effects in the Relevant Markets

Proof that defendant’s activities had an impact upon competition in the relevant market is ‘an absolutely essential element of the rule of reason case.’ ” Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors, 786 F.2d 1400, 1405 (9th Cir.1986) (citations omitted). The term “relevant market,” in this context,

“encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition ... where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.”

Tanaka, 252 F.3d at 1063 (quoting Oltz v. St. Peter’s Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir.1988) (internal citations omitted)). . . .

A. College Education Market

1. Market Definition

As outlined in the findings of fact, Plaintiffs produced sufficient evidence at trial to establish the existence of a national market in which NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits. Specifically, these schools compete to offer recruits the opportunity to earn a higher education while playing for an FBS football or Division I men’s basketball team. In exchange, the recruits who accept these offers provide their schools with their athletic services and acquiesce in their schools’ use of their names, images, and likenesses while they are enrolled. The recruits must also pay for any other costs of attendance not covered by their grants-in-aid. . . .

2. The Challenged Restraint

Because FBS football and Division I basketball schools are the only suppliers in the relevant market, they have the power, when acting in concert through the NCAA and its conferences, to fix the price of their product. They have chosen to exercise this power by forming an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit’s athletic services along with the use of his name, image, and likeness while he is in school. If any school seeks to lower this fixed price—by offering any recruit a cash rebate, deferred payment, or other form of direct compensation—that school may be subject to sanctions by the NCAA.

This price-fixing agreement constitutes a restraint of trade. The evidence presented at trial makes clear that, in the absence of this agreement, certain schools would compete for recruits by offering them a lower price for the opportunity to play FBS football or Division I basketball while they attend college. Indeed, the NCAA’s own expert, Dr. Rubinfeld, acknowledged that
the NCAA operates as a cartel that imposes a restraint on trade in this market.

Despite this undisputed evidence, the NCAA contends that its conduct does not amount to price-fixing because the price that most student-athletes actually pay is “at or close to zero” due to their athletic scholarships. This argument mischaracterizes the commercial nature of the transactions between FBS football and Division I basketball schools and their recruits. While it is true that many FBS football and Division I basketball players do not pay for tuition, room, or board in a traditional sense, they nevertheless provide their schools with something of significant value: their athletic services and the rights to use their names, images, and likenesses while they are enrolled. They must also pay the incidental expenses of their college attendance. . . .

Although Plaintiffs have characterized FBS football and Division I basketball schools as sellers in the market for educational and athletic opportunities, in their post-trial brief they argued that the schools could alternatively be characterized as buyers in a market for recruits’ athletic services and licensing rights. The relevant market would be that for the recruitment of the highest ranked male high school football and basketball players each year. Viewed from this perspective, Plaintiffs’ antitrust claim arises under a theory of monopsony, rather than monopoly, alleging an agreement to fix prices among buyers rather than sellers. Such an agreement, if proven, would violate § 1 of the Sherman Act just as a price-fixing agreement among sellers would. . . .

In recent years, several courts have specifically recognized that monopsonistic practices in a market for athletic services may provide a cognizable basis for relief under the Sherman Act. See, e.g., Rock, 2013 WL 4479815, at *11 (finding that plaintiff had identified a cognizable market in which “buyers of labor (the schools) are all members of NCAA Division I football and are competing for the labor of the sellers (the prospective student-athletes who seek to play Division I football)”); In re NCAA I–A Walk–On Football Players Litig., 398 F.Supp.2d 1144, 1150 (W.D.Wash.2005) ( “Plaintiffs have alleged a sufficient ‘input’ market in which NCAA member schools compete for skilled amateur football players.”). Indeed, the Seventh Circuit recently noted in Agnew that the “proper identification of a labor market for student-athletes ... would meet plaintiffs’ burden of describing a cognizable market under the Sherman Act.”683 F.3d at 346. Given that Plaintiffs’ alternative monopsony theory mirrors their monopoly price-fixing theory, the evidence presented and facts found above are sufficient to establish a restraint of trade in a market for recruits’ athletic services just as they are to establish a restraint of trade in the college education market. As explained above, viewed from this perspective, the sellers in this market are the recruits; the buyers are FBS football and Division I basketball schools; the product is the combination of the recruits’ athletic services and licensing rights; and the restraint is the agreement among schools not to offer any recruit more than the value of a full grant-in-aid. In the absence of this restraint, schools would compete against one another by offering to pay more for the best recruits’ athletic services and licensing rights—that is, they would engage in price competition. . . .

III. Procompetitive Justifications
Because Plaintiffs have presented sufficient evidence to show that the NCAA’s rules impose a restraint on competition in the college education market, the Court must determine whether that
restraint is justified. In making this determination, it must consider whether the “anticompetitive aspects of the challenged practice outweigh its procompetitive effects.” *Paladin Associates*, 328 F.3d at 1156. . . .

**A. Amateurism**

As noted in the findings of fact, the NCAA asserts that its restrictions on student-athlete compensation are necessary to preserve the amateur tradition and identity of college sports. It contends that this tradition and identity contribute to the popularity of college sports and help distinguish them from professional sports and other forms of entertainment in the marketplace. For support, it points to historical evidence of its commitment to amateurism, recent consumer opinion surveys, and testimony from various witnesses regarding popular perceptions of college sports. Although this evidence could justify some limited restrictions on student-athlete compensation, it does not justify the specific restrictions challenged in this case. In particular, it does not justify the NCAA’s sweeping prohibition on FBS football and Division I basketball players receiving any compensation for the use of their names, images, and likenesses. . . .

The historical record that the NCAA cites as evidence of its longstanding commitment to amateurism is unpersuasive. This record reveals that the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways. Rather than evincing the association’s adherence to a set of core principles, this history documents how malleable the NCAA’s definition of amateurism has been since its founding.

The association’s current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism. A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of “core principles.”

Nonetheless, some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball. If the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA’s products—specifically, FBS football and Division I basketball telecasts, re-broadcasts, ticket sales, and merchandise—then the restrictions would be procompetitive. . . .

Ultimately, the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography. . . .

The Court therefore concludes that the NCAA’s restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-
related products. Although they might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their names, images, and likenesses.

B. Competitive Balance
The NCAA asserts that its challenged rules are justified by the need to maintain the current level of competitive balance among its FBS football and Division I basketball teams in order to maintain their popularity. This Court has previously recognized that a sports league’s efforts to achieve the optimal competitive balance among its teams may serve a procompetitive purpose if promoting such competitive balance increases demand for the league’s product. See April 11, 2014 Order at 33; American Needle, 560 U.S. at 204, 130 S.Ct. 2201 (“We have recognized, for example, ‘that the interest in maintaining a competitive balance’ among ‘athletic teams is legitimate and important.’ ” (citing Board of Regents, 468 U.S. at 117, 104 S.Ct. 2948)). As the Supreme Court has explained, the “hypothesis that legitimizes the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product.” Board of Regents, 468 U.S. at 119–20, 104 S.Ct. 2948.

Here, the NCAA has not presented sufficient evidence to show that its restrictions on student-athlete compensation actually have any effect on competitive balance, let alone produce an optimal level of competitive balance. The consensus among sports economists who have studied the issue, as summarized by Drs. Noll and Rascher, is that the NCAA’s current restrictions on compensation do not have any effect on competitive balance.

C. Integration of Academics and Athletics
The NCAA asserts that its restrictions on student-athlete compensation help educate student-athletes and integrate them into their schools’ academic communities. It argues that the integration of academics and athletics serves to improve the quality of educational services provided to student-athletes in the restrained college education market. Courts have recognized that this goal—improving product quality—may be a legitimate procompetitive justification. See County of Tuolumne v. Sonora Cnty. Hosp., 236 F.3d 1148, 1160 (9th Cir.2001) (recognizing that improving product quality may be a legitimate procompetitive justification); Law, 134 F.3d at 1023 (recognizing that “increasing output, creating operating efficiencies, making a new product available, enhancing service or quality, and widening consumer choice” may be procompetitive justifications).

The evidence presented by the NCAA suggests that integrating student-athletes into the academic communities at their schools improves the quality of the educational services that they receive. As noted above, several university administrators testified about the benefits that student-athletes derive from participating in their schools’ academic communities. Plaintiffs confirmed that they appreciated receiving these educational benefits when they were student-athletes, while Dr. Heckman testified that these benefits also carry long-term value.

That said, the NCAA has not shown that the specific restraints challenged in this case are
necessary to achieve these benefits. Indeed, student-athletes would receive many of the same educational benefits described above regardless of whether or not the NCAA permitted them to receive compensation for the use of their names, images, and likenesses. They would continue to receive scholarships, for instance, and would almost certainly continue to receive tutoring and other academic support services. As long as the NCAA continued to monitor schools’ academic progress rates and require that student-athletes meet certain academic benchmarks—a requirement that is not challenged here—the schools’ incentives to support their student-athletes academically would remain unchanged. Similarly, the student-athletes’ own incentives to perform well academically would remain the same, particularly if they were required to meet these academic requirements as a condition of receiving compensation for the use of their names, images, and likenesses. Such a requirement might even strengthen student-athletes’ incentives to focus on schoolwork.

As found above, the only way in which the challenged rules might facilitate the integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community. Limited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal. As with the NCAA’s amateurism justification, however, the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation, paid now or in the future, from licensing revenue generated from the use of student-athletes’ names, images, and likenesses.

D. Increased Output
The NCAA argues that the challenged restraint increases the output of its product. Courts have recognized that increased output may be a legitimate procompetitive justification. See Board of Regents, 468 U.S. at 114, 104 S.Ct. 2948; Law, 134 F.3d at 1023.

Here, the NCAA argues that its restrictions on student-athlete compensation increase the number of opportunities for schools and student-athletes to participate in Division I sports, which ultimately increases the number of FBS football and Division I basketball games played. It claims that its rules increase this output in two ways: first, by attracting schools with a “philosophical commitment to amateurism” to compete in Division I and, second, by enabling schools that otherwise could not afford to compete in Division I to do so. Docket No. 279, NCAA Post–Trial Brief, at 24. Neither of these arguments is persuasive.

The NCAA has not presented sufficient evidence to show that a significant number of schools choose to compete in Division I because of a “philosophical commitment to amateurism.” As noted in the findings of fact, some Division I conferences have recently sought greater autonomy from the NCAA specifically so that they could enact their own rules, including new scholarship rules. These efforts suggest that many current Division I schools are committed neither to the NCAA’s current restrictions on student-athlete compensation nor to the idea that all Division I schools must award scholarships of the same value. . . .

IV. Less Restrictive Alternatives
As outlined above, the NCAA has produced sufficient evidence to support an inference that some circumscribed restrictions on student-athlete compensation may yield procompetitive
benefits. First, it presented evidence suggesting that preventing schools from paying FBS football and Division I basketball players large sums of money while they are enrolled in school may serve to increase consumer demand for its product. Second, it presented evidence suggesting that this restriction may facilitate its member schools’ efforts to integrate student-athletes into the academic communities on their campuses, thereby improving the quality of educational services they offer. Thus, because the NCAA has met its burden under the rule of reason to that extent, the burden shifts back to Plaintiffs to show that these procompetitive goals can be achieved in “‘other and better ways’”—that is, through “’less restrictive alternatives.’” (citations omitted).

A court need not address the availability of less restrictive alternatives for achieving a purported procompetitive goal “when the defendant fails to meet its own obligation under the rule of reason burden-shifting procedure.” *Id.; see also Law,* 134 F.3d at 1024 n.16 (“Because we hold that the NCAA did not establish evidence of sufficient procompetitive benefits, we need not address question of whether the plaintiffs were able to show that comparable procompetitive benefits could be achieved through viable, less anticompetitive means.”). Thus, in the present case, the Court does not consider whether Plaintiffs’ proposed less restrictive alternatives would promote competitive balance or increase output because the NCAA failed to meet its burden with respect to these stated procompetitive justifications. Rather, the Court’s inquiry focuses only on whether Plaintiffs have identified any less restrictive alternatives for both preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism and improving the quality of educational opportunities for student-athletes by integrating academics and athletics.

As set forth in the findings of fact, Plaintiffs have identified two legitimate less restrictive alternatives for achieving these goals. First, the NCAA could permit FBS football and Division I basketball schools to award stipends to student-athletes up to the full cost of attendance, as that term is defined in the NCAA’s bylaws, to make up for any shortfall in its grants-in-aid. Second, the NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires. The NCAA could also prohibit schools from funding the stipends or payments held in trust with anything other than revenue generated from the use of the student-athletes’ own names, images, and likenesses. Permitting schools to award these stipends and deferred payments would increase price competition among FBS football and Division I basketball schools in the college education market (or, alternatively, in the market for recruits’ athletic services and licensing rights) without undermining the NCAA’s stated procompetitive objectives.

]No[witnesses provided a persuasive explanation as to why the NCAA could not implement a trust payment system like the one Plaintiffs propose. The Court therefore concludes that a narrowly tailored trust payment system—which would allow schools to offer their FBS football and Division I basketball recruits a limited and equal share of the licensing revenue generated from the use of their names, images, and likenesses—constitutes a less restrictive means of achieving the NCAA’s stated procompetitive goals.

VI. Remedy
“The several district courts of the United States are invested with jurisdiction to prevent and restrain violations” of § 1 of the Sherman Act. 15 U.S.C. § 4. . . . Accordingly, this Court will enter an injunction to remove any unreasonable elements of the restraint found in this case.

Consistent with the less restrictive alternatives found, the Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws.

The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires. Although the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust, it will prohibit the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically eligible to compete. The NCAA’s witnesses stated that their concerns about student-athlete compensation would be minimized or negated if compensation was capped at a few thousand dollars per year. This is also comparable to the amount of money that the NCAA permits student-athletes to receive if they qualify for a Pell grant and the amount that tennis players may receive prior to enrollment. None of the other evidence presented at trial suggests that the NCAA’s legitimate procompetitive goals will be undermined by allowing such a modest payment. Schools may offer lower amounts of deferred compensation if they choose but may not unlawfully conspire with each another in setting these amounts. To ensure that the NCAA may achieve its goal of integrating academics and athletics, the injunction will not preclude the NCAA from enforcing its existing rules—or enacting new rules—to prevent student-athletes from using the money held in trust for their benefit to obtain other financial benefits while they are still in school. Furthermore, consistent with Plaintiffs’ representation that they are only seeking to enjoin restrictions on the sharing of group licensing revenue, the NCAA may enact and enforce rules ensuring that no school may offer a recruit a greater share of licensing revenue than it offers any other recruit in the same class on the same team. The amount of compensation schools decide to place in trust may vary from year to year. Nothing in the injunction will preclude the NCAA from continuing to enforce all of its other existing rules which are designed to achieve its legitimate procompetitive goals. This includes its rules prohibiting student-athletes from endorsing commercial products, setting academic eligibility requirements, prohibiting schools from creating athlete-only dorms, and setting limits on practice hours. Nor shall anything in this injunction preclude the NCAA from enforcing its current rules limiting the total number of football and basketball scholarships each school may award, which are not challenged here.

The injunction will not be stayed pending any appeal of this order but will not take effect until the start of next FBS football and Division I basketball recruiting cycle. [ED.-The court
subsequently stated the injunction will become effective on August 1, 2015; the NCAA’s appeal is pending before the Ninth Circuit.]

Add a new Notes 8 and 9 on page 255:

8. **Analysis of O’Bannon.** Why did the court find that NCAA rules barring student-athletes from receiving a share of the licensing revenues the NCAA and its member schools earn from products using student-athletes’ names, images, and likenesses violates §1? Do you agree with the court’s remedy? As a federal appellate court judge, how would you resolve the issues likely to be raised by the NCAA on appeal?

9. **Additional Antitrust Litigation.** In *Marshall v. ESPN Inc.*, No. 3:14-cv-01945 (M.D. Tenn., filed October 3, 2014), a group of current and former NCAA Division I basketball and football players sued television broadcasters, college athletics conferences, and others, alleging they were forced to sign unconscionable waivers of their otherwise existing right to compensation for use of their publicity rights in the advertising and promotion of college basketball and football game broadcasts in violation of §1.

Add to PROBLEM 3-11 on page 255 before the question:

*See also Gregory-McGhee v. NCAA*, Case No. 4:14-cv-01777 (N.D. Cal., filed April 17, 2014) and *Alston v. NCAA*, Case No. 3:14-cv-01011 (N.D. Cal., filed March 5, 2014), two pending cases against the NCAA, Pacific 12 Conference, Big Ten Conference, Big Twelve Conference, Southeastern Conference, and Atlantic Coast Conference making essentially similar allegations.

Add new PROBLEM 3-12 on page 255:

In *Jenkins v. NCAA*, Case No. 3:14-cv-01678 (D. N.J., filed March 17, 2014), a group of current and former Division I basketball and FBS football players allege the NCAA, Pacific 12 Conference, Big Ten Conference, Big Twelve Conference, Southeastern Conference, and Atlantic Coast Conference “earn billions of dollars in revenues each year through the hard work, sweat, and sometimes broken bodies of top-tier college football and men’s basketball athletes who perform services for Defendants’ member institutions in the big business of college sports. However, instead of allowing their member institutions to compete for the services of those players while operating their businesses, Defendants have entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services. Those restrictions are pernicious, a blatant violation of the antitrust laws, have no legitimate pro-competitive justification, and should now be struck down and enjoined.” They assert this is “a patently unlawful price-fixing and group boycott arrangement” causing them to receive “less remuneration for their playing services than they would receive in a competitive market,” which should be enjoined so that the free market can determine the economic value and components of athletic scholarships for Division I basketball and FBS football players. Evaluate the merits of their claims.
Chapter 4  Regulating Olympic and International Athletics

Add to the end of the second paragraph on page 260:

On December 11, 2013, the IOC’s Executive Board voted to grant the Int’l Federation of American Football, the sport’s international governing body with 64 member nations from six continents, provisional recognition. This is an important step towards American football possibly becoming a future Olympic sport.

Add to the end of the second full paragraph on page 311:

On November, 15, 2013, the WADA Foundation Board approved the 2015 WADA Code, which will become effective on January 1, 2015. Its text is available at https://www.wada-ama.org/en/resources/the-code/2015-world-anti-doping-code. The section of the Code with the most significant revisions is Article 10, which provides for harsher sanctions for intentional anti-doping violations and more flexibility in determining sanctions for inadvertent violations. Article 10.2.1 provides that the period of ineligibility for use of a prohibited substance (e.g., anabolic steroids) that is not a “specified substance” is four years unless the athlete proves its use was not intentional. Article 10.2.3 states: “the term ‘intentional’ is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.” Article 10.5.1.1 provides that, if the athlete establishes no significant fault or negligence, the sanction for usage of a specified substance will range from a reprimand to no period of ineligibility depending on his degree of fault.“ Article 10.5.1.2 establishes the same range of sanctions depending on his degree of fault if the athlete proves that the detected presence of a prohibited substance in his system came from a contaminated product and no significant fault or negligence in connection with usage of the product.

Chapter 5  Coaches’ Contracts and Related Issues

Add at page 336 following the parenthetical discussion of Patria v. East Hartford Bd. of Educ:

Jones v. Alcorn State Univ., 120 So.3d 448 (Miss. App. 2013) (a coach’s right to due process was not violated where the coach was given notice of alleged grounds for termination, granted a hearing before the university’s grievance committee, and the athlete was permitted to question witnesses and call witnesses on his own behalf).

Add to end of note 1 on page 352: But see Baldwin v. Bd. of Supervisors Univ. of La. System, 2014 WL 5393105 (La. Oct. 15, 2014) (university did not violate terms of employment contract with a head football coach where he was relieved of his coaching duties but otherwise continued to receive salary and benefits and remained a paid university employee in a capacity other than
coach; because the coach was not terminated, the notice of termination provision of his contract was never triggered).

Add after the third sentence of Note 2 on page 352:

In January 2014, the University of Louisville entered into a $24.5 million seven-year contract with Bobby Petrino to be the head coach of the university’s football team. Petrino’s contract with Louisville includes a morals clause allowing the school to terminate his contract or to take corrective action if he violates it.

Add to the end of first paragraph of note 1 on pages 361-62:

; see Fleming v. Kent State Univ., 17 N.E. 3d 620 (Ohio. Ct. App. 2014) (applying Ohio law, the court discusses the factors that determine whether a liquidated damages provision is valid or constitutes an unenforceable penalty).

Add to end of second paragraph on page 366:

; Fleming v. Kent State Univ., 17 N.E. 3d 620 (Ohio. Ct. App. 2014) (the reassignment of an assistant football defensive coordinator to assistant athletic director position constituted a breach of contract because contract stipulated that plaintiff was hired for a coaching position and as a consequence of his reassignment, plaintiff was no longer employed in the position for which he had been hired).

Chapter 6  Professional Sports League Governance and Legal Regulation

Add as new Note 4 on p.402:

Shortly after replacing David Stern as the NBA’s Commissioner in February of 2014, Adam Silver encountered a challenge to his authority when he fined Los Angeles Clippers’ owner Donald Sterling $2.5 million, indefinitely banned him from the NBA, and attempted to force the sale of his team. The dispute, born of complex and tortured facts, erupted on April 25, 2014, when an audio recording surfaced in which Sterling made racist comments indicating he did not welcome African-Americans at Clippers’ games. Sterling, who had been accused of racism on many previous occasions, immediately came under fire. Sponsors dropped the Clippers, public figures skewered Sterling in traditional and social media, and the Clippers’ team members protested by tossing their warm-up jackets on the floor at midcourt in unison before a game. Arguing that Sterling violated the NBA’s constitution and bylaws with his comments, Silver used his “best interests” authority to impose the above-described penalties and to push toward stripping Sterling of his ownership if he and his family did not sell the team by June 3, 2014. Ultimately, on May 29, 2014, Sterling’s wife claimed authority over the estate and reached an agreement to sell the team to Steve Ballmer for $2 billion. See Satchel Price, The complete Donald Sterling saga timeline, SBNation.com, May 30, 2014,

Add to the end of the first paragraph of Note 2 on page 410:

; *City of San Jose v MLB*, 2013 WL 5609346 (N.D. Cal.) (because ‘the federal antitrust exemption for the ‘business of baseball’ remains unchanged, and is not limited to the reserve clause, . . . MLB’s alleged interference with the A’s relocation to San José is exempt from antitrust regulation”).

Add a new Note 6 on page 413:

6. *Baseball’s Antitrust Exemption Inapplicable to Territorial Broadcasting Restrictions.* In *Laumann v. NHL*, 2014 WL 3900566 (S.D.N.Y.), the court ruled:

   The continued viability and scope of the baseball exemption are far from clear. The MLB Defendants argue that the territorial broadcasting restrictions at issue here fall under the exemption and preclude their liability. They base their argument principally on the holding in *Toolson* and the language of the Curt Flood Act. Specifically, the MLB Defendants argue that the Supreme Court in *Toolson* affirmed dismissal of all of the plaintiff’s claims, including the factual allegations related to territorial broadcasting restrictions. Therefore, the Court must have found those restrictions to be covered by the exemption.

   However, none of the published opinions in the *Toolson* cases—at the district, circuit, or Supreme Court levels—even mentioned the territorial broadcasting allegations. Additionally, the Supreme Court expressly limited its holding in *Toolson* to the contours of its decision in *Federal Baseball*, which rested entirely on interstate commerce grounds and did not involve broadcasting-related
allegations. Indeed, because television broadcasting is an interstate industry by nature, it cannot fall within the exemption defined by Federal Baseball. It would be strange to read Toolson to expand Federal Baseball’s holding to territorial broadcasting restrictions sub silentio.

Moreover, the language and structure of the SBA suggest that, as of 1961, Congress understood sports broadcasting agreements to fall outside the baseball exemption. The provision of the SBA granting limited immunity to a narrow category of broadcasting agreements would be meaningless if all baseball broadcasting agreements were already covered by the common law exemption. Moreover, the SBA expressly excluded from its safe harbor most agreements involving geographic broadcasting territories, suggesting that Congress intended such agreements to be subject to the antitrust laws.

Congressional understanding is relevant because Flood replaced Federal Baseball’s and Toolson’s holdings based on interstate commerce with a limited holding based only on stare decisis and inferred congressional intent. Therefore, Congress’s understanding of the scope of the baseball exemption before Flood is highly persuasive.

Moreover, in rejecting the holdings in Federal Baseball and Toolson, the Flood Court made specific reference to the reserve system throughout its analysis, permitting a narrower reading of the exemption. One district court concluded that “the antitrust exemption created by Federal Baseball is limited to baseball’s reserve system.” Other courts have interpreted Flood to preserve a broader exemption for professional baseball. However, defendants cite no case that applied the exemption to broadcasting restrictions except one judge’s comments from the bench in granting a motion to dismiss several years before the SBA was enacted. The only published federal court opinion to address the question after the SBA, Henderson Broadcasting Corp. v. Houston Sports Association, found the exemption inapplicable to a baseball club’s radio broadcasting agreements. Henderson reasoned as follows:

[The Supreme Court] has implied that broadcasting is not central enough to baseball to be encompassed in the baseball exemption ... Congressional action does not support an extension of the exemption to radio broadcasting ... [and] lower federal courts have declined to apply the baseball exemption in suits involving business enterprises which, like broadcasting, are related to but separate and distinct from baseball.

All of these arguments apply with equal force here.

Defendants argue that the Curt Flood Act reveals a congressional consensus that sports broadcasting agreements are covered by the baseball exemption. They point to language from a Congressional Budget Office (“CBO”) cost estimate suggesting that the Act would retain the antitrust exemption for a variety of
topics, including “league expansion, franchise location, the amateur draft, and broadcast rights.” However, a CBO cost estimate is not persuasive evidence of congressional intent. The statutory language expressly does not change “the application of the antitrust laws” with respect to any topic other than “employment of major league baseball players,” including but not limited to “the marketing or sales of the entertainment product of organized professional baseball and the licensing of intellectual property rights owned or held by organized professional baseball teams individually or collectively.” It is a tenuous inference that Congress considered broadcasting exempt simply because “sales of the entertainment product of organized professional baseball” and “licensing of intellectual property rights” were included in a long list of topics that would remain unchanged by the Act. The Curt Flood Act adds little to the analysis of whether territorial broadcasting restrictions fall under the common law baseball exemption.

Exceptions to the antitrust laws are to be construed narrowly. Moreover, the Supreme Court has expressly questioned the validity and logic of the baseball exemption and declined to extend it to other sports. I therefore decline to apply the exemption to a subject that is not central to the business of baseball, and that Congress did not intend to exempt—namely baseball’s contracts for television broadcasting rights.

Is Laumann consistent with Flood and the SBA?

Add to the end of the first paragraph on page 421:

See also Laumann v. NHL, 907 F.Supp.2d 465 (S.D.N.Y. 2012) (alleged agreements among MLB and NHL clubs to create exclusive local television territories and broadcasting rights for each club and to grant their respective leagues the exclusive right to sell television and internet broadcasting rights to those games outside these local territories are subject to §1 scrutiny).

Add to the end of the first full paragraph of Note 2 on page 454:

See also Dang v. San Francisco Forty Niners, 2013 WL 3989946 (N.D. Cal.) (allegation by a consumer that he paid an “anticompetitive overcharge for his purchase” of an item of apparel bearing an NFL team’s logo because of NFL’s exclusive license with Reebok stated a valid claim under §1 of the Sherman Act and California antitrust law; “Plaintiff has alleged relevant markets sufficient to withstand Defendants’ Motion to Dismiss: (1) ‘the United States market for the licensing of the trademarks, logos, and other emblems of individual NFL teams for use in apparel’; and (2) ‘the United States retail market for apparel bearing the Intellectual Property of any NFL team.’”).
Add to the end of Note 2 on page 454:

See *American Needle, Inc. v. New Orleans Louisiana Saints*, 2014 WL 1364022 (N.D. Ill.) (refusing to apply “quick look” rule of reason because “exclusive license arrangement encouraged additional licensee commitment and had numerous procompetitive effects, including improvements in product design, quality, distribution, and coordination of styles with other apparel items”).

Add as a new paragraph at the end of Note 3 on page 455:

In *Laumann v. NHL*, 907 F.Supp.2d 465 (S.D.N.Y. 2012), the court ruled that alleged agreements among MLB and NHL clubs limiting the telecasting of professional sports games are subject to rule of reason analysis. Refusing to dismiss plaintiffs’ §1 claims, the court explained: “Plaintiffs have adequately alleged harm to competition with respect to the horizontal agreements among individual hockey and baseball clubs, as part of the NHL and MLB, to divide the television market. Making all games available as part of a package, while it may increase output overall, does not, as a matter of law, eliminate the harm to competition wrought by preventing the individual teams from competing to sell their games outside their home territories in the first place. And plaintiffs in this case—the consumers—have plausibly alleged that they are the direct victims of this harm to competition.” *Id.* at 491.

Add the following principal case on page 455:

*Laumann v. National Hockey League*

2014 WL 3900566 (S.D.N.Y.)

Scheindlin, District Judge.

I. INTRODUCTION

Plaintiffs bring these putative class actions against the National Hockey League (“NHL”) and various individual clubs in the league (the “NHL Defendants”); Major League Baseball (“MLB”) and various individual clubs in the league (the “MLB Defendants”) (together the “League Defendants”); multiple regional sports networks (“RSNs”) that produce and distribute professional baseball and hockey programming; two multichannel video programming distributors (“MVPDs” or “distributors”), Comcast and DIRECTV (together with the RSNs, the “Television Defendants” or “broadcasters”); Madison Square Garden Company and the New York Rangers Hockey Club (the “MSG Defendants”); and New York Yankees Partnership and Yankees Entertainment & Sports Network, LLC (“YES”) (together the “Yankee Defendants”). Plaintiffs allege violations under Sections 1 and 2 of the Sherman Antitrust Act (the “Sherman Act”). [The NHL and MLB Defendants moved for summary judgment.]

II. BACKGROUND
NHL is an unincorporated association of thirty major league professional ice hockey clubs, nine of which are named as defendants in *Laumann*. MLB is an unincorporated association of thirty professional baseball clubs, nine of which are named as defendants in *Garber*. The clubs within each League are competitors—both on the field and in the contest to broaden their fan bases. However, the clubs must also coordinate in various ways in order to produce live sporting events, including agreeing upon the game rules and setting a schedule of games for the season. Both leagues divide their member teams into geographic territories and assign each team a home television territory (“HTT”) for broadcasting purposes. Neither the Comcast Defendants nor the DIRECTV Defendants played a role in the initial creation of the Leagues’ HTTs.

The structure of the territorial broadcasting system is largely uncontested. By League agreement, each club agrees to license its games for telecast only within its designated HTT. The clubs then contract with RSNs through Rights Agreements. The Rights Agreements generally provide each RSN the exclusive right to produce a club’s games and telecast them in the HTT. The Agreements do not permit the RSNs to license telecasts for broadcast outside the HTTs. The Rights Agreements also require the RSNs to provide their telecasts to the Leagues without charge for use in the out-of-market packages (“OOM packages”). The clubs keep the revenue from their respective Rights Agreements. There are significant differences in the economic value of the various HTTs.

In order to produce the telecasts of live games, the RSNs invest in equipment, production facilities, and a large staff. They also produce “shoulder” programming such as pre-game and post-game shows. The RSNs then sell their programming to MVPDs like Comcast and DIRECTV through Affiliation Agreements, and the MVPDs televise the programming through standard packages sold to consumers within the HTT. Even when an MVPD agrees to carry a RSN, it does not always distribute that RSN throughout its entire territory. The MVPDs acquire the rights to broadcast the games subject to the territorial restrictions in the RSNs’ agreements with the Leagues. The MVPDs black out games in unauthorized territories in accordance with those restrictions.

Fans can watch out-of-market games in one of two ways. *First*, some games are televised nationally through contracts between the Leagues and national broadcasters like ESPN and Fox. The clubs have agreed to allow the Leagues to negotiate national contracts on their behalf. The Leagues’ agreements with national broadcasters contain provisions requiring the Leagues to preserve the HTTs. The revenues from national broadcasts are shared equally among the clubs.

*Second*, the Leagues produce OOM packages in both television and Internet format. The television packages—NHL Center Ice and MLB Extra Innings—are available for purchase through MVPDs, including Comcast and DIRECTV. The Internet packages—NHL GameCenter Live and MLB.tv—are available for purchase directly from the Leagues. The OOM packages are comprised of local RSN programming from each of the clubs. As with the national broadcasts, revenues from the OOM packages are shared equally among the clubs.

Each of the OOM packages requires the purchase of the full slate of out-of-market games, even
if a consumer is only interested in viewing the games of one team. The OOMs exclude in-market games to “avoid diverting viewers from local RSNs that produce the live game feeds that form the OOM packages.”

In sum, each RSN is the sole producer of its club’s games and the sole distributor of those games within the HTT aside from limited nationally broadcasted games. The OOM packages do not show in-market games to avoid competition with the local RSN. Additionally, the territorial broadcast restrictions allow each RSN to largely avoid competing with out-of-market games produced by other RSNs.

Internet streaming rights are owned by the Leagues and/or the clubs. The RSNs have no right to license their programming for Internet streaming directly. The Internet OOM packages are the primary way for fans to view games on the Internet. Additionally, some MVPDs have negotiated with the Leagues to provide Internet streaming of out-of-market games to subscribers of the OOM television packages. Internet streaming of in-market games remains largely unavailable to consumers.

B. The League Defendants Are Not Entitled to Summary Judgment

While territorial divisions of a market are normally per se violations, the Supreme Court has held that a per se approach is inappropriate in the context of sports broadcasting restrictions due to the necessary interdependence of the teams within a League. On the other hand, the procompetitive benefit of the challenged scheme here is not so obvious that the case can be resolved in favor of defendants in the “‘twinkling of an eye.’” Therefore the rule of reason is the appropriate standard in this case.

Plaintiffs have carried their initial burden of showing an actual impact on competition. The clubs in each League have entered an express agreement to limit competition between the clubs—and their broadcaster affiliates—based on geographic territories. There is also evidence of a negative impact on the output, price, and perhaps even quality of sports programming. Plaintiffs’ expert, Dr. Roger G. Noll, attests that consumers pay higher prices for live game telecasts, and have less choice among the telecasts available to them, than they would in the absence of the territorial restrictions. Similarly, Dr. Noll estimates that the price of OOM packages would decrease by about fifty percent in a world without the restrictions. Finally, defendants have not argued in these motions that the Leagues lack market power.

Defendants respond by identifying various procompetitive effects of the territorial broadcast restrictions. They claim that the rules: 1) prevent free riding, 2) preclude competition with joint venture products, 3) incentivize investment in higher quality telecasts, 4) maintain competitive balance, 5) preserve a balance between local loyalty and interest in the sport as a whole, and 6) increase the overall number of games that are telecast. Plaintiffs deny that the territorial rules serve the above interests and also challenge the validity of the interests in light of the territorial rules’ overall economic impact on competition.

First, defendants argue that the territorial rules prevent free riding. Although avoiding free riding can be a legitimate procompetitive goal in certain contexts, it is not clear how free riding would
pose a threat in this case. Defendants argue that the clubs would “free ride” on the popularity and publicity of the Leagues if they were permitted to license their games nationally. However, the same argument could be made for any revenue-producing activity that an individual team undertakes, including local ticket sales. Defendants also claim that the clubs would “free ride” off the OOM packages by nationally licensing individual club broadcasts, but it is the clubs and RSNs who create the programming in the first place. If anything, the OOM packages benefit from the labor and investment of the clubs and RSNs, not the other way around. Defendants’ theory of free riding is unclear and unpersuasive.

Second, defendants argue that the Leagues have an unassailable right to prevent the clubs from competing with the “joint venture.” However, no case cited by defendants stands for the proposition that a joint venture may always prevent its members from competing with the venture product regardless of anticompetitive consequences. Rather, in each case, the court concluded based on the facts presented that the restraint in question caused no actual harm to competition. “If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from §1, then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products.”

Third, defendants argue that territorial exclusivity encourages the RSNs to invest in higher-quality telecasts, including high-definition cameras, announcers, audio-visual effects, and related pre-game and post-game programming. However, the incentive for added investment is inflated profit stemming from limited competition. “[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.” To the extent that the Leagues defend content exclusivity rather than territorial exclusivity, Dr. Noll predicts that increased competition would overall improve output and consumer satisfaction, an argument that applies with equal force to the quality of telecasts.

Fourth, defendants argue that the territorial restrictions foster competitive balance between the teams and prevent excessive disparities in team quality. Maintaining competitive balance is a legitimate and important goal for professional sports leagues. However, it is unclear whether the territorial restrictions at issue here really serve that purpose. On the one hand, the restrictions protect less popular clubs from competition with more popular teams in their own HTTs. On the other hand, the system requires small market teams to refrain from broadcasting in larger, more populous markets, while big market teams forego only smaller, less populous markets. It is not immediately clear whether the restrictions help or harm competitive balance overall.

Defendants also claim that the revenue sharing aspects of the OOM packages and national broadcasts foster competitive balance. However, there is support in the economic community for the theory that revenue sharing in fact exacerbates competitive imbalance. Even accepting the premise that revenue sharing is beneficial, defendants have not explained why broadcasting contracts are a better mechanism than more direct, limited forms of revenue sharing.

Fifth, defendants claim that they have a legitimate pro-competitive interest in maintaining “a balance between the promotion of [hockey and baseball] as [] national game[s] and the need to
incentivize Clubs to build their local fan bases.” Aside from the fact that these two goals appear to conflict, defendants have not explained what the ideal balance would be, or how they might quantify it. There is no objective measure the Leagues could aspire to attain. Therefore defendants cannot establish that this particular balance between local and national interests is better for consumers, or for demand, than the balance that would prevail in a free market. Moreover, the Leagues purport to bolster regional interest and team loyalty by consciously depriving consumers of out-of-market games they would prefer, which is generally not a permissible aim under the antitrust laws.

Finally, defendants argue that the number of telecasts created and broadcast is greater under the territorial restrictions than it would be in the plaintiffs’ “but-for” world. According to defendants, while almost every game is currently available to consumers in one format or another (national broadcast, local RSN, or OOM package), a system dependent on consumer demand could not guarantee that every game would be available everywhere because less popular teams would struggle to get their games produced or televised on their own. Destroying the HTTs would also destroy content exclusivity because OOMs and both competing teams would be able to sell the same game in the same areas. As a result, RSNs would be loathe to give their telecasts to the Leagues to create OOM packages, depriving consumers of the ability to access any and all out-of-market games as they do now. Similarly, national broadcasters would refuse to enter into national contracts without the assurance of exclusivity. Because plaintiffs do not challenge the legality of the OOM packages or national broadcasts, defendants argue, the territorial system is also immune from challenge as a matter of law.

These arguments are far from compelling. Just because plaintiffs do not directly challenge the legality of the OOM packages and national broadcasts does not mean that preserving them is sufficient justification for the territorial rules. Even the complete disappearance of OOM packages would not necessarily cause consumer harm if the same content could be distributed in another form (such as by RSNs nationwide). The OOMs are simply one form of delivering the content to consumers—a form made necessary by the territorial rules themselves. Moreover, it is certainly conceivable that the OOMs would continue to exist absent the territorial restrictions, given the low added cost of creating the packages and the convenience of bundling to many consumers.

[24] Defendants’ assumption that market demand would be insufficient to ensure access to the same number of games is questionable. Indeed, the Television Defendants insist that the sports rights are so valuable that they would compete for those rights vigorously even in the absence of the territorial rules. Moreover, “[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with th[e] fundamental goal of antitrust law.” While defendants have identified some conceivable procompetitive effects from the territorial rules, plaintiffs have produced equally plausible (if not more plausible) arguments in opposition. It certainly cannot be said that defendants have established procompetitive benefits to the economy as a matter of law.

Defendants cite Virgin Atlantic Airways Ltd. v. British Airways PLC for the proposition that
plaintiffs must identify a less restrictive alternative for any procompetitive effect defendants can identify, even if the overall effect on the economy is overwhelmingly anticompetitive. Such an interpretation, however, is inconsistent with the Supreme Court’s mandate that “the essential inquiry [under the rule of reason] ... [is] whether or not the challenged restraint enhances competition.” Indeed, in United States v. Visa U.S.A., Inc., the Second Circuit balanced the alleged procompetitive and anticompetitive effects of the exclusivity rules before requiring the Government to propose any less restrictive alternatives.

Most of defendants’ claimed pro-competitive effects are disputable, and the overall effect on the economy is even less conclusive, especially in light of Dr. Noll’s testimony that abolishing the territorial restrictions would decrease the cost of sports programming without diminishing output. Far from being implausible, plaintiffs’ “but-for” world is at least as likely as defendants’ prognostications. Plaintiffs have raised a genuine issue of material fact regarding the overall competitive impact of the territorial rules, foreclosing the possibility of summary judgment for the Leagues under the rule of reason.

Chapter 7 Labor Relations in Professional Sports

Replace “NOTE” at the bottom of page 490 with “NOTES”

Add “1.” before the Note on pages 490 and 491.

Add as new Note 2 on page 491:

The benefits to athletes of unionization and collective bargaining are perhaps most clearly seen when examining baseball’s minor leagues, in which players are not unionized. Since MLB players formed the MLBPA, MLB minimum salaries have increased by 2,500%. Over the same time period, minor league salaries have increased by only 70%, and some minor league players make a mere $1,100 per month. With no access to collective bargaining, a group of minor league players in 2014 turned to the courts, alleging that their compensation violates the Fair Labor Standards Act (FLSA). The suit is currently pending, but it will turn largely on the court’s perception of whether playing minor league baseball is, as one commentator puts it, “a career . . . a good time, or something in between,” and if it is considered employment, whether it is appropriately categorized as “seasonal” employment. Tony Dokoupil, Major League Baseball’s ‘Working Poor’: Minor Leaguers Sue Over Pay, NBCSports.com, July 15, 2014, http://www.nbcnews.com/news/sports/major-league-baseballs-working-poor-minor-leaguers-sue-over-pay-n156051. A tentative trial date is set for September of 2016. Ashby Jones, Baseball Suit Calls Out Minor-League Pay, WSJ.com, Sept. 19, 2014, http://www.wsj.com/articles/baseball-suit-calls-out-minor-league-pay-1411146392.

Several NFL cheerleaders, who like minor league baseball players are not unionized and are concerned that their compensation violates the FLSA, have filed similar suits. See Alexandra Sifferlin, NFL Cheerleaders File Suit Saying They Make As Little As $2.85 Per Hour, Time.com,

Add after the first sentence of the Note beginning on page 513:

Examinations assessing physical condition are a standard part of pre-draft evaluations. They serve to protect clubs contemplating large roster expenditures from signing players with physical limitations or ailments that might compromise the players’ ability and, therefore, limit their monetary value. In some cases, they also alert players to life-threatening conditions potentially exacerbated by playing. For instance, in 2014, Isaiah Austin, who starred at Baylor University and was projected to be a first-round NBA draft pick, was diagnosed with Marfan Syndrome after a routine physical examination at the NBA Combine. The condition increases a person’s risk a cardiac incident when exercising vigorously. While the diagnosis certainly would have impacted clubs’ perspectives on drafting him, Austin withdrew from the draft altogether and ended his basketball career out of concern for his health.

In some instances, however, a player refuses to take a test that might impact his market value even if it might reveal important information about his health.

Delete the second and third sentences of the Note beginning on page 513.

Add after the second sentence of the first paragraph of the section titled “Professional Team Sports Drug Testing Programs” on page 514:

A 2013 survey found that “63% of the public believe steroid use is a big problem among professional athletes” in comparison to 46% and 17% believing it is “big problem” for college and high school athletes, respectively. The American Public’s Perception of Illegal Steroid Use: A National Survey at 9 (2013) available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCkQFjAA&url=http%3A%2F%2Fwww.csde.umb.edu%2Fsdocuments%2FSteroidReport.pdf&ei=_ImgUvn6NeGfyQHprICYCQ&usg=AFQjCNGuf7KnwCmnX1hLeCHBFOnZiTg&bvm=bv.57155469,d.aWc.

Add after the first full paragraph on page 517:

In 2013, however, another MLB performance-enhancing drug scandal erupted, raising (and, for some, confirming) fears that doping remains prevalent in MLB. After a lengthy investigation, MLB persuaded Anthony Bosch, the founder of the Biogenesis “anti-aging” clinic in Coral Gables, Florida to “turn over a cache of material, including emails, ledgers and phone records
that allegedly confirmed ballplayers were doping.” Julie K. Brown, A-Rod, 12 others suspended in Biogenesis scandal, Miami Herald, Aug. 6, 2013, http://www.miamiherald.com/2013/08/06/3543980/a-rod-12-others-suspended-in-biogenesis.html. Over a dozen players, including New York Yankees superstar Alex Rodriguez, were handed lengthy suspensions. Rodriguez, who had previously tested positive for performance enhancing drugs, was, in the aftermath of the Biogenesis disclosure, further reviled as a cheater throughout much of the country. With the help of the MLBPA, he immediately challenged the 211 day suspension. Id. He argued before an MLB arbitration panel chaired by Frederic Horowitz that: Bosch’s testimony was not credible; MLB engaged in egregious misconduct during the investigation; and MLB could not ultimately show by clear and convincing evidence that he used performance-enhancing drugs. The arbitration panel, however, sided with MLB and upheld the suspension, although it reduced the suspension’s length to one full season and post-season (162 games plus any post-season games for which his team qualifies). See MLBPA v. Office of the Commissioner of Baseball, MLB Arbitration Panel Decision No. 131., 32-34 (Jan. 13, 2014)(Horowitz, Manfred, and Prouty).


Replace the fourth sentence of the first full paragraph on page 519 with:

The major aspects of the NFL’s drug testing program under that addendum can be summarized as follows:

Delete the second and third sentences of the second paragraph on page 522.

Add as a new paragraph after first sentence of the second paragraph on page 522:

In September of 2014, the NFL and NFLPA agreed on drug testing and substance abuse policies, which represented a major advance in the league and union working together to address the issues. Among other things, the new policies permit Human Growth Hormone testing on non-game days and require that an independent arbitrator hears appeals for positive test violations. Ryan Wilson, NFL players vote to adopt new drug-testing policies, CBSSports.com, Sept. 12, 2014, http://www.cbssports.com/nfl/eye-on-football/24706854/nfl-players-vote-to-adopt-new-drug-testing-policies.
Add after the last paragraph on page 522:

In 2014, MLB and the MLBPA agreed to further strengthen the drug testing program. They increased the number of in-season and out-of-season random drug tests, expanded the list of banned substances, and increased the penalties for positive tests. Under the new agreement, first time offenders now face an eighty game suspension for testing positive for the use of banned performance-enhancing substances. This rises to a season long 162 game suspension for a second positive test, and a lifetime ban for a third. An arbitrator may reduce a suspension for a first or second violation by up to fifty percent if a player proves by clear and convincing evidence that a positive test was not caused by his “significant fault.” Paul Hagen, *MLB, MLBPA agree to improve joint drug program*, MLB.com, March 28, 2014, http://mlb.mlb.com/news/article/mlb/mlb-mlbpa-agree-to-improve-joint-drug-program?ymd=20140328&content_id=70316506&vkey=news_mlb.

Replace “2011” in the third full sentence on page 524 with:

2012

Add as a footnote after the paragraph spanning pages 523 and 524:

Just over a year later, MLB confronted Braun with substantial evidence indicating that he did, in fact, use performance enhancing drugs, and Braun finally admitted his PED use and his previous deception. As a consequence, he was suspended for 65 games. *Ryan Braun suspended rest of year*, ESPN.com, July 23, 2013, http://espn.go.com/mlb/story/_/id/9500252/.

Add as a new Note between Note 1 and Note 2 on page 525:

The legalization of marijuana in Colorado and Washington presents interesting challenges for sports leagues that prohibit its use. Upon the legislation passing, many leagues, including the NFL, the NBA, and MLB, emphasized that the legal development would not impact their drug testing policies. Jeffrey Martin, *Sports leagues unfazed by votes to legalize marijuana*, USAToday.com, Nov. 8, 2012, http://www.usatoday.com/story/sports/nfl/2012/11/07/recreational-marijuana-sports-colorado-washington/1690651/. The NFL, however, may move off of that position, owing to the violence of the game. Many estimates suggest that over 50% of NFL players regularly smoke marijuana – with some estimates suggesting the number is as high as 70% or 80% -- for, among other reasons, its pain-killing properties. Robert Klemko, *Where There’s Smoke….*, SI.com, Jan. 17, 2014, http://mmqb.si.com/2014/01/17/marijuana-in-the-nfl-colorado-legalization/. While the NFL has not indicated a willingness to permit players’ marijuana use to treat generalized pain, NFL Commissioner Roger Goodell has expressed a willingness to permit marijuana use to treat concussions and other head injuries “if [medical experts] determine this could be a proper usage.” Chris Strauss, *Goodell: NFL would consider allowing medical marijuana*, USAToday.com, Jan. 23, 2014,
Replace the first clause of the first sentence of the second full paragraph on page 585 with:

Vilma’s defamation suit was ultimately dismissed, but along with the defamation suit he filed an additional suit.

Add as a new Note between Note 3 and Note 4 on page 586:

In *Hewitt v. Kerr*, 2013 WL5725992 (Mo. App. E.D., Oct. 22, 2013), questions again arose about the NFL Commissioner’s role in resolving disputes in the arbitration context. In that case, Todd Hewitt, the St. Louis Rams’ former equipment manager, sued the club for age discrimination after being terminated. The case revolved around the enforceability of an arbitration provision in Hewitt’s employment agreement requiring that he be bound by the decisions of the Commissioner and that those decisions shall be unappealable. The court found the provision unconscionable and, thus, unenforceable:

[T]he Arbitration Provision entrusts the arbitration proceedings to the Commissioner, whose decision shall be final, binding, conclusive and unappealable. Here, the arbitrator is the designee of the Commissioner and the Commissioner owes his position to the teams comprising the NFL, which includes the Rams. . . . [W]e find an arbitration provision that allows the selection of the arbitrator, who must be unbiased, to be made solely by an individual who is in a position of bias, to be unconscionable and unenforceable.

*Id.* at *3*. A appeal is pending before the Missouri supreme court.

This case, like the New Orleans Saints Bounty Scandal discussed in Note 3, above, reveals judicial concern with, and a willingness to reign in, the scope of a league commissioner’s authority. Do you view this as a legitimate concern? As you know from Chapter 6, commissioners are generally granted broad discretion to act in the “best interests” of the league. What does a case like *Hewitt* mean for the “best interests” power?

Add as an additional New Note between Note 3 and Note 4 on page 586:

The bulk of the materials in this “Club and League Power to Discipline” section of this chapter have involved discipline for a player’s on-the-field conduct. What is a sports league’s responsibility to discipline players for off-the-field conduct? The NFL confronted this issue in the 2014 when two star players, Ray Rice and Adrian Peterson, engaged in highly publicized episodes of domestic abuse. Rice struck his then fiancé (and now wife) in an Atlantic City casino’s elevator, knocking her unconscious, and Peterson beat his four-year-old son with a switch, causing welts on his bottom, thighs, and scrotum.
NFL Commissioner Roger Goodell initially suspended Rice for two games and was widely assailed for it. He was accused of indifference to domestic abuse and his league’s players’ involvement in it, and he was called upon to resign by commentators and anti-domestic violence advocates. Shortly after the punishment was announced, a video emerged that was taken from a different camera angle than those previously released, and it clearly showed Rice unleashing a brutal punch that struck his fiancé in the face. In the aftermath of the second video’s release, Commissioner Goodell suspended Rice indefinitely, asserting that Rice misled him during the initial investigation. Goodell was roundly criticized on many grounds. Some commentators argued that the brutality of the attack was implicit in the originally released video and that the punishment should have been indefinite suspension from the beginning. Others alleged that league officials had access to the second video for months and had suppressed it. Still others viewed the second suspension as arbitrary and as unjust and refuted Goodell’s assertion that Rice misled him. Ultimately Rice appealed the suspension, and on December 1, 2014, he was immediately reinstated. The arbitrator, former U.S. District Court Judge Barbra Jones, found that the second penalty imposed on Rice was arbitrary and that Goodell had no power to issue the second suspension. Ray Rice wins appeal, eligible to sign, ESPN.com, Dec. 1, 2014, http://espn.go.com/nfl/story/_/id/11949855/ray-rice-baltimore-ravens-wins-appeal-eligible-reinstatement.

On September 12, 2014, while the NFL was addressing the Rice domestic abuse scandal, Peterson was indicted for child abuse. Two days later, the Minnesota Vikings deactivated him, and in early November, Peterson pled no contest to the charges and was placed on probation, fined $4,000 and ordered to complete 80 hours of community service. Once the criminal case was resolved, the NFL suspended Peterson for the remainder of the season for violating the personal conduct policy. Peterson appealed, as Rice did, but on December 12, 2014, the arbitrator, former NFL executive Harold Henderson, denied the appeal. Adrian Peterson’s appeal denied, ESPN.com, Dec. 14, 2014, http://espn.go.com/nfl/story/_/id/12020801/adrian-peterson-appeal-suspension-denied. Peterson and the NFLPA then filed a federal suit over the matter, arguing among other things, that Henderson, as a long time NFL executive, was biased in his ruling. Josh Katzowiz, NFLPA files lawsuit vs. NFL in Adrian Peterson suspension case, CBSSports.com, Dec. 15, 2014, http://www.cbssports.com/nfl/eye-on-football/24890919/report-nflpa-files-lawsuit-vs-nfl-in-adrian-peterson-case. The case is currently pending.

The Rice and Peterson matters raise a host of important questions about a league’s power to discipline a player. Should a league’s disciplinary power apply to off-the-field conduct in the same way it applies to on-the-field conduct? Should the fact that prosecutors choose to indict a player for off-the-field conduct (as they did with respect to Peterson but not with respect to Rice) impact a league’s disciplinary authority or decisions? To avoid impropriety or the appearance of impropriety in any given case – e.g., a former league executive ruling for the league is a dispute with a player – should all appeals from league disciplinary decisions be heard by the same non-league affiliated arbitrator or arbitration body?

In December 2014, the NFL’s 32 owners unanimously passed a new Personal Conduct Policy to address concerns regarding players’ on-the-field as well as off-the-field conduct. With respect to
off-the-field conduct, the policy “provides for clinical evaluations and follow-up education, counseling or treatment programs for anyone arrested or charged with conduct that would violate the policy; states clubs are obligated to promptly report any possible violations that come to their attention; and forms a conduct committee of NFL owners who will review the policy annually and recommend appropriate changes.” In addition, the policy reassigns initial disciplinary authority in personal conduct matters from Commissioner Goodell to a to-be-determined “member of the league office staff who will be a highly-qualified individual with a criminal justice background.” Tom Pelissero, NFL owners pass new personal conduct policy, USA Today, Dec. 10, 2014, http://www.usatoday.com/story/sports/nfl/2014/12/10/roger-goodell-nfl-owners-personal-conduct-policy/20199033/.

Add to the last paragraph on page 587 after “See, e.g.”:

_Nelson v. National Hockey League_, 2014 WL 656793 (N.D. Ill.) (Illinois tort claims against NHL on behalf of deceased former player are preempted);

Add as a new Note between Note 3 and Note 4 on page 620:

Although the NFL and NFLPA agreed to a new CBA in the _Brady_ case’s aftermath, their relationship has remained contentious. In May 2012, less than a year after coming to terms on the CBA, the NFLPA filed a $4 billion federal lawsuit against the NFL, arguing that the NFL fraudulently induced the NFLPA to settle the _Brady_ case and enter the CBA by concealing the existent of a secret salary cap that restrained players’ 2010 salaries. _See White v. National Football League_, 2014 WL 27822031, 1 (8th Cir. 2014). The district court rejected the collusion claim and dismissed the case. _Id_. On appeal, however, the Eight Circuit concluded the NFLPA should have the opportunity to “convince the district court that the dismissal was fraudulently procured,” although the Eighth Circuit noted that the NFLPA would bear “a heavy burden in attempting to do so.” _Id_. at 9. This litigation is pending.

Add to end of Note 4 on page 620:

See _Retail Associates, Inc. and Retail Clerks International Association, Locals Nos. 128 and 633, AFL-CIO_, 120 NLRB 388, 394 (1958) (“The decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disrupting effect on multiemployer collective bargaining which would result if such withdrawal were permitted to be lightly made. The attempted withdrawal cannot be accepted as unequivocal and in good faith where, as here, it is obviously employed only as a measure of momentary expedience, or strategy in bargaining, and to avoid a Board election to test the union majority.”).
Chapter 8  Regulating Agents

Add at the end of the second paragraph of Note 1 at the top of page 669:

Champion Pro Consulting Group, Inc. v. Impact Sports Football, LLC, 2013 WL 5461829, *17-18 (M.D. N.C., Sept. 30, 2013) (where athlete terminated agent representation agreement with the plaintiff, the court rejects plaintiff’s tortious interference with a contract claim; the court holds that defendant’s conduct was privileged because it was motivated by a legitimate business purpose—competition in business—and not merely a malicious intent to injure the plaintiff).

In Miller v. Walters, 2014 WL 5333473 (Supreme Ct. N.Y., Oct. 9, 2014), an agent, founder and president of ASM, a sports management firm, sued a rival sports agency firm, Relativity Sports alleging tortious interference, unjust enrichment and unfair competition. Plaintiffs’ claims arose out of defendants entering into a representation with one of plaintiff’s former athlete clients, NBA player Larry Sanders. Plaintiffs alleged that after having invested considerable resources in the player’s development, defendants embarked on a scheme to steal Sanders away and to reap the benefits of plaintiff’s efforts. According to plaintiffs, defendants’ scheme resulted in the termination of Sanders’s agency contract with plaintiff and Sanders entering into a representation agreement with defendants.

In regard to plaintiffs’ tortious interference claim, the court found that plaintiff failed to establish that defendants induced Sanders to terminate his relationship with plaintiff by the use of unlawful means. It rejected plaintiffs’ assertion that defendants’ alleged representations to the player that “he was a ‘max player’ and that they could secure movie roles him” did not amount to unlawful means because plaintiff failed to establish that the representations were actually or knowingly false when made.

Plaintiff’s based their unjust enrichment claim on the alleged services they rendered in assisting the player to develop his skills and Sanders receiving a $44 million contract extension and the defendants’ failure to compensate them for such services. In rejecting plaintiffs’ unjust enrichment claim, the court emphasized plaintiffs’ failure to establish a relationship between them and defendants that could have induced reliance or inducement; therefore the relationship between the parties was too attenuated to support an unjust enrichment claim. The court also rejected plaintiffs’ unfair competition and prima facie tort claims.

Add at the end of Note 2 on page 670:

In Champion Pro Consulting Group, Inc., supra, the court addressed the legality of disparaging remarks made by an agent that allegedly persuaded an athlete to terminate his agent representation contract with plaintiff. The plaintiff alleged that the following comments constituted slander per se: (1) plaintiff should have obtained more endorsement contracts for the athlete; (2) the new agents could perform better marketing services than the plaintiff; and, (3) it was plaintiff’s fault that the athlete was not selected higher in the 2011 NFL draft. In dismissing plaintiff defamation claim, the court characterized these statements as personal opinion because they were “incapable of being actually or factually proven or disproven.” Id. at *15.
Add at the end of the first full paragraph on page 683:

In a sign that it may aggressively enforce the UAAA, the North Carolina Secretary of State’s office indicted several individuals who allegedly engaged in conduct that resulted in the imposition of NCAA sanctions against the University of North Carolina at Chapel Hill. (For background information discussing the conduct that violated NCAA rules see note 5 on page 183 of the casebook and University of North Carolina at Chapter Hill, NCAA Public Infractions Report, March 12, 2012). An agent was indicted for allegedly providing impermissible benefits to induce athletes to sign agency contract. Brooke Pryor, *Sports Agent Terry Watson Indicted Related to UNC Athlete-Agent Case*, DailyTarHeel.com, Oct. 10, 2013, http://www.dailytarheel.com/article/2013/10/second-indictment-in-related-to-unc-athlete-agent-case. Also indicted was a former UNC tutor for allegedly improperly using her relationship with an athlete to induce him to sign a representation agreement with a sports agent. Brooke Pryor, *Former Tutor Jennifer Wiley Thompson Indicted*, DailyTarHeel.com, Oct. 9, 2013, http://www.dailytarheel.com/article/2013/10/footballindictments-1004.

Add as new Note 2 on page 683:

2: Revising the UAAA. Critics have identified concerns that question the overall effectiveness of the UAAA. The concerns include an increasing lack of uniformity as states adopt variations to the Act, the UAAA’s lack of effective deterrence effect arising from under-enforcement and weak penalties, and the belief that the UAAA fails to adequately protect the interests of student-athletes. Responding to such concerns, the Uniform Law Commission formed a committee to expand the UAAA’s scope and improve its effectiveness. Rich Cassidy, *Proposed Amendments to Uniform Athlete Agents Act Attract Attention in Chicago*, On Lawyering .Com (Oct. 29, 2013), http://onlawyering.com/2013/10/proposed-amendments-to-the-uniform-athlete-agents-act-attract-attention-in-chicago/ . A statement in support of forming the committee identifies reasons for amending the Act.

[T]he act has received increasing pushback from state regulators. Montana repealed the act in 2007, due to a perceived lack of agents to register; Colorado repealed the registration function of the act in 2010 (a year after the UAAA’s initial adoption) for similar reasons. . . . This activity has stemmed in large part from fiscal concerns regarding the cost of implementing and maintaining a registry versus the number of agents who register and the resulting fee revenue, and general burden on regulatory staff. In California and Virginia, bills to enact the UAAA were vetoed in 2010 and 2011, respectively, over similar concerns. The problem is compounded by a culture of disregard for registration laws among unscrupulous agents, and systematic lack of reporting and enforcement on several levels.” [NCCUSL, *Memorandum: Proposed Study Committee on Revisions to the Uniform Athlete Agents Act* (Dec. 7, 2011), http://www.uniformlaws.org/shared/docs/athlete_agents/2011dec7_AmendUAAA%20Proposal%20to%20Scope.pdf ]
Issues that the committee is addressing include: 1) Redefining who is an agent so as to include a broader group of individuals (e.g., financial and marketing advisors as is the case in Oregon), NCCUSL, Memorandum: Background on the UAAA and Issues to be Considered at the March Drafting Committee Meeting 2-3 (March 2014); 2) determining whether to include or exclude licensed professional such as attorneys from the definition of an agent, Id. at 3-4; 3) defining athlete agent to include entities (e.g., sports representation firms), Id.; 4) amending the definition of student-athlete to encompass elementary and secondary schools and to encompass professional athletes and student-athletes, Id. at 3; 5) revising the UAAA’s reciprocity provisions to facilitate agents registering in multiple states, Id. at 4; 6) including coaches within the definition of those who recruit and solicit student-athletes, Id. at 6; 7) exploring the creation of a centralized registry and delegating the agent registration function to entities such as professional players associations, Id. at 4; 8) requiring agents to secure surety bonds, Id. at 5; 9) requiring athlete agents to notify an athlete’s institution before attempting to contact or contacting a student athlete Id. at 6; and, 10) expanding the civil enforcement of the UAAA beyond student-athletes and educational institutions to include entities (e.g., collegiate conferences) that could be injured as a result of agent violations of the UAAA, Id. at 6-7. The ULC’s goal is to implement amendments to the UAAA in 2015. Aaron Beard, Committee to Meet to Discuss Changes to Agent Law, AP NewsCarhve.com (Oct. 25, 2013), http://www.apnewsarchive.com/2013/Committee-starts-work-Friday-on-ways-to-strengthen-laws-penalizing-unscrupulous-sports-agents/id-0a45b2d608044dc9bcbea56413ed4410.

Add after citation to Total Economic Athletic Management case at top of page 684:

See Marchibroda v. Demoff, 2013 WL 6638501 (Cal. Ct. App. Dec. 17, 2013) (promise by agent to pay another agent a percentage of fees earned from representation of athlete is enforceable under neither contract (because promise was made after services were allegedly rendered and lacked consideration) nor quantum meruit where any services performed were not performed at the promisor’s request).

Add at the end of the first paragraph on page 684:

See Champion Pro Consulting Group, Inc., supra, at *14 (agent who was fired by his former athlete client was entitled to recover in restitution for reasonable value of services provided by agent prior to the end of his contractual relationship with the athlete).

Add to end of third paragraph of note 2 on pp. 687-88:

Suspend Contract Advisor Martin Magid’s Certification, NFLPA.Com (June 25, 2014),
https://www.nflplayers.com/Articles/Press-Releases/Arbitrator-Upholds-Discipline-on-Three-Contract-Advisors/; and, the three-month suspension of John Rickert. NFLPA Legal Dept.,
CARD Suspends Contract Advisor Martin Magid’s Certification, NFLPA.Com (June 25, 2014),

Add to end of Note 3 on pp. 688-89:

Amendments to the NFLPA’s regulations adopted in 2012 and 2013, include a provision requiring mandatory arbitration for disputes between “two or more Contract Advisors with respect to their individual entitlement to fees owed, whether paid or unpaid, by a player-client who was jointly represented by such agents, or represented by a firm with which the agents in question were associated,” NFLPA Legal Dept., Memorandum from Legal Dep’t, Nat’l Football League Players Ass’n, to Contract Advisors 2 (April 10, 2012), NFLPA Regulations § 5(A)(6); language clarifying the meaning of the “sufficient negotiating experience” exception to the educational requirement for certification to specify that an applicant must have “at least seven years of sufficient negotiating experience.” Id. at § 2(A); clarifying what constitutes an accredited college or university; Id.; requiring additional disclosures as a part of the application process (i.e., applicants must list unsatisfied liens), NFLPA Legal Dept., Memorandum from NFLPA Legal Dep’t, to Contract Advisors 1, (May 8, 2013); and, allowing applicants, who fail the contract advisor exam, 30 days within which to notify the NFLPA of their intention dispute their failing score. Id.

In 2014, the NFLPA’s Committee on Agent Regulation and Discipline announced it would review of its regulations governing contract advisors. Liz Mullen, “A Lot of Agent Missteps” Prompt Wholesale NFLPA Review, Sports Business Journal (April 21-27, 2014),
http://www.sportsbusinessdaily.com/Journal/Issues/2014/04/21/Labor-and-Agents/Labor-and-Agents.aspx?hl=Labor%20and%20Agents&sc=0. According to the NFLPA, “players are concerned about the general level of representation being provided, including agents giving bad advice as well as not understanding the college-bargaining agreement, the salary cap and other key issues.” Id. Among the matters the committee will address are: the agent exam, the standards for becoming certified, and the numbers of years an agent can retain his or her certification without having a client. Id.

Chapter 9   Racial Equity Issues in Athletics

Replace the final full sentence on page 714 with:

For the 2011-2012 season, the racial demographics of combined head coaching positions in all Division I men’s sports were as follow: whites, 86.2 percent; African Americans, 8.3 percent; Asian Americans, 1.0 percent, Latinos, 1.7 percent; and Native Americans, 0.4 percent.
Replace footnote 6 on page 714 with:


Replace the sentence spanning pages 714 and 715 with:

Similar numbers are present in all Division I women’s sports, where whites hold approximately 84.5 percent of head coaching positions.

Add as new paragraphs before “ii. Administrative Opportunities” on p.715:

Notably, significant minority hirings in collegiate coaching sometimes spark comments that may be interpreted as racially-tinged and may help explain why representation of minorities among college coaches remains so low.

For instance, on January 6, 2014, the University of Texas, which has one of the nation’s most storied collegiate football programs, hired Charlie Strong, who is African American, to be its new head coach. Strong spent the previous four years as the University of Louisville’s head coach where he had tremendous success. He compiled a 37-15 record overall record and ended each year with a Bowl Game, the last of which was an improbable upset victory against the University of Florida in the 2013 Sugar Bowl.

Notwithstanding Strong’s track record, within two days of the hire, Red McCombs – a University of Texas booster and one of the richest and most powerful people in the state – attacked it. “I think it was a kick in the face,” he stated publicly, “I think the whole thing is a bit sideways. . . I don’t have any doubt that Charlie is a fine coach. I think he would make a great position coach, maybe a coordinator. But I don’t believe [he belongs at] what should be one of the three most powerful university programs in the world right now at UT-Austin. I don’t think it adds up.” Max Olson, *Red McCombs bashes Texas hire*, ESPN.com, Jan. 8, 2014, http://espn.go.com/college-football/story/_/id/10257706/booster-red-mccombs-bashes-texas-longhorns-charlie-strong-hire.

For instance, at the end of the 2012-2013 NBA regular season, people of color held 47.6 percent of the league’s head coaching positions but just 7.3 percent of its CEO/president positions.

Similarly, at the beginning of the 2013 MLB season, people of color represented a larger percentage of MLB managers than of MLB general managers.

In 2011-2012, African American women accounted for approximately 47.9 percent of Division I women basketball players and 24 percent of Division I women track athletes. The profile of women of color participating in Division I athletics overall during the 2011-2012 season was as follows: African Americans women composed approximately 12.6 percent, Latinas 4.1 percent, Asians 2.3 percent, and Native Americans 0.4 percent.
While governmental and league efforts have been at times successful in countering racist behavior in global soccer, activist athletes using social media have proven powerful in their own right, at least with respect to abuse from fans. For instance, after being serenaded with monkey noises and having bananas thrown at them and other players of color in Spain’s First Division during the 2013-2014 season, Barcelona players Neymar and Dani Alves planned a social media counterattack. They decided that when a banana was next thrown at one of them during a game, he would peel it and eat it on the field in view of the cameras, and Alves did just that on April 27, 2014. Immediately thereafter, Neymar posted a picture on social media sites eating a banana with the note “We are all monkeys.” Before long other athletes, celebrities, and dignitaries – including Brazil’s president – around the world posted similar messages in solidarity with the targeted players. Fernando Kallas, *Neymar planned Alves’ banana eating anti-racist protest*, AS, April 29, 2014, http://as.com/diarioas/2014/04/29/english/1398770114_882297.html.

In addition to raising awareness of racial abuse in soccer, the social media campaign ensured authorities pursued the perpetrator, and he was ultimately arrested on charges “related to racist provocation,” which carry with them up to three years imprisonment upon conviction. James Rush, *Revealed: How Barcelona players PLANNED banana-eating riposte in advance - as fruit-throwing fan is arrested*, Daily Mail, April 30, 2014, http://www.dailymail.co.uk/news/article-2616673/Football-fan-accused-throwing-banana-Dani-Alves-arrested-Spain-inciting-hatred.html.

Add to note 2 on page 742 following parenthetical discussion of *Cowan v. Unified Sch. Dist.*

*Minnis v. Bd. of Supervisors of La. State Univ. and A & M College*, 2014 WL 5364049 (M.D. La. Oct. 21, 2014) (African-American, who had a losing record as head coach of the women’s tennis team, failed to establish his discharge violated Title VII or Title IX).

Add as a new paragraph at the end of Note 5 on page 745:

In a more recent matter that has not sparked litigation but has prompted substantial debate, a number of NFL and NBA players in the fall of 2014 publicly expressed outrage over the widely publicized deaths of African-American citizens Michael Brown and Eric Garner at the hands of white police officers. Several St. Louis Rams players held their hands up in a “Don’t Shoot” pose while walking on to the field before a game in protest of Brown’s shooting and NBA stars, including Derrick Rose and LeBron James, wore t-shirts reading “I Can’t Breathe” in protest of Garner’s choking death. Although public opinion was divided and some (including police groups) called on the Rams and the NFL on the one hand, and the NBA on the other, to discipline the players involved, the club and the leagues did not do so, citing the players’ right to express their opinions. Soraya Nadia McDonald, *When it comes to activism, athletes aren’t the only ones changing. The leagues that employ them are*, WashingtonPost.com, Dec. 9, 2014, http://www.washingtonpost.com/news/morning-mix/wp/2014/12/09/when-it-comes-to-activism-athletes-arent-the-only-ones-changing-the-leagues-that-employ-them-are-too/; *No Fines*

Add to the end of the second full paragraph on page 753:

In the wake of the Harjo plaintiffs’ defeat, a younger group of plaintiffs – against whom the laches argument would be inapplicable – essentially reinitiated the Harjo plaintiffs’ effort, petitioning the TTAB to cancel six of Pro-Football’s federal trademark registrations. Their petition is currently pending before the TTAB. Erik Brady, New generation of American Indians challenges Redskins, USA Today.com, May 10, 2013, http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/native-americans-washington-mascot-fight/2148877/.

On June 18, 2014, the United States Patent and Trademark Office (“USPTO”) ordered the cancellation of the Washington Redskins’ trademark registrations that were issued in 1967 and 1990. The USPTO held that the evidence supported the plaintiffs’ claim that the registrations were disparaging to Native Americans at the time they were registered. As a result, the court held that the trademark was granted in error and must be cancelled to correct the mistake. Blackhorse v. Pro-Football, Inc., Cancellation No. 92046185, United States Patent and Trademark Office (June 18, 2014). The team is currently challenging the ruling in an appeal to the Federal Circuit.

Add to the end of Note 5 on page 756:

In may be the last major case surrounding the University of North Dakota mascot issue, Spirit Lake Tribe of Indians v. NCAA, 75 F.3d 1089 (2013), the Eight Circuit addressed claims asserted by the Spirit Lake Tribe and a member of another tribe seeking to enjoin the NCAA from sanctioning the university for use of the Fighting Sioux name. Plaintiffs alleged that discontinuing use of the name would dishonor the sacred ceremony during which permission was granted for the university to use the name. (In 1969, elders of the Standing Rock tribe and one elder of the Spirit Lake tribe ceremonially approved of the university’s use of the Fighting Sioux name). Plaintiffs asserted, inter alia, that the NCAA’s actions leading to the discontinuance by the university’s use of the Fighting Sioux name gave rise to a 42 U.S.C. § 1981 claim. The court found that the plaintiffs failed to establish the intentional discrimination element of a § 1981 action in that there was no showing that the “NCAA enacted the policy in order to eradicate Sioux culture, as the [plaintiffs] allege.” Id. at 1093. The court also rejected plaintiffs’ claim that the NCAA’s policy tortiously interfered with a contract that arose from the 1969 ceremony. The court found that the ceremony did not create a contract given an absence of the mutual intent required to create a contractual obligation and because any such obligation that might have arisen would have lacked sufficient certainty. Id.
Add to the end of the second full paragraph on page 766:

In *Heike v. Guevara*, 519 Fed. Appx. 911(6th Cir. 2013), a Caucasian student-athlete alleged that her basketball coach refused to renew her scholarship because she was white or heterosexual. Plaintiff alleged violations of her substantive and procedural due process rights under the Fourteenth Amendment. In regard to plaintiff’s racial discrimination claims, the court applied the *McDonnell Douglas* framework that allows a plaintiff to establish an equal protection claim either by presenting direct evidence of discrimination or indirect evidence of discrimination. Applying this framework, the court held that the coach’s alleged statements that she preferred “thug” or “ghetto” players and that plaintiff was not her “type” failed to establish direct evidence of racial discrimination. The court reasoned that to adopt plaintiff’s logic would countenance the perpetuation of stereotypes because it assumes that only black players can be “thug” or “ghetto”. *Id.* at 919. The court also found that plaintiff failed to present indirect evidence of racial discrimination. *Id.* at 921. Finally, the court rejected plaintiff’s equal protection claim that she was discriminated against on the basis of her sexual preference because she allegedly “looked ‘too girly’”. *Id.* Analogizing the college’s failure to renew plaintiff’s one-year scholarship to a one-year employment contract renewable at will, the court stated that “[t]o subject run-of-the-mill coaching decisions to class-of-one equal protection challenges would be to expose collegiate athletics to an unprecedented, unjustified and unjustifiable level of judicial oversight.” *Id.* at 922.

Add as a new Note between Note 2 and Note 3 on page 767:

*Title VII as a Remedial Option in Cases of Racial Workplace Harassment.* While *Priester, Malcolm, and Garvey* involved amateur athletes, in the professional sports context, Title VII’s workplace harassment protections provide a remedy for racially abused athletes. If an employer engages in or encourages harassment or fails to reasonably protect employees from harassment, liability may follow. See 42 U.S.C. § 2000e-2(a).

Chapter 10 Gender Equity Issues in Athletics

Add after the first full paragraph on page 775:

The NWLC has also highlighted major issues that remain in the effort to ensure gender equity. At the interscholastic level, participation by school or school district continues to be quite variable with some schools having a large percentage gap in terms of participation. For example, the NWLC indicates that many states have schools that report participation by girls at far lower rates than boys. For example, approximately half of the schools in the states of Arkansas, Mississippi, North Carolina, District of Columbia, Texas, South Carolina, Alabama, Louisiana, Tennessee and Georgia report a participation gap of 10 percentage points or higher, resulting in boys participating at dramatically higher rates than girls. For a detailed report regarding participation rates at the interscholastic level, see The Next Generation of Title IX Athletics, NWLC.com, June 2012, http://www.nwlc.org/sites/default/files/pdfs/nwlcathletics_titleixfactsheet.pdf.

Gender inequity at the intercollegiate level persists as well, with the NWLC reporting that, “While more than half of the students at NCAA schools are women, they receive only 44% of the athletic participation opportunities. Moreover, female athletes at the typical Division I-FBS (formerly Division I-A) school receive roughly 28% of the total money spent on athletics, 31% of the recruiting dollars, and 42% of the athletic scholarship dollars. In addition, at the typical FBS school, for every dollar spent on women’s sports, about two and a half dollars are spent on men’s sports.” Id. The existence of men’s football may explain, albeit without justifying, the differences. At the FBS level, for example, dollars generated by men’s sports often dramatically exceed those generated by women’s sports, although this may be a chicken-and-egg problem, given the history of spending more dollars on men’s sports, particularly football and basketball, than women’s sports. This data was made available in part due to the passage of the High School Transparency Acts, which require disclosure of participation and expenditure rates.

Add after the second full paragraph on page 775:

As discussed in greater length in Note 9 at page 821, the issue of sexual harassment and denial of access to educational opportunity under Title IX has become an increasingly significant issue in the gender equity area. Given the proliferation of cases in 2013 in this area, it is likely that the sensitive issues implicated in these cases will gain the attention they deserve.

Add after the final full paragraph on page 775:

Efforts to achieve gender equity in Europe are also noteworthy. In July of 2014, a “group of experts adopted an ambitious and innovative report in the field of gender equality and sport. The proposals draw on the conclusions of the December 2013 EU Conference on Gender Equality in Sport. They address all stakeholders in the field of sport as well as national governments and the European Commission. The experts proposed measures relating to management, training, prevention of violence and the media, including:
1. Changing recruitment policies for new posts in boards and staff, including coaching staff.
2. Establishing apprenticeships and trainee positions in executive boards, management and selection teams for young female managers and coaches.
3. Implementing modules in training courses for coaches and sport administrators.
4. Setting up preventive programmes against gender-based violence in sport.
5. Developing guidelines on how sport organisations can operate with the media to increase and improve media coverage of (mixed) major sport events.


The European focus on management and training for women, prevention of violence against women, and access to the media for women can provide a comparative basis for strengthening the model of equity for women in sport in the United States.

Another issue drawing increasing attention is the handling of violence against women by male sports figures. In July of 2014, Baltimore Ravens running back, Ray Rice, was suspended by NFL Commissioner Roger Goodell for the first two games of the 2014 season, for aggravated assault against his then-fiancé (he reportedly knocked her unconscious). Many commentators strongly criticized the NFL for the leniency of the penalty. Writing for ESPN, Jane McManus opined:

> Commissioner Roger Goodell has issued longer suspensions for pot smoking, taking Adderall, DUI, illegal tattoos, dogfighting and eating a protein bar thought to be on the NFL's approved list. Two games. It’s a joke, and a bad one. Worse, it leaves the door open for people to think that Janay Rice bears a lot of the responsibility for eliciting the punch that seemingly knocked her out. * * * This comes in the same offseason when elite pass-rusher Robert Mathis got four games for, according to him, using an unapproved fertility drug as he and his wife tried to get her pregnant. * * * The NFL is sending a strong message by issuing such a weak suspension; it’s about as meaningful as a yellow card in a soccer game. * * * And make no mistake, the NFL has a problem on its hands.


There are governance, moral and economic issues raised by the Commissioner’s action: (1) whether some forms of substance abuse are worse than aggravated domestic assault; (2) whether the commissioner may, as a legal matter, or should, as a policy matter, proceed on his own in such matters or should seek to work with the NFLPA to develop a joint program for dealing with abuse issues; and (3) whether, as an economic matter, the Commissioner’s actions may adversely impact the NFL’s concerted efforts to expand the number of women watching and supporting the NFL.
Title IX is increasingly being used against colleges and other institutions to deal with failure to report sexual abuse. See, e.g., Robin Wilson, *Why Colleges Are on the Hook for Sexual Assault*, June 6, 2014, http://chronicle.com/article/Why-Colleges-Are-on-the-Hook/146943. Failure to report or efforts to cover-up or rationalize sexual abuse by athletes has been common in the intercollegiate context, but any cover-up or rationalization will be viewed with grave disfavor and can harm the reputation (and therefore the revenue potential) of amateur and professional athletics.

In a major case involving Jameis Winston, the Heisman trophy winning quarterback for Florida State University, Florida State University took the unprecedented step of having a former Florida State Supreme Court justice decide a student conduct hearing to deal with four claims of sexual misconduct brought by a woman student on campus against Winston. The justice decided that there was insufficient or inconclusive evidence that Winston was guilty of the claimed rape and sexual misconduct. For two differing reactions to the case, see Robert Sherman, “Jameis Winston Cleared of Rape Like Every Other College Sports Star,” http://www.thedailybeast.com/articles/2014/12/22/jameis-winston-cleared-of-rape-like-every-other-sports-star.html and Patrick Nohe, “Here’s What the New York Times Isn’t Telling You,” http://chopchat.com/2014/12/24/heres-new-york-times-isnt-telling/ Sherman argues that women simply cannot prevail against women in actions against high profile athletes, at the institutional level where institutions and athletes often have a common interest – winning on the court or field. Nohe, on the other hand, argues that the evidence was insufficient to find Mr. Winston guilty. These articles raise interesting questions regarding the viability of Title IX actions against high profile athletes at the intercollegiate level. For yet another perspective on the Winston case, arguing that student-athletes are often disserved by the NCAA’s deference to institutions and coaches, see Rodney Smith, “Jameis Winston’s one game suspension is insufficient.” http://www.deseretnews.com/article/865612327/Jameis-Winstons-one-game-suspension-is-insufficient.html?pg=all Others have argued that universities should not play student-athletes previously convicted of crimes involving gender abuse. See Jake New, “Looking the Other Way?” https://www.insidehighered.com/news/2014/11/04/should-ncaa-prevent-convicted-criminals-playing-college-sports

Add to the end of Note 1 on page 788:

Girls and women desiring to play football continue to assert the Equal Protection Clause in the federal or a state constitution with some success. For example, in August 2013, the ACLU of Indiana filed a lawsuit on behalf of a seventh grade girl who had been refused permission to play on her school football team. The school district quickly settled the matter by simply agreeing to permit the girl to play. Pulaski Post.com, http://www.pulaskipost.com/index.php?option=com_content&view=article&id=2540%3Awinamac-to-allow-girl-on-middle-school-football-team&catid=4%3Anews&Itemid=1. While the Equal Protection issue remains unsettled, school districts, such as this one, often settle these matters by permitting girls to play.
Add to the end of PROBLEM 10-1 on page 793:


Replace the final sentence of Note 7 on page 814 with:

Moreover, a recent study reveals that gains for women under Title IX have “not been shared equally by White and African American females. High schools attended by African American females do not offer the same range of sports as those available in schools attended by White females.” See Moneque Walker Pickett, Marvin P. Dawkins, and Jomills Henry Braddock, Race and Gender Equity in Sports: Have White and African American Females Benefited Equally from Title IX, American Behavioral Scientist, http://abs.sagepub.com/content/56/11/1581.abstract. When considering new sports, the NCAA has a preference for sports recognized at the interscholastic level. Is this problematic in terms of racial equity?

Add to the end of Note 9 on page 821:

Many cases have recently been filed asserting sexual harassment and denial of access to educational opportunities based on the failure of a school or university to respond appropriately to student-on-student sexual harassment. Perhaps the most prominent recent case involves a number of women who allege that they were sexually assaulted while students at the University of Connecticut and the university failed to protect them. The women assert that the University responded to their sexual assault complaints “with deliberate indifference or worse.” Pat Eaton-Robb, UConn Facing Federal Title IX Lawsuit, Associated Press, Nov. 1, 2013, http://bigstory.ap.org/article/women-uconn-failed-protect-us-sex-assault. In their book, The System: The Glory and Scandal of Big-Time Football (Doubleday 2013), Jeff Benedict and Armen Keteyian offer a very sobering account of the world of big-time college football, including a chronicling of a number of alleged instances of rape and related activities on the part of student-athletes and the pressures that attend the handling of those matters – the student-athlete often either denies or admits the act but argues it was consensual and the university and its leadership is left with the decision of whether to permit the player to participate. Schools often take a hard-line approach, refusing to permit the student-athlete to play and investigating the matter thoroughly. Failing to take claims of harassment seriously can lead to significant repercussions for the school and its personnel. On August 23, 2013, for example, the Iowa Supreme Court held that the University of Iowa was justified in firing its longtime dean of students for mishandling a student sexual assault case that had received significant media attention. In a unanimous decision, the court affirmed the lower court’s dismissal of the dean of students’ claims that he was defamed and wrongfully terminated by UI President Sally Mason. One commentator responded to this decision by noting, “The court’s decision is a reminder for practitioners to advise their clients to be proactive in sexual abuse and harassment investigations.” Aditi Mukherji, University of Iowa's Firing Affirmed By Iowa Supreme Court, FindLaw.com, Aug. 27, 2013, http://blogs.findlaw.com/eighth_circuit/2013/08/university-of-
4. **Student-Athlete Disparate Treatment Claims**: In *Thomas v. University of Pittsburgh*, 2014 WL 3055361 (W.D. Pa July 7, 2014), a scholarship student-athlete on the women’s basketball team was suspended indefinitely following an altercation with a teammate and the basketball coach. The plaintiff alleged that her suspension violated Title IX because it was more severe than sanctions imposed on male athletes who had engaged in more egregious conduct but were permitted to continue to play and receive the benefits attendant to being a student-athlete. According to plaintiff, defendants’ intentional and disparate treatment violated Title IX. The court held that “Plaintiff alleges sufficient facts regarding the University's disparate treatment of females and males relating to disciplinary procedures to sustain a Title IX claim.” The court also rejected defendants’ motions to dismiss plaintiff’s punitive damages and equal protection claims.

Add as a new Note between Note 1 and Note 2 on page 850:

Professor Marc Edelman has argued that college sports have a major gender equity problem, offering three reasons why this is the case:

1. **The current gender pay gap among college coaches is one of the worst in society.** Even without allowing college athletes to control the value of their own likenesses, there is an enormous and growing pay gap between male and female college coaches. . . Salary information obtained by the *New York Times* from the U.S. Department of Education indicates that from 2003 to 2010 the average pay of NCAA Division I men’s team coaches increased 67%, whereas the average pay for NCAA Division I women’s coaches increased just 16%. Thus, the gender pay gap among NCAA member coaches is not only large, but also widening.

2. **There are also disproportionately few women in important athletic director positions.** This glass ceiling that many NCAA member schools have placed on women in athletic management also cannot be ignored.

3. **Finally, many NCAA members implicitly endorse a WNBA minimum age rule that requires women’s college basketball players to delay their pro hoops dreams longer than men.** With respect to women’s athletes themselves, many NCAA leaders seem to have implicitly endorsed the WNBA’s collectively bargained rule that requires American women’s basketball players to wait four years after their high school graduation before turning professional, even though men’s basketball players may turn pro after just one year of college.

There are tensions that must be faced: 1) Student-athletes, many of whom are athletes of color, in the major revenue producing sports at the most competitive intercollegiate levels are demanding more compensation; and 2) Gender equity, under Title IX and as a matter of policy, creates demands for equity in compensation and benefits. How can and should these tensions be addressed? In the O’Bannon litigation, involving the NCAA’s use of the images of student-athletes in video games, promotional materials and other related merchandise, U.S. District Judge Claudia Wilken rejected the NCAA’s argument that more support could be given to women’s sports if the NCAA is not required to pay its male student-athletes in the revenue generating sports. Judge Wilken said “the NCAA could mandate that Division I schools and conferences redirect a greater portion of the licensing revenue generated by football and basketball to these other sports. . . The NCAA has not explained why it could not adopt more stringent revenue-sharing rules. . . The challenged restraint is not justified by the NCAA’s claimed desire to support women’s sports or less prominent men’s sports.” Nick McCann, Federal Judge Rejects NCAA's Gender Excuse in Class Action, CourthouseNewsService.com, April 15, 2014, http://www.courthousenews.com/2014/04/15/67069.htm.

One might ask, however, whether in some measure Judge Wilken has simply begged the questions regarding the tensions. Is equitable sharing of licensing revenues among all student-athletes unfair to the student-athletes who generated those funds, especially if these revenues do not continue to be used to enhance salaries of coaches and other athletic department employees?

Chapter 11 Health, Safety, and Risk Management Issues in Sports

Add to the end of the first paragraph of Note 2 on page 868:

Accord, South Shore Baseball, LLC v. DeJesus, 982 N.E.2d 1076, 1084 (Ind. App. 2013) (adopting the limited duty rule, the court holds as a matter of law that “an operator of a baseball stadium who ‘provides screening behind home plate sufficient to meet ordinary demands for protected seating has fulfilled its duty with respect to screening and cannot be subjected to liability for injuries resulting to a spectator by an object leaving the playing field’”).

Add as new Note 6 on page 871:

Stretching the Baseball Rule? What if the flying object that hits a spectator is a piece of food rather than a piece of game equipment? On September 8, 2009, Robert Coomer was sitting in the stands watching a Kansas City Royals game when he was struck in the eye by a hot dog the Royals’ mascot threw into the stands as part of a product promotion. The mascot took no care with the throw, tossing it behind his back, and the damage to Coomer’s eye was substantial: a torn retina requiring surgery. Coomer sued, and the Royals defended based on the “baseball rule,” arguing that they were no more liable to Coomer than they would have been if he were hit by a foul ball. The trial court agreed and found for Coomer, but the Missouri court of appeals reversed, finding that being hit with a hot dog is fundamentally different than being hit with a baseball, because being hit with a hot dog is not an inherent risk of attending a game. See
Coomer v. Kansas City Royals, 2013 WL 150838 (Mo. Ct. App., Jan. 15, 2013). An appeal is pending before the Missouri Supreme Court. See FCH v. Rodriguez, 335 P.3d 183 (Nev. 2014) (rejecting both the limited duty rule and assumption of risk defenses where plaintiff, who was watching a sporting event on television at a sports bar, was injured when another patron dove for a souvenir that was tossed by a promotional actor to other patrons also watching the event on television).

Add to the first paragraph on page 884 following the parenthetical discussion of Lestina v. West Bend Insurance Co.:

Cope v. Utah Valley State College, 290 P.3d 314, 322 (Utah Ct. App. 2012) (holding that a “duty of reasonable care generally encompasses a duty not to create an unreasonable risk of harm. . . . Ordinarily participants cannot reasonably expect instructors or coaches to insulate them from risks inherent in an activity in which they voluntarily engage”).

Add to the end of the first paragraph on page 884 following the parenthetical discussion of Noffke v. Bakke:

Hanus v. Loon Mountain Recreation Corp., 2014 WL 1513232 (D. N. H. Apr. 14, 2014) (a statute limiting the liability of ski areas for dangers inherent in sport, including skier collisions, immunized ski area from liability for injuries to a 13-year old skier resulting from a collision with another skier who was an employee of the ski area and may have acted recklessly; the court found that the relevant statute displaces the common law and makes no exception for employees or reckless behavior resulting in a skier-to-skier injury).

Add to the end of Note 2 at the top of page 907:

Philippou v. Baldwin Union Fee Sch. Dist., 963 N.Y.S.2d 701, 703-04 (N.Y.A.D. 2 Dept. 2013) (although it adopted the rule that primary assumption of the risk extends to risks associated with open and obvious conditions of the playing field, the court concludes that the defendant failed to present a prima facie case that an improperly taped wrestling mat did not increase the risk of injury inherent in wrestling).

Add to the end of Note 3 on page 907:

Mercier v. Greenwich Academy, Inc., 2013 WL 3874511 (D. Conn., July 25, 2013) (following Kahn, the court extends the reckless and intentional standard in rejecting plaintiff’s claim that a coach negligently failed to remove her from competition after she exhibited concussion symptoms; allegations state claim for recklessness).

In Mann v. Palmerton, 2014 WL 3557180 (M.D. Pa. July 17, 2014): A high school football player sustained a hit during football practice that allegedly left him disoriented and experiencing numbness. Immediately after he was hit, his coaches allegedly ordered plaintiff to continue to practice even though they observed his disorientation. As a consequence of defendants’ actions
and their failure to have proper policies in place (e.g., providing a medical evaluation) to effectively address the dangers of traumatic brain injuries, plaintiff alleged that he suffered health related ailments. Plaintiff alleged that defendants’ conduct amounted to a constitutional tort pursuant to the state created danger doctrine in violation of the Fourteenth Amendment. Noting that the due process clause does not impose an affirmative duty on the state to protect individuals from harm cause by private actors, the court found that such a duty may be found if the elements of the state-created danger claim are satisfied. The court found that plaintiff had sufficiently alleged facts that could satisfy the following four elements of a state-created danger claim:

(1) the harm ultimately caused was foreseeable and fairly direct;
(2) a state actor acted with a degree of culpability that shocks the conscience;
(3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
(4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Id. at *4.

The court also found that plaintiff had alleged facts sufficient to sustain a cause of action against the municipal defendants. The court stated:

Plaintiffs have sufficiently alleged that Defendants had a policy or custom of failing to medically clear student athletes and failing to enforce and/or enact proper and adequate policies for head injuries. In addition, they adequately allege that failure to train the coaches on proper procedures and a safety protocol amounts to deliberate indifference to recurring head injuries, a common hazard associated with football. Therefore, the portion of Defendants' motion to dismiss attacking municipal liability will be denied.

Id. at *9.

Add as new Note 5 at the bottom of page 913:

Statutory Exceptions. In Pelham v. Bd. Regents Univ. System of Georgia (Ga. App. 2013), a football player, injured during practice after his coach allegedly ordered players to fight one another to secure scholarship, asserted negligence and negligence per se claims. The court ruled that Georgia’s anti-hazing statute does not create a statutory waiver of sovereign immunity. It also found that the athlete’s claims were barred because they fell within the assault and battery
exception to the waiver of sovereign immunity for torts committed by state officers and employees acting within scope of their employment. According to the court, the coach, who facilitated the tortious act, was protected because a third party caused the injury to the plaintiff.

In *Smith v. Kroesen*, 2104 WL 1248456 (D. N.J.), a plaintiff injured by a co-participant alleged the other player’s coach was liable for negligent coaching. Attempting to avoid the coach’s qualified immunity defense, the plaintiff argued that the coach’s gross negligence brought him within the gross negligence exception to the qualified immunity afforded volunteer coaches. Defining gross negligence as referring to “behavior which constitutes indifference to consequences,” the court found plaintiff failed to present evidence that the coach was grossly negligent in performing his coaching duties.

Add after the third sentence of Note 1 on page 932:

*Roe v. St. Louis University*, 746 F.3d 874 (8th Cir. 2014) (finding university not negligent in its treatment of field hockey player’s injury).

Add to the end of Note 2 at the top of page 934:

*See Mynhardt v. Elon Univ.*, 725 S.E.2d 632, 637 (N.C. Ct. App. 2012) (in a case involving a fraternity member, the court relies on precedent involving claims asserted by student-athletes in holding that “a university should not generally be an insurer of its students’ safety, and . . . therefore, the student-university relationship, standing alone does not constitute a special relationship giving rise to a duty of care”); *Roe v. Saint Louis Univ.*, 2012 WL 6757558 (E.D. Mo) at *6, aff’d on other grounds, 746 F.3d 874 (8th Cir. 2014) (in rejecting a female student-athlete’s claim that she was sexually assaulted because of her university’s negligent failure to supervise an off-campus party, the court finds that because of the absence of special relationship, the defendant possessed no duty to supervise and ensure plaintiff’s safety at the private off-campus party). *Id.*

Add to the end of Note 5 on page 934:

*; Bader v. Ferri*, 2013 WL 3776546 (Ohio App.) (upholding waiver releasing university and its employees, agents, and representatives from negligence for “any and all claims” resulting from “participation” in intercollegiate athletics as well as “any and all claims” arising from “diagnostic, medical and/or surgical treatment” of injuries sustained “while engaged in activities related to intercollegiate athletics). But see *UCF Athletic Assoc. v. Plancher*, 121 So.3d 1097 (Fla. App. 2013) (exculpatory clause in release did not bar claims because language did not clearly inform athlete that he was contracting away his rights; language suggested clause covered only injuries inherent in the sport).
Add to end of first paragraph of Note 6 on page 935:

In *UCF Athletic Assoc. v. Plancher*, 121 So.3d 1097 (Fla. App. 5 Dist. 2013), the parents of deceased football player, who allegedly died from a sickle-related condition that was exacerbated during an intense practice, brought a negligence action against the University of Central Florida and the University of Central Florida Athletic Association (“UCFAA), a direct-support organization that administered the university’s athletics department. Noting that it was clear that the university was a state agency, the court framed the immunity issue as whether “UCFAA is a corporation primarily acting as an instrumentality of UCF . . . so as to extend the immunity afforded to UCG to UCFAA as well.” *Id.* at 1103. Concluding that UCFAA was entitled to limited sovereign immunity, the court focused on UCFAA’s corporate structure which makes it subject to UCF’s governance, financial and operational control. Consequently, UCFAA was entitled to limited sovereign immunity by virtue of a Florida statute that waives immunity for tort claims, but sets a maximum recovery of $200,000. Based on this statute, the plaintiffs’ $10 million jury award was reduced to $200,000.

Add as new Note 7 on page 935:

*Physical Abuse by a Coach.* Coaches sometimes put their own players at risk through abusive behavior in practices and during games. In April of 2013, video footage emerged of former Rutgers University head coach, Mike Rice, physically assaulting his players. Brittany Brady, *Rutgers coach fired after abusive video broadcast*, CNN.com, Apr. 4, 2013, http://www.cnn.com/2013/04/03/sport/rutgers-video-attack/. The video showed Rice throwing basketballs at his players and forcefully pushing them while verbally insulting them. *Id.* Although such coaching tactics are certainly not novel and are viewed by some as appropriate hard-nose coaching, others find them appalling. Rutgers initially punished Rice with a three-game suspension and a $75,000 fine, but after being pressured by state officials, the University terminated him. *Id.* Still, Rice received $475,000 in severance pay. Angela Delli Santi, *Rutgers, Mike Rice Settlement: Fired Basketball Coach To Receive $475,000 Under Agreement*, Huffington Post, Apr. 18, 2013, http://www.huffingtonpost.com/2013/04/18/rutgers-mike-rice-settlement-coach-paid_n_3113310.html.

In December of 2013, Derrick Randall, one of the abused players, filed a civil suit against Rice, one of Rice’s assistant coaches, the university’s athletic director, and the university’s president for “willfully, recklessly, negligently and with deliberate indifference, plac[ing] [Randall] in a hostile environment in which he was regularly and continuously subjected to physical, mental, verbal and emotional abuse . . . .” *Lawsuit alleges abuse by Mike Rice*, ESPN.com, Dec. 10, 2013, http://espn.go.com/new-york/mens-college-basketball/story/_/id/10114698/former-rutgers-scarlet-knights-player-sues-coach-mike-rice-behavior. At the time of this writing, the lawsuit is pending.
Add as a new paragraph after the first full paragraph on page 940:

In May 2014, a class of former NFL players brought a similar suit, Dent v. Nat’l Football League, 2014 WL 7205048 (ND Cal.), against the NFL as a whole. Led by a group of eight players representing several different teams, the class asserted that to keep players in games NFL teams routinely, and sometimes illegally, supplied players with powerful pain-killing drugs without regard for the medical complications such dosages could ultimately cause. Citing to Section 301 of the Labor Management Relations Act, which governs “[s]uits for violation of contracts between an employer and a labor organization,” the NFL moved to dismiss the suit. The league argued that even if the plaintiffs’ claims were true, the Collective Bargaining Agreement between the league and the players’ union provided the bargained-for remedies. Indeed, the league argued that it some cases named plaintiffs had previously sought out those remedies. The Court sided with the NFL and granted the motion to dismiss, finding “preemption does not require that the preempted state law claim be replaced by an analogue claim in the collective-bargaining agreement…. Nevertheless, the types of claims asserted in the operative complaint are grievable in important respects under the various CBAs.” Id. at *2, 11.

Add as a new Note between Note 2 and Note 3 on page 941:

Out-of-state Physician Malpractice Liability. Currently, most sports medicine professionals who perform medical services outside their states of licensure are not covered by medical malpractice insurance, which exposes physicians travelling with sports teams to financial risk when they treat players at away games. On April 8, 2014, however, United States Senators John Thune and Amy Klobuchar introduced a bill – the Sports Medicine Licensure Clarity Act – that would reduce that risk. The bill, which at the time of this writing is under consideration by the Senate Committee on Health, Education, Labor, and Pensions, would clarify that health care services provided by a sports medicine professional in a state outside the state in which the provider is licensed would be covered by the provider’s medical malpractice insurer. See Bipartisan Bill Seeks to Clarify Out-of-State Practice of Sports Medicine, Orthopedic Design & Technology, April 11, 2014, www.odtmag.com/news/2014/04/11/bipartisan_bill_seeks_to_clarify_out-of-state_practice_of_sports_medicine.

Replace “McGee” in Note 4 on page 941 with “Magee”.

Replace the first sentence under heading E on page 942 with:

In 2013, the NFL offered to pay $765 million to settle a massive lawsuit brought by a class of over 4,500 former players who argued they were unknowingly exposed to potentially debilitating brain trauma while playing the in League. These players argued that the NFL knew of the danger they were incurring while playing, but chose not to disclose it. Under the deal, $675 million of the settlement would be paid to former players who suffered cognitive injury, and up to $75 million would be set aside to provide medical exams for retired players. Additional funds were earmarked for further head trauma research and education. See Stephanie Smith, NFL and ex-players reach deal in concussion lawsuit, Aug. 30, 2013,
http://www.cnn.com/2013/08/29/health/nfl-concussion-settlement/. Despite the huge sum the NFL was required to pay, the deal was largely seen as a “win” for the League for numerous reasons. First, the NFL enjoys annual revenues of over $9 billion, so while $765 million is a daunting number, it represents only a fraction of what the NFL makes in one year. Second, the NFL had twenty years to pay the settlement amount, reducing the impact of the League’s initial financial hit. Finally, by avoiding litigation, the NFL protected itself from a discovery process that may have unearthed evidence of bad faith on the League’s part as well as the possibility of being ordered to pay billions of dollars in damages. See Dan Diamond, NFL pays $765 to settle case, still wins, Forbes.com, Aug. 29, 2013, http://www.forbes.com/sites/dandiamond/2013/08/29/nfl-pays-765-million-to-settle-concussion-case-still-wins/.

The court, viewing the dollar figure as insufficient to remedy the class members’ injuries, ultimately refused to approve the settlement, and on June 25, 2014, following the court’s refusal, the parties submitted a revised settlement agreement for the court’s approval. The revised agreement addresses the concern that a capped fund would be insufficient to pay players who later develop a qualifying condition. The revised agreement includes no cap on the NFL’s obligations under the monetary award fund. See Curtis Skinner, UPDATE 1—NFL Agrees to Eliminate Cap on Player Payments in Concussion Lawsuit, Reuters.com, June 25, 2014, http://www.reuters.com/article/2014/06/25/nfl-concussion-idUSL2N0P616B20140625. On July 7, 2014, presiding Judge Anita Brody gave preliminary approval of the revised settlement. Judge Brody will make a final approval determination in 2015, but approval appears likely in that she has raised “no red flags on the deal despite strenuous opposition from some players through their counsel.” Daniel Kaplan, Final Approval of Concussion Claims Against NFL Not Likely Until Next Year, SportsBusinessDaily.com, Nov. 20, 2014, http://www.sportsbusinessdaily.com/Daily/Issues/2014/11/20/Leagues-and-Governing-Bodies/Concussions.aspx.

The NFL concussion lawsuit has inspired similar concussion-related lawsuits against other defendants, including the NCAA, the NHL, and the football helmet manufacturer, Riddell. These suits are pending, and, like the NFL concussion litigation and settlement, they will likely profoundly impact the way sports organizations and individual athletes conceive of and address brain trauma.

Add to end of first paragraph on page 943:

; Green v. Arizona Cardinals Football Club LLC, (E.D. Mo. May 14, 2014) (concluding defendant’s duties arose out of common law and not terms of CBA, a federal judge remanded to state court former football players’ claims alleging defendants violated several tort duties relating to brain trauma the players suffered from exposure to concussive blows).
See Robinson v. Dept. of Labor & Industries, 2014 WL 2198372 (Wash. App.) (in contrast to club’s players who signed a standard NFL player contract, which evidences the parties’ mutual consent to an employment relationship, a free agent who injured his knee during an off-season minicamp tryout is not an “employee” entitled to recover workers’ compensation benefits).

In Kansas City Chiefs, v. Allen, 2013 WL 1339820 (W.D. Mo.), defendants, players who sought to file workers compensation claims in California, sought to overturn an arbitrator’s determination that the players desist from pursuing their California workers’ compensation claims and file any such claims in Missouri. The plaintiffs’ asserted that the arbitrator’s decision should be vacated because the choice of law and/or choice of forum provision of the CBA, which provided the basis for the arbitrator’s decision, contravened public policy by waiving the right of players to pursue workers’ compensation claims in states other than Missouri. In rejecting the players’ claims, the court articulated the governing standard as whether the arbitrator’s award is “contrary to ‘well defined and dominant’ public policy, which must be ‘ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” Id. at *5. Applying this standard, the court concluded the arbitration award did not “violate any explicit, well-defined, and dominant public policy” of the jurisdiction whose law controlled, Missouri. In reaching this conclusion, the court ruled that Missouri precedent establishes that a choice of law provision is enforceable unless it was contrary to fundamental Missouri policy. Id. The court also found that even if were to apply California law, the arbitrator’s award would not have been contrary to California public policy. Id. at *6. According to the court, “none of the Players have established enforcement of the Award violates an explicit, well-defined, and dominant California public policy by prohibiting them from pursuing workers’ compensation benefits in California.” Id.

In the forgoing cases, athletes filed workers’ compensation claims in California because, unlike California, many other states fail to recognize cumulative injuries as falling within the scope of their workers’ compensation statutes. In October 2013, California’s Governor Jerry Brown signed into law legislation that will preclude most professional athletes from filing workers’ compensation claims California. The statute permits professional athletes in the sports of baseball, basketball, football, ice hockey and soccer to pursue cumulative trauma claims in California only if the athlete worked for more than two seasons during the athletes’ career for a California-based team and the athlete played for fewer than seven years for a team(s) not based in California. Cumulative trauma injuries include injuries incurred over a period of time such as arthritis and brain injuries such as chronic traumatic encephalopathy. West’s Ann. Cal. Labor Code § 3600.5 (2013). See Federal Insurance Co. v. Workers’ Compensation Appeals Board, 2103 WL 6240421 (Ct. App. Dec. 3, 2013) (retired WNBA player, who played one game in California during the season when her injury first occurred, could not pursue workers’ compensation cumulative injury claim because California did not have a “sufficient relationship with [her] injuries to make application of California’s workers’ compensation law reasonable”).
Add to the end of Note 5 on page 950:

See Robinson v. Dept. of Labor & Industrial Relations, 2014 WL 2198372 (Wash. App. Div. 1, May 27, 2014) (finding that team had no right to control players physical conduct or to discipline player, and that there was no mutual agreement to an employment relationship, court concludes an NFL free agent injured during off-season mini-camp tryout was not an employee and therefore not entitled to workers’ compensation benefits).

Add as new Note 8 on page 964:

8. Informed Consent Model for Professional Athletes? In Mobley v. Madison Square Garden LP, 2013 U.S. Dist. LEXIS 46341 (S.D.N.Y.), a New York federal district court ruled that Cutino Mobley, a former NBA basketball player, may have a valid state law disability discrimination claim against the New York Knicks for refusing to allow him to play basketball with hypertrophic cardiomyopathy during the 2008-09 season based on his medical disqualification by two cardiologists. In his complaint, Mobley alleged that he had been medically cleared to play NBA basketball from 1999-2008 with this condition (subject to his signing a liability waiver), and that three other cardiologists examined him and concluded there was no material change in his heart condition and he was as fit to play basketball during that season as he had been from 1999-2008. The court held that Mobley pled sufficient facts to contradict the medical opinions of the two cardiologists who had disqualified him and that it is “plausible that he was qualified to perform safely the essential functions of a professional basketball player,” which he ultimately must prove to prevail on his New York disability discrimination law claim against the Knicks. This decision suggests that some courts may be willing to adopt an “athlete informed consent model for professional athletes, which would enable a professional athlete to choose to participate, despite medical disqualification by the team physician, if other competent medical authority clears him to play.” Matthew J. Mitten, Enhanced Risk of Harm to One’s Self as a Justification for Exclusion from Athletics, 8 Marq. Sports L.J. 189, 221-223 (1998). Mobley ultimately dropped the suit in hopes of putting the issue behind him, signing with a different team, and returning to the NBA. Jared Zwerling, Source: Cutino Mobley eyes return, ESPN.com, Aug. 9, 2013, http://espn.go.com/new-york/nba/story/_/id/9554812/cuttino-mobley-drops-lawsuit-try-comeback-source-says.

Add as a new Note between Note 1 and Note 2 on page 986:

Starego v. New Jersey State Interscholastic Athletic Ass’n, 2013 WL 4804821 (D. N.J.), which was decided in September of 2013, also involved a high school athlete who, like Eric Dompierre and Luis Cruz, had developmental disabilities and sought extra high school eligibility. In Starego, however, the United States District Court for the District of New Jersey found in favor of the State Interscholastic Athletic Association. It found that in denying Anthony Starego’s request for a waiver to play on the Brick High School football team for a fifth year, the Association did not violate the ADA. Within weeks of the decision, however – whether for fear of fighting an appeal (which Starego’s parents promised to file) or out of compassion – the Association reversed course and granted Starego a fifth year of eligibility. See Scott Stump,
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Add to the end of the second full paragraph on page 991:

In addition, a term or phrase may become associated with a sports team (e.g., EVIL EMPIRE for the New York Yankees baseball club) through public usage or fans’ recognition, thereby conferring trademark rights on the team. New York Yankees Partnership v. Evil Enterprises, Inc., 2013 WL 1305332 (T.T.A.B.)

Revise the last sentence in the last full paragraph on page 991 to read:

“Legal proceedings to prevent and remedy infringement or counterfeiting of federally registered marks may be brought in federal courts to obtain injunctive relief and damages.”

Add to the end of Note 1 on page 1000:

Intentional and unauthorized use of a mark that is known to be “identical with, or substantially indistinguishable from” a federally registered mark (15 U.S.C. § 1127) and creates a likelihood of confusion also constitutes trademark counterfeiting (15 U.S.C. § 1114), which may enable the mark owner to recover statutory damages and attorneys’ fees under the Lanham Act. See, e.g., Ohio State University v. Skreened, Ltd., 2014 WL 1576882 (S.D. Ohio 2014) (defendant’s unauthorized sale of shirts bearing marks identical to or substantially indistinguishable from university’s federally registered marks on shirts sold by its licensees constitutes counterfeiting as well as trademark infringement and unfair competition).

Add to the end of the third paragraph of Note 4 on page 1002:

But see Ohio State University v. Skreened, Ltd., 2014 WL 1576882 (S.D. Ohio 2014) (“[A]n allegation of parody is but one consideration to be considered in the larger context of possible infringement. The evidence here does not . . . suggest that Defendants are seeking to be ironic commentators on academia or college athletic culture [simply by selling shirts bearing a university’s trademarks without authorization]; the only evidence before this Court is that Defendants are trying to make a buck by appropriating marks for commercial use.”)

Add to the end of Note 4 on page 1015:

Cf. Nat’l Football Scouting, Inc. v Rang, 912 F.Supp.2d 985 (W.D. Wash. 2012) (prospective NFL player grades are “compilations of data chosen and weighed with creativity and judgment,” which constitute a copyrightable “numeric expression of a professional opinion”)

Effectively characterizing this as an unauthorized form of Internet streaming, in American Broadcasting Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014), the Supreme Court ruled that a system combining the functionality of a standard TV antenna, a DVR, and a Slingbox-like device, which enabled users to watch live television programs broadcast over the public airwaves, including sports events, over the Internet in real-time constitutes copyright infringement. The Court held that this technologically complex system of retransmitted television broadcasts is analogous to a cable television system, which publicly performs the copyrighted programs it broadcasts to its subscribers. The Copyright Act permits a cable television system to do so without infringement liability pursuant to a compulsory license requiring payment of statutorily determined fees, which are distributed to owners of the copyrighted broadcasts. On remand, the district court determined that the Supreme Court “did not imply, much less hold, that simply because an entity performs publicly in much the same way as a CATV system, it is necessarily a cable system entitled to a § 111 compulsory license.” Relying on WPIX v. IVI, Inc. [see Note 3 on pp. 1018-1019], it concluded that § 111’s compulsory license does not extend to the Internet transmissions enabled by Aereo’s system, observing that the Copyright Office “recently informed Aereo that it ‘do[es] not see anything in the Supreme Court’s recent decision . . . that would alter’ [IVI’s] conclusion that ‘Section 111 is meant to encompass [only] ‘localized retransmission services’ that are ‘regulated as cable systems by the FCC.’” The court issued a preliminary injunction “barring Aereo from retransmitting programs to its subscribers while the programs are still being broadcast.” American Broadcasting Companies, Inc. v. Aereo, Inc., 112 U.S.P.Q.2d 1582 (S.D.N.Y. 2014).

Add to first full paragraph on page 1036 after “See also”: 

Jordan v. Jewel Food Stores, Inc., 743 F.3d 509 (7th Cir. 2014) (Chicago grocery store ad in magazine’s commemorative issue congratulating former Chicago Bulls player Michael Jordan on his induction into pro basketball hall of fame is commercial speech subject to his alleged right of publicity claim).

Add after Note 2 on page 1045:

In re NCAA STUDENT–ATHLETE NAME & LIKENESS LICENSING LITIGATION
724 F.3d 1268 (9th Cir. 2013)

BYBEE, Circuit Judge:

Video games are entitled to the full protections of the First Amendment, because “[l]ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with
the virtual world).” *Brown v. Entm't Merchs. Ass'n*, — U.S. ——, 131 S.Ct. 2729, 2733, 180 L.Ed.2d 708 (2011). Such rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment. *Zacchini v. Scripps–Howard Broad. Co.*, 433 U.S. 562, 574–75, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). In this case, we must balance the right of publicity of a former college football player against the asserted First Amendment right of a video game developer to use his likeness in its expressive works.

The district court concluded that the game developer, Electronic Arts (“EA”), had no First Amendment defense against the right-of-publicity claims of the football player, Samuel Keller. We affirm. Under the “transformative use” test developed by the California Supreme Court, EA's use does not qualify for First Amendment protection as a matter of law because it literally recreates Keller in the very setting in which he has achieved renown. The other First Amendment defenses asserted by EA do not defeat Keller's claims either.

I

Samuel Keller was the starting quarterback for Arizona State University in 2005 before he transferred to the University of Nebraska, where he played during the 2007 season. EA is the producer of the *NCAA Football* series of video games, which allow users to control avatars representing college football players as those avatars participate in simulated games. In *NCAA Football*, EA seeks to replicate each school's entire team as accurately as possible. Every real football player on each team included in the game has a corresponding avatar in the game with the player's actual jersey number and virtually identical height, weight, build, skin tone, hair color, and home state. EA attempts to match any unique, highly identifiable playing behaviors by sending detailed questionnaires to team equipment managers. Additionally, EA creates realistic virtual versions of actual stadiums; populates them with the virtual athletes, coaches, cheerleaders, and fans realistically rendered by EA's graphic artists; and incorporates realistic sounds such as the crunch of the players' pads and the roar of the crowd.

EA's game differs from reality in that EA omits the players' names on their jerseys and assigns each player a home town that is different from the actual player's home town. However, users of the video game may upload rosters of names obtained from third parties so that the names do appear on the jerseys. In such cases, EA allows images from the game containing athletes' real names to be posted on its website by users. . . .

In the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school
year as Keller. In the 2008 edition, the virtual quarterback for Nebraska has these same characteristics, though the jersey number does not match, presumably because Keller changed his number right before the season started.

Objecting to this use of his likeness, Keller [and nine other former NCAA football or men’s basketball players, including Ed O’Bannon] filed a putative class-action complaint in the Northern District of California asserting, as relevant on appeal, that EA violated his right of publicity under California Civil Code § 3344 and California common law. . . .

A

The California Supreme Court formulated the transformative use defense in Comedy III Productions, Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 106 Cal.Rptr.2d 126, 21 P.3d 797 (2001). The defense is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” The California Supreme Court explained that “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.” The court rejected the wholesale importation of the copyright “fair use” defense into right-of-publicity claims, but recognized that some aspects of that defense are “particularly pertinent.” . . .

Comedy III gives us at least five factors to consider in determining whether a work is sufficiently transformative to obtain First Amendment protection. See J. Thomas McCarthy, The Rights of Publicity and Privacy § 8:72 (2d ed.2012). First, if “the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized,” it is more likely to be transformative than if “the depiction or imitation of the celebrity is the very sum and substance of the work in question.” Second, the work is protected if it is “primarily the defendant's own expression”—as long as that expression is “something other than the likeness of the celebrity.” Id. This factor requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. Third, to avoid making judgments concerning “the quality of the artistic contribution,” a court should conduct an inquiry “more quantitative than qualitative” and ask “whether the literal and imitative or the creative elements predominate in the work.” Fourth, the California Supreme Court indicated that “a subsidiary inquiry” would be useful in close cases: whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.” Lastly, the court indicated that “when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her
California courts have applied the transformative use test in relevant situations in four cases. First, in Comedy III itself, the California Supreme Court applied the test to T-shirts and lithographs bearing a likeness of The Three Stooges and concluded that it could “discern no significant transformative or creative contribution.” The court reasoned that the artist's “undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame.”

Second, in Winter v. DC Comics, the California Supreme Court applied the test to comic books containing characters Johnny and Edgar Autumn, “depicted as villainous half-worm, half-human offspring” but evoking two famous brothers, rockers Johnny and Edgar Winter. 30 Cal.4th 881, 134 Cal.Rptr.2d 634, 69 P.3d 473, 476 (2003). The court held that “the comic books are transformative and entitled to First Amendment protection.” It reasoned that the comic books “are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs' mere likenesses.” “To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature.”

Third, in Kirby v. Sega of America, Inc., the California Court of Appeal applied the transformative use test to a video game in which the user controls the dancing of “Ulala,” a reporter from outer space allegedly based on singer Kierin Kirby, whose “signature” lyrical expression ... is ‘ooh la la.’ ” The court held that “Ulala is more than a mere likeness or literal depiction of Kirby,” pointing to Ulala's “extremely tall, slender computer-generated physique,” her “hairstyle and primary costume,” her dance moves, and her role as “a space-age reporter in the 25th century,” all of which were “unlike any public depiction of Kirby.” “As in Winter, Ulala is a ‘fanciful, creative character' who exists in the context of a unique and expressive video game.”

number of avatars, some of which represent actual rock stars, including the members of the rock band No Doubt. Activision licensed No Doubt's likeness, but allegedly exceeded the scope of the license by permitting users to manipulate the No Doubt avatars to play any song in the game, solo or with members of other bands, and even to alter the avatars' voices. The court held that No Doubt's right of publicity prevailed despite Activision's First Amendment defense because the game was not “transformative” under the Comedy III test. It reasoned that the video game characters were “literal recreations of the band members,” doing “the same activity by which the band achieved and maintains its fame.” According to the court, the fact “that the avatars appear in the context of a videogame that contains many other creative elements[ ] does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.” The court concluded that “the expressive elements of the game remain manifestly subordinated to the overall goal of creating a conventional portrait of No Doubt so as to commercially exploit its fame.”...

With these cases in mind as guidance, we conclude that EA's use of Keller's likeness does not contain significant transformative elements such that EA is entitled to the defense as a matter of law. The facts of No Doubt are very similar to those here. EA is alleged to have replicated Keller's physical characteristics in NCAA Football, just as the members of No Doubt are realistically portrayed in Band Hero. Here, as in Band Hero, users manipulate the characters in the performance of the same activity for which they are known in real life—playing football in this case, and performing in a rock band in Band Hero. The context in which the activity occurs is also similarly realistic—real venues in Band Hero and realistic depictions of actual football stadiums in NCAA Football. As the district court found, Keller is represented as “what he was: the starting quarterback for Arizona State” and Nebraska, and “the game’s setting is identical to where the public found [Keller] during his collegiate career: on the football field.”

EA argues that the district court erred in focusing primarily on Keller's likeness and ignoring the transformative elements of the game as a whole. Judge Thomas, our dissenting colleague, suggests the same. We are unable to say that there was any error, particularly in light of No Doubt, which reasoned much the same as the district court in this case: “that the avatars appear in the context of a videogame that contains many other creative elements[ ] does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.” EA suggests that the fact that NCAA Football users can alter the characteristics of the avatars in the game is significant. Again, our dissenting colleague agrees. In No Doubt, the California Court of Appeal noted that Band Hero “d[id] not permit players to alter the No Doubt avatars in any respect.” The court went on to say that the No Doubt avatars “remain at all times immutable images of the real celebrity musicians, in stark contrast to the
‘fanciful, creative characters’ in Winter and Kirby.” The court explained further:

[I]t is the differences between Kirby and the instant case ... which are determinative. In Kirby, the pop singer was portrayed as an entirely new character—the space-age news reporter Ulala. In Band Hero, by contrast, no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame. Moreover, the avatars perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a videogame that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.

Judge Thomas says that “[t]he Court of Appeal cited character immutability as a chief factor distinguishing [No Doubt] from Winter and Kirby.” Though No Doubt certainly mentioned the immutability of the avatars, we do not read the California Court of Appeal's decision as turning on the inability of users to alter the avatars. The key contrast with Winter and Kirby was that in those games the public figures were transformed into “fanciful, creative characters” or “portrayed as ... entirely new character[s].” On this front, our case is clearly aligned with No Doubt, not with Winter and Kirby. We believe No Doubt offers a persuasive precedent that cannot be materially distinguished from Keller's case.

The Third Circuit came to the same conclusion in Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d Cir.2013). In Hart, EA faced a materially identical challenge under New Jersey right-of-publicity law, brought by former Rutgers quarterback Ryan Hart. (“Keller is simply [Hart] incarnated in California.”). Though the Third Circuit was tasked with interpreting New Jersey law, the court looked to the transformative use test developed in California. See id. at 158 n. 23 (noting that the right-of-publicity laws are “strikingly similar ... and protect similar interests” in New Jersey and California, and that “consequently [there is] no issue in applying balancing tests developed in California to New Jersey”); see also id. at 165 (holding that “the Transformative Use Test is the proper analytical framework to apply to cases such as the one at bar”). Applying the test, the court held that “the NCAA Football ... games at issue ... do not sufficiently transform [Hart]'s identity to escape the right of publicity claim,” reversing the district court's grant of summary judgment to EA.

As we have, the Third Circuit considered the potentially transformative nature of the game as a whole, and the user's ability to alter avatar characteristics. Asserting that “the lack of
transformative context is even more pronounced here than in *No Doubt,*” and that “the ability to modify the avatar counts for little where the appeal of the game lies in users’ ability to play as, or alongside [,] their preferred players or team,” the Third Circuit agreed with us that these changes do not render the *NCAA Football* games sufficiently transformative to defeat a right-of-publicity claim. . . .

Given that *NCAA Football* realistically portrays college football players in the context of college football games, the district court was correct in concluding that EA cannot prevail as a matter of law based on the transformative use defense . . .

**AFFIRMED.**

THOMAS, Circuit Judge, dissenting:

Because the creative and transformative elements of Electronic Arts' *NCAA Football* video game series predominate over the commercial use of the athletes' likenesses, the First Amendment protects EA from liability. Therefore, I respectfully dissent.

I

. . . The First Amendment affords additional protection to *NCAA Football* because it involves a subject of substantial public interest: collegiate football. *Moore v. Univ. of Notre Dame,* 968 F.Supp. 1330, 1337 (N.D.Ind.1997). Because football is a matter of public interest, the use of the images of athletes is entitled to constitutional protection, even if profits are involved. . . .

The majority confines its inquiry to how a single athlete's likeness is represented in the video game, rather than examining the transformative and creative elements in the video game as a whole. . . .

When EA's *NCAA Football* video game series is examined carefully, and put in proper context, I conclude that the creative and transformative elements of the games predominate over the commercial use of the likenesses of the athletes within the games. . . .

The college teams that are supplied in the game do replicate the actual college teams for that season, including virtual athletes who bear the statistical and physical dimensions of the actual college athletes. But, unlike their professional football counterparts in the *Madden NFL* series, the NCAA football players in these games are not identified.

The gamers can also change their abilities, appearances, and physical characteristics at will.
Keller's impressive physical likeness can be morphed by the gamer into an overweight and slow virtual athlete, with anemic passing ability. And the gamer can create new virtual players out of whole cloth. Players can change teams. The gamer could pit Sam Keller against himself, or a stronger or weaker version of himself, on a different team. Or the gamer could play the game endlessly without ever encountering Keller's avatar. In the simulated games, the gamer controls not only the conduct of the game, but the weather, crowd noise, mascots, and other environmental factors. Of course, one may play the game leaving the players unaltered, pitting team against team. But, in this context as well, the work is one of historic fiction. The gamer controls the teams, players, and games.

Applying the *Comedy III* considerations to *NCAA Football* in proper holistic context, the considerations favor First Amendment protection. The athletic likenesses are but one of the raw materials from which the broader game is constructed. The work, considered as a whole, is primarily one of EA's own expression. The creative and transformative elements predominate over the commercial use of likenesses. The marketability and economic value of the game comes from the creative elements within, not from the pure commercial exploitation of a celebrity image. The game is not a conventional portrait of a celebrity, but a work consisting of many creative and transformative elements.

Unlike the majority, I would not punish EA for the realism of its games and for the skill of the artists who created realistic settings for the football games. That the lifelike roar of the crowd and the crunch of pads contribute to the gamer's experience demonstrates how little of *NCAA Football* is driven by the particular likeness of Sam Keller, or any of the other plaintiffs, rather than by the game's artistic elements.

In short, considering the creative elements alone in this case satisfies the transformative use test in favor of First Amendment protection.

**NOTES AND QUESTIONS**

1. Do you agree with the majority or dissent’s decision and reasoning regarding the appropriate balance between creative expression protected by the First Amendment and non-protected unauthorized usage that may be actionable under state publicity rights laws? What are the policy and practical implications of their respective rulings?

2. *C.B.C. Distribution and Marketing* Distinguished. The 9th Circuit majority opinion states:

We similarly reject Judge Thomas's argument that Keller's right-of-publicity claim should give way to the First Amendment in light of the fact that “the
essence of NCAA Football is founded on publicly available data.” Judge Thomas compares NCAA Football to the fantasy baseball products that the Eighth Circuit deemed protected by the First Amendment in the face of a right-of-publicity claim in C.B.C. Distribution and Marketing, 505 F.3d at 823–24. But there is a big difference between a video game like NCAA Football and fantasy baseball products like those at issue in C.B.C. Those products merely “incorporate[d] the names along with performance and biographical data of actual major league baseball players.” NCAA Football, on the other hand, uses virtual likenesses of actual college football players. It is seemingly true that each likeness is generated largely from publicly available data—though, as Judge Thomas acknowledges, EA solicits certain information directly from schools—but finding this fact dispositive would neuter the right of publicity in our digital world. Computer programmers with the appropriate expertise can create a realistic likeness of any celebrity using only publicly available data. If EA creates a virtual likeness of Tom Brady using only publicly available data—public images and videos of Brady—does EA have free reign to use that likeness in commercials without violating Brady's right of publicity? We think not, and thus must reject Judge Thomas's point about the public availability of much of the data used given that EA produced and used actual likenesses of the athletes involved.

724 F.3d at 1283, n. 2. Is the majority’s reasoning convincing?

3. Aftermath. Shortly before the related antitrust case went to trial, the NCAA settled the right of publicity claims aspect of In re NCAA Student–Athlete Name & Likeness Licensing Litigation (which alleged the NCAA had sanctioned Electronic Arts’ use of college football and basketball players’ likenesses in video games without authorization) for $20 million. Electronic Arts and Collegiate Licensing Company paid $40 million to settle all of plaintiffs’ claims against them, including their publicity rights claims.

4. In Brown v Electronic Arts, Inc., 724 F.3d 1235 (9th Cir. 2013), the Ninth Circuit rejected plaintiff’s claim that Electronic Arts’ unauthorized use of his likeness in its Madden NFL football video games violated §43(a) of the Lanham Act, which prohibits “the use of a public figure’s persona, likeness, or other uniquely distinguishing characteristic” to cause a likelihood of consumer confusion. Observing that §43(a) protection “is limited by the First Amendment, particularly if the product involved is an expressive work”, the court relied on the test developed in Rogers v. Grimaldi, 875 F.2d 994 (2d Cir.1989) “to balance the public’s First Amendment interest in free expression against the public’s interest in being free from consumer confusion about affiliation and endorsement.” Under the Rogers test, § 43(a) will not be applied to expressive works “unless the [use of the trademark or other identifying material] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [use of trademark or other identifying material] explicitly misleads as to the source or the content of the work.”
The Ninth Circuit applied the Rogers test because a video game is an expressive work and concluded:

We agree with the district court that the use of Brown's likeness is artistically relevant to the Madden NFL games. As Brown points out in trying to undermine the status of the games as expressive works, EA prides itself on the extreme realism of the games. As Brown emphasizes in arguing that it is in fact his likeness in the games: “[I]t is axiomatic the '65 Cleveland Browns simply, by definition, cannot be the '65 Cleveland Browns without the players who played for the '65 Cleveland Browns. This fundamental truth applies especially to that team's most famous player, Jim Brown.” Given the acknowledged centrality of realism to EA's expressive goal, and the importance of including Brown's likeness to realistically recreate one of the teams in the game, it is obvious that Brown's likeness has at least some artistic relevance to EA's work.

Even if the use of a trademark or other identifying material is artistically relevant to the expressive work, the creator of the expressive work can be subject to a Lanham Act claim if the creator uses the mark or material to ‘explicitly mislead[ ] [consumers] as to the source or the content of the work.’ . . . The test requires that the use be explicitly misleading to consumers. To be relevant, evidence must relate to the nature of the behavior of the identifying material's user, not the impact of the use. Even if Brown could offer a survey demonstrating that consumers of the Madden NFL series believed that Brown endorsed the game, that would not support the claim that the use was explicitly misleading to consumers.

Brown argues that certain written materials that accompanied versions of the game demonstrate EA's attempts to explicitly mislead consumers about his endorsement or involvement with the game's production. Unlike mere use of the mark or a consumer survey, statements made in materials accompanying the game are at least the right kind of evidence to show that EA tried to explicitly mislead consumers about its relationship with Brown. Here, however, the statements highlighted by Brown do not show any attempt to mislead consumers. Brown points to materials that say that one of the game's features was the inclusion of “[f]ifty of the NFL's greatest players and every All–Madden team.” Since Brown is one of the fifty greatest NFL players of all time and has been named to the “All Madden, All Millennium” team, Brown argues that the statement “explicitly represents that Brown was in EA's game.” But Brown needs to prove that EA explicitly misled consumers about Brown's endorsement of the game, not that EA used Brown's likeness in the game; nothing in EA's promotion suggests that the fifty NFL players who are members of the All Madden,
All Millennium team endorse EA’s game. EA’s statement is true and not misleading.

Is Brown consistent with the Ninth Circuit majority’s ruling in In re NCAA Student–Athlete Name & Likeness Licensing Litigation?

Add as new Note 5:

5. Does the Unauthorized Broadcast of a Game or Sports Event Violate an Athlete’s Right of Publicity? Currently there is a split of authority regarding whether the producer’s copyrighted broadcast of a game or sports event violates participating athletes’ right of publicity if done without their consent. In Dryer v. NFL, 2014 WL 5106738 (D. Minn.), a Minnesota federal district court ruled that the NFL’s use of former players’ names and images in “compilations of clips of game footage into theme-based programs describing a football game or series of games and the players on the field” is protected by the First Amendment as non-commercial expressive works. It characterized these productions as “a history lesson of NFL football,” observing that the “only way for NFL Films to tell such stories is by showing footage of the game—the plays, the players, the coaches, the referees, and even the fans.” Concluding that the challenged uses of Plaintiffs’ likenesses in game footage are akin to the use of game footage in sports news broadcasts, newspapers, and magazines,” it ruled that plaintiffs “failed to establish that the uses of which they complain are truly different from the uses found permissible in C.B.C, CBS, and Gionfriddo.” Observing that plaintiffs do not challenge the NFL’s right to “exploit the original game broadcast by showing that full broadcast on the NFL Network or ESPN Classic,” the court also held that these productions incorporated copyrighted game footage that preempted plaintiff’s right of publicity claims because they were not used to advertise a separate, unrelated product such as groceries as in Jordan. See also Ray v. ESPN, Inc., 2014 WL 2766187 (W.D. Mo.) (rejecting professional wrestler’s claim that rebroadcast of his performance violated his right of publicity); Somerson v. McMahon, 956 F.Supp.2d 1345 (N.D. Ga. 2012) (same). But see In re NCAA Student–Athlete Name & Likeness Licensing Litigation, 2013 WL 5778233 (N.D. Cal.) (college football and basketball players’ right of publicity claims arising out of alleged unauthorized usage of their images in televised game footage are not preempted by the First Amendment or Copyright Act); In re NCAA Student–Athlete Name & Likeness Licensing Litigation, 2014 WL 1410451 at * 11 (N.D. Cal.). (In sum, Zacchini and Wisconsin Interscholastic make clear that the First Amendment does not bar Division I student-athletes from selling group licenses to use their names, images, and likenesses in live or recorded broadcasts of entire college football and basketball games.”).