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Contracts and Representation

OBJECTIVES

Upon completing this chapter, you will be able to:

- 1) analyze a contract to determine if there has been an offer, acceptance, and consideration;
- 2) understand the process of forming a contract in sport contexts;
- 3) recognize the significance of various provisions commonly included in contracts in sport; and
- 4) understand the importance of contracts in establishing and maintaining business relationships in sport between teams, athletes, and ticket holders.

INTRODUCTION

A contract is a legally enforceable promise or set of promises between two or more people. A breach of the promise or set of promises results in a remedy, usually money, or a demand for performance. Contracts in sport include employment agreements, vendor agreements, sponsorship, naming rights agreements, leases, and warranties. Furthermore, releases and hold-harmless documents may be contracts. An important element of athlete representation is the contract.

Contracts can be express or implied. Express contracts are written or oral agreements, while implied contracts result from conduct. Courts do not distinguish between express and implied contracts. The court's role is to assist the parties in retaining the original or intended agreement. Written agreements are easier to prove than oral agreements. Implied contracts can be difficult to prove. Only adults may enter into contracts; minors are not held to such agreements. The Uniform Commercial Code (UCC) and state and federal regulations require that certain agreements be in writing.

Contract law and how courts interpret agreements differ from state to state. Contracts should be drafted and reviewed or updated annually by legal counsel.

CONTRACTS

A contract is an agreement between two or more parties in which at least one party has made a promise, a second party has accepted the first party's promise, and the element of consideration has been determined. Elements of a contract are:

Offer

Acceptance

Consideration

The offer is a promise, or expression of intent. The offer, as made, must be accepted by another person to whom it was made to constitute an acceptance. An offer may be withdrawn prior to acceptance unless the offer contains exact dates or a period of time in which the offer is open. The offer must be accepted within the period of time designated or within a reasonable period of time if no specific period of time has been designated. Consideration is the third component of the contract. While consideration is often the payment of money, consideration can also be an agreement to do something or not to do something. For example, I offer you a position as a head lifeguard for \$65,000 for one year. You accept the position and agree to begin work on January 1, 2012. The offer was the offer of the position and the acceptance was your stating that you would take the position. The consideration was the \$65,000. Additional terms of the contract that may also serve as consideration could include the fact that you are required to not pursue other full-time employment during the term of the contract (so, in effect, you are agreeing to not do something that you would otherwise legally be entitled to do). This entire process is often referred to as manifestation of mutual assent. When the agreement is put in writing, it becomes a written contract. Oral contracts are also enforceable, but establishing the existence of a contract and the terms of the contract becomes more difficult for the party trying to enforce an oral contract.

A contract may also be accepted with conduct that amounts to acceptance of the offer. An example of this would be if I offer you \$20 to mow my lawn. When I arrive home from work, I notice that the lawn has been mown. Your conduct of mowing the lawn, rather than directly accepting my offer to mow the lawn, constituted acceptance of the offer. Twenty dollars was the consideration.

Consideration may be required before the accepting party carries out the task or is paid following completion of the work. The timing of the consideration is to be understood by both parties in written and oral agreements. If the accepting party (the offeree) refuses to accept the promise exactly as the promise was made by the offeror and requests that the offer be altered, the original offer is "dead" and cannot be accepted. Changing the original terms is a counteroffer, not an acceptance. When a counteroffer is made, the entire process is repeated with the parties exchanging positions (the original offeror now becomes the offeree; the original offeree becomes the offeror by making a counteroffer).

Agreements with Merchants

When the agreement is with a merchant, contract concepts and negotiation processes can be altered to meet the unique needs of the industry. Agreements with merchants usually fall within the scope of the Uniform Commercial Code (UCC) and are described in the law of sales. The offer may be through a wide range of marketing documents, such as through television, newspaper, and Internet advertisements, with the formal bill of sale being the element most resembling the offer. Advertisements and circulars are not offers but invitations to the public to make an offer. Preliminary negotiations are not offers. Advertisements, circulars, and preliminary negotiations become important, however, when the accepting party relies on their content in entering into a deal.

Consideration in a contract with a merchant is the price. If the price is acceptable to the industry, the price can be stated or left open until the date of delivery. The ability to leave the price open is important for orders placed three to six months in advance of delivery in a market where prices shift rapidly.

Shipping and designation of the time of the product's transfer from the manufacturer (or vendor) to the purchaser are unique to sales, including the sale of sport equipment such as would be necessary in starting a fitness center. Depending on the terms of the contract, the purchaser takes ownership at the time the product leaves the manufacturer's (or retailer's) loading dock or at the time the product arrives at the door of the purchaser. The payment of freight, insurance coverage, and obligation to trace lost products are the responsibilities of the owner. Purchasers who have agreed to pay freight on delivery often ignore other potential aspects of ownership until problems occur. Transfer of ownership needs to be clearly understood by all parties at the time of contract formation.

Acceptance of a product often includes inspection prior to acceptance. Although most freight handlers require a signature of acceptance, the signature merely records the location of the product on a particular day. If, after inspection of the product, the purchaser finds that the product does not meet the expectations of the agreement, the purchaser must notify the manufacturer or seller. Alterations in the product, substitutions, and any other changes not acceptable to the purchaser are to be rejected immediately. Contracts should contain the period of time the purchaser has to inspect and accept (or reject) the product, and a designation of freight and insurance coverage of a returned product.

Manufacturers and sellers of products should become familiar with the laws regulating commercial paper or negotiable instruments. These transactions (shipping, inspecting, accepting, and paying for merchandise) are governed by the Uniform Commercial Code (UCC). While the contents of negotiable instruments are beyond the scope of this book, manufacturers and sellers need to be aware that what they believe to be a contract may have additional meaning and obligations in sales.

agreeing to at the time of the agreement and will interpret a detailed contract using the exact wording of the agreement.

All agreements are to be made in good faith. When the contract's terms involve terminology or practices of a specific industry or business, the court will examine the contract in light of the customs in that industry and in terms of expected performance. Fraud, misrepresentation, and non-disclosure are factors that do not meet the good faith element and can cause a contract to be void. In some situations, the agreement may be so unfair to one of the parties that, even though the parties signed the contract, the court may choose not to enforce the contract.

Merchant forms are forms created by sellers to be used in ordering equipment and arranging for service contracts. If changes are made in the forms, the changes must be in writing and be identified in the first page of the form.

Employment contracts usually list starting and completion dates. Wages, major job duties and responsibilities, and the kind of relationship that will exist between the employer and employee are listed in the agreement. Employee handbook policies and regulations are often incorporated into written and verbal employment agreements. When an employment contract requires a party to have certain licenses or certificates and the person signing the contract does not have the required credentials within a specified period of time, the contract is not binding.

Misunderstandings about employment contracts are frequent in schools and universities, in which contracts must be ratified by a board. For example, when a teacher signs an offered contract that has not been signed by the school district, and returns it to the school system, he/she assumes the agreement is complete. For the agreement to be complete, however, the returned contract must be approved or ratified at the next school board meeting. On occasion, the school or university may choose not to ratify the agreement. If this decision is made, the person no longer has a contract or a job. When prospective employees have sued, the courts have maintained that the agreement signed by the employee was not a valid contract until it was ratified by the appropriate board.

Agreements in spas, sport and fitness clubs, team or individual sports (e.g., part-time coaching positions), and any other sport or physical activity environment may establish the employee as an independent contractor. Chapter 8, Legal Entities and Employer-Employee Relationships, contains a discussion on the subject of independent contracting and reviews the system for analyzing such a contract.

Minors

A person must be 18 years of age, or the age of majority, to enter into a contract. Contracts cannot be negotiated with minors. If a minor enters into a contract, the minor may ratify or accept the agreement once the minor turns 18. The supposed contract, entered into with a minor, is also voidable by the minor but not by the party contracting with the minor. There is no obligation to ratify a contract entered into as a minor.

- 6) The party executing the release must not only release himself/herself but release any and all parties, including creditors, dependents, etc., that might have a cause of action.
- 7) The release is to acknowledge the risk of the activity. The risk is described so that an ordinary person understands the chances one takes in participating in the activity. These statements are best created by the professional in physical skills.
- 8) The signing party must clearly acknowledge an understanding of the risk, a willingness to accept the risk, and proof that no pressure existed to force the person to accept the agreement.

The verbiage of offer, acceptance, and consideration is to be part of the written statement. For example, in consideration of being allowed to participate in rafting, an individual would agree to ("I accept...") all the requirements of the release. The courts will look at the release to determine that it is clear, explicit, and unequivocal.

INFLUENCE OF COURT DECISIONS

The acceptance of a release as a contract differs from state to state. In *O'Connor v. The United States Fencing Association* (2003), the level of acceptance of such releases in California, Colorado, and New York is compared. Erin O'Connor, a fencer with aspirations for national recognition, severely injured her knee while performing in a competition held in California. O'Connor reported that "she lost her footing when executing this maneuver because the [fencing] strip was not properly anchored" (548). The injury required surgery and extensive rehabilitation. O'Connor's suit alleged a severe injury as a result of a negligently prepared competitive surface.

The United States Fencing Association (USFA) requested summary judgment on the basis of the following waivers. The first one was signed by O'Connor and her mother, as she was a minor at the time. She was an adult at the time she signed the second waiver. The first waiver states:

YOU MUST SIGN WAIVER OF LIABILITY OR MEMBERSHIP
WILL BE NULL AND VOID

Upon entering events sponsored by the USFA and/or its member Division, I agree to abide by the rules of the USFA, as currently published. I understand and appreciate that participation in a sport carries a risk to me of serious injury, including permanent paralysis or death. I voluntarily and knowingly recognize, accept, and assume this risk and release the USFA, its sponsors, event organizers, and officials from any liability.
(547)

ALL PARTICIPANTS MUST READ AND SIGN EACH OF THE
FOLLOWING STATEMENTS

Waiver of Liability: Upon entering this tournament under the auspices of the USFA, I agree to abide by the current rules of the USFA. I enter this tournament at my own risk and release the USFA and its sponsors, referees, and tournament organizers from any liability. The undersigned certifies that the birth date of the individual is as stated on the entry form and that the individual is a current competitive member of the USFA. (548)

The USFA reported that it was not responsible for the incident as it did not provide the fencing strips. A third party, Illinois Fencing, was responsible for the placement of the strips on the floor.

When the waiver became the primary point of contention, the state law to be used became significant. The plaintiff was a resident of New York, while the incident occurred in California, and the USFA had its principal place of business in Colorado. "New York had a longstanding policy disfavoring contracts [waivers].... Indeed, the New York legislature passed a statute specifically disclaiming the legitimacy of exculpatory contracts in the context of recreational activities" (549). In New York, waivers are considered against public policy. California, in contrast, favored waivers of liability and, when the waivers met the requirements of a contract, they were considered valid and were enforced. Colorado law, while not as specific as New York law, appeared to be closer to New York than California. Colorado law spoke to the issue of a "contract of adhesion." A contract of adhesion is one in which the person accepting the agreement has no alternative to accomplish his/her goal but to sign the contract. If O'Connor wanted to compete in a competition sponsored by the USFA, she had no other option than to sign the release. If her ambition were to be an Olympic fencer, no other form of fencing competition would prepare her for that goal. "In this case, Ms. O'Connor was not in a position to negotiate a less onerous contract with [the] USFA, as the waiver of liability was a prerequisite to participation in the National Championship Competition" (552).

The court mentioned that the release was broad and failed to identify specific risks that she was waiving. Therefore, "it is difficult to see how a person signing the agreement involved in this case would have been able to foresee the risk of inappropriate or defective flooring materials. This is not a risk inherent to fencing nor would it be particularly obvious to an inexperienced amateur like Ms. O'Connor, who was competing in her first national tournament" (553).

The United States District Court for the Eastern District of New York denied the United States Fencing Association's summary judgment and motion to dismiss. O'Connor was successful.

On occasion, minors participate in activities unaccompanied by their parents or guardians. Usually the agencies sponsoring such activities obtain blanket releases from the parents prior to the trip. When an event on a trip requires the signature of a parent or guardian, the persons chaperoning the young people usually sign.

Johnson, et al. v. New River Scenic Whitewater Tours, Inc. (2004) identifies the problems that can occur in such a situation. Fourteen-year-old Lindsey Gillespie traveled to Charleston, West Virginia, with a church-sponsored youth group to perform mission work. The culminating activity was a whitewater rafting trip on the New River. The associate pastor of the Fort Johnson Baptist Church planned and accompanied the group on the trip. On the day of the rafting event, he was asked to sign the following releases for each of the minors:

In consideration for Lindsay Gillespie ("minor") being permitted by NEW RIVER SCENIC WHITEWATER TOURS to participate in its recreational events and activities, I agree to this WAIVER, RELEASE, AND INDEMNIFICATION; the undersigned parent and/or guardian of the minor, for themselves and on behalf of the minor, join in the foregoing WAIVER AND RELEASE and stipulates and agrees to SAVE AND HOLD HARMLESS, INDEMNIFY, AND FOREVER DEFEND NEW RIVER SCENIC WHITEWATER TOURS from and against any claims, actions, demands, expenses, liabilities (including reasonable attorneys' fees), and NEGLIGENCE made or brought by the minor or by anyone on behalf of the minor, as a result of the minor's participation in NEW RIVER SCENIC WHITEWATER TOURS sponsored recreational events and activities and the use of the facilities of NEW RIVER SCENIC WHITEWATER TOURS.

I understand this rafting trip, which has been arranged by NEW RIVER SCENIC WHITEWATER TOURS, INC. is a participation sport which involves certain hazards and risks. The risks and hazards involved may include, but are not limited to, traveling in rough waters in a rubber raft, having medical emergencies in remote areas, unexpected weather conditions, as well as risks involved in transportation by cars, buses, and other vehicles.

By signing this form, I indicate I am aware of the above dangers and that, furthermore, I release NEW RIVER SCENIC WHITEWATER TOURS, INC. from liability, claims, debts, and actions of all kinds both now and in the future, as a result of my participation in this trip. It will also serve as a release for my heirs, executors, administrators, and any minor accompanying me (Parents or Guardian must sign for all persons under age 18).

I hereby assume all risks and dangers and all responsibility for any losses and/or damages whether caused in whole or in part by the negligence or other conduct of the owners, agents, officers, or employees of NEW RIVER SCENIC WHITEWATER TOURS, INC., or by any other person.

unless all twelve of his teammates wrote a letter supporting his reinstatement to the team. Giuliani alleged that his teammates generally supported his return to the team, but that Coach Vincent instructed players to "back off" and "was instilling new fears in his teammates that their positions on next year's roster were also in jeopardy." Coach Vincent required Giuliani to participate in a qualifier to rejoin the team for the upcoming season even though Coach Vincent had indicated earlier that those who participated as a member of the varsity team in a 2007-2008 tournament, as Giuliani had done, had already qualified for the team (4). The coach then told Giuliani that he could maintain his status on the team without re-qualifying if he agreed to certain "parameters" that were included in a written agreement. Giuliani refused to agree to these conditions. He alleged the coach then retaliated against him and did not inform him that he had been kicked off the golf team.

In July 2008, Giuliani sued Duke and Coach Vincent for breach of contract, breach of the covenant of good faith and fair dealing, and tortious interference with contract. The United States Magistrate Judge for the United States District Court for the Middle District of North Carolina recommended that the defendant's motion be granted because Giuliani failed to establish the elements of a breach of contract claim. Giuliani filed objections to the recommendations. Duke and Coach Vincent then filed a motion to dismiss Giuliani's claim.

In analyzing the breach of contract claim, Giuliani argued, in part, that Coach Myers' oral recruiting statements were contractual terms "binding on Duke by operation of ordinary principles of contract law" (14). He specifically alleged that Coach Myers's recruiting offer included an opportunity to compete, a promise of a right of access to the Athletic Department's programs and facilities while he was a student, and life-time access to Duke's training facilities. Giuliani further alleged that when he enrolled at Duke, the recruiting offer was converted into a binding promise enforceable under long-held principles of North Carolina contract law. Duke and Coach Vincent, meanwhile, argued that Myers had not alleged facts that establish the elements of an oral agreement between Coach Myers (on behalf of Duke) and Mr. Giuliani. They pointed to the fact that in his complaint, Giuliani identified four documents rather than the oral communications between Coach Myers and himself as the specific provisions of the contract at issue. The four documents were the Duke University Student-Athlete Handbook, the Duke University Athletic Department Policy Manual, the Duke University Student Bulletin, and the NCAA Division I Manual.

The court stated that a valid contract is formed when two parties manifest an intent to be bound. "A contract does not exist if 'one party simply believes that a contract exists, but there is no meeting of the minds'" (17). In addition, the terms of the contract must be "definite and certain or capable of being made so" such that the parties "assent to the same things, in the same sense" (17). In analyzing his breach of contract claim, the court found that Coach Myers's oral statements made during recruiting did not constitute a valid contract because the statements did not show a meeting of the minds, nor did they establish definite and certain terms (17). Rather than manifesting an intent to be bound, Coach Myers's statements to Mr. Giuliani described the potential

benefits available if Mr. Giuliani enrolled at Duke, earned a spot on the golf team, and maintained that spot on the team (17–18). The court found that the statements were, at best, ambiguous as to the circumstances under which Mr. Giuliani would acquire any rights. In the court's view, the statement regarding inclusion in tournaments was framed as an "opportunity to ... earn spots" to compete, and the statement regarding life-time access was conditioned on Mr. Giuliani being an "alumnus of the Duke Golf Program" (18). These statements are not certain and definite as to what constitutes an "opportunity" or how one may become an "alumnus of the Duke Golf Program" (18). Therefore, the court held that the alleged representations of Coach Myers did not create an enforceable contract (20).

On Giuliani's claims that the handbooks and policy manuals established a valid contract, the court found that "although plaintiff has alleged the statements of Coach Myers and the existence of the handbooks, plaintiff has not produced or alleged a contract specifically incorporating Duke's handbooks and policy manuals into a contract." Thus, this claim for breach of contract was also denied.

More recent interpretations of contracts involving student-athletes have focused on the use of image and likeness in video games. One argument, under contract law, is that requiring amateur student-athletes to waive certain rights, specifically their right of publicity, in order to be eligible to compete under NCAA rules is unconscionable. For a detailed discussion of the unconscionability arguments and how consent theory could cure some of these issues for member institutions and the NCAA, consider Baker, Grady, and Rappole (2012). Significant cases, including *Keller v. NCAA*, are discussed in further detail in Chapter 10, Intellectual Property.

APPEARANCE CONTRACTS

Litigation related to athlete appearance contracts for promotional purposes has become more frequent as celebrity athletes build their own unique commercial brands. *Front-Line Promotions & Mktg., Inc. v. Mayweather Promotions, LLC* (2009) involved a promotional appearance by Floyd Mayweather during the 2008 NBA All Star Weekend in New Orleans. In January of 2008, Insights and Front-Line entered into a partnership agreement to produce two events at the Sugar Mill in New Orleans on February 16 and February 17, 2008. They each agreed to procure the attendance of certain celebrities and musicians to appear at the events; Front-Line agreed to secure Mr. Mayweather to host the Sunday-night event. A representative of Front-Line purporting to be Mayweather's talent representative signed an agreement for Mayweather to appear at the NBA All Star Weekend event in exchange for a \$25,000 fee, half of which was to be paid within twenty-four hours of executing the contract. At the top of the agreement is the heading "Mayweather Promotions, LLC." The "Talent" is identified as "Floyd Mayweather of Mayweather Promotions, LLC." The final paragraph stated, "This agreement is confidential between the promoter named Front-Line Promotions and the talent named Floyd 'Money Mayweather' of Mayweather Promotions, LLC." A second page of the fully executed version of the agreement contains signature lines for "Promoter" and for "Talent Representative." Mayweather did not appear at the event.

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Plaintiffs subsequently filed a lawsuit seeking damages for financial loss and reputational injury due to defendants' alleged breach of the agreement, as well as consequential damages for defendants' bad faith failure to perform under the agreement. Defendants filed a motion seeking dismissal of all claims against Mr. Mayweather and dismissal of all claims by Insights. The defendants argued that Mayweather was not a party to the contract and, therefore, he could not be liable for any breach of that contract. The plaintiffs, however, contended that Mayweather was a proper defendant for three reasons. First, they argued, Robinson-White was his agent and she bound him to appear at the event when she signed the contract on his behalf. Second, the plaintiffs argued that Mayweather's obligation to appear was strictly personal, under the Louisiana civil code, and that he could not escape personal liability. Third, the plaintiffs contended that the contract was vague and ambiguous as to the identity of the obligor and that it should, therefore, be construed against the drafter, Mayweather Promotions.

12 Louisiana Civil Code article 1766 states that

An obligation is strictly personal when its performance can be enforced only by the obligee, or only against the obligor.

When the performance requires the special skill or qualification of the obligor, the obligation is presumed to be strictly personal on the part of the obligor. All obligations to perform personal services are presumed to be strictly personal on the part of the obligor.

When the performance is intended for the benefit of the obligee exclusively, the obligation is strictly personal on the part of that obligee.

The district court ruled that since "[a] party cannot breach a contract to which it is not a party," determining whether Mayweather was indeed a party to the contract was key. The district court found that "In construing contracts, it is well established that ... the contract itself is the best evidence of the relationship existing between the parties and the true intention of the parties is to be sought and determined by the language of the contract when the wording is clear" (9). The court found that the agreement identified two parties to the contract: 1) Front-Line, as promoter; and 2) "Floyd 'Money Mayweather' of Mayweather Promotions, LLC" as talent. This plain text suggests that this agreement intended to make Mr. Mayweather a party. Defendants still stressed the fact that Mr. Mayweather did not sign the agreement; it was initialed and signed by Robinson-White as "Talent Representative." Robinson-White testified she had signed similar agreements as talent representative of Mr. Mayweather which were a part of her duties for Mayweather Promotions.

The plaintiffs, meanwhile, argued that Robinson-White was acting as Mayweather's agent when she signed the agreement, and that under Louisiana law, Mr. Mayweather was bound to perform the obligations that Robinson-White, acting on his behalf, agreed he would perform. There was also conflicting testimony about whether Robinson-White was indeed his agent with authority to book appearances on his behalf. Mayweather himself, however, testified that Robinson-White lacked the "ability to

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sign appearance agreements" on his behalf, notwithstanding what actually happened in this case. Because of the conflicting testimony about whether Robinson-White was indeed acting as Mayweather's agent, the district court denied Mayweather's claims.

CONTRACTS INVOLVING TICKETS

As personal seat licenses become the norm and season ticket holders gain ownership rights to seats and season tickets at professional and college sporting events, litigation involving tickets becomes inevitable.

In *Brotherson v. Professional Basketball Club, LLC* (2009), former season-ticket holders of the Seattle Supersonics sued after the team moved to Oklahoma City. Plaintiffs' claims for breach of contract involved the "Emerald Club Contract." The contract, which the team ownership group, Professional Basketball Club (PBC), offered to virtually all Sonics 2007 season-ticket holders, let them renew their tickets for the 2008 season at 2007 season prices, and, notably, gave them the option to renew at the same price for the 2009 and 2010 seasons. The contracts were allegedly formed in the spring of 2007, although there was a high probability the team would leave Washington. As noted by the court, the Emerald Club was created out of "concern that uncertainty over the team's future would hurt ticket sales" (1276).

In the meantime, PBC described the Emerald Club in several publications, most notably in a brochure mailed to 2007 season-ticket holders. The brochure provided details of an "unprecedented offer" to Sonics season-ticket holders and an "unprecedented commitment" to provide "three-year cost certainty through the 2009-10 season" (1280). While the brochure did include a message about uncertainty in reaching an agreement with the state and local government to finance a new arena, "nowhere in the Brochure did PBC suggest that the Sonics might play home games at a location other than Key Arena before the 2011 season" (1281). The court found that "PBC deliberately declined to acknowledge the possibility of relocation before 2010 in the Emerald Club Brochure or any other communication sent to potential Emerald Club members" (1281). Furthermore, "whatever uncertainty surrounded the team, PBC marketed the Emerald Club to 'move forward with business models and business practices to promote and sell the team in a go-forward basis in Seattle.' Even when the chairman of Professional Basketball Club, the owners of the Seattle Supersonics, learned that the NBA itself was concerned with PBC's 'messaging relative to renewals,' PBC made no change to the Emerald Club terms" (1281).

In analyzing the breach of contract claims, the court found the existence of a contract. On the question of whether the parties mutually assented to a contract, the court found that the brochure sent by PBC and season-ticket holders had "all the hallmarks of an offer," including 1) containing the word "offer," 2) stating a fixed price and material terms, and 3) giving the option to purchase future tickets at a set price (1284). PBC instead claimed that the brochure was not an offer, relying upon cases holding that certain advertisements are not offers. The court found PBC's argument that the brochure was not an offer "mystifying," ruling that "the brochure itself was an explicit promise that it could provide seats for all renewing season ticket holders" (1284). The

court went on to find that "having received the Emerald Club offer, there is no dispute that each Plaintiff accepted PBC's offer by paying the price stated in accordance with the Brochure's instructions. Moreover, no one disputes that Plaintiffs' payments were adequate consideration for the Emerald Club Contract" (1284).

The court then considered whether PBC breached the contract as a matter of law by refusing to honor the option to renew tickets for 2009, and would breach the contract again as a matter of law by not honoring the option for the 2010 season. According to the court, "nowhere in the Emerald Club Contract does PBC mention that the tickets it was selling are revocable, much less revocable at will. Given this omission, PBC finds no support for the notion that the revocable nature of the tickets is disclosed within the four corners of the Contract. Any reasonable person entering the Emerald Club Contract would have understood that the tickets were licenses, in the sense that he or she would have understood that the tickets did not create a property interest in a seat or access to Key Arena" (1286–1287). The court opined, "if a reasonable consumer understood that he or she was buying nothing other than the right to be subject to the unfettered whim of PBC, the court queries why anyone would have entered the Emerald Club Contract" (1287). Thus, the court found that PBC had no absolute right to revoke tickets it sold to Emerald Club members, and thus could not avoid damages on that basis (1285). Furthermore, the court determined that uncertainty over PBC's future in Seattle or its decision to move to Oklahoma City created a condition precedent which would relieve PBC of its contractual obligations to Emerald Club season-ticket holders (1289).

In analyzing the option to purchase tickets for the 2009 season and 2010 season, the court was unable to determine as a matter of law whether plaintiffs had exercised their option in a timely manner. If it was found that PBC breached the Emerald Club option, then plaintiffs had the right to prove expectation damages. Plaintiffs also sought specific performance of the option to purchase 2010 season tickets. Specific performance would compel the sale of the tickets under the agreed-upon terms. They asked the court to order PBC to sell tickets to them on the terms of the option. The court found they were not entitled to specific performance and dismissed these claims. "Even if specific performance were available as a matter of law, the court would not exercise its equitable power to award Plaintiffs tickets that they do not want" (1294).

Other pending cases involving rights owed to season-ticket holders include a suit by the Rosen family against the University of South Carolina (Shain, 2011). The Rosen family claimed they were promised free parking near the football stadium if they became lifetime Silver Spur members of the Gamecock Club, the university's booster organization. The family said they were told when they agreed to become lifetime members in 1987 that they would not have to pay for parking. But the university, as part of a wide-ranging effort to raise more money to improve facilities, started charging for parking around the stadium. Richland County, South Carolina Judge Joseph Strickland dismissed the Rosens' case in 2009 after ruling that the University of South Carolina did not breach the written contract because it did not promise that parking would be free. The Rosen family appealed. A three-judge panel of the South Carolina Court of Appeals agreed with the Rosens.

Another pending lawsuit was filed by a fan who sued her sister over their family's season tickets for Duke basketball (Brooks, 2011). Katina Dorton, the daughter of a longtime Duke basketball season-ticket holder, is seeking unspecified damages and asking the Wake County (North Carolina) Superior Court to invalidate the "fraudulent transfer" of a pair of Cameron Indoor Stadium season tickets to her sister, Sophia, and her sister's husband. Dorton's father, John Dorton, a Duke graduate and dentist who treated athletes and coaches, paid his dues over the years, earning season tickets through contributions to the Iron Dukes booster club. When Sophia Caudle's then-fiancé, Gordon Caudle, transferred the tickets into his name in July 2008, John Dorton, who died in January 2010, was "ill and unable to act for himself" (1). The lawsuit alleges Caudle was not a member of the Dorton family at the time of the transfer and therefore had no authority to repossess the tickets.

EMPLOYMENT CONTRACTS

Bires v. WalTom, LLC, involved a complaint between an auto-racing team that runs a rookie development program and NASCAR Nationwide Series driver Kelly Bires. In 2005, Bires signed an agreement that prohibited him from negotiating for a driving position on another team for a period of forty-five days. He claimed that he had no choice but to sign the agreement based on the surrounding circumstances and as a result, forfeited opportunities to secure other employment. Later that month, Bires received a telephone call from the team's owner that purportedly included a formal offer to drive for the team the following season. He claimed that later conversations solidified the terms of that offer, and altogether resulted in an oral contract to drive in the LMS in 2006, in which he was paid a salary, bonuses, and a percentage of race winnings. According to Bires, the team never indicated that its promises would not be binding until a written agreement was signed, or that he would have to make future royalties payments.

He then claimed he was subsequently forced to enter into a written agreement with substantially different terms. Specifically, he challenged enforceability of a royalty clause that required the driver to pay the team 25% of his gross race earnings for 10 years. The court held that the royalty provision was not a wage assignment covered by the Illinois Wage Assignment Act. In addition, paying the driver for less than one year of employment constituted insufficient consideration by the team to support the royalty clause. On the issue of adequacy of consideration, the court stated, "Any act or promise that benefits one party or disadvantages the other is sufficient consideration to support the formation of a contract" (1028). Bires asserted that the agreement fails for lack of consideration because while WalTom agreed to pay Bires a salary and to pay certain expenses, "the Agreement makes these purported payment obligations entirely optional to WalTom to perform or not perform" (1028). Bires argued that WalTom's promises were illusory and that because it could terminate the contract at its sole discretion, the agreement lacked mutuality (1028). Bires further argued that while WalTom may have performed by paying Bires his salary and other payments owed him based on Bires's performance under the contract, the relevant question was

whether there was sufficient consideration for the ten-year royalties provision, which Bires referred to as a restrictive covenant. The court agreed with Bires that the royalties provision at issue, while not stated expressly as a covenant not to compete, is subject to the same analysis as restrictive covenants under Illinois law.

Construing the royalty clause as a non-compete covenant, the court found the following to be unreasonable: a) the 10-year duration; b) the lack of geographic limitation; and c) the application to all the driver's gross earnings, including those derived from racing-related activities such as entertainment and publishing. Thus, the court deemed the royalty clause an illegal restraint of trade. Judgment was entered for the driver on the lack of consideration and illegal restraint of trade counts, but fact issues remained about whether the contract was procedurally or substantively unconscionable or violated the Illinois consumer fraud statute.

ATHLETE REPRESENTATION

In general, athlete representation is similar to representation in the business world in that it requires the representative to understand the person or project and the environment in which the person or project exists. That foundation is in contract, accounting, labor, and intellectual property law.

What is complicated about athlete representation is the understanding of the business of sport. It involves a thorough knowledge of the sport, including the business of a particular sport (i.e., it is essential to understand the rules of the National Collegiate Athletic Association [NCAA]). The agent is expected to understand the particular sport's collective bargaining agreement and bylaws, draft system and other means of gaining entry to a team, salary caps, and value of a particular playing position. The athlete's situation in terms of rules related to interscholastic and intercollegiate governance must be understood. A sincere respect for the athlete is a must.

Representation of athletes in organized team sports and in individual sports varies considerably. In organized team sports, the athlete is usually selected through a draft and is governed by league rules; the collective bargaining agreement and bylaws govern the job. The representative's first task is to explain the collective bargaining agreement and contract to the athlete. At the same time the agent negotiates all additional terms (beyond the collective bargaining agreement) that will meet the needs of the athlete. This combination of accepting the collective bargaining agreement and negotiating contractual terms is unlike any other type of employment. Employees are either members of a union and work under the union's collective bargaining agreement or are management and bargain for the terms of their individual contracts. The team sport athlete has both.

Representation of the team sport athlete may be full support, partial support, or only contractual assistance. In addition to the contract, the full-term support includes obtaining a portfolio of sponsorship and speaking engagements, intellectual property, financial and investment advice (including trusts and wills), real estate guidance, and any support agreed to in the representative/athlete agreement. Partial support usually includes contract, sponsorship, and intellectual property representation. Contract negotiation is the third area.

Individual sport representation is different in that one of the representative's biggest tasks is the identification, selection, and obtaining of the athlete's acceptance to a range of tournaments or events. These tournaments or events must meet the athlete's goals and schedule, yet bring the greatest revenues and future opportunities possible.

The logistics of travel, car rentals, applications, and hotels are among the basic tasks. Training, practice, equipment maintenance, and schedules at home and in tournaments are arranged. Player contracts are usually agreements for individual performance and events.

Athlete representatives or agents are required to have state licenses and league certifications. They are also expected to have experience in contract negotiations and leads for endorsements. They will help the athlete obtain equipment for the athlete's use, equipment and product endorsements, personal appearances (i.e., speeches, autograph sessions), select volunteer and charitable opportunities, summer camp presentations, trading cards, and other opportunities. Financial guidance is extremely important as an athlete usually makes considerable money in a very short period of time. A representative's skill in guiding the athlete in understanding how that large sum of money can enable the athlete to be financially secure for life is paramount.

The scandals that have plagued professional athletes created a need for licensing of sport agents. Many states have statutes requiring agents to be licensed and post a substantial security bond. Often, this legislation has been in response to specific state problems. As the number of states that licensed agents grew, confusion existed among agents as to the merits of seeking licenses in multiple states. There was a cry for reciprocity across state lines, which is the recognition of an agent's license in one state by another state. This prompted the creation of the Uniform Athlete Agent Act (UAAA). The UAAA has been passed in 40 states, the District of Columbia, and the U.S. Virgin Islands. In most cases, the UAAA requires an athlete agent to register with a state authority, typically the Secretary of State, in order to act as an athlete agent in that state. During the registration process, an athlete agent must provide important background information, both professional and criminal in nature. It also provides reciprocity of registration across state lines for an agent certified in a neighboring state. Penalties and remedies for violation of components of the act are provided.

Cases in Representation

Cases that describe two very typical situations in the representation of athletes include the provision of cars and other impermissible benefits to NCAA athletes (*Black, et al. v. National Football League Players Association, Inc.*, 2000) and the problems that athletes might encounter with financial advisors (*Clark v. Weisberg, et al.*, 1999).

The National Football League Players Association (NFLPA) brought disciplinary proceedings against Black for allegedly providing NCAA athletes with cars, stocks, and bribed coaches. Black brought suit against the NFLPA, describing the disciplinary proceedings as unlawful and affecting his livelihood. Specifically, his complaint was an antitrust conspiracy. The NFLPA then revoked Black's contract advisor certificate for

three years. Black filed an amended complaint. He removed the antitrust complaint and added new claims:

That NFLPA's initiation of the disciplinary proceedings was based on race discrimination in violation of Section 1981; and that NFLPA tortiously interfered with Mr. Black's business relations (and those of his corporate entity Professional Management, Inc.) by invoking disciplinary action. Mr. Black continues to claim that the arbitration process established by the regulations is illegal under the FAA. (*Black, et al. v. National Football League Players Association, Inc.*, 2000, 3)

Black had signed the following agreement to become certified as an NFLPA advisor:

In submitting this Application, I agree to comply with and be bound by these Regulations ... I agree that if I am denied certification or if subsequent to obtaining certification it is revoked or suspended pursuant to the Regulations, the exclusive method for challenging any such action is through the arbitration procedure set forth in the Regulations. In consideration for the opportunity to obtain certification and in consideration of NFLPA's time and expense incurred in the processing of this application for such certification, I further agree that this Application and the Certification, if one is issued to me, along with the NFLPA Regulations Governing Contract Advisors shall constitute a contract between NFLPA and myself. (2)

The United States District Court for the District of Columbia ruled that the plaintiff could take discovery (gather additional evidence) on the discrimination claims, but that the defendant was entitled to judgment as a matter of law on the claims of tortious interference and violation of the Federal Arbitration Act (2). In 2001, William (Tank) Black was sentenced to nearly 7 years in prison followed by three years' probation and a fine of \$15,000 for money laundering charges (Suhr, 2001).

In *Clark v. Weisberg, et al.* (1999), Clark, a former professional football player, sued his accountant. He alleged conversion, breach of fiduciary duty, and negligence. He requested that a special master be named to conduct an accounting of his money. Clark's salary from the National Football League (NFL) team he had played for had been automatically transferred to the accountant. The accountant was to pay his bills, provide him an allowance, maintain his insurance and taxes, and place the residual in investments. Clark suffered a career-ending injury and asked the accountant for an accounting of his investments. The accountant said that Clark was broke and that he had spent his money foolishly.

Clark brought an action, alleging that the accountant invested Clark's money in the accountant's family financial interests, failed to disclose the location of Clark's assets when asked to do so, and did not inform Clark of his insurance and tax status. As Clark retired, he discovered that the accountant had not maintained his injury

insurance policy. Clark's motion for the appointment of a special master (person to oversee his accounts) was denied because the issues in the case were not more complicated than those in a usual case such that it required appointment of a special master.

SUMMARY

Contracts are legally enforceable agreements containing a promise (or set of promises) accepted by another (through signature, verbal agreement, or conduct) for consideration. Consideration can be either a promise to do something, a promise not to do something, or money. Sales agreements, leases, warranties, employment contracts, and releases may be contracts. Contracts can be express or implied. Express contracts are facilitated either verbally or in writing. Implied contracts are agreements accepted as a result of the conduct of the accepting party.

DISCUSSION QUESTIONS

1. How can contract law be used to protect the rights of a range of sport businesses? Under what circumstances would a lawsuit for breach of contract become necessary?
2. Given the evolution of the Internet and digital communications, how can professional athletes protect their commercial interests using contract law?

ACTIVITIES

1. Retrieve the coaching contracts of the head coach in any sport at your college or university, if publicly available. Determine what provisions of the contract are included and analyze whether the specific provision benefits the coach or the school, or both.
2. Do an Internet search for a personal appearance contract. Review the terms of the agreement. Now, consider what terms would be necessary for a similar appearance contract between a professional athlete and a sponsor, such as a beverage company.

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8

Legal Entities and Employer-Employee Relationships

OBJECTIVES

Upon completing this chapter you will:

- 1) know a number of ways to organize a business;
- 2) be confident in comparing the status of an independent contractor with a regular employee;
- 3) be able to explain vicarious liability; and
- 4) be competent to implement the Fourteenth Amendment of the United States Constitution, Equal Protection Clause, procedural due process, in terminating an employee.

INTRODUCTION

Sport managers have responsibilities that require an understanding of a wide range of business-related laws. Independent contractors play a significant role in sport and physical activity; coaches are often independent contractors. This chapter begins with a description of business organizations, including sole proprietorships, partnerships, "C" and "S" corporations, and limited liability companies and partnerships. Self-employment or working for others becomes a legal concern as the reader compares regular and leased employees with independent contractors. Vicarious liability is the liability of administrators for the torts of their employees. Procedural due process is the major legal theory in employment, evaluation, and termination of personnel.

BUSINESS ORGANIZATIONS

A person starting his/her own business has a number of decisions to make in selecting the organization most appropriate to his/her needs. Businesses are organized under state law. Liability and tax consequences play a primary role in the decision-making process.

Sole Proprietorship

A sole proprietorship is a business owned and operated by one person. The business is started by opening a bank account and obtaining requisite licenses and permits. The sole proprietor is liable for the debts of the business and pays them from the business or personal resources. When the business needs credit or the ability to obtain a loan, a sole proprietor uses his/her personal credit to obtain resources. If the business hires employees, the owner is personally liable for their wages, and for federal and state employment taxes. The sole proprietor's personal assets will be used to satisfy debts the business encounters, including a judgment following litigation. Income from the business—after deductions for money spent to make the income—is taxed at the sole proprietor's individual income tax level. If the business goes bankrupt, the owner covers the bills. If the owner cannot cover the bills, the owner goes bankrupt. Should the owner die or not be able to work, the business may fail.

The advantages of a sole proprietorship are its informality and ease of establishment. Decisions can be made in a short period of time, and the individual is not required to share profits. Profits and losses are part of the owner's personal income tax statement. Sole proprietorships are popular with people starting a business. Often, persons who start as sole proprietors move to a more sophisticated organization as the business grows.

Partnership

The Uniform Partnership Act (UPA) defines partners as two or more co-owners in a business for profit. A written agreement is recommended but not required. Partners need to identify the financial, material, and managerial contributions of each partner. The law considers all partners equal. If partner contributions are not equal, the differences must be identified in writing. The death of a partner is a problem to be addressed in the agreement. Will the partnership fold, with the assets going to the next of kin of the deceased partner, or will the partnership go to the living partner with no assets to the deceased partner's family and/or next of kin? Often, insurance is used to offset the damage that might occur to the business and/or the partner's next of kin at the time of death.

Advantages of a partnership are ease of creation, direct award of profits, more capital than the sole proprietorship, freedom from direct government control, and flexibility in decision making. If people work together effectively, partnerships can provide a business with little bureaucracy. The disadvantages of a partnership are that one partner can be liable for the expenses of both partners, that one partner can speak and/or obtain credit or loans for both partners without the other partner's knowledge, and that capital is difficult to obtain.

Corporation

A corporation is a business formed by the authority of state government through the filing of Articles of Incorporation with the Secretary of State. In addition to obtaining a charter from the state, a corporation must hold annual meetings and adhere

to government regulations. Regular "C" and subchapter "S" are the two basic types of corporations. A corporation is a legal entity that is separate and distinct from the shareholders who own the corporation. A corporation can be sued and can sue. It has the same rights and privileges as a person. Shareholders indirectly control corporation activities by electing a board of directors, which in turn elects the officers responsible for the day-to-day operations of the business. All assets are owned by the corporation, not by the shareholders. Owners of the corporation are stockholders and can be held liable only for the extent of their investment in the corporation. The legal ramifications are that shareholders in a corporation can lose only the investment they have in the corporation; their personal assets cannot be attached for corporate debts unless the court can find that the corporation was a sham. Stocks and bonds issued by the corporation must satisfy the federal Securities Act of 1933, the Securities and Exchange Act of 1934, and the policies of the Securities and Exchange Commission (SEC). A corporation pays taxes at a predetermined level. Shareholder dividends are taxed at the shareholder's personal tax rate. Shareholder profits are taxed twice, at the corporation level and at the personal income level.

Subchapter "S" Corporation

A subchapter "S" corporation has all of the characteristics of a corporation. The difference is that profits and losses pass through to the shareholders—as they do in the sole proprietorship and partnership—and become a part of each shareholder's individual taxable income. Thus, shareholders pay taxes once on the profits of the corporation. Limitations of a subchapter "S" corporation are that shareholders are limited to 75 shareholders. Shareholders have only one class of stock and must be United States citizens; corporate status has to be attained as well. The advantages of a subchapter "S" corporation are the limited liability of stockholders to their investment, the status as a legal entity, and the ease of ownership and transfer; in addition, the organization is not affected by the death of participants, and it has a base for securing capital from investors. The disadvantages are governmental control, laws, charter activities, and expenses associated with the forming of a corporation.

Limited Liability Company (LLC)

A Limited Liability Company (LLC) is an organization that is accepted in most states and treated as a partnership for federal (not state) income tax purposes. The LLC has the limited liability of a corporation. It is formed by two or more persons who file Articles of Organization with the Secretary of State. Business elements, including management systems, are in the agreement. The number of partners is unlimited, which permits other corporations and partnerships to become shareholders. The LLC operating agreement resembles a partnership agreement. A limited liability company is not as complex as a subchapter "S" corporation. An advantage is that owners have the liability of a corporation as it is a separate entity. Owners are called members, not partners, and no formal minutes or resolutions are required. Disadvantages are that an LLC is dissolved when members die or file for bankruptcy, whereas corporations go on forever.

Limited Liability Partnership (LLP)

Limited Liability Partnerships (LLPs) are often public service partnerships that retain partnership tax benefits while obtaining corporate liability benefits. Again, similar to the information noted above concerning the LLC, each state is unique in its requirements for an LLP. Therefore, the regulations for an LLP differ from state to state.

Not-for-Profit Corporation

A not-for-profit corporation is a corporation that does not distribute income to its members, directors, or officers. It is organized for charitable, benevolent, educational, religious, social, athletic, scientific, or trade association purposes. The basic organization is the same as any other corporation. It is only the purpose of the organization that differs. While members of the board are not paid, the organization has a staff that is paid.

EMPLOYER-EMPLOYEE RELATIONSHIPS

Employment relationships are regular employee (working for another); independent contractor; self-employed; or leased employee (a combination of regular employee and independent contractor). The leased employee is a regular employee of a business that serves as an independent contractor on the work site. Labor unions are addressed in Chapter 9, Antitrust and Labor Law. The major differences in these relationships are in the various parties' responsibilities for legal, financial, and social obligations.

Regular Employees

A regular employee works directly for the employer. The worker answers to the employer or to a person in the employer's chain of command. In a regular employment relationship, the employer has the right to control the employee and to direct the employee's work. How and what the work will be is controlled by the employer. Employers are responsible for the actions of their employees. In regular employment, the employer has an equitable hiring process and safe working environment, evaluates only the tasks of the job, and provides a due process hearing—if appropriate—prior to termination. Employers have financial responsibilities to the employee for wages, unemployment insurance, worker's compensation, benefits, and other negotiated services. Employers also provide supplies and equipment. The employer is legally responsible for all work-related torts committed by the employee. The relationship in the law is often referred to as master/servant.

Independent Contractors

In an independent contractor relationship, the employer has a contract right to the completed task or project. The employer has no control over selection, training, or the means used by personnel to accomplish the tasks. Independent contractors are usually paid in lump sums. The employer is not liable for the torts of independent contractors or their employees. An employer becomes liable for independent contractors and their employees only if the work environment is hazardous or the independent contractor's status is violated as explained in the Test of Independent Contractor Status below.

Independent contractors are responsible for their own actions and those of their employees. Independent contractors pay wages, federal and state taxes, and insurance. They are liable for their own injuries.

Even though an employer has created an independent contractor relationship through a written agreement, the employer can—by accident—assume control sufficient to end the status. To avoid this situation, the parties should identify, in writing, the party responsible for worker's compensation, withholding taxes, adhering to civil rights legislation (including age, race, and sex discrimination), wage and labor laws, and employee safety. Employers may be personally liable for selecting a contractor with a history of carelessness, permitting a hazardous situation to exist, failing to perform required legal duties, and allowing persons to engage in inherently dangerous work.

When an employer chooses to use an independent contractor, the employer must be confident that the independent contractor understands his/her status. Asking a person to sign an independent contractor agreement may be insufficient. If challenged, the employer must prove that the independent contract was not signed under duress, federal and state taxes were paid, and legal liability was recognized.

An employer with both regular employees and independent contractors must treat each according to their status. An independent contractor supplies his/her own materials and equipment; the business supplies materials and equipment for regular employees.

Test of Independent Contractor Status

Over the years, the courts have arrived at a number of questions to guide a party or the court in distinguishing between a regular employee and an independent contractor. It is not necessary to fulfill all of the requirements listed below. However, a majority of affirmative responses is expected.

- 1) *Control.* Who is in charge? What is the extent of their control? Who hires, evaluates, and fires? Who determines method of work and when the work will be completed? In an unforeseen situation, who becomes the leader? If the independent contractor controls the above, independent contractor status will be retained.
- 2) *Is work unique?* Does the job require special certificates or licenses? What is the level of specialization of the employees? When the level of specialization is sufficiently unique that few people can control the day-to-day tasks of the employees, the situation lends itself to the independent contractor status. For example, when the administrator of a sports facility is unable to supervise the swimming pool, the pool manager could easily be an independent contractor.
- 3) *Custom.* Is the selected relationship—regular employee or independent contractor—the one used most often in the industry?
- 4) *Skills.* Are requisite skills so unique or so advanced that it is difficult to control or supervise employees? A company claiming independent contractor status

must avoid all but minimal orientation, in-service training, or other forms of employee control. Requirements that specific progressions be used could void the independent contractor status. Note that an employer who wishes to retain an independent contractor status can, for example, require in the contract that all employees possess an American Red Cross certificate; however, they cannot demand the use of a specific program in accomplishing the task.

- 5) *Period of employment.* Independent contractors are hired to do specific tasks for an identified period of time. Continuous employment will be examined for violation of an independent contractor status.
- 6) *Compensation.* Compensation is a lump sum. The money is paid only to the contractor. Employer payments directly to independent contractor employees may void the independent contractor agreement.

Leased Employees

According to Clement (2004), leased employees "are a combination of the regular employee and the independent contractor. The leasing firm serves as the independent contractor to the employer. The employee becomes an employee of the leasing firm and is given salary, fringe benefits, and liability coverage by the leasing firm. Leasing firms also hire, fire, and evaluate employees. The employer merely creates a contract for a specific task to be accomplished, and the leasing company provides the service" (p. 101). Under the Equal Employment Opportunity Commission (EEOC), leased employees, temporary, seasonal, and part-time employees are considered contingent or temporary workers. Interns and volunteers are not covered.

Interns and Volunteers

The United States Department of Labor, Fair Labor Standards Act, requires that an unpaid internship in the for-profit or private sector meet the following requirements:

- 1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- 2) the internship experience is for the benefit of the intern;
- 3) the intern does not displace regular employees, but works under close supervision of existing staff;
- 4) the employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- 5) the intern is not necessarily entitled to a job at the conclusion of the internship; and
- 6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship. (Internship Programs under The Fair Labor Standards Act, fact sheet, April 2010)

If the above criteria are not met, the intern is to be paid a minimum wage with overtime, as appropriate. Higher education, including athletics, is covered under the act whether they are operated for profit or not for profit (U.S. Department of Labor, Wage and Hour Division, WH Publication 1282, September 2010, p. 2). Of primary importance is that the job be similar to that provided in an educational institution and that it be for the benefit of the intern.

VICARIOUS LIABILITY

Vicarious liability is the manager's responsibility for the torts of his/her employees. Managers are liable for torts committed in the workplace even though they (the managers) were not present or aware that the tort was committed. The legal theory (*respondent superior*) finds administrators responsible for the torts of their employees merely because they are administrators. In addition, administrators may be personally liable for having hired an incompetent employee or incompetent independent contractor.

Torts that are committed beyond the job description or the administrator's supervision are not covered under vicarious liability. The test of vicarious liability, or *respondent superior*, is the administrator's right to control and direct the work of the employee. An administrator's status as a volunteer does not change his/her vicarious liability status. Intentional torts are not covered by vicarious liability unless the administrator has directed the employee to commit the intentional tort or has ratified the intentional tort after it was committed.

TYPES OF EMPLOYEES

Employer-employee categories are regular, at-will, contract, or membership in a labor union.

Regular Employee

Regular employee is the type of employment most often found in the work force. The regular employee works at the request of the employer; has income taxes, social security, and Medicare withheld from his/her income; and may be provided with insurance, pensions, and paid leaves. As mentioned earlier, the employer is liable for the torts of a regular employee, for providing a safe working environment, and for honoring the employee's legal rights.

At-Will

At-will employment occurs when an employer has a task to be done, seeks persons capable of doing the task, and offers a wage, followed by the parties' agreeing to the job. When one party no longer wishes to work with the other, the party merely informs the other of his/her wishes. The reason for either party's termination does not have to be given. Today, Florida, Georgia, and Louisiana are total at-will states. Bennett-Alexander and Hartman (2009) list the following as exceptions to the at-will categories: implied contracts, public policy, and good faith. Using information gathered from the Bureau of National Affairs Labor and Employment Law, they provide information on each of these exceptions by state (pp. 28, 29).

Contracts

There are two types of employment contracts: written agreements and implied contracts. Written agreements are used universally in certain businesses and industries. Universities tend to use written agreements; therefore, most collegiate athletic department agreements will be in written form. The details of written agreements (contracts) are outlined in the chapter on contracts. Implied contracts are agreements between parties usually based on the practice in the industry, verbal promises of long-term employment, and policies that would lead an applicant to feel secure in taking an offered position. Many states permit an implied-contract relationship through policies, handbooks, and promises.

Labor Unions

Labor unions (agencies that negotiate contracts with businesses) are private associations formed to represent groups of workers with common needs and a common desire to obtain the best wages possible for the entire group.

EMPLOYING, EVALUATING, AND TERMINATING EMPLOYEES

A business creates a system for employing each individual that begins with a need, followed by a job description, advertisements, candidate screening, and finally employment. There are several federal employment laws that prevent discrimination in hiring. Evaluation and, on occasion, termination of employees are influenced by the Fourteenth Amendment to the U.S. Constitution, the Due Process Clause.

Federal Employment Laws

Employers are subject to federal laws created to remedy discrimination on the basis of race, color, sex, age, religion, national origin, and handicap. The federal laws that deal with discrimination include the Equal Pay Act of 1963, the Executive Orders of the 1950s and 1960s, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. The Equal Employment Opportunities Commission (EEOC) is the federal government agency responsible for administering many of the discrimination acts. Affirmative action, a program designed to remedy past discriminatory practices in hiring minority groups, is used when discrimination has been found. It enables protected groups to receive special attention in employment until such time as their numbers are proportionate to the percentage of employees in the non-protected group. Employees may volunteer or be required to establish an affirmative action program.

Procedural Due Process

The Fourteenth Amendment of the U. S. Constitution states that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." State actions, not private actions, are covered under the Fourteenth Amendment. Procedural due process enables an individual who is about to lose a liberty or property right to present his/her side of the situation and to be assured of

fair treatment. Analysis, under procedural due process, is the balancing of the interests of the state against the rights of the individual.

Procedural due process systems are to be tailored to meet the needs of the business or agency. Legal advice is to be obtained before finalizing a system. When an employer is about to remove a liberty or property right (job) from an employee, the employee must:

- know and understand the charge and complaint;
- have a right to a hearing and to be represented by counsel in the hearing;
- be able to prepare and respond to charges; and
- present witnesses and question adverse witnesses.

The system must be in writing and contained in employee handbooks or related documents. The appeal process is to contain the following steps:

- Written notice of charges including dates, times, and details.
- Time and date for hearing.
- Explanation of representation and how it will be used in the hearing.
- Ample opportunity to prepare for hearing.
- Hearing is to give each side an opportunity to present its case.
- The hearing is convened before an impartial panel.
- Effort is made to negotiate a viable settlement among the parties.
- Settlement is made at hearing, if appropriate.
- The decision and rationale for the decision is contained in a written report.
- Proceedings are recorded and available to the employee.

The employee may bring a lawsuit if not satisfied with the conduct of the hearing or if he/she believes that due process was compromised.

Employing

Search

The following suggestions are based on results in *Griggs v. Duke Power Company* (1971), *Equal Employment Opportunity Commission v. Atlas Paper Box Company* (1989), and *Ward Cove Packing Company v. Atonio* (1989). In preparation for an employee search, supervisors are to learn the labor laws and contracts that cover the job. They are expected to understand the agency or corporation's affirmative action program. The job description is the centerpiece of the employment process. It must contain an accurate and comprehensive description of the significant job tasks. Qualifications essential to success in carrying out the tasks of the job are to be stated. Experience and qualifications unrelated to the job are to be avoided. The job is to be advertised in publications read by potential candidates. If deadlines are used, they are published

and enforced. The employer, in conjunction with the search committee, forecasts the worker pool for the newly created position. What will be the extent and magnitude of the pool? Will the pool contain a number of reasonable candidates for the position? Among those qualified, how many would be inclined to accept the job?

Screening

Initial screening of candidates is based on objective published criteria. Checklists that use job criteria are recommended for use in the process. Only those meeting the published criteria move into the second level of screening. Each level of screening increases the demands on the candidates. The screening instruments, size of interview pool, and use of recommendations in making decisions are determined prior to the start of the job search. With candidates' permission, each reference and former employer of the applicants is checked.

Interviewing

The interviewing process is designed to provide an in-depth assessment of the candidate's skills through a sufficiently civil process that enables the candidate to retain an interest in the position. In-service training may be provided to interviewers to avoid the possibility that an interviewer would ask a discriminatory question about such things as age, marital status, the likelihood that a spouse will move to the city, and provisions for childcare. Candidates should leave the interview understanding the employment relationship classification and, if it is a contract, the nature and contents of the contract. Interviewers are to submit common form-written evaluations for each candidate.

Documentation is the employer's key to the entire process. Each step within the process is outlined and defined prior to instituting the search. The job description is crafted with the needs of the job and requisite skills and credentials in mind. The job description is easy to explain and defend should it be challenged. Screening and interviewing checklists and reports are objective when possible, signed, and dated. They are gathered immediately after their use.

Many search committees inform candidates of their status throughout the review process; the only legal requirement is that eliminated candidates be informed of their status when the job has been filled. Employers are to create a plan, follow the plan, and carefully document each step in the process.

Evaluating

Employee evaluation is an assessment of the elements of the job description and day-to-day tasks of the position. It is to be made in a fair manner. *Griggs v. Duke Power Company* (1971) established the need for performance evaluation based on identified job requirements. If, for example, in-service training is highly valued in evaluation, evidence must exist that it is essential to successful job performance. Sound business management suggests that employees are to engage in an evaluation assessment dialogue prior to completing an evaluation. Results of an evaluation are to be available to the employee. Serious deficits in work habits and disagreements over the execution of job tasks are to be reviewed. A rehabilitation program to address work deficiencies is

to exist and be used appropriately. Continuous monitoring of the success or failure of individuals in the program is to be maintained.

Terminating

The termination process is to be contained in the employee handbook and is to be carried out exactly as it has been described. Reasons for termination tend to be a comprehensive poor work record, documented by numerous evaluations over a substantially long period of time; violation of federal or state laws; or creation of a hazard in the work environment. The due process system is used in termination.

SUMMARY

Business organizations include sole proprietorships, partnerships, "C" and "S" corporations, and limited liability companies and partnerships. A sole proprietor assumes total liability and responsibility for the business, including all of his/her financial assets. Partnerships involve shared responsibility among partners. Corporations are legal entities where owners have only their investments in the corporation at risk. Subchapter "S" corporations have corporate liability status and individual tax status. Limited liability companies and partnerships have corporate liability status and partnership tax status. Regular employee, independent contractor, and leased employee are three potential employment relationships. Vicarious liability is the liability of administrators for the torts of their employees. Due process laws assist an employer in employing, evaluating, and terminating employees.

DISCUSSION QUESTIONS

1. You are starting your own business. Analyze the advantages and disadvantages of each of the following business organizations: sole proprietorship, subchapter S corporation, or limited liability company (LLC). Which one would you select and why?
2. What is the most popular business organization among professional team owners?
3. Contrast an independent contractor with a regular employee relationship.
4. What are the requirements for an internship under the Fair Labor Standards Act?

ACTIVITIES

1. Create a job description for a familiar position. In small groups, conduct interviews for the position.
2. A friend is starting a new business. Given the content of this chapter, what advice would you give your friend?
3. You are the owner of a leasing company that provides lifeguards for a local pool. Your contract states that each guard is to work Monday through

Labor Law and Antitrust

OBJECTIVES

Upon completing this chapter, you will:

- 1) have learned the history of labor law in the United States;
- 2) be familiar with the role of labor law in professional sport;
- 3) understand antitrust law and how it has been applied to sport;
- 4) be able to contrast the differences in the antitrust court decisions among a range of sports; and
- 5) understand contemporary antitrust court decisions involving the National Collegiate Athletic Association (NCAA), Electronic Arts (EA), and Collegiate Licensing Company (CLC).

INTRODUCTION

Black's Law Dictionary (2011) identifies antitrust as “the body of law designed to protect trade and commerce from unlawful restraints, monopolies, price-fixing and price discrimination” (p. 41). Although antitrust issues appear in both the private and public sectors of sport, most antitrust legislation is designed to provide control in the private sector or profit-making businesses. Article One of the U.S. Constitution, the Sherman Act of 1890, the Clayton Act of 1914, the Norris LaGuardia Act of 1932, and the National Labor Relations Act (a result of amendments to the Wagner Act of 1935) play a role in the understanding of antitrust. Three U.S. Supreme Court decisions have exempted professional baseball from all antitrust laws. Decisions in other professional and amateur sport have not received the same special treatment. In recent years, litigations surrounding collegiate sports and the governance of sport activities has increased.

LABOR LAWS

Article One of the United States Constitution

Article One, Section Eight (Number Three) of the U.S. Constitution states that Congress shall have the power “to regulate commerce with foreign Nations, and among the

several States, and with the Indian Tribes." Section Eight (Number Eighteen) gives Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Antitrust

Federal antitrust laws regulate interstate commerce in an effort to prevent the organization of monopolies. The laws cover goods, land, and services. Practices such as price fixing are in violation of these laws. When the courts are asked to examine a potential violation of antitrust law, the courts use a "rule of reason test" in which the illegal practice is balanced against the anti-competitive effect. When analyzing sport in the context of the following laws, sport is viewed as private and operated to make a profit.

Sherman Act of 1890

Section I of the Sherman Act states that every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony."

Section II adds that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

Clayton Act of 1914

The Clayton Act is more precise than the Sherman Act and is thought to have further defined the Sherman Act. Sections Four and Six of the Clayton Act are significant to professional athletes, as they negotiate individual contract components and collective bargaining agreements. Section Four states that

any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit including a reasonable attorney's fee. The court may award under this section ... simple interest in actual damages for the period beginning on the date of service of such person's pleadings.

Section Six states that

the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, or to forbid or restrain

individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Norris-LaGuardia Act of 1932

The Public Policy provision of the Norris-LaGuardia Act of 1932 defined the liberty of contract and freedom of labor roles of the individual worker who was not part of a formal labor group. He/she gained the freedoms of association, self-organization, and representation granted to the groups in the earlier antitrust laws. The act provided a solid recognition for American labor. This recognition was fine-tuned in the National Labor Relations Act.

National Labor Relations Act

The National Labor Relations Act, a result of amendments to the Wagner Act of 1935, noted that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment." An employer or a labor organization that restrains or coerces an employee in the exercise of the employee's rights commits an unfair labor practice. It is also an unfair labor practice for a labor organization to refuse to bargain collectively with an employer who is an official representative of their employees.

UNIQUE CHARACTERISTICS OF PROFESSIONAL SPORT

Sport is considered "big business." However, sport has a culture far different from the traditions associated with business and industry. The first distinction is in the definition of sport (the product). Sport competition is the product. For sport competition to be successful in the entertainment market, play must be exciting and lively with a close score throughout the event. The exciting, lively, and highly competitive (i.e., close score) encounter is most assured when a "level playing field" (or equal skills) has been established prior to competition. To create a level playing field, players must be allocated to competing teams on the basis of skill and talent so all teams in a competitive league have an equal start. Such items as drafts, trades, and salary caps are among the systems used to create this equality. Owners within a league work cooperatively to allocate players. Once all players have joined a team, each owner works diligently to win or beat the other league owners. This close working relationship coupled with a passionate desire to beat the very same teams is one of the hallmarks of professional league competition.

In business and industry, employees either join unions and accept collective bargaining agreements or individually negotiate their employment contracts. An employee in professional athletics automatically becomes a member of the players' union (the

players' collective bargaining unit) and accepts the work, economic, and other benefits that have been negotiated by the union. Outstanding athletes then bargain individually, usually through an agent, for additional privileges. Thus, the second major difference between professional sports and business and industry is the role and use of labor unions and individually negotiated employment contracts.

Another difference between sport and business/industry is found in client interaction and satisfaction. In most businesses, an unhappy client or customer can search out another source for products or services. Often, the unhappy collegiate and professional sport client (spectator) cannot find another team to support. Gary Roberts (1991) noted that a legal problem in antitrust claims in sport is defining "the relevant market that the plaintiff claims has been monopolized. The market definition must include both a product and a geographic dimension—for example, professional football entertainment in the United States" (p. 138).

Career longevity is another difference between professional sport and business/industry. Few employers expect a person's entire career to span an average of three to five years. Professional athletes have short timeframes for career success; this difference in length of careers prompts the professional athlete to want instant success and demand the gratification that accompanies such success. Employees in business and industry do not have to establish their value in the workplace in such a short time period. Because of the reality of the potential length of their careers, outstanding professional athletes want free agency status and the ability to test their skills in the free market as often as possible. They want these opportunities when they are playing at their best, not at the completion of three or five years of play. Also, they are concerned that career-threatening injuries may shorten their sport career. Each of these factors plays a role in the antitrust cases associated with professional athletes.

LITIGATION

Antitrust cases in sport include unique decisions awarded in professional baseball, football, basketball, hockey, collegiate sport, and sport organizations. The majority of the litigation in sport has been in professional "big business" team sports. Today, collegiate sport has become a party in antitrust cases, and individuals have used antitrust in defining player rights.

Professional Sport

Baseball

Three U.S. Supreme Court decisions (1992, 1953, and 1972) have exempted professional baseball from antitrust laws. The 1922 Supreme Court, under Justice Holmes, found in *Federal Baseball Club of Baltimore v. National League of Baseball Clubs* (1922) that professional baseball did not meet the Sherman Act "interstate commerce" clause, as its "business is giving exhibitions of baseball, which are purely state affairs" (208). The suit was brought over the "reserve clause" in relation to contracts signed by professional baseball players. As a result of this clause, a player was bound to an owner for his entire career unless the owner chose to trade him. This system, designed to create

a level playing field (equal competition), prohibited a team from making an offer to a player who was under contract.

In the case of *Toolson v. New York Yankees* (1953), the plaintiff approached the Supreme Court believing that the court would find professional baseball part of "interstate commerce" due to the advent of television. Surely, national television broadcasts had turned professional baseball into "interstate commerce." Again, the issue was the "reserve clause" and that the contract clause violated the Sherman Act and Clayton Act. This time the Supreme Court said that baseball had operated successfully under the decision of *Federal Baseball Clubs of Baltimore v. National League of Baseball Clubs*, and as a result, it seemed appropriate to continue to exempt baseball from antitrust law.

Curt Flood, a player traded to another club without his knowledge, filed a cause of action (*Flood v. Kuhn*, 1972) under antitrust law. Again, the U.S. Supreme Court noted that baseball had operated successfully under the antitrust exemption and therefore the antitrust exemption should be maintained.

In 1995, the Major League Baseball Players Association (MLBPA), the collective bargaining representative for the players in the 28 clubs, reported the baseball owners' labor law violations to the National Labor Relations Board. The employment agreement expired at the end of 1993. The players went on strike in August of 1994. The action halted the season, resulted in the cancellation of the 1994 World Series, and continued through part of the 1995 season. The owners wanted a salary cap, the elimination of the salary arbitration system, and restricted free agency. The players' counterproposal was a tax system to "deter extravagant wage offers" (*Silverman v. Major League Baseball*, 1995, 252).

The National Labor Relations Board (Region 2) sought a preliminary injunction pending the outcome of their investigation. At issue were complaints "that the Owners had violated Section 8(a, 1) [to interfere with, restrain, or coerce employees in the exercise of guaranteed rights: wages, hours, and conditions of employment] and (5) [to refuse to bargain collectively with representatives of employees] of the Act by unilaterally eliminating, before an impasse had been reached, salary arbitration for certain reserve players, competitive bargaining for certain free agents, and the anti-collusion provision of their collective bargaining agreement" (*Silverman v. Major League Baseball*, 1995, 250).

The issues involved free agency and the "reserve clause." Under free agency, a player with six years or more of play could become a free agent. Once the player signed a new contract, the player had another five years before becoming a free agent. This agreement also limited the number of free agents that each club could sign in two top-performance categories. Reserve players, those with fewer than six years of play, were under the Uniform Players Contract. Each year they were offered a new contract with a salary adjustment. According to the Uniform Players Contract, "If the player refuses the offer, the owner is entitled to 'reserve' the player's services and the player is not permitted to play for other teams. An owner may only reserve a player once under this system" (*Silverman*, 1995, 251). After a three-year period, the athlete could request salary arbitration. The outcomes of the salary arbitration did not affect the player's

reserve status.

In deliberation, the court in the *Silverman v. Major League Baseball* (1995) case noted that

Collective bargaining in the context of professional sports presents issues different from most other contexts. On one hand, the talent of an individual athlete can provide him with extraordinary bargaining power, but on the other hand, a player may sell his talent only to a circumscribed group of owners, who have something akin to monopoly power in the sport at issue. These circumstances in professional sports have given rise to the development of the reserve/free agency system, which, perhaps not surprisingly, is quite different from other models of collective bargaining in less specialized and unique industries. (255–256)

The court issued an injunction directing Major League Baseball: “(1) to restore the terms and conditions of employment provided under the expired basic agreement which was effective January 1, 1990, including its free agency/reserve system with salary arbitration for eligible reserve players ... (2) immediately to rescind by written notice to all club members any actions taken ... and (3) to bargain in good faith without unilateral changes to the basic agreement with the Major League Baseball Players Association in compliance with 8(a, 1) and (5) of the National Labor Relations Act” (*Silverman v. Major League Baseball*, 1995, 261).

In 1998, Congress passed the Curt Flood Act. This legislation partially repealed baseball’s exemption of antitrust. The act amended the Clayton Act by subjecting business practices, “directly relating to or affecting employment of major league baseball players ... to the antitrust laws to the same extent such ... practices ... would be subject to the antitrust law of ... persons in any other professional sports business affecting interstate commerce” (15 USC 27A [a]). The Curt Flood Act repealed baseball’s antitrust exemption only as it affected labor issues between owners and players. It did not affect franchise ownership, expansion and relocation, existing broadcasting arrangements, the draft, and owner-commissioner agreements.

The case *Major League Baseball, et al. v. Crist* (2003) was a response to Major League Baseball’s decision to eliminate two teams from the league (Florida Marlins and Tampa Bay Devil Rays). Crist, Florida’s attorney general, began an investigation of Major League Baseball under Florida’s Antitrust Act of 1980 to “determine whether there is, has been, or may be a violation of ... the [state or federal antitrust laws] ... by conduct, activities, or proposed action of the following nature: possible contracts, combinations, or conspiracies in restraint of trade, or monopolization, attempted monopolization, or combinations or conspiracies to monopolize trade or commerce, relating to the proposed contraction and/or relocation of the Tampa Bay Devil Rays and/or the Florida Marlins” (1180). The United States Court of Appeals for the Eleventh Circuit ruled that the federal exemption preempted state antitrust law and that the attorney general could not continue with the investigation. The decision provides a comprehensive analysis of antitrust law at the state and federal levels and how it is applied to baseball.

Football

Football players have long wondered why baseball was exempt from antitrust regulations and football was not exempt. Professional football was denied an antitrust exemption in *United States v. Shubert* (1955) and *Radovich v. National Football League* (1957). In 1974, football players decided to challenge the "Rozelle Rule" under antitrust law (*Mackey v. National Football League*, 1976). The "Rozelle Rule" required a team signing a veteran free agent to compensate the team losing the player with cash or a draft choice. The district court found that the "Rozelle Rule" violated the Sherman Act; the Eighth Circuit affirmed the decision. As a result, the "Rozelle Rule" was replaced by the "Right of First Refusal," a system found to be less offensive to the players. A right of first refusal is a contract right that belongs to the current contract holder, in this case, an NFL team, to match the offer made to a specific player by another team in or outside of the league, within a designated period of time. If the offer is not made in the time period, the player goes to the new team; if the offer is made, the player stays with the current team.

Powell, the plaintiff in *Powell v. National Football League* (1988, 1989, and 1991), brought a case on behalf of a number of members of the National Football League Players Association (NFLPA) against the National Football League (NFL) for violation of the Clayton and Sherman Acts. The dispute was "over the rights of veteran free agents to play for the NFL clubs of their choosing. For more than a decade, the movement of veteran free agents has been subject to the Right of First Refusal/Compensation System" (*Powell, et al. v. National Football League, et al.*, 1988, 813).

The parties returned to the District Court of Minnesota requesting a preliminary injunction. The court denied the injunction, stating that such a grant would be in conflict with the purpose (to bargain in good faith) of the Norris-LaGuardia Act. The first decision of the Minnesota District Court was appealed to the United States Court of Appeals, Eighth Circuit. The Eighth Circuit reversed and remanded the decision and held that "the antitrust laws are inapplicable under the circumstances of the case as the non-statutory labor exemption extends beyond impasse" (*Powell, et al. v. National Football League*, 1989, 1304). Powell returned to the same court and requested an opportunity to consolidate with the *McNeil* case (*McNeil v. National Football League*, 1992) which is analyzed below. The request was denied.

In the *McNeil* case, eight NFL players whose contracts had expired brought a cause of action under the Sherman Act against all the NFL team owners. This was not an NFLPA action as presented in *Powell*; it covered only the named players. The complaint was over the wage scale and a plan created by the owners that they called "Plan B." The players' goal was to prevent the enforcement of the first refusal compensation plan. Plan B allowed each team to retain limited rights to 37 players each season. Players classified as unprotected would become unrestricted free agents and would be free to sign with any NFL club. Owners retained a right of first refusal for all protected players. If a protected player signed with a new team, the new team was expected to provide a draft choice to the player's original team. The jury found components of the

wage plan in violation of the Sherman Act. Only those players that were found to have sustained injury were awarded money damages.

Finally, as a result of the *McNeil* case, today's existing system was created. It allows teams to have exclusive control over players for their first three years. The players have limited rights of first refusal for years four and five, and unrestricted free agency after five years. As soon as the decision was final, ten players immediately requested and were granted a temporary restraining order to prevent the enforcement of the first refusal compensation (*Jackson, et al. v. National Football League*, 1992).

Two weeks after the *McNeil* decision, Reggie White and five other named plaintiffs representing all professional, college, and other persons who had played or wanted to play professional football from 1987 to the completion of the case, brought a class action suit against the National Football League over "the right of first refusal rules of Plan B, the college draft, the NFL Player Contract, and the preseason pay rule" (*White v. NFL*, 1993[1], 1394). The settlement agreement provided for the NFLPA to be the exclusive bargaining agent for the players:

- (a) the terms of the Stipulation and Settlement Agreement fundamentally modify the NFL's rules, policies, and practices regarding veteran player movement and employment. The settlement also fundamentally modifies, by agreement, the college draft, the NFL Player Contract, and various other terms and conditions of NFL player employment.
- (b) the revised player mobility and employment rules represent a successful effort by NFL players to eliminate Plan B, and to bring about substantial modifications in the principles relating to veteran player transfer. (*White v. NFL*, 1993[2], 1464)

The plaintiff notified class members of the proposed settlement. A hearing was held in which many players objected to the details of the settlement. The district court overruled the objections. Shortly thereafter, the NFL and the NFLPA entered into a new collective bargaining agreement that included the terms of the settlement. Those who objected to the settlement filed a claim with the United States Court of Appeals for the Eighth Circuit to open the settlement. The court affirmed the approval of the settlement of the district court.

The parties extended the collective bargaining agreements with amendments in 1996 and again in 2006 for the contract through 2012. In May of 2008, the NFL asked to be relieved from the current agreement for financial reasons. At the same time, the NFL recognized that in order to achieve their interests, a lockout might be necessary. The players wanted to avoid a lockout.

The media rights became the issue. The broadcast contracts provided about half of the NFL's total revenue. The existing broadcast contracts did not require the media to pay rights fees during a lockout. So the NFL decided to extend broadcast rights with any of the media agencies willing to renegotiate. This would mean that the players

could not use the revenue loss from the media as a bargaining tool in future negotiations. Under the new DirecTV contract, the "NFL could receive substantially more from DirecTV in 2011 if it locks out the players than if it does not" (*White, et al. v. National Football League*, 2011, 945). Other deals were negotiated with CBS and Fox, NBC, ESPN, and Comcast and Verizon. In June of 2010, the players sued the NFL for violating the SSA agreement by extending and renegotiating the broadcast contracts without trying to get the greatest revenue. As a result of a special master's report, the court awarded the players \$6.9 million in damages for the NBC violation and found that the players had not met the burden of demonstrating damages for other media deals. The players objected.

The United States District Court for the District of Minnesota considered four factors in determining whether an injunction should be issued: "(1) the threat of irreparable harm to the movant in the absence of relief, (2) the balance between that harm and the harm that the relief may cause the non-moving party, (3) the likelihood of the movant's ultimate success on the merits, (4) the public interest. Money damages were not discussed. For that reason the court determined that additional briefing and a hearing be held before the final order was issued" (*White, et al. v. National Football League*, 2011, 954). On March 12, 2011, the players filed a complaint that the lock-out threatened by the NFL would violate antitrust laws, state contracts, and tort law. Again they asked for an injunction.

On March 12, the League imposed a lockout of the players. At that point, the League notified players under contract that, among other things, they were not permitted to enter team facilities except in connection with a non-team event or a charitable event, they would not receive compensation or health insurance benefits from their teams, and they were not permitted to play, practice, work out, attend meetings, or consult with team medical or training staff at team facilities. The League also filed an amended unfair labor practice charge with the National Labor Relations Board on March 11, alleging that the NFLPA's disclaimer was a "sham" and that the combination of a disclaimer by the union and subsequent antitrust litigation was a "ploy and an unlawful subversion of the collective bargaining process." The League had filed a previous charge in February 2011, alleging that the union failed to confer in good faith during negotiations over a new collective bargaining agreement. (*Brady, et al., v. National Football League, et al.*, 2011[3], 788)

The court of appeals for the Eighth Circuit in *Brady* did not agree with the district court's view in *White*, that the "balance of the equities tilts heavily in favor of the Players" (793). They looked at the four factors listed above and on May 16, 2011 granted a stay pending the final disposition of the expedited appeal. The *Brady, et al. v. NFL* case was dismissed after the lockout on August 26, 2011, by the United States District Judge Susan Richad Nelson.

The issue in *American Needle, Inc. v. National Football League* (2008, 2010) was whether the NFL was a single entity or a group of separate teams. The day of the filing of the suit, the NFL had 32 separately owned and operated football teams. They played a series of games throughout the season with the Super Bowl as the finale. NFL defined “the product that teams produced jointly—NFL football—requires coordination and integration between the teams” (*American Needle, Inc. v. National Football League*, 2008, 737). In the early 1960s, the individual teams pooled their intellectual property rights and the NFL granted licenses to a number of different vendors, including American Needle, to create products. In 2000, the NFL requested bids from vendors with the decision to select an exclusive licensee. The contract, for ten years, went to Reebok; none of the licensees were renewed. American Needle, one of the former vendors, sued under antitrust, a “contract, combination, ... or conspiracy in restraint of trade” (738). American Needle claimed that the NFL’s requirement to pool individual team trademarks under one license vendor was a conspiracy. They felt that each team should hire their own vendors.

The NFL claimed single entity; American Needle responded that they did not have enough information to know if the NFL was a single entity. Discovery became detailed, with American Needle requesting documents the NFL claimed had nothing to do with the single entity status. Finally, the court determined that the NFL was a single entity; American Needle’s claims failed as a matter of law. The court of appeals affirmed the district court’s decision. The United States Supreme Court reversed and remanded. The Supreme Court made the decision under the “rule of reason” test. Was there a contract, combination, or conspiracy among the individual teams? Was there concerted action? The Court found that “The NFL teams do not possess either the unitary decision making quality or the single aggregation of economic power characteristic of independent actions. Each ... is a substantial, independently owned, independently managed business whose general corporate actions are guided or determined by separate corporate consciousness, and whose objectives are not common” (*American Needle, Inc. v. National Football League*, 2010, 2205). Thus, the court reversed the earlier court’s decision and remanded the case for further study.

Basketball

The National Basketball Association (NBA) negotiated a contract in 1988 that expired in 1994 (*NBA, et al. v. Williams, et al.*, 1995). In the 1994 contract negotiations, the players

demanded the elimination of three provisions in the 1988 Collective Bargaining Agreement (CBA); the “College Draft,” the “Right of First Refusal,” and the “Revenue Sharing/Salary Cap System”:

*The College Draft is the process by which exclusive rights to negotiate with eligible college players are apportioned among the NBA Teams....

*The Right of First Refusal permits a team to match any offer made to one of its current players by another team and thus to retain the player’s services....

*The Revenue Sharing/Salary Cap System establishes an overall wage framework that provides that the: (i) total player salaries and benefits paid by all NBA Teams will be no less than a specified percentage of revenues; and (ii) the total salary paid to players by each team is subject to both a maximum and a required minimum.

*The Right of First Refusal and the present version of the College Draft have been incorporated in all the CBA's signed by the parties since 1976; the Revenue Sharing/Salary Cap provision has been included in every CBA since 1983. (*NBA, et al. v Williams, et al.*, 1995, 685)

In July of 1994, Judge Duffy of the Southern District of New York granted the NBA its request for relief and dismissed the case. The players appealed. The United States Court of Appeals for the Second Circuit affirmed. The court held "that the antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a CBA, or from using economic force to obtain agreement to those proposals" (693).

Hockey

In 1977, McCourt signed a three-year National Hockey League (NHL) Standard Player Contract to play hockey for the NHL's franchise located in Detroit. In an effort to gain a new player, the Detroit Red Wings gave McCourt to the Los Angeles Kings. Instead of going to Los Angeles, McCourt sued the NHL, Los Angeles Kings, National Hockey League Players Association, and Detroit Red Wings (*McCourt v. California Sports, Inc., et al.*, 1979). He alleged that the reserve system violated the Sherman Act. McCourt received a preliminary injunction restraining defendants from enforcing the arbitration award and his reassignment. The NHL appealed. The United States Court of Appeals, Sixth Circuit, vacated the injunction and remanded the case. The court held that the non-statutory labor exemption applied since the reserve system was incorporated into the collective bargaining agreement as a result of a good faith bargain.

The value of a brand has increased measurably in the last ten years. The NHL decided to grow hockey by improving the strength of the League brand. They planned to achieve the entertainment successes experienced by baseball and football. To attain such visibility, they considered enticing the individual NHL Clubs to assign their trademarks to the League so that the League could be marketed on a collective basis. In 1994, member clubs granted the League exclusive rights to use or license trademarks for advertising, and for the sale and distribution of products and services. The clubs also "agreed that the right to develop and exploit the internet as a marketing tool resided in the League" (*Madison Square Garden, L.P. v. National Hockey League, et al.*, 2007, 5).

In 2000, the clubs decided to change the Internet approach to a hybrid model. The League's and the clubs' websites would be part of an integrated network, with certain elements available on the clubs' websites and others available on NHL.com (*Madison Square Garden, L.P. v. National Hockey League*, 2007, 5). The commissioner's Internet

plan restricted a portion of each team's website for NHL content and reserved 35% of each club's website for NHL-controlled advertising. The rules also required that all merchandise sales were to be made through the League Store.

The NHL is an unincorporated association of thirty member clubs organized as a joint venture. They share a common constitution and bylaws. The League Commission has the power to interpret the constitution, bylaws, League rules, and resolutions. Member clubs are separately owned, and have separate assets, stadium rights, employees, and intellectual property rights in team logos and designs. In 2005, the League again examined the media revenues and decided centralization was necessary. A committee commissioned to review the situation recommended consolidation of team sites to a common technology platform with a single content manager. The consolidation was expected to save approximately \$2 million.

In February of 2007, the League and Rangers met to discuss differences, one of them the Internet regulation. They failed to reach agreement on any of the issues. Thus, the Rangers decided to set up an "Internet Store" to sell Ranger merchandise, use virtual advertising and signage in Ranger home game broadcasts, and stream broadcasts of Ranger games on the Internet. All were illegal according to League rules (*Madison Square Garden, L.P., et al. v. National Hockey League, et al.*, 2007, 10). Deputy Commissioner Daly sent them a letter instructing them to stop or be fined \$100,000 a day for the violation. The Rangers remained in violation for two days and \$200,000. Both groups met to resolve the differences. Negotiations broke down, and the League said they would begin fines the first day of the season if the Rangers did not agree to a common Internet site. The Rangers went to court for an injunction against the League. The Rangers alleged that the League had "become an 'illegal cartel' in its attempts to prevent office competition between and among NHL member clubs" (14). The Rangers' motion for a preliminary injunction was denied. They had failed to demonstrate a likelihood of success on the merits. They appealed. The Court of Appeals for the Second Circuit affirmed the district court's decision.

Collegiate Sports

The National Collegiate Athletic Association's acquisition of women's collegiate sports was a model hostile takeover of a business or agency where the plaintiff's only chance for survival was antitrust law. This decision is discussed in detail in Chapter 5, Fourteenth Amendment and Title IX (*AIWA v. NCAA*, 1983, 1984; Hult, 1980; Uhler, 1982). The decisions freed the NCAA to become "big business" athletics similar to professional team sports. It was the day that higher education traded the academic sport model for a semi-professional system. Since that time, NCAA has been plagued with litigation.

In January of 1991, the National Collegiate Athletic Association (NCAA) adopted a bylaw (11.02.3) that restricted the earnings of the fourth member of a Division One (D-1) basketball staff and various other D-1 coaches. The earnings were restricted to \$12,000 for the year and \$4,000 for the summer. It was known that some of these coaches had made as much as \$60,000 to \$70,000 prior to the change. The cap was an

effort to reduce the costs in D-1 competition. A number of restricted-earnings coaches filed suits against the NCAA. Eventually, the cases were consolidated within *Law, et al. v. NCAA* (1996). The plaintiffs sued, alleging price fixing in violation of the Sherman Act and claiming that the NCAA had conspired to limit the maximum compensation it would pay to one category of coaches. The United States District Court for the District of Kansas found that the NCAA's restricted-earnings rule represented price fixing and violated antitrust laws. The court stated that "Because the Restricted Earnings Coach Rule is a restraint of trade as prohibited by the Sherman Act, the NCAA bears a heavy burden in this case to establish that the restraint enhances competition or, in other words, promotes a legitimate, pro-competitive goal. On this record, the Court finds that the NCAA has not met this weighty burden and that plaintiffs are entitled to judgment as a matter of law on the issue of liability" (*Law, et al. v. NCAA*, 1995, 1410).

Electronic Arts, the creator and marketer of sport video games, was sued for antitrust violations by the athletes whose likenesses have been used in games (*Keller, et al. v. Electronic Arts, Inc., National Collegiate Athletic Association, and Collegiate Licensing Company*, 2010; *O'Bannon, et al. v. National Collegiate Athletic Association, Collegiate Licensing Company, et al.*, 2009, 2010; *In re Student-Athlete Name & Likeness Licensing Litigation*, 2011). Among Electronic Arts games are Madden NFL 10, Madden NFL 11, NCAA Football 10, and NCAA Football 11. The athletes have sued and continue to sue Electronic Arts under "The Right of Publicity" as described in Chapter 10, Intellectual Property.

Their antitrust claim is that in signing the forms required to play sports under NCAA rules, they had to agree to release their rights to their personal image, likeness, and/or name for use by NCAA on merchandise and licensees. When the athletes signed the release they were not informed that the release was forever, not just for the four years of NCAA play. Specifically, the defendants, the National Collegiate Athletic Association (NCAA), and the Collegiate Licensing Company (CLC) have "engaged in anticompetitive conduct in two ways. First, they ... conspired to fix the prices they received for the use and sale of their images, likenesses and/or names at zero dollars.... Second, ... defendants engaged in a group boycott/refusal to deal conspiracy that required all current student athletes to sign forms ... to relinquish all rights in perpetuity for use of their images, likenesses, and/or names and to deny Antitrust Class Members compensation in the form of royalties for the continued use of their images, likenesses, and/or names for profit" (*In re: NCAA Student-Athlete Name and Likeness Litigation*, 2011[2], 10). The athletes' legal complaints are in violation of the Sherman Act for unreasonable restraint of trade, group boycott, refusal to deal, unjust enrichment, and an accounting.

Early complaints were filed by Keller and O'Bannon. Both cases were filed as representing themselves and all other affected athletes. Sam Keller was a starting quarterback for Arizona State University and the University of Nebraska football teams. Among the charges in his complaint was that Electronic Arts was using his likeness without consent; misconduct on the part of the NCAA and Collegiate Licensing Company (CLC) for violating one of the NCAA's bylaws; civil conspiracy; and breach of

contract. A purpose in filling the claim was to request the permission of the court for a class action suit (*Keller, et al. v. Electronic Arts, Inc., NCAA, and CLC*, 2010). In 2009, O'Bannon, a Nevada resident who had played basketball for UCLA, submitted a similar claim against the NCAA and CLC to the United States District Court for the Northern District of California. NCAA, in response to the suit, requested a change of venue to Southern Indiana. The court denied the request (*O'Bannon, et al. v. NCAA and CLC*, 2009). O'Bannon made the following claims, first under the Sherman Act and later under common law:

Violation of Section I of the Sherman Act:

- A. Existence of a contract, combination or conspiracy. Contract was proved through NCAA's requirement that athletes sign Form 08-3a which gives away their personal rights. Arrangements between NCAA, CLC, and Electronic Arts created a second contract. Thus, O'Bannon satisfied prong one of the Sherman Act.
 - B. Unreasonable restraint of trade (Rule of Reason). Conduct constituted price-fixing and a group boycott. The complaint is that NCAA has fixed the price of former athletes' image at zero and has created a boycott of former student-athletes in the collegiate licensing market.
 - C. Under the Statute of limitations, his plea for a continuing violation was accepted.
 - D. Standing must be accomplished when "(1) he or she suffers a concrete, particularized injury; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision." (*O'Bannon, et al. v. NCAA, CLC, et al.* 2009, 16)
- Standing was established; and he succeeded under the common law claim of unjust enrichment (*O'Bannon, et al. v. NCAA, et al.*, 2009, 22).

The court order as of January 15, 2010, was for the Keller and O'Bannon actions to file a consolidated amended complaint and to attend a case management conference. The athletes joined together and the case name became *In re: Student-Athlete Name and Likeness Litigation*. There were seventeen named plaintiffs in the action. In February of 2011, the action for a change in venue denied earlier was denied again. In May of 2011 litigation, Electronic Art's motion to dismiss the Sherman Act claims was granted; NCAA and CLC motions to dismiss similar claims were denied. On July 28, 2011, EA's motion for dismissal of common law claims was denied. No further actions are in print as of this publication.

Sport Organizations

Antitrust claims have played a role in disputes over eligibility rules and re-organization of sport competitions. Maurice Clarett, an outstanding Ohio State University football player, decided to join the National Football League (NFL). Clarett, a sophomore, was denied the opportunity due to an NFL rule limiting eligibility to players three seasons following high school play. Clarett sued under antitrust. He based his claim on what he perceived as an unreasonable restraint of trade. The plaintiff noted that "Antitrust law will not tolerate a contract which unreasonably forbids anyone to practice his calling" (*Clarett v. National Football League*, 2004, 382). The District Court for the Southern District of New York granted Clarett's motion for summary judgment and denied the NFL's motion. "Because the Rule violates the antitrust law, it cannot preclude Clarett's eligibility for the 2004 NFL draft. Accordingly, it is hereby ORDERED that Clarett is eligible to participate in the 2004 NFL draft" (*Clarett v. National Football League*, 2004, 410-411).

The Association of Tennis Professionals (ATP) sponsors the worldwide tennis circuit. A re-organization of the tour moved some events and players to top tier play while others were downgraded. The Hamburg, Germany, tournament was moved from first tier to second tier, prompting this lawsuit (*Deutscher Tennis Bund, et al. v. APT Tour, Inc., et al.*, 2010). The suit alleged that the plan, called "Brave New World," violated Sections 1 and 2 of the Sherman Act and that the ATP Directors had breached duties owed to the Federation (824). Also, individual players had complaints concerning the number and types of tournaments they would be required to play. The jury returned a verdict for ATP, stating that "the Federation failed to prove ATP entered into a contract, combination, or conspiracy with any separate entity under Section 1 of the Sherman Act, and did not establish a relevant product market under Section 2 of the Sherman Act" (824). The Federation appealed the verdict. ATP alleged it was a single entity or a single enterprise. The United States Court of Appeals for the Third Circuit affirmed the jury verdict for defendants on the Sherman Act claims and found for defendants on the breach of duties.

SUMMARY

Antitrust laws promote competition by regulating against monopolies. Article One of the United States Constitution, the Sherman Act, the Clayton Act, the Norris-LaGuardia Act, and the National Labor Relations Act play a role in protecting organizations from antitrust. Sport is particularly sensitive to antitrust legislation due to efforts on the part of professional sport owners to create a "level playing field." Baseball has achieved a status beyond antitrust; players have not been as successful in using antitrust as a theory against owners in other sports as they have been in baseball. The collegiate antitrust litigation involving image and likeness is somewhat unique and bears observation in the future.