

# Seventh Circuit and Wisconsin Sports Law Jurisprudence

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# SEVENTH CIRCUIT AND WISCONSIN SPORTS LAW JURISPRUDENCE

MATTHEW J. MITTEN\*

## I. INTRODUCTION

This article identifies, synthesizes, and explains the significant contributions that the United States Court of Appeals for the Seventh Circuit and Wisconsin federal and state courts have made to the rapidly developing body of American sports law jurisprudence. It focuses on legal regulation of high school, college, Olympic, and professional sports as well as sports-related intellectual property and tort issues.<sup>1</sup> A threshold issue is what constitutes a “sport” from the perspective of participants and spectators, an important determination for purposes of the evolving judicial common law regulation and interpretation of statutory authorities. The Wisconsin Supreme Court broadly defined “sport” as “[a]n activity involving physical exertion and skill that is governed by a set of rules or customs,” which encompasses high school cheerleading.<sup>2</sup> Consistent

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<sup>1</sup> Other interesting Seventh Circuit and Wisconsin sports-related cases involve a wide array of areas of law such as *tax law*, see *Selig v. United States*, 740 F.2d 572, 573–74 (7th Cir. 1984) (After becoming part owner of the Milwaukee Brewers, Bud Selig properly allocated \$10.2 million of the \$10.8 million purchase price of the Seattle Pilots to the value of the 149 players’ contracts acquired as part of purchase of club.); *NFL player contract interpretation*, see *Tollefson v. Green Bay Packers, Inc.*, 41 N.W.2d 201, 202–03 (Wis. 1950) (under terms of contract player was to receive a minimum of \$3,600 regardless of whether or not he participated in games played where he was not discharged for cause); *Johnson v. Green Bay Packers, Inc.*, 74 N.W.2d 784, 790–91 (Wis. 1956) (contract provision referring all matters in dispute to arbitration inapplicable to player’s claim against the club for failing to pay him); *sports gambling*, see *United States v. Tedder*, 403 F.3d 836, 838 (7th Cir. 2005) (defendant convicted of conspiring to defraud the United States by assisting a sports wagering enterprise and money laundering); and *federal constitutional law*, see *Weinberg v. City of Chicago*, 310 F.3d 1029, 1033–34, 1040, 1045–46 (7th Cir. 2002) (Chicago ordinance prohibiting peddling of books within 1,000 feet of sports stadium impermissibly infringes free speech rights of peddler desiring to sell a book critical of sports club owner whose team plays in stadium).

<sup>2</sup> *Noffke v. Bakke*, 2009 WI 10, ¶ 17, 315 Wis.2d 350, 364–65, 760 N.W.2d 156, 162 (Wis. 2009) (quoting AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1742 (3d ed. 1992)) (construing Wisconsin co-participant tort immunity statute). *But see Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 105 (2d Cir. 2012) (cheerleading is not a sport for purposes of athletic participation opportunities under Title IX).

with other jurisdictions, the Seventh Circuit ruled that a spectator is entitled only to “view whatever event transpire[s]”<sup>3</sup> and has no right to a sports event that is “*exciting*” or during which participants “*competed well*.”<sup>4</sup>

## II. HIGH SCHOOL SPORTS

The Seventh Circuit and Wisconsin courts have developed a significant body of high school sports law jurisprudence, most of which is consistent with other jurisdictions. There are, however, some important, unresolved issues, as well as a few leading cases that, over time, may influence the development of the law governing high school athletics in states outside the Seventh Circuit.

To date, there has been no judicial determination whether the respective governing bodies for high school sports in Illinois, Indiana, or Wisconsin are a state actor,<sup>5</sup> whose rules, decisions, and conduct is subject to the constraints of the U.S. Constitution pursuant to *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*.<sup>6</sup> In *Brentwood Academy*, the U.S. Supreme Court held that the “nominally private character of the [Tennessee Secondary School Athletic] Association [(TSSAA)] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings.”<sup>7</sup> The Court concluded the TSSAA is a state actor because the requisite entwinement with the State of Tennessee exists.<sup>8</sup> Although the state did not create the TSSAA or fund its operations,<sup>9</sup> public schools constituted 84% of its membership, state board of education members served ex officio on its board of control and legislative council, and its ministerial employees are eligible to participate in the state retirement system.<sup>10</sup> The state board of education also permitted students to satisfy its physical education requirement by participating in athletics sponsored by the TSSAA.<sup>11</sup>

Prior to the 2001 *Brentwood Academy* ruling, the Seventh Circuit held that

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<sup>3</sup> *Bowers v. Fed’n Internationale de L’Automobile*, 489 F.3d 316, 321–22 (7th Cir. 2007) (quoting *Castillo v. Tyson*, 701 N.Y.S.2d 423, 423 (N.Y. App. Div. 2003) (six-car competition does not deprive plaintiffs of contractual right to see a Formula One race).

<sup>4</sup> *Id.* at 322.

<sup>5</sup> In *Wisconsin Interscholastic Athletic Ass’n v. Gannett Co.*, the parties stipulated the WIAA is a state actor, making it unnecessary for this issue to be judicially determined before resolving the merits of the First Amendment claims in this case. 658 F.3d 614, 616 (7th Cir. 2011).

<sup>6</sup> 531 U.S. 288 (2001).

<sup>7</sup> *Id.* at 298.

<sup>8</sup> *Id.* at 291.

<sup>9</sup> *Id.* at 307 (Thomas, J., dissenting).

<sup>10</sup> *Id.* at 291, 300.

<sup>11</sup> *Id.* at 301.

the Illinois High School Association (IHSA) is a state actor because of the “overwhelmingly public character” of its member schools, 85% of which are public schools.<sup>12</sup> In a case in which the panel majority did not address this issue, Judge Posner concluded that the Indiana High School Athletic Association (IHSAA), whose membership is “composed primarily of public schools,” is a state actor.<sup>13</sup> A Wisconsin federal district court denied the Wisconsin Interscholastic Athletic Association’s (WIAA) motion to dismiss a complaint alleging its violation of a student’s federal constitutional rights because the WIAA’s “direct influence upon the school’s athletic programs” makes it “clear that the [WIAA is] . . . functioning ‘under color of’ state law.”<sup>14</sup>

After *Brentwood Academy*, in *Bukowski v. Wisconsin Interscholastic Athletic Ass’n*,<sup>15</sup> a Wisconsin court of appeals ruled that the plaintiff did not prove the WIAA is a state actor because he offered no evidence of “extensive entwinement” between the Wisconsin State Board of Education or public schools and the WIAA.<sup>16</sup> The court observed that the WIAA is not a state actor even if it received federal funds, which is alone insufficient to establish state action.<sup>17</sup> However, this unpublished opinion has no precedential authority. Because virtually all Wisconsin public schools with interscholastic athletic programs are a member of the WIAA (and collectively constitute a majority of its members), and their principals and administrators probably are extensively involved in its rule-making and decision-making authority, the WIAA is likely to be judicially found to be a state actor when record evidence of “extensive entwinement” with its member public schools is established.

Wisconsin courts and the Seventh Circuit have expressed a reluctance to interfere judicially with the contractual relationship between a state high school athletic association and its member schools. In *School District of Slinger v. Wisconsin Interscholastic Athletic Ass’n*, a Wisconsin appellate court held that the WIAA’s constitution, bylaws, and rules establish a contract between the WIAA and its member schools.<sup>18</sup> Because these documents gave the WIAA’s Board of Control “unfettered power” with “no effort to limit that authority with

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<sup>12</sup> *Griffin High Sch. v. Ill. High Sch. Ass’n*, 822 F.2d 671, 674 (7th Cir. 1987). See also *Menora v. Ill. High Sch. Ass’n*, 683 F.2d 1030, 1032 (7th Cir. 1982) (IHSA does not contest the district court’s ruling that it is a state actor on appeal, so “there is no issue of state action before us.”).

<sup>13</sup> *Crane v. Ind. High Sch. Athletic Ass’n*, 975 F.2d 1315, 1326 (7th Cir. 1992) (Posner, J., dissenting).

<sup>14</sup> *Leffel v. Wis. Interscholastic Athletic Ass’n*, 398 F. Supp. 749, 750 (E.D. Wis. 1975).

<sup>15</sup> 2007 WI App 1, 298 Wis. 2d 246, 726 N.W.2d 356.

<sup>16</sup> *Id.* at ¶¶ 10–11.

<sup>17</sup> *Id.* at ¶ 11.

<sup>18</sup> 563 N.W.2d 585, 590 (Wis. Ct. App. 1997).

any strict criteria”<sup>19</sup> when aligning athletic conferences, it rejected a member school’s allegation that the Board breached its implied contractual right to a “‘reasonable’” conference affiliation.<sup>20</sup> The court concluded “the WIAA constitution, by-laws and rules on conference realignment do not provide individual members with a contractual right to a ‘reasonable’ conference alignment.”<sup>21</sup>

In *Griffin High School v. Illinois High School Ass’n*,<sup>22</sup> the Seventh Circuit rejected a private, religious school’s claims that the IHSA’s new transfer rules, which bar transfer students from participating in interscholastic athletics for one year unless their parents changed residence from one school district to another, but makes an exception for students who transfer from a private to public school if no undue influence is involved, violate the equal protection and due process clauses.<sup>23</sup> Because the transfer rules are facially neutral and do not burden the free exercise of religion or the right of parents to educate their children, the court applied a rational basis test to both claims.<sup>24</sup> It found the transfer rules rationally furthered the IHSA’s legitimate objective of placing “public schools on an equal footing with private schools with regard to student recruitment, without abandoning the goal of preventing undue influence on transfer students”<sup>25</sup> and do not deny equal protection of the law.<sup>26</sup>

The *Griffin* court concluded the transfer rules do not violate the school’s due process rights:

As an IHSA member, Griffin was free to submit amendments or proposals to the association. It has not done so, and according to the IHSA, Griffin has never attended meetings of the legislative body of the IHSA. Griffin received the process that was due: notice of the proposed regulation and the right to participate in the IHSA decisionmaking [sic] process through fair and democratic procedures.<sup>27</sup>

There are no published federal or state cases resolving disputes between the

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<sup>19</sup> *Id.* at 591.

<sup>20</sup> *Id.* at 588, 591.

<sup>21</sup> *Id.* at 591.

<sup>22</sup> 822 F.2d 671 (7th Cir. 1987).

<sup>23</sup> *Id.* at 673–74.

<sup>24</sup> *Id.* at 674–76.

<sup>25</sup> *Id.* at 675.

<sup>26</sup> *Id.* at 676.

<sup>27</sup> *Id.*

WIAA and high school athletes. There are, however, a few cases in which the Seventh Circuit decided claims brought by high school athletes against the IHSA or IHSAA. Although it is difficult to make any broad generalizations based on such a small number of cases, it is notable that the court recognizes that participation in interscholastic athletics is an important part of a student's high school education and has affirmed the granting of injunctive relief to enable athletic participation in appropriate cases.

*Crane v. Indiana High School Athletic Ass'n* is one of the rare federal appellate court cases finding that a state high school athletic association applied its athlete eligibility rules in an arbitrary and capricious manner in violation of state private association laws.<sup>28</sup> In *Crane*, applying Indiana law, the Seventh Circuit affirmed the district court's permanent injunction prohibiting the Indiana High School Athletic Association (IHSAA) from declaring a student who moved from one divorced parent's residence to the other's residence, thereby requiring him to change public schools, ineligible to play varsity sports at his new school for one year.<sup>29</sup> The decision to have him move to live with his father was made by his parents based on their belief that the move was in his best interests.<sup>30</sup> It was undisputed that this move was not motivated by any athletics reasons.<sup>31</sup> Finding that the rule was "poorly drafted," with important terms "conspicuously undefined," the court determined "the IHSAA is attempting to find definitions for those phrases that will allow it to declare Ryan, and others like him, ineligible—regardless of whether his transfer was athletically motivated."<sup>32</sup> Observing that the student appeared to be eligible pursuant to another part of the rule, it stated, "The IHSAA's inconsistency is aggravated by the fact that it does not publish any type of written opinion or reasoning for its eligibility decisions to member schools."<sup>33</sup> The majority ruled the IHSAA's interpretation and application of its transfer student eligibility rule to the plaintiff was arbitrary and capricious in violation of Indiana law.<sup>34</sup>

*Crane* is significant because it requires state high school athletic association

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<sup>28</sup> 975 F.2d 1315, 1326 (7th Cir. 1992).

<sup>29</sup> *Id.* at 1317–18.

<sup>30</sup> *Id.* at 1317.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1325.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1326. Thus, the majority did not consider "whether the rules run afoul of [federal] equal protection or due process and express[ed] no opinion on these issues," as the district court had ruled. *Id.* In dissent, Judge Posner expressed concern that the majority's ruling based on state private association law would "subject to fish-eyed scrutiny by federal judges applying a vague norm of reasonableness," "every interpretation, every application, of every such rule—that could be thought to interfere with the family, or rather with a particular family." *Id.* at 1327 (Posner, J., dissenting).

eligibility rules to be clear and unambiguous, reasonably interpreted in light of their legitimate objectives, and consistently applied.<sup>35</sup> It also suggests that the governing body's rules, interpretations, and applications should be published to provide guidance to its member schools, students, and parents.<sup>36</sup> Moreover, this case recognizes that "participation in competitive high school athletics ha[s] emotional and psychological benefits that [can] not easily be quantified" and "money damages [may] not adequately compensate [a student] for the lost opportunity to [participate] in the state" championship competition, thereby justifying permanent injunctive relief in appropriate cases.<sup>37</sup>

In *Washington v. Indiana High School Athletic Ass'n*, the Seventh Circuit upheld a preliminary injunction enjoining the IHSAA from enforcing its "eight semester" rule and denying a learning disabled student from playing interscholastic basketball during the second semester of the 1998–1999 school year.<sup>38</sup> Pursuant to this rule, a student is automatically ineligible to participate in any interscholastic sports after eight semesters from his first day of high school enrollment even if the student was not enrolled for the full eight semesters.<sup>39</sup> The plaintiff had temporarily dropped out of high school because of his learning disability during this eight-semester period.<sup>40</sup>

Applying the federal disability discrimination laws,<sup>41</sup> the court concluded an individualized inquiry is necessary to determine if waiver of this rule is a required reasonable accommodation of his learning disability, or a fundamental alteration of its eight semester rule the IHSAA is not required to make.<sup>42</sup> It ruled that permitting the student to play basketball is a reasonable accommodation that would not fundamentally alter the rule's legitimate objectives of "promoting competitive equity, protecting students' safety, creating opportunities for

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<sup>35</sup> See *id.* at 1325. Subsequently, the Seventh Circuit explained that "for a student athlete in public school, membership in IHSAA is not voluntary, and actions of the IHSAA arguably should be held to a stricter standard of judicial review" than those of a private sport governing body that does not have monolithic regulatory authority. *Freeman v. Sports Car Club of Am., Inc.*, 51 F.3d 1358, 1363 (7th Cir. 1995).

<sup>36</sup> See *Crane*, 975 F.2d at 1325.

<sup>37</sup> *Id.* at 1326.

<sup>38</sup> 181 F.3d 840, 842 (7th Cir. 1999).

<sup>39</sup> *Id.* at 852.

<sup>40</sup> *Id.*

<sup>41</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2012); Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (2012).

<sup>42</sup> *Washington*, 181 F.3d at 851–52. This determination is consistent with the Supreme Court's subsequent ruling that a sports governing body's refusal to consider an athlete's personal circumstances "in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001).

younger students,” and ensuring academics are paramount to athletics.<sup>43</sup> The court observed that “waiver of the rule in [plaintiff’s] case has promoted his education” because he “reentered [sic] school because of basketball, has improved his grades in part due to the influence of basketball and his coach, and is even considering going to college.”<sup>44</sup>

On the other hand, the Seventh Circuit has not been as receptive to athletes’ claims that a state high school athletic association violated their federal constitutional rights. In *Menora v. Illinois High School Ass’n*, the panel majority vacated a preliminary injunction prohibiting the IHSA from preventing orthodox Jewish males from playing basketball while wearing yarmulkes on their heads.<sup>45</sup> Adopting a test that balances the students’ religious liberty interests and benefits of playing interscholastic basketball with the IHSA’s safety concerns, it ruled the plaintiffs did not satisfy “the burden of proving that their First Amendment rights were infringed by the [IHSA’s] no-headwear rule,”<sup>46</sup> despite the lack of any documented cases of a fall caused by a falling yarmulke.<sup>47</sup> However, the majority ordered the district court to retain jurisdiction to provide plaintiffs with “an opportunity to propose to the [IHSA] a form of secure head covering that complies with Jewish law yet meets [its] safety concerns.”<sup>48</sup>

Similarly, it is difficult for athletes to prevail on claims asserting that a public high school, which is a state actor, violated their federal constitutional rights. Although public schools must not infringe their due process, equal protection, First Amendment (e.g., freedom of association, expression, and religious liberty), Fourth Amendment (freedom from unreasonable searches), and other protected rights, high school athletes have been successful in relatively few Seventh Circuit or Wisconsin federal district court cases—which is consistent with the sports law jurisprudence of other circuit courts.

Although there is no constitutional liberty or property right to participate in interscholastic sports,<sup>49</sup> in *Butler v. Oak Creek-Franklin School District*,<sup>50</sup> a

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<sup>43</sup> *Washington*, 181 F.3d at 842, 852.

<sup>44</sup> *Id.* at 852.

<sup>45</sup> 683 F.2d 1030, 1031–32, 1036 (7th Cir. 1982).

<sup>46</sup> *Id.* at 1035.

<sup>47</sup> *Id.* at 1034.

<sup>48</sup> *Id.* at 1035. Dissenting, Judge Cudahy concluded the district court “properly resolved the question before him in favor of the plaintiffs” and stated, “[T]he effective foreclosure of the plaintiffs from interscholastic basketball—their schools’ only interscholastic sport—is a significant, if not severe, burden and deprivation.” *Id.* at 1037 (Cudahy, J., dissenting).

<sup>49</sup> *Smith v. Chippewa Falls Area Unified Sch. Dist.*, 302 F. Supp. 2d 953, 957 (W.D. Wis. 2002).

<sup>50</sup> 116 F. Supp. 2d 1038, 1056 (E.D. Wis. 2000) (denying student’s request for a preliminary injunction); 172 F. Supp. 2d 1102, 1128 (E.D. Wis. 2001) (granting and denying in part school’s motion for summary judgment).



Wisconsin federal court recognized that “the opportunity to participate in high school extracurricular activities is a valuable part of a complete educational experience.”<sup>51</sup> It found a “reasonable likelihood” that a student who was allowed to participate in high school athletics “had a legitimate expectation—and thus an entitlement—created by independent state sources, of being allowed to continue participating so long as he adhered to the terms of the [school’s] Athletic Code and other pertinent rules and regulations.”<sup>52</sup> Thus, the student has a property right in continued sports participation that can be taken away only if a public school provides appropriate due process.<sup>53</sup>

*Butler* upheld the authority of high schools to sanction athletes for misconduct outside of school hours and off campus, if necessary, to maintain appropriate standards of conduct and student decorum.<sup>54</sup> It establishes a comprehensive framework for analyzing whether a school has satisfied the procedural due process requirements to prevent a student from participating in interscholastic athletics as a disciplinary sanction for violating its athletic code and other applicable rules.<sup>55</sup> Prior to suspending a student from athletic participation, a school must provide notice of the specific rule and conduct that violates it,<sup>56</sup> as well as “the opportunity to give his side of the story,” although a hearing is not required.<sup>57</sup> After a suspension from participation in athletics, “a prompt hearing and a prompt decision without appreciable delay”<sup>58</sup> before an impartial decision-maker is required.<sup>59</sup> The court held that the participation of the school’s athletic director, who had imposed the suspension, in the deliberations of the Coaches’ Council, which had conducted the hearing, violated due process.<sup>60</sup> The hearing body’s decision must be based on evidence proving it was, at least, more likely than not the student violated the particular rule,<sup>61</sup> which, according

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<sup>51</sup> *Butler*, 116 F. Supp. 2d at 1050.

<sup>52</sup> *Id.* at 1049.

<sup>53</sup> *Id.* at 1045, 1049.

<sup>54</sup> *Id.* at 1056.

<sup>55</sup> *Id.* at 1050–55.

<sup>56</sup> *Butler v. Oak Creek Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1112 (citing *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 658 (W.D. Tex. 2000)).

<sup>57</sup> *Butler*, 116 F. Supp.2d at 1051–52.

<sup>58</sup> *Id.* at 1053.

<sup>59</sup> *Butler*, 172 F. Supp. 2d at 1115–16.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1119. Implicitly applying these requirements, another Wisconsin federal court concluded,

The undisputed facts establish that plaintiff was afforded procedural due process. He was allowed to engage in “give-and-take” with the school administrators investigating his case at the initial investigation stage and at all levels of appeal provided for in the athletic code.

to the court, must be more than simply being arrested, pleading no contest, or remaining silent about the charged offense.<sup>62</sup> Even if the student admits the rule violation, he must be given an opportunity to be heard regarding the appropriate discipline and any mitigating factors justifying a reduction in the length of suspension from athletic participation.<sup>63</sup>

Public schools cannot violate substantive due process by requiring a student to forego a constitutionally protected liberty interest in order to participate in interscholastic athletics. However, only fundamental liberty rights such as those expressly enumerated in the Constitution's Bill of Rights and a limited category of non-enumerated rights will trigger more than rational basis judicial scrutiny.<sup>64</sup> For example, in *Hayden ex rel. A.H. v. Greensburg Community School Corp.*,<sup>65</sup> the Seventh Circuit ruled that, although "the manner in which [a student] wears his hair is a cognizable aspect of personal liberty . . . [It] is not a fundamental right."<sup>66</sup> Therefore, a high school's hair policy for athletes is subject to only very deferential rational basis judicial scrutiny.<sup>67</sup>

Although high school athletes have privacy rights that constitute a liberty interest protected by the Due Process Clause, as well as the Fourth Amendment's prohibition of unreasonable searches and seizures, the Seventh Circuit has ruled they have a diminished expectation of privacy, which gives public schools significant latitude in implementing drug testing programs. In *Schail v. Tippecanoe County School Corp.*, the Seventh Circuit upheld random, suspicionless testing for recreational drugs as a condition of participation in interscholastic athletics.<sup>68</sup> The court determined that suspicionless taking and testing of athletes' urine along with limited disclosure to school officials implicated

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Defendants presented the evidence upon which they reached their determination and plaintiff was permitted to respond to that evidence and to give his own version of the facts. Although plaintiff may believe that defendants' athletic code is draconian, nothing in the undisputed facts supports an inference that defendants' decision to suspend plaintiff from athletic competition was arbitrary and capricious, as plaintiff argues.

Smith v. Chippewa Falls Area Unified Sch. Dist., 302 F. Supp. 2d 953, 958 (W.D. Wis. 2002).

<sup>62</sup> *Butler*, 172 F. Supp. 2d at 1123–27.

<sup>63</sup> *Id.* at 1113–15.

<sup>64</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (The Supreme Court has characterized "the rights to marry, . . . to have children, . . . to direct the education and upbringing of one's children, . . . to marital privacy, . . . to use contraception, . . . to bodily integrity, . . . and to abortion" as fundamental liberty rights.).

<sup>65</sup> 743 F.3d 569 (7th Cir. 2014).

<sup>66</sup> *Id.* at 575–76.

<sup>67</sup> *Id.* at 576.

<sup>68</sup> 864 F.2d 1309, 1310, 1324 (7th Cir. 1988).

their privacy interests, but “‘communal undress’ inherent in athletic participation,” required physical exams, and extensive regulation of interscholastic sports creates “reduced expectations of privacy.”<sup>69</sup> The school’s interests in protecting athletes’ health and safety outweighed this limited infringement of their privacy rights.<sup>70</sup> According to the court, “[b]ecause of their high visibility and leadership roles, it is not unreasonable to single out athletes . . . for special attention with respect to drug usage,”<sup>71</sup> which does not violate their due process and Fourth Amendment rights. Applying a similar balancing test, the Supreme Court subsequently upheld the constitutionality of random drug testing of high school athletes for recreational drugs.<sup>72</sup>

The Seventh Circuit and Wisconsin courts have rejected athletes’ equal protection claims against public school districts alleging unequal treatment of individuals on the playing field. In *O’Connor v. Board of Education*,<sup>73</sup> the Seventh Circuit held that athletic conference rules requiring separate teams for boys and girls in contact sports does not violate the equal protection rights of a girl who wanted to play on the boys’ team.<sup>74</sup> It determined that “[s]eparate but equal” teams are substantially related to the important governmental objective of maximizing interscholastic sports participation by both genders.<sup>75</sup> In *N.T. ex rel. Tabbert v. School District of Westfield*,<sup>76</sup> a Wisconsin federal district court rejected the claim of a female basketball player that her coach’s yelling at her more than other girls on the team and benching her violated her equal protection rights.<sup>77</sup> Applying rational basis standard, because no gender discrimination was alleged, the court upheld the coach’s discretionary decisions regarding “how best to coach her team” and to achieve her legitimate goal of winning games rather than giving each member the same amount of playing time.<sup>78</sup>

By contrast, courts have been more receptive to challenges to rules regulating athletes’ off-field conduct that results in gender discrimination. In *Hayden v. Greenburg Community School Corp.*, the Seventh Circuit held the boys’ basketball coach’s hair-length policy, which required boys to have shorter hair than

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<sup>69</sup> *Id.* at 1318.

<sup>70</sup> *Id.* at 1321.

<sup>71</sup> *Id.* at 1320.

<sup>72</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 650, 652–53, 665 (1995).

<sup>73</sup> 645 F.2d 578 (7th Cir. 1981).

<sup>74</sup> *Id.* at 579, 582.

<sup>75</sup> *Id.* at 581.

<sup>76</sup> No. 11–CV–00556, 2013 WL 1191903 (E.D. Wis. Mar. 21, 2013).

<sup>77</sup> *Id.* at \*4–5.

<sup>78</sup> *Id.*

players on the girls' basketball team, violated the boys' equal protection rights.<sup>79</sup> The coach's policy imitated the one established by legendary basketball coach John Wooden and required boys' hair to be cut above the collar, ears, and eyebrows to promote team unity and a "clean cut" image.<sup>80</sup> The court characterized this policy, which burdened boys more than girls, as a form of gender discrimination that requires an "exceedingly persuasive" justification (i.e., important interest) that is substantially furthered by the policy.<sup>81</sup> Although "sex-differentiated standards consistent with community norms . . . part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike"<sup>82</sup> would satisfy this standard, the panel majority found "no rational, let alone exceedingly persuasive, justification . . . for restricting the hair length of male athletes alone."<sup>83</sup>

Following other courts,<sup>84</sup> the Seventh Circuit has held that unequal treatment of female high school athletes compared to boys playing the same sport may violate Title IX's prohibition against gender discrimination in athletic programs offered by schools receiving federal funds.<sup>85</sup> In *Parker v. Franklin County Community School Corp.*,<sup>86</sup> the court ruled that several Indiana public high schools' longstanding tradition of scheduling significantly more boys' varsity basketball games on weekend nights than girls' basketball games is substantial enough to deny equal athletic opportunities on a program-wide basis by

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<sup>79</sup> 743 F.3d 569, 572, 582 (7th Cir. 2014).

<sup>80</sup> *Id.* at 572, 584.

<sup>81</sup> *Id.* at 579–80, 582.

<sup>82</sup> *Id.* at 581.

<sup>83</sup> *Id.* at 582. It observed that the challenged "policy prohibits far more than an Age-of-Aquarius, Tiny-Tim, hair-crawling-past-the-shoulders sort of hair style—it compels all male basketball players to wear genuinely short hair," and that "one or two men on this court might find themselves in trouble with [the coach] for hair over the ears." *Id.* at 581–82. Dissenting, Judge Manion observed that the school's athletic code provision regarding hair styles is the same for all female and male athletes except for hair length, and that "[r]equiring men, but not women, to keep their hair at a certain length has never been held to be unequally burdensome." *Id.* at 586 (Manion, J., dissenting).

<sup>84</sup> *McCormick ex rel. Geldwert v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 280, 302 (2d Cir. 2004) (season scheduling decisions that deprived girls, but not boys, of opportunity to compete in regional and state championships violated Title IX); *Cmtys. for Equity v. Mich High Sch. Athletic Ass'n*, 178 F.Supp.2d 805, 807, 851 (W.D. Mich. 2001), *aff'd on appeal*, 459 F.3d 676, 695 (6th Cir. 2006) (high school athletic association violated equal protection rights of female student-athletes by scheduling athletic seasons and tournaments for girls' sports during less advantageous times of academic year than boys' athletic seasons).

<sup>85</sup> *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910 (7th Cir. 2012). *See also* Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2013).

<sup>86</sup> *See generally Parker*, 667 F.3d 910.

disadvantaging girls basketball players, absent any offsetting, comparably better treatment of female athletes than male athletes in any other aspects of their athletic programs.<sup>87</sup> For example, during the 2009–10 season, 95% of the boys' games, but only 53% of the girls' games, were scheduled on Friday and Saturday nights, which attracted much larger crowds, accompanied by cheerleaders and the pep band in an exciting, supportive environment.<sup>88</sup> This disparity negatively impacted the girls' basketball players, resulting in disproportionate academic burdens (i.e., less time to do homework), a smaller audience of spectators, and feelings of inferiority because of their much larger number of weekday games.<sup>89</sup> The court recognized “these harms are not insignificant and may have the effect of discouraging girls from participating in sports in contravention of the purposes of Title IX.”<sup>90</sup>

### III. COLLEGE SPORTS

There is a dearth of significant Wisconsin cases regarding intercollegiate athletics, but the Seventh Circuit has decided several important cases that define the legal relationship between a university and its student-athletes as well as apply federal civil rights (e.g., Title IX, Rehabilitation Act of 1972) and antitrust laws to college sports.

Consistent with other jurisdictions,<sup>91</sup> in *Ross v. Creighton University*,<sup>92</sup> the Seventh Circuit recognized there is a contractual relationship between a university and its student-athletes consisting of written and oral promises that may be both express and implied.<sup>93</sup> Applying Illinois law, the court ruled that a student-athlete alleging a breach of contract claim “must point to an identifiable . . . promise” the university failed to honor.<sup>94</sup> Although a university's decision to admit an academically deficient student-athlete and the general quality of education it provides are not subject to judicial review for policy reasons,<sup>95</sup> the court

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<sup>87</sup> *Id.* at 914, 922, 924.

<sup>88</sup> *Id.* at 914.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 923.

<sup>91</sup> *See, e.g.*, *Jackson v. Drake Univ.*, 778 F. Supp. 1490, 1493 (S.D. Iowa 1991); *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. App. 1972).

<sup>92</sup> 957 F.2d 410 (7th Cir. 1992).

<sup>93</sup> *Id.* at 416–17 (citing *Zumbrun v. Univ. of Southern Cal.*, 101 Cal. Rptr. 499, 504 (1972); *Wickstrom v. N. Idaho Coll.*, 725 P.2d 155, 157 (Idaho 1986)).

<sup>94</sup> *Id.* at 416–17.

<sup>95</sup> *Id.* at 415. The court observed there is no “satisfactory standard of care by which to evaluate an educator,” “inherent uncertainties . . . about the cause and nature of damages,” a potential “flood of litigation against schools,” and concern about judicial oversight of “the day-to-day operations of

concluded a university's alleged failure to perform a promised service states a breach of contract claim:

We read Mr. Ross' complaint to allege more than a failure of the University to provide him with an education of a certain quality. Rather, he alleges that the University knew that he was not qualified academically to participate in its curriculum. Nevertheless, it made a specific promise that he would be able to participate in a meaningful way in that program because it would provide certain specific services to him. Finally, he alleges that the University breached its promise by renegeing on its commitment to provide those services and, consequently, effectively cutting him off from *any* participation in and benefit from the University's academic program. To adjudicate such a claim, the court would not be required to determine whether Creighton had breached its contract with Mr. Ross by providing *deficient* academic services. Rather, its inquiry would be limited to whether the University had provided any real access to its academic curriculum at all.<sup>96</sup>

Ross, however, cautioned that "courts should not 'take on the job of supervising the relationship between colleges and student-athletes or creating in effect a new relationship between them.'"<sup>97</sup> This view is consistent with general reluctance of courts to expand the nature and scope of contractual obligations a university owes to student-athletes beyond the express terms of an athletic scholarship and any specific oral promises it has made.<sup>98</sup>

When applying federal civil rights statutes, the Seventh Circuit has been very deferential to the authority of a university to operate its intercollegiate athletics program and to determine the individual sports it offers as well as the eligibility requirements for its student-athletes.

As have all other federal appellate courts,<sup>99</sup> the Seventh Circuit has rejected claims that elimination of male intercollegiate teams violates Title IX and

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schools." *Id.* at 414 (citations omitted).

<sup>96</sup> *Id.* at 417.

<sup>97</sup> *Id.* (citation omitted).

<sup>98</sup> See, e.g., Jackson v. Drake Univ., 778 F. Supp. 1490, 1493 (S.D. Iowa 1991) (Student-athlete's "financial aid agreements do not implicitly contain a right to play basketball.").

<sup>99</sup> See, e.g., Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615–16 (6th Cir. 2002); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048–49 (8th Cir. 2002) (quoting *Neal*, 198 F.3d at 769–70); *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999)).

denies equal protection of the law. In *Kelley v. Board of Trustees, University of Illinois*,<sup>100</sup> the Seventh Circuit upheld the University of Illinois' decision to eliminate its men's swimming team (as well as two other men's teams and one women's team) for budgetary reasons and to comply with Title IX's requirement that equal athletic participation opportunities be provided for both genders.<sup>101</sup> It found that eliminating the men's swimming team does not violate Title IX because men's intercollegiate athletic participation opportunities at the university would continue to be more than substantially proportionate to their undergraduate enrollment.<sup>102</sup> On the other hand, the court concluded the university's decision to retain its women's swimming program is a valid, reasonable response necessary to ensure women have substantially proportionate athletic participation opportunities pursuant to Title IX.<sup>103</sup> The court ruled that cutting men's sports to comply with Title IX does not deny male athletes equal protection of the law because remedying discrimination in the provision of intercollegiate athletic participation opportunities is an important government objective that is furthered by complying with Title IX's substantial proportionality compliance test.<sup>104</sup>

Rejecting the male athletes' assertion that Title IX requires athletic participation opportunities for the underrepresented gender to be increased rather than reducing those for the overrepresented gender, the Seventh Circuit explained:

Title IX's stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex. And the remedial scheme established by Title IX and the applicable regulation and policy interpretation are clearly substantially related to this end.<sup>105</sup>

Similarly, in *Boulahanis v. Board of Regents*, the Seventh Circuit held that Illinois State University's elimination of its men's wrestling and soccer teams solely to comply with Title IX by providing substantially proportionate

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<sup>100</sup> 35 F.3d 265 (7th Cir. 1994).

<sup>101</sup> *Id.* at 269–72.

<sup>102</sup> *Id.* at 270.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 272–73.

<sup>105</sup> *Id.* at 272.

athletic participation opportunities for both its female and male students does not constitute prohibited gender discrimination.<sup>106</sup> Rejecting plaintiffs' attempt to distinguish *Kelley* on the ground there is a legally dispositive difference between eliminating athletic teams for financial reasons rather than gender, the court stated:

That distinction ignores the fact that a university's decision as to which athletic programs to offer necessarily entails budgetary considerations. . . . To say that one decision is financial, while another is sex-based, assumes that these two aspects can be neatly separated. They cannot. . . . Ultimately, both the decision of the University in this case and the decision of the University of Illinois at issue in *Kelley* were based on a combination of financial and sex-based concerns that are not easily distinguished.<sup>107</sup>

In *Knapp v. Northwestern University*,<sup>108</sup> the Seventh Circuit ruled that a university has valid authority to establish reasonable medical eligibility requirements that its student-athletes must satisfy as a condition of being eligible to participate in its intercollegiate athletics program.<sup>109</sup> In a landmark case applying the Rehabilitation Act of 1973 to college athletics, the court held that requiring student-athletes to be medically cleared by a university's team physician is a legitimate physical qualification for participation in intercollegiate sports.<sup>110</sup> Northwestern University refused to permit a student who had suffered cardiac arrest while playing competitive basketball and was medically disqualified by its team physician from playing on its intercollegiate basketball team.<sup>111</sup>

Although other physicians medically cleared him to play intercollegiate basketball, the Seventh Circuit concluded that the university's decision does not violate the Rehabilitation Act, which permits a person with a physical disability to be excluded from participation in an activity to prevent "a significant risk of personal physical injury."<sup>112</sup> The court characterized its judicial role narrowly:

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<sup>106</sup> 198 F.3d 633, 636–38 (7th Cir. 1999).

<sup>107</sup> *Id.* at 637.

<sup>108</sup> 101 F.3d 473 (7th Cir. 1996).

<sup>109</sup> *Id.* at 482 (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 407 (1979)).

<sup>110</sup> *Id.* at 484.

<sup>111</sup> *Id.* at 476–77.

<sup>112</sup> *Id.* at 483 (citing *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991); *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619, 622 (9th Cir. 1982)).



“[I]n the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court’s place is to ensure that the exclusion or disqualification . . . was individualized, reasonably made, and based upon competent medical evidence.”<sup>113</sup> The court explained that “medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations.”<sup>114</sup> However, it stated, “[W]e are *not* saying Northwestern’s decision necessarily is the right decision,” and acknowledged, “all universities need not evaluate risk the same way.”<sup>115</sup>

Consistent with other federal appellate courts,<sup>116</sup> the Seventh Circuit has given the National Collegiate Athletic Association (NCAA) broad latitude to preserve the “amateur” nature of intercollegiate athletics by holding that student-athlete eligibility rules are per se legal and do not violate federal antitrust law. In *Banks v. NCAA*, the majority rejected an antitrust challenge to two NCAA amateurism rules that render college football players ineligible if they declare for the NFL draft or agree to be represented by an agent in the sport of football.<sup>117</sup> It affirmed the dismissal of the complaint because it did not allege the rule had anti-competitive effects in an identifiable relevant market.<sup>118</sup> Finding that “the no-draft rule and other like NCAA regulations preserve the bright line of demarcation between college and ‘play for pay’ football,”<sup>119</sup> the majority concluded:

The no-draft rule has no more impact on the market for college football players than other NCAA eligibility requirements such as grades, semester hours carried, or requiring a high school diploma. They all constitute eligibility requirements essential to participation in NCAA sponsored amateur athletic competition. . . . Banks’ allegation that the no-draft rule restrains trade

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<sup>113</sup> *Id.* at 485.

<sup>114</sup> *Id.* at 484.

<sup>115</sup> *Id.* at 485.

<sup>116</sup> *See, e.g.,* *Smith v. NCAA*, 139 F.3d 180, 185–87 (3d Cir. 1998); *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988). *But see* *O’Bannon v. NCAA*, No. C 09–3329 CW, 2014 WL 3899815, at \*7, \*37 (N.D. Cal. Aug. 8, 2014) (evidencing the first federal case invalidating a NCAA amateur eligibility rule, specifically a prohibition against student-athletes’ receiving a share of licensing and broadcasting revenues from products incorporating their likenesses on a group basis, because it violates antitrust law).

<sup>117</sup> 977 F.2d 1081, 1083–84, 1093–94 (7th Cir. 1992).

<sup>118</sup> *Id.* at 1094.

<sup>119</sup> *Id.* at 1090 (citation omitted).

is absurd. None of the NCAA rules affecting college football eligibility restrain trade in the market for college players because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education.<sup>120</sup>

However, Judge Flaum, who vigorously dissented in *Banks*, and other Seventh Circuit judges<sup>121</sup> expressed a willingness to characterize NCAA student-athlete eligibility rules as commercial restraints subject to antitrust scrutiny:

If the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft before their eligibility expired, and return if things didn't work out, would be more attractive to athletes than colleges that declined to offer the same opportunity. The no-draft rule eliminates this potential element of competition among colleges, the purchasers of labor in the college football labor market. It categorically rules out a term of employment that players, the suppliers of labor in that market, would find advantageous.<sup>122</sup>

Nevertheless, even if they are deemed to be commercial in nature, the Seventh Circuit recently reaffirmed its view that NCAA student-athlete eligibility rules are valid as a matter of law for purposes of antitrust law. In *Agnew v. NCAA*,<sup>123</sup> Judge Flaum, writing for a unanimous panel, stated:

A certain amount of collusion in college [sports] is permitted because it is necessary for the product to exist. Accordingly, when an NCAA bylaw is clearly meant to help maintain the

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<sup>120</sup> *Id.* at 1089–90.

<sup>121</sup> *See e.g.*, *United States v. Walters*, 997 F.2d 1219, 1225 (7th Cir. 1993).

The NCAA depresses athletes' income—restricting payments to the value of tuition, room, and board, while receiving services of substantially greater worth. The NCAA treats this as desirable preservation of amateur sports; a more jaundiced eye would see it as the use of monopsony power to obtain athletes' services for less than the competitive market price.

*Id.*

<sup>122</sup> *Banks*, 977 F.2d at 1095 (citations omitted).

<sup>123</sup> 683 F.3d 328 (7th Cir. 2012).

“revered tradition of amateurism in college sports” or the “preservation of the student-athlete in higher education,” the bylaw will be presumed procompetitive, since we must give the NCAA “ample latitude to play that role.”<sup>124</sup>

*Agnew* distinguished NCAA limits on length of athletic scholarships and caps on the number a college team may grant, which it characterized as commercial restraints that are not presumptively procompetitive, from student-athlete eligibility rules:

For the purposes of college sports, and in the name of amateurism, we consider players who receive nothing more than educational costs in return for their services to be “unpaid athletes.” It is for this reason, though, that the prohibition against multi-year scholarships does not implicate the preservation of amateurism, for whether or not a player receives four years of educational expenses or one year of educational expenses, he is still an amateur. It is not until payment above and beyond educational costs is received that a player is considered a “paid athlete.” . . . The NCAA's limitation on athlete compensation *beyond* educational expenses . . . directly advances the goal of maintaining a “clear line of demarcation between intercollegiate athletics and professional sports,” . . . and thus is best categorized as an eligibility rule aimed at preserving the existence of amateurism and the student-athlete.<sup>125</sup>

#### IV. PROFESSIONAL SPORTS

The Seventh Circuit and the Wisconsin Supreme Court have decided several important cases involving the professional sport industry, some of which have established leading precedents; whereas, a few have been reversed by the United States Supreme Court. Although it is difficult to make broad generalizations because these cases consider several different bodies of law, their respective professional sports law jurisprudence appears to be fairly conservative in that it is supportive of private sport governing body autonomy, as well as direct state regulation of professional

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<sup>124</sup> *Id.* at 342–43 (quoting *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984) (the only Supreme Court case applying federal antitrust law to the NCAA)).

<sup>125</sup> *Id.* at 344–45 (quoting *Banks*, 977 F.2d at 1089).

sports and sports-specific state legislation. On the other hand, these courts generally have demonstrated a reluctance to use general federal statutes such as the Americans with Disabilities Act of 1990 (ADA)<sup>126</sup> and the Sherman Act<sup>127</sup> to regulate professional sports.

Because professional sports leagues and governing bodies are private associations, the Seventh Circuit has held they should be given substantial latitude in governing their internal affairs, which justifies very deferential judicial review of their rules and decisions that are challenged by league clubs and individual members of the association. In *Charles O. Finley v. Kuhn*,<sup>128</sup> the Seventh Circuit upheld the authority of Major League Baseball (MLB) Commissioner Bowie Kuhn to disapprove the sale of three Oakland Athletics player contracts to the Boston Red Sox and New York Yankees, which he found to be “not in the best interests of baseball,” primarily because these transactions harmed the Oakland club and lessened competitive balance among MLB teams “through the buying of success by the more affluent clubs,” such as the Red Sox and Yankees.<sup>129</sup> Finding the MLB clubs had given Commissioner Bowie Kuhn contractually broad authority to take action and make decisions, which in his sole judgment, are consistent with the best interests of baseball, it concluded “[w]hether he was right or wrong is beyond the competence and the jurisdiction of this court to decide.”<sup>130</sup> Observing that the judiciary generally “will not intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations,”<sup>131</sup> the court created two exceptions in which judicial review and relief is appropriate: “[1] [W]here the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association and [2] where the association has failed to follow the basic rudiments of due process of law.”<sup>132</sup>

In *Olinger v. United States Golf Ass’n*, the Seventh Circuit rejected the claim of a professional golfer, whose degenerative medical condition significantly impaired his ability to walk, that the United States Golf Association’s (USGA) refusal to allow him ride in a golf cart during the United States Open golf tournament violates the ADA.<sup>133</sup> The official rules of golf do not prohibit

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<sup>126</sup> 42 U.S.C. §§ 12101–12134 (2012).

<sup>127</sup> 15 U.S.C. §§ 1–7 (2012).

<sup>128</sup> 569 F.2d 527 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).

<sup>129</sup> *Id.* at 531–32.

<sup>130</sup> *Id.* at 539–40.

<sup>131</sup> *Id.* at 542 (quoting *Am. Fed’n of Technical Eng’rs v. La Jeunesse*, 347 N.E.2d 712, 715 (Ill. 1976)).

<sup>132</sup> *Id.* at 544.

<sup>133</sup> 205 F.3d 1001, 1001, 1007 (7th Cir. 2000).

the use of golf carts and permit tournament competition organizers to determine whether to permit their use, which the USGA declined to do.<sup>134</sup> Although the ADA requires that “reasonable modifications” be made to enable physically disabled athletes such as the plaintiff to participate in a sport, modifications that would “fundamentally alter” the sport are not required.<sup>135</sup> Determining “that physical and mental fatigue and a uniform set of rules for all golfers are integral parts of championship-level golf,”<sup>136</sup> the court ruled that requiring the USGA to allow plaintiff to use a cart would fundamentally alter the nature of the United States Open golf tournament, which the ADA does not require.<sup>137</sup> The panel reasoned “the decision on whether the rules of the game should be adjusted to accommodate [the plaintiff] is best left to those who hold the future of golf in trust.”<sup>138</sup>

*Charles O. Finley* is a landmark case establishing the narrow scope of judicial review under the state common law of private associations,<sup>139</sup> which has been frequently cited and followed by courts in other jurisdictions.<sup>140</sup> However, *Olinger* subsequently was effectively overruled by *PGA Tour, Inc. v. Martin*.<sup>141</sup> In *Martin*, the Supreme Court determined that, according to the rules of golf, walking is not an essential part of even championship golf competitions, so the use of carts would not necessarily constitute a fundamental alteration of the game.<sup>142</sup> It ruled that an individualized determination must be made by the sport’s governing body to determine whether permitting a physically disabled golfer would provide a competitive advantage, thereby fundamentally altering a championship golf tournament.<sup>143</sup>

The Seventh Circuit and the Wisconsin Supreme Court have been similarly deferential regarding the authority of state administrative bodies to directly regulate professional sports and state legislatures to enact statutes that benefit professional sports organizations.

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<sup>134</sup> *Id.* at 1003.

<sup>135</sup> 42 U.S.C. § 12182(b)(2)(A)(ii) (2012).

<sup>136</sup> *Olinger*, 205 F.3d at 1006.

<sup>137</sup> *Id.*; 42 U.S.C. § 12182(b)(2)(A)(ii).

<sup>138</sup> *Olinger*, 205 F.3d at 1007.

<sup>139</sup> See generally *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).

<sup>140</sup> See generally *Crouch v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 845 F.2d 397 (2nd Cir. 1998); *Oakland Raiders v. NFL*, 32 Cal. Rptr. 3d 266 (Cal. Ct. App. 2005).

<sup>141</sup> 532 U.S. 661 (2001).

<sup>142</sup> *Id.* at 666 n.3, 685, 689 (citing U.S. Golf Ass’n, *Rules and Decisions*, USGA, <http://www.usga.org/Rule-Books/Rules-of-Golf/Appendix-I/> (Dec. 2, 2014)).

<sup>143</sup> *Id.* at 688.

In *Dimeo v. Griffin*,<sup>144</sup> a 7–4 en banc decision, the Seventh Circuit upheld random, suspicionless testing of jockeys, harness racing drivers, and other participants in horse racing for recreational drugs.<sup>145</sup> The majority rejected these parties’ contention that the Illinois Racing Board’s drug testing policy violated the Fourth Amendment’s prohibition against unreasonable search and seizures.<sup>146</sup> It concluded the Board has a substantial interest in protecting the safety of these participants who may be injured or killed in accidents caused by illegal drug use, as well as preventing potential lost state tax revenues if public interest and betting in horse racing declined because jockeys and other participants were using drugs and causing adverse perceptions of the fairness of races.<sup>147</sup> Despite “no proven cases of lethal or other serious accidents caused by drug-using horse-race participants, or any other public scandals resulting from such use,”<sup>148</sup> they ruled that the Board’s interests outweighed “the *incremental* loss of privacy”<sup>149</sup> imposed on the plaintiffs, who are participants in “a heavily regulated activity”<sup>150</sup> that could be subjected to frequent medical exams to ensure their health and safety.<sup>151</sup>

In *Libertarian Party of Wisconsin v. State*,<sup>152</sup> the Wisconsin Supreme Court upheld the constitutionality of the Stadium Act, a state statute permitting the establishment of local baseball park districts in any county with a population in excess of 500,000 and contiguous counties and authorizing them to build, finance, and operate professional baseball stadia.<sup>153</sup> Only Milwaukee County, where the Milwaukee Brewers played their games, and surrounding counties were within the class created by this legislation.<sup>154</sup> A key issue for purposes of determining its constitutionality was “whether the legislation creating local baseball park districts satisfies the public purpose doctrine,” not “whether the game of baseball or the Milwaukee Brewers serve a public purpose.”<sup>155</sup> The

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<sup>144</sup> 943 F.2d 679 (7th Cir. 1991).

<sup>145</sup> *Id.* at 680–81, 685.

<sup>146</sup> *Id.* at 685.

<sup>147</sup> *Id.* at 683.

<sup>148</sup> *Id.* at 684.

<sup>149</sup> *Id.* at 683.

<sup>150</sup> *Id.* at 681.

<sup>151</sup> *Id.* at 682. The dissenting judges noted “there is not the slightest evidence of drug-related accidents in this horse-racing case” and expressed “doubt that preventing the worst horse race accident in history would justify setting aside the Constitution.” *Id.* at 688–89 (Wood, J., dissenting). They lamented, “It is too bad we cannot ask the horses about horse racing, but they are not talking.” *Id.* at 691.

<sup>152</sup> 546 N.W.2d 424 (Wis. 1996).

<sup>153</sup> *Id.* at 428, 440.

<sup>154</sup> *Id.* at 429.

<sup>155</sup> *Id.* at 433.

Wisconsin legislature's purpose was "to promote the recreational opportunities that flow from an economically viable professional baseball team and economic development associated with baseball."<sup>156</sup> The court stated the legislature's opinion regarding "what constitutes a public purpose . . . must be given great weight,"<sup>157</sup> and its determination should be judicially overruled only if "manifestly arbitrary or unreasonable."<sup>158</sup> It followed the view adopted by a majority of other jurisdictions and held "the fact that a private entity such as the Brewers will benefit from the Stadium Act does not destroy [its] predominant public purpose."<sup>159</sup>

Both the Wisconsin Supreme Court and the Seventh Circuit have made significant contributions to the development of professional sports antitrust law jurisprudence, one of the most important forms of public law regulation of the professional sports industry.

In *State v. Milwaukee Braves, Inc.*,<sup>160</sup> the Wisconsin Supreme Court broadly construed the scope of professional baseball's antitrust immunity to include state antitrust law as well as federal antitrust law,<sup>161</sup> which was subsequently confirmed by *Flood v. Kuhn*.<sup>162</sup> Despite concluding that the refusal of the National League and the failure of the American League to put a replacement team in Milwaukee when the Braves moved to Atlanta is a concerted refusal to deal in violation of Wisconsin antitrust law, the majority ruled that the United States Constitution precluded its application.<sup>163</sup> Some of its members concluded it would violate the Supremacy Clause because "application and enforcement of a state antitrust law to decisions of the league as to the location of franchises and membership in the league would conflict with the national policy in this segment of interstate commerce"<sup>164</sup> based on United State Supreme Court precedent that professional baseball is immune from federal antitrust law.<sup>165</sup> Others determined that doing so would violate the Commerce Clause because "the

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<sup>156</sup> *Id.* at 431.

<sup>157</sup> *Id.* at 433–34 (citing *State ex rel. Warren v. Reuter*, 170 N.W.2d 790, 794 (Wis. 1969)).

<sup>158</sup> *Id.* at 435 (quoting *State ex rel. Hammermill Paper Co. v. La Plante*, 205 N.W.2d 784, 798 (Wis. 1973)).

<sup>159</sup> *Id.* at 434.

<sup>160</sup> 144 N.W.2d 1 (Wis. 1966).

<sup>161</sup> *Id.* at 18.

<sup>162</sup> 407 U.S. 258, 284–85 (1972) (State antitrust regulation of baseball would conflict with federal antitrust law immunity and burden interstate commerce, thereby violating the Supremacy and Commerce Clauses.).

<sup>163</sup> *Milwaukee Braves*, 144 N.W.2d at 7, 18.

<sup>164</sup> *Id.* at 17.

<sup>165</sup> See *Toolson v. N. Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953); *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

structure of the leagues, their decisions as to their own membership, location of franchises, and things of that nature, require uniformity of regulation, and since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress.”<sup>166</sup>

In *United States Trotting Ass’n v. Chicago Downs Ass’n*, the Seventh Circuit followed other federal appellate courts applying the rule of reason to challenged sports industry rules and internal regulation under Section 1 of the Sherman Act, which prohibits agreements that unreasonably restrain interstate trade.<sup>167</sup> It reversed the district court’s ruling that threats by the United States Trotting Association (USTA), a horse racing record keeping and rule-making organization, to impose sanctions on its members who raced horses at two tracks that were receiving the benefits of its services without paying for them is a *per se* illegal group boycott.<sup>168</sup> The panel concluded that the more flexible rule of reason, which balances the anticompetitive and procompetitive effects of the challenged restraint on a case-by-case basis, generally should be applied.<sup>169</sup> It adopted the position of other circuit courts, recognizing that “in organized sports ‘interdependence,’ ‘cooperation,’ and at least ‘a few rules are essential to survival;’”<sup>170</sup> therefore, sports industry restraints should not be presumed to be *per se* illegal.<sup>171</sup> The Seventh Circuit noted that preventing free-riding may be a procompetitive justification necessary to cover the costs of effective internal sports industry regulation.<sup>172</sup>

There are two noteworthy Seventh Circuit antitrust cases applying Section 1 to the rules and collective decisions of a major professional sports league that allegedly restrain trade among its member clubs. An important threshold issue is whether league clubs are separate economic entities whose collective action is subject to Section 1, or whether a sports league and its members are an economically integrated single business enterprise whose conduct is not covered by Section 1 (i.e., the “single entity defense”). Contrary to other circuit courts,<sup>173</sup>

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<sup>166</sup> *Milwaukee Braves*, 144 N.W.2d at 18 (citing *Graves v. N.Y. ex rel. O’Keefe*, 306 U.S. 466, 479 n.1 (1939)). The dissenting judges “conclude[d] there is neither federal pre-emption of the Wisconsin law nor is the remedy sought by the State of Wisconsin [(movement of the Braves back to Milwaukee or placement of an expansion baseball club in Milwaukee)] of a nature that [it] will burden interstate commerce.” *Id.* at 18–19 (Heffernan, J., dissenting).

<sup>167</sup> 665 F.2d 781, 790 (7th Cir. 1981).

<sup>168</sup> *Id.* at 783–85, 790–91.

<sup>169</sup> *Id.* at 787–88, 790.

<sup>170</sup> *Id.* at 789–90 (citation omitted).

<sup>171</sup> *Id.* at 790.

<sup>172</sup> *Id.* at 789.

<sup>173</sup> *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir. 1994); *L.A. Mem’l Coliseum Comm’n v. NFL*, 726 F.2d 1381, 1390 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984); *N. Am. Soccer League v. NFL*,



the Seventh Circuit adopted the latter view.

In *Chicago Professional Sports Ltd. v. National Basketball Ass'n*, the Seventh Circuit suggested the single entity defense should not be rejected simply because American professional sports leagues are composed of independently owned and operated member clubs that collectively govern their internal affairs.<sup>174</sup> The court proposed that a functional approach, which analyzes whether league clubs are economic competitors in the alleged relevant market that is restrained, be used to determine the appropriateness of applying Section 1 on a case-by-case basis.<sup>175</sup> In other words, whether the particular challenged conduct (in this case, an NBA rule limiting the number of superstation broadcasts of a club's games that may be nationally broadcast in a season) has the requisite degree of economic integration to be considered that of a single economic entity requires facet-by-facet analysis of each league's operations.<sup>176</sup>

Judge Easterbrook observed that the NBA is closer to a single firm than a group of independent firms when acting in the broadcast market:

Whether the NBA itself is more like a single firm, which would be analyzed only under § 2 of the Sherman Act, [which prohibits monopolization or attempted monopolization,] or like a joint venture, which would be subject to the Rule of Reason under § 1, is a tough question . . . . It has characteristics of both. Unlike the colleges and universities that belong to the National Collegiate Athletic Association, . . . the NBA has no existence independent of sports. It makes professional basketball; only it can make "NBA Basketball" games . . . . From the perspective of fans and advertisers (who use sports telecasts to reach fans), "NBA Basketball" is one product from a single source even though the Chicago Bulls and Seattle Supersonics[, two of the NBA's clubs,] are highly distinguishable, just as General Motors is a single firm even though a Corvette differs from a Chevrolet. But from the perspective of college basketball players who seek to sell their skills, the teams are distinct, and because the human capital of players is not readily transferable to other sports (as even Michael Jordan learned) the league looks more

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670 F.2d 1249, 1257–58 (2d Cir. 1981), *cert. denied*, 459 U.S. 1074 (1982).

<sup>174</sup> 95 F.3d 593, 600 (7th Cir. 1996).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 596, 600.

like a group of firms acting as a monopsony.<sup>177</sup>

Based on *Chicago Professional Sports, in American Needle, Inc. v. National Football League*, the Seventh Circuit accepted the NFL's argument that its member clubs function as a single economic entity in jointly producing NFL football and collectively licensing their trademarked merchandise, which does not constitute concerted action under Section 1.<sup>178</sup> The court held "the record amply establishes that since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football."<sup>179</sup>

Because this holding created a conflict among circuit courts regarding the single entity defense, the Supreme Court granted a writ of certiorari. The Court reversed the Seventh Circuit's ruling and concluded:

The NFL teams do not possess either the unitary decisionmaking [sic] quality or the single aggregation of economic power characteristic of independent action. Each of the teams is a substantial, independently owned, and independently managed business. . . . The teams compete with one another, not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing interests of each "corporation itself;" . . . teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking [sic]." . . . Decisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the marketplace of independent centers of deci-

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<sup>177</sup> *Id.* at 599.

<sup>178</sup> *Am. Needle, Inc. v. NFL*, 538 F.3d 736, 744 (7th Cir. 2008).

<sup>179</sup> *Id.*

sionmaking [sic],” . . . and therefore of actual or potential competition.<sup>180</sup>

Nevertheless, *Chicago Professional Sports* established precedent holding that league restrictions on the licensing or sale of a member club’s intellectual property rights must be evaluated under a full rule of reason analysis, which has been followed by other circuit courts.<sup>181</sup> The Seventh Circuit held that proof the NBA has market power is required to prove the NBA’s limit on the number of games a club may televise on a superstation and its tax on televised superstation games restrains trade.<sup>182</sup> As the court explained, the plaintiff must prove there are no reasonable entertainment substitutes for NBA games from the perspective of television viewers (or no alternative means for companies to advertise their products to consumers with the same demographic characteristics):

[T]here is no time slot when NBA basketball predominates. The NBA’s season lasts from November through June; games are played seven days a week. This season overlaps all of the other professional and college sports, so even sports fanatics have many other options. From advertisers’ perspective—likely the right one, because advertisers are the ones who actually pay for telecasts—the market is even more competitive. Advertisers seek viewers of certain demographic characteristics, and homogeneity is highly valued. . . . If the NBA assembled for advertisers an audience that was uniquely homogeneous, or had especially high willingness-to-buy, then it might have market power even if it represented a small portion of air-time.<sup>183</sup>

The Seventh Circuit also decided two Sherman Act Section 2 cases against the owner/operator of a sports stadium contending that their policies constitute illegal monopolization or attempted monopolization of a local market. These rulings are significant because relatively few cases have addressed this issue in

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<sup>180</sup> *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 196–97 (2010) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984)).

<sup>181</sup> *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 334 (2d Cir. 2008); *Madison Square Garden, L.P. v. NHL*, 270 Fed. Appx. 56, 58 (2d Cir. 2008).

<sup>182</sup> *Chi. Prof’l Sports Ltd. v. NBA*, 95 F.3d 593, 600–01 (7th Cir. 1996).

<sup>183</sup> *Id.*

the context of professional sports. In *Fishman v. Estate of Wirtz*,<sup>184</sup> the court ruled that the owner of the Chicago Stadium, the largest indoor sports arena in Chicago at the time, violated Section 2 by using its “‘strategic dominance’ of the market in suitable arenas” to prevent another bidder from competing to purchase the Chicago Bulls NBA club.<sup>185</sup> It affirmed the lower court’s finding that “‘the relevant market was competition for the presentation of live professional basketball in Chicago,’”<sup>186</sup> while rejecting defendants’ assertion “‘that the parties must be in head-to-head competition *in* the relevant market . . . before the anti-trust laws will apply.”<sup>187</sup> In *Elliott v. United Center*, the Seventh Circuit held that “‘[f]ood sales within the United Center’” (the current home of the Chicago Blackhawks and Bulls teams) is not a relevant market.<sup>188</sup> The court rejected the Section 2 claim of vendors who sold peanuts outside the United Center that the arena’s policy prohibiting patrons from bringing food into the arena is “‘an illegal attempt to monopolize food sales inside the arena and in the surrounding geographic area.’”<sup>189</sup> Consistent with *Chicago Professional Sports*, it “‘rejected the proposition that a firm can be said to have monopoly power in its own product, absent proof that the product itself has no economic substitutes.’”<sup>190</sup>

In addition to developing a substantial body of law governing the relationship between a professional sports league or organization and its members, the Seventh Circuit authored a leading case defining the legal duty of care an agent is required to satisfy when representing professional athletes. In *Zinn v. Parish*,<sup>191</sup> the Seventh Circuit ruled that an agent is obligated to use “‘reasonable efforts’”<sup>192</sup> in obtaining employment for his client as a professional athlete and reasonable care in negotiating employment contracts.<sup>193</sup> Regarding related services such as seeking endorsement contracts and off-season employment for the player, the court held that an agent has an implied duty “‘to make ‘good faith’ efforts to obtain what [the player] sought’” and “‘such efforts constitute full performance of [his] obligations.’”<sup>194</sup> Absent any guarantees or promises, an agent

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<sup>184</sup> 807 F.2d 520 (7th Cir. 1986).

<sup>185</sup> *Id.* at 527, 530, 562.

<sup>186</sup> *Id.* at 530, 562.

<sup>187</sup> *Id.* at 531.

<sup>188</sup> 126 F.3d 1003, 1003 (7th Cir. 1997).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1005.

<sup>191</sup> 644 F.2d 360 (7th Cir. 1981).

<sup>192</sup> *Id.* at 365.

<sup>193</sup> *Id.* at 366.

<sup>194</sup> *Id.*

who has “at all times acted in good faith, with a willingness ‘to provide assistance within his ability,’”<sup>195</sup> is not liable for unsuccessful results.

## V. OLYMPIC SPORTS

The Seventh Circuit’s Olympic sports jurisprudence is more developed than any other federal appellate court and is the source of several significant precedents establishing the generally accepted legal principle that American courts have a very limited role in regulating Olympic sports, particularly athlete eligibility disputes.

In *Michels v. United States Olympic Committee*,<sup>196</sup> the Seventh Circuit held that the Amateur Sports Act of 1978 (ASA)<sup>197</sup> does not provide an athlete with an express or implied private right of action to have an athletic eligibility or participation dispute resolved by a federal court.<sup>198</sup> The International Weightlifting Federation (IWF), the international governing body for the sport of weightlifting, suspended an American weightlifter for two years because he tested positive for testosterone, a banned substance, during the Pan American Games.<sup>199</sup> Because of his suspension, the United States Wrestling Federation (USWF), the national governing body (NGB) for the sport of weightlifting in the U.S., refused to permit him to compete for a spot on the American weightlifting team that would compete at the 1984 Olympic Games.<sup>200</sup> The athlete’s claim that his test results were invalid was rejected by both the IWF and the United States Olympic Committee (USOC) in separate internal administrative proceedings, and his suspension was upheld.<sup>201</sup> Thereafter, the athlete asserted the USOC violated the ASA.<sup>202</sup>

The court concluded the ASA’s legislative history “clearly reveals that Congress intended not to create a private cause of action under the Act” for athletes.<sup>203</sup> Although the originally proposed version of the ASA contained an “Amateur Athlete’s Bill of Rights,” it was eliminated after ““strong resistance

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<sup>195</sup> *Id.*

<sup>196</sup> 741 F.2d 155 (7th Cir. 1984).

<sup>197</sup> 36 U.S.C. § 371 (2012). In 1998, Congress revised the ASA, which was re-named the Ted Stevens Olympic and Amateur Sports Act. *See* 36 U.S.C. § 220501 (2013).

<sup>198</sup> *Michels*, 741 F.2d at 156. The ASA now explicitly states, “[N]either this paragraph nor any other provision of this chapter shall create a private right of action under this chapter.” 36 U.S.C. § 220505(b)(9).

<sup>199</sup> *Michels*, 741 F.2d at 156.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 156–57.

<sup>202</sup> *Id.* at 156.

<sup>203</sup> *Id.* at 157 (citations omitted).

by the high school and college communities.”<sup>204</sup> The legislative history indicated “the compromise reached was that certain substantive provisions on athletes’ rights would be included in the USOC Constitution, and not in the bill.”<sup>205</sup> Thus, the court dismissed the athlete’s claims under the ASA.<sup>206</sup>

Concurring, Judge Posner stated that the USOC’s Constitution should not be characterized as a federal law, the violation of which would create a federal cause of action for athletes.<sup>207</sup> Doing so would contravene the compromise created by the ASA, which requires the USOC to establish procedures for resolving a dispute between an NGB and an athlete relating to his or her opportunity to participate in the Olympic Games.<sup>208</sup> He explained: “Any doubt on this score can be dispelled by the reflection that there can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games.”<sup>209</sup> He noted the athlete’s dispute ultimately is with the IWF, an international body that is not a member of the USOC, rather than the USWF.<sup>210</sup> Judge Posner observed:

It is not by accident that the statute does not require the [USOC] to establish machinery for resolving disputes between athletes and nonmembers. . . . The USOC has no control over nonmembers. The [IWF] can thumb its collective nose at the [USOC]. It can do more: if the USOC tried to put Michels on the U.S. Olympic Weightlifting team in defiance of the IWF’s expulsion, the IWF could ask the International Olympic Committee to disqualify the team. Michels might succeed only in destroying the Olympic hopes of all the American weightlifters.<sup>211</sup>

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<sup>204</sup> *Id.* at 158.

<sup>205</sup> *Id.* (citation omitted).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 159 (Posner, J., concurring). In *S.F. Arts & Athletics, Inc. v. U. S. Olympic Comm.*, the Supreme Court subsequently ruled that the USOC is a private entity, thereby implicitly validating Judge Posner’s conclusion that the USOC Constitution is not federal law. See 483 U.S. 522, 547 (1987).

<sup>208</sup> *Michels*, 741 F.2d at 159 (Posner, J., concurring).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

In *Lindland v. United States Wrestling Ass'n*,<sup>212</sup> the Seventh Circuit recognized that the ASA provides an Olympic sport athlete with the right to submit an eligibility dispute with an NGB to final and binding arbitration in accordance with the Commercial Rules of the American Arbitration Association (AAA) if it is not resolved by the USOC to his or her satisfaction.<sup>213</sup> It confirmed an arbitration award (Burns award) finding that the USA Wrestling Association's grievance procedures for protesting the results of a match to determine a spot on the U.S. Olympic team were flawed and ordering a rematch as a remedy.<sup>214</sup> The court confirmed the Burns award because (1) the arbitrator had valid jurisdiction to resolve the dispute between the athlete challenging those procedures and USA Wrestling; and (2) there was no evidence it was the product of any corruption, fraud, or bias, which would have been valid grounds for vacating the award.<sup>215</sup> Thus, the wrestler who won the rematch, Matt Lindland, was entitled to be USA Wrestling's nominee for the 2000 Olympic team in his weight class.<sup>216</sup>

The Seventh Circuit vacated a subsequent arbitration award (Campbell award) brought by the wrestler who lost the rematch, Keith Sieracki, which directed USA Wrestling not to implement the Burns award based on the arbitrator's determination that the result of the original match was valid and its grievance procedures were adequate.<sup>217</sup> The court concluded the ASA "does not authorize arbitration about the propriety of another arbitrator's decision"<sup>218</sup> because the ASA "would be self-destructive if it authorized such proceedings, which would lead to enduring turmoil (as happened here) and defeat the statute's function of facilitating final resolution of disputes."<sup>219</sup> It also noted that

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<sup>212</sup> 227 F.3d 1000 (7th Cir. 2000).

<sup>213</sup> *Id.* at 1003–04 (referencing ASA § 220529(a)).

<sup>214</sup> *Id.* at 1008.

<sup>215</sup> *Id.* at 1001–02. *See also* U. S. Wrestling Fed'n v. Wrestling Div. of AAU, Inc., 605 F.2d 313, 320 (7th Cir. 1979) (confirming an AAA arbitration award resolving a dispute concerning which of two organizations is entitled to be designated as the NGB for wrestling because alleged interest or bias of arbitration panel's chair is "too 'remote, uncertain, and speculative' to require the arbitration decision to be set aside").

<sup>216</sup> *Lindland*, 227 F.3d at 1005.

<sup>217</sup> *Id.* at 1003. Sieracki was not a party to the Burns arbitration proceeding because the then-current provisions of the ASA only provided for arbitration between an aggrieved athlete and an NGB, rather than arbitration among the athletes. After *Lindland*, the USOC's Bylaws were amended to provide that appropriate notice be given to all athletes who may be adversely affected by the arbitration. These athletes may choose to participate in the arbitration as a party. An athlete who receives notice is bound by the arbitration decision even if he or she chooses not to participate in the arbitration proceeding. United States Olympic Committee Bylaw 9.8 (2013).

<sup>218</sup> *Lindland*, 227 F.3d at 1003.

<sup>219</sup> *Id.* at 1004.

AAA's Commercial Rules provide that "an 'arbitrator is not empowered to re-determine [sic] the merits of any claim already decided.'" <sup>220</sup> Regarding "athletic justice," the court ruled that an Olympic sports arbitrator is not permitted to disregard applicable rules: "Arbitrators are not ombudsmen; they are authorized to resolve disputes under contracts and rules, not to declare how the world should work in the large." <sup>221</sup> If this occurs, the resulting award will be judicially vacated rather than confirmed and given enforceable legal effect. <sup>222</sup>

*Slaney v. International Amateur Athletic Federation*, <sup>223</sup> another leading precedent established by the Seventh Circuit, illustrates that U.S. courts will not resolve the merits of athlete eligibility or participation disputes with either national (e.g., USOC, NGBs) and international sports governing bodies (e.g., International Olympic Committee (IOC)), or international federations (IFs). <sup>224</sup> In this case, accomplished middle-distance runner Mary Decker Slaney sought to judicially challenge an International Amateur Athletic Federation (IAAF) Arbitral Tribunal's (Tribunal) determination that urine test results, revealing she had a T/E ratio greater than six to one, constituted a positive test for testosterone in violation of the IAAF's anti-doping rules and justify suspending her from competition in IAAF-sanctioned events. <sup>225</sup> She asserted several state contract and tort law claims against the USOC and IAAF. <sup>226</sup>

The Seventh Circuit ruled the ASA preempts Slaney's state law claims against the USOC, which did not assert it was violating its own eligibility rules, because "eligibility decisions fall within the USOC's exclusive jurisdiction over all matters pertaining to United States participation in the Olympic Games." <sup>227</sup> It concluded "the method by which the USOC determines the eligibility of [its] athletes" is not subject to judicial review. <sup>228</sup> According to the court, the need for uniformity in determining questions of Olympic athlete eligibility and avoiding potentially conflicting judicial interpretations by different courts justified

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<sup>220</sup> *Id.* (quoting AM. ARBITRATION ASS'N, CONSTRUCTION: ARBITRATION RULES & MEDIATION PROCEDURES, Rule 48(a) (Oct. 1, 2009)).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 1003 (citing *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

<sup>223</sup> 244 F.3d 580 (7th Cir. 2001).

<sup>224</sup> *Id.* at 601.

<sup>225</sup> *Id.* at 585–87.

<sup>226</sup> *Id.* Slaney also asserted a Racketeer Influenced and Corrupt Organizations (RICO) claim against the USOC, which was rejected because her complaint did not plead all of the necessary elements of this federal statutory claim. *Id.* at 596–01.

<sup>227</sup> *Id.* at 595–96.

<sup>228</sup> *Id.* at 596.



this conclusion.<sup>229</sup>

The court held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),<sup>230</sup> an international treaty to which the U.S. is a party, precluded Slaney from re-litigating the same issues decided by the Tribunal, a foreign arbitration proceeding in Monaco (which also is a party to the New York Convention).<sup>231</sup> The Tribunal found Slaney committed a doping violation because she did not prove by clear and convincing evidence that her elevated T/E ratio was caused by a pathological or physiological condition.<sup>232</sup> Because her state law claims would require judicial determination of whether she “was properly found guilty of a doping offense,” the Seventh Circuit concluded that reconsidering these claims “would undermine or nullify the Tribunal’s decision” in violation of the New York Convention.<sup>233</sup> It explained: “Our judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received.”<sup>234</sup> The court rejected her contention that the Tribunal’s arbitration award is unenforceable because she had been denied the fair opportunity to present her case and the award itself violated U.S. public policy.<sup>235</sup> It found she had received a fundamentally fair hearing and required Slaney to prove her elevated T/E ratio was caused by a pathological or physiological condition did not violate the “exceedingly narrow” public policy defense recognized by U.S. courts.<sup>236</sup>

## VI. INTELLECTUAL PROPERTY ISSUES

In general, the Seventh Circuit and Wisconsin courts have broadly defined the scope of the intellectual property rights of sports clubs, leagues, and organizations as well as athletes.<sup>237</sup>

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<sup>229</sup> *Id.* at 595 (citing *Dolan v. U.S. Equestrian Team, Inc.*, 608 A.2d 434, 437 (N.J. App. Div. 1992); *Walton-Floyd v. USOC*, 965 S.W.2d 35, 40 (Tex. Ct. App. 1998)).

<sup>230</sup> 9 U.S.C. § 201 (2012).

<sup>231</sup> *Slaney*, 244 F.3d at 588, 594.

<sup>232</sup> *Id.* at 589.

<sup>233</sup> *Id.* at 590.

<sup>234</sup> *Id.* at 591.

<sup>235</sup> *Id.* at 591, 593–94.

<sup>236</sup> *Id.* at 593–94.

<sup>237</sup> *See infra* notes 235–74 and accompanying text. It is interesting to note that a Wisconsin federal magistrate judge concluded that Amerik Wojciechowski is the “likely author” (i.e., creator) of the famous “cheese wedge hat” worn with pride by thousands of fans of Wisconsin professional sports teams, particularly the Green Bay Packers. *Foamation, Inc. v. Wedeward Enters. Inc.*, 947 F. Supp. 1287, 1297 (E.D. Wis. 1996). Observing that no one may have a valid copyright in the cheese wedge hat because it was commercially produced and distributed without the required affixed notice of copyright,

The Seventh Circuit and its federal district courts generally have provided a significant degree of legal protection to sports teams' trademarks under the Lanham Act, a federal statute prohibiting the unauthorized use of another's trademark that creates a likelihood of confusion in the marketplace.<sup>238</sup> *Boston Professional Hockey Ass'n v. Reliable Knitting Works, Inc.*<sup>239</sup> is part of a group of mid-1970s cases that "recognizes a trademark as a product and confers broad property rights on its owner beyond the right to prevent likely consumer confusion regarding the origin or source of merchandise bearing the trademark."<sup>240</sup> In this 1973 case, a Wisconsin federal district court ruled that defendant's unauthorized sale of hats with emblems bearing the Boston Bruins NHL team's BRUINS and circled "B" marks, which are federally registered for its professional ice hockey games, violates the Lanham Act.<sup>241</sup> It found that defendant's conduct "was likely to cause confusion, or to cause mistake, or to deceive,"<sup>242</sup> despite no evidence of "misrepresenting its caps as caps manufactured by plaintiff or licensees of plaintiff's . . . marks" or any consumer confusion regarding the source of its goods.<sup>243</sup>

The Seventh Circuit has held that a professional sports club has the exclusive right to use its team name even after relocating to another city and to prevent unauthorized usage that creates a likelihood of consumer confusion. In *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club Ltd.*,<sup>244</sup> the court enjoined a Canadian Football League team from calling itself the "Baltimore CFL Colts" because this name was shown to create a likelihood of consumer confusion regarding the team's nonexistent relationship with the "Indianapolis Colts," an NFL team that left Baltimore and moved to Indianapolis nine years ago.<sup>245</sup> It explained:

If "Baltimore CFL Colts" is confusingly similar to "Indianapolis Colts" by virtue of the history of the Indianapolis team and

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the court noted that "the public interest is generally best served by robust competition . . . in the cheese wedge hat market" and that the public benefits "from an abundant quantity, and ever improving quality, of cheese wedge hats." *Id.* at 1298.

<sup>238</sup> 15 U.S.C. § 1051(a)(3)(D) (2006).

<sup>239</sup> 178 U.S.P.Q. 274 (E.D. Wis. 1973).

<sup>240</sup> Matthew J. Mitten, *From Dallas Cap to American Needle and Beyond: Antitrust Law's Limited Capacity to Stitch Consumer Harm from Professional Sports Club Trademark Monopolies*, 86 TUL. L. REV. 901, 908 (2012).

<sup>241</sup> *Bos. Prof'l*, 178 U.S.P.Q., at 276–78.

<sup>242</sup> *Id.* at 278 (citations omitted).

<sup>243</sup> *Id.* at 277.

<sup>244</sup> 34 F.3d 410 (7th Cir. 1994).

<sup>245</sup> *Id.* at 411, 416.

the overlapping product and geographical markets served by it and by the new Baltimore team, the latter's use of the abandoned mark would infringe the Indianapolis Colts' new mark. The Colts' abandonment of a mark confusingly similar to their new mark neither broke the continuity of the team in its different locations—it was the same team, merely having a different home base and therefore a different geographical component in its name—nor entitled a third party to pick it up and use it to confuse Colts fans, and other actual or potential consumers of products and services marketed by the Colts or by other National Football League teams, with regard to the identity, sponsorship, or league affiliation of the third party, that is, the new Baltimore team.<sup>246</sup>

Similarly, in *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*,<sup>247</sup> the Seventh Circuit ruled that plaintiff's proposed use of the "St. Louis Rams" as the name of a fictional, cartoon sports team would infringe the Los Angeles Rams NFL club's right to continue using "Rams" to identify the team after its upcoming relocation to St. Louis.<sup>248</sup> Observing that the club was founded as the Cleveland Rams in 1937, moved to become the Los Angeles Rams in 1946, and was relocating to become the St. Louis Rams in 1995, the court determined: "[T]he Rams organization and the NFL had a long-established priority over the use of the 'Rams' name in connection with the same professional football team, regardless of urban affiliation."<sup>249</sup>

In contrast, in *Illinois High School Ass'n v. GTE Vantage, Inc.*,<sup>250</sup> the Seventh Circuit narrowly construed the Illinois High School Association's (IHSA) trademark rights in "March Madness," which it had been using since the early 1940s to identify its high school basketball tournament.<sup>251</sup> It held that the IHSA could not prevent the NCAA from using "March Madness" as the name of its college basketball tournament or licensing third parties to use this term for commercial purposes.<sup>252</sup> In 1982, broadcaster Brent Musburger used "March Madness" to refer to the NCAA's basketball tournament, which became

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<sup>246</sup> *Id.* at 413.

<sup>247</sup> 188 F.3d 427 (7th Cir. 1999).

<sup>248</sup> *Id.* at 430, 435, 437–39.

<sup>249</sup> *Id.* at 431, 435.

<sup>250</sup> 99 F.3d 244 (7th Cir. 1996).

<sup>251</sup> *Id.* at 245, 247.

<sup>252</sup> *Id.* at 248.

widely used by the national media and public.<sup>253</sup> Because ““March Madness”” is a name “the public has affixed to something other than, as well as, the Illinois high school basketball tournament;” the court characterized it as a dual-use term and “that for the sake of protecting effective communication,” and that the “IHSAs’ rights do not extend to the NCAA tournament and to merchandise such as Vantage’s game that is sold in connection with that tournament.”<sup>254</sup>

Consistent with the broad scope of protection generally provided to sports trademarks, the Seventh Circuit also has broadly construed the copyright and contractual rights of producers of sporting events. In *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*,<sup>255</sup> the Seventh Circuit held that Major League Baseball (MLB) clubs own the copyright to televised baseball games, which confers exclusive rights to the televised performances of the players.<sup>256</sup> Unlike the underlying games, the telecasts of the games are copyrighted original and creative audiovisual works within the subject matter of copyright<sup>257</sup> that are fixed in a tangible medium of expression because they are simultaneously videotaped when broadcast. The court determined:

Because the Players are employees and their performances before broadcast audiences are within the scope of their employment, the telecasts of major league baseball games, which consist of the Players’ performances, are works made for hire [under the Copyright Act]. . . . Thus, in the absence of an agreement to the contrary, the Clubs are presumed to own all of the rights encompassed in the telecasts of the games. The district court found that there was no written agreement that the Clubs would not own the copyright to the telecasts, and, therefore, that the copyright was owned by the Clubs.<sup>258</sup>

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<sup>253</sup> *Id.* at 245.

<sup>254</sup> *Id.* at 247–48.

<sup>255</sup> 805 F.2d 663 (7th Cir. 1986).

<sup>256</sup> *Id.* at 673, 677. The court expressed no opinion regarding whether the copyrights in game telecasts “are owned separately by individual clubs or jointly by some combination of clubs,” or whether the copyrights “are owned exclusively by the Clubs or jointly by the Clubs and the television stations or networks that record and broadcast the games.” *Id.* at 673–74 n.18.

<sup>257</sup> The court determined that “telecasts are independent creations,” “filming an event involves creative labor,” and “telecasts are audiovisual works” under § 102(a)(6) of the Copyright Act. *Id.* at 668–69.

<sup>258</sup> *Id.* at 670. The court noted:

Contrary to the Players’ contention, the effect of this decision is not to grant the Clubs perpetual rights to the Players’ performances. The Players remain free to attain their objective

The Seventh Circuit rejected the MLB players union's claim that the clubs' unauthorized telecasts of games in which they played violated their publicity rights.<sup>259</sup> Because the clubs owned the copyright to televised baseball games, it ruled that the players' publicity rights in their game performances were preempted by the Copyright Act.<sup>260</sup> The court explained:

[O]nce a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purpose of preemption under § 301(a). Thus, if a baseball game were not broadcast or were telecast without being recorded, the Players' performances similarly would not be fixed in tangible form and their rights of publicity would not be subject to preemption. . . . By virtue of being videotaped, however, the Players' performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted.<sup>261</sup>

In *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*,<sup>262</sup> the Seventh Circuit held that the WIAA, which the parties stipulated is a state actor subject to the Federal Constitution, has a property right in its tournament games and its grant of exclusive contract rights to stream games over the Internet does not violate the First Amendment.<sup>263</sup> Finding that "tournament games are a performance product of WIAA that it has the right to control,"<sup>264</sup> the court determined that the "WIAA has the right to package and distribute its performance; nothing in the First Amendment confers on the media an affirmative right to broadcast entire performances"<sup>265</sup> without its authorization. Observing that the WIAA's media policy permits the media "to talk and write about the events to their

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by bargaining with the Clubs for a contractual declaration that the Players own a joint or an exclusive interest in the copyright of the telecasts.

*Id.* at 679 (citation omitted).

<sup>259</sup> *Id.* at 674–75.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 675 (citation omitted).

<sup>262</sup> 658 F.3d 614 (7th Cir. 2011).

<sup>263</sup> *Id.* at 616, 629.

<sup>264</sup> *Id.* at 616.

<sup>265</sup> *Id.* at 622.

hearts' content," it ruled, "What they cannot do is to appropriate the entertainment product that WIAA has created without paying for it."<sup>266</sup>

Like many other states,<sup>267</sup> Wisconsin recognizes a common law and statutory<sup>268</sup> right of publicity, which provides athletes with the exclusive right to commercially exploit and license others to use their respective names, likenesses, and other aspects of their persona in connection with the advertising and sale of products and services.<sup>269</sup> In *Hirsch v. S.C. Johnson & Son, Inc.*,<sup>270</sup> the Wisconsin Supreme Court created a common law right in the "publicity value" of one's name and identity because of the public interest in permitting control of "commercial uses of one's personality and the prevention of unjust enrichment of those who appropriate the publicity value of another's identity."<sup>271</sup> The court ruled that Elroy Hirsch, a nationally prominent former collegiate and professional athlete widely known as "Crazylegs" because of his unique style of running, had a valid damages claim for the unauthorized use of "Crazylegs" to market a shaving gel for women.<sup>272</sup>

In *Jordan v. Jewel Food Stores, Inc.*,<sup>273</sup> the Seventh Circuit held that a Chicago grocery store chain's advertisement in Sports Illustrated magazine's commemorative issue congratulating former Chicago Bulls player Michael Jordan on his recent induction into the basketball hall of fame is commercial speech subject to his alleged right of publicity and Lanham Act unfair competition claims.<sup>274</sup> Concluding that the "ad ha[d] an unmistakable commercial function: enhancing the Jewel-Osco brand in the minds of consumers,"<sup>275</sup> it reversed the lower court's ruling that the ad is noncommercial speech protected by the First Amendment.<sup>276</sup> Even though it did not market any specific products to consumers, the court characterized this ad as "a form of image advertising aimed at promoting goodwill for the Jewel-Osco brand by exploiting public affection for

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<sup>266</sup> *Id.*

<sup>267</sup> See J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 1 §§ 6:1–6:9 (West Group ed., 2d ed. 2012).

<sup>268</sup> WIS. STAT. § 995.50 (2011–12).

<sup>269</sup> § 995.50 (2)(b) (2011–12).

<sup>270</sup> 280 N.W.2d 129 (Wis. 1979).

<sup>271</sup> *Id.* at 134 (citation omitted).

<sup>272</sup> *Id.* at 131, 137. The court also held that the facts established a prima facie case of common law trade name infringement based on evidence that defendant's unauthorized use of "Crazylegs" creates a likelihood of public confusion regarding Hirsch's sponsorship of its shaving gel. *Id.* at 139–40.

<sup>273</sup> 743 F.3d 509 (7th Cir. 2014).

<sup>274</sup> *Id.* at 511, 519–20, 522.

<sup>275</sup> *Id.* at 518.

<sup>276</sup> *Id.* at 512, 522.

Jordan at an auspicious moment in his career.”<sup>277</sup>

## VII. TORTS ISSUES

Most of Wisconsin’s sports law jurisprudence involves tort law issues, particularly liability for personal injuries to co-participants or spectators during sports events, which requires judicial interpretation and application of Wisconsin statutes regarding these issues. Wisconsin courts also have decided several cases regarding the validity of liability waivers for personal injuries suffered during recreational sports as well as one of the few U.S. cases concerning the legal duty of a state high school athletic association to protect athletes’ health and safety. Sports-related tort issues are generally governed by state law, and there are no Seventh Circuit cases considering these issues.

In Wisconsin, the general common law negligence rule is that a person has a legal duty to use reasonable care and is subject to liability for breaching this duty.<sup>278</sup> In *Mohr v. St. Paul Fire & Marine Insurance Co.*,<sup>279</sup> the Wisconsin Court of Appeals rejected the WIAA’s assertion that it had no legal duty to independently determine whether the National Federation of High Schools’ Rule 2–7–2, which permitted (but did not require) the use of starting platforms for high school interscholastic swimming events for pools with water depths of 3.5 feet, established an appropriate level of safety.<sup>280</sup> A high school swimmer, who was injured when he struck his head during a practice dive off an eighteen-inch platform at his school’s pool, alleged the WIAA negligently adopted this rule, thereby requiring its member schools to follow the rule and creating the belief it was safe to use platforms with 3.5 feet of water.<sup>281</sup> Reversing the trial court’s grant of summary judgment for the WIAA, the appellate court ruled, “[T]he crucial question with regard to the WIAA’s duty is not . . . whether it had a duty to make its own assessment of the adequacy of Rule 2–7–2 before adopting it, but, rather, whether its conduct in not doing so was consistent with its duty to exercise reasonable care.”<sup>282</sup>

Regarding the liability of a co-participant for injuring another during a

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<sup>277</sup> *Id.* at 519.

<sup>278</sup> *See, e.g.,* *Alvarado v. Sersch*, 2003 WI 55 ¶ 25, 262 Wis.2d 74, 662 N.W.2d 350, 356 (2003) (Cause in fact, damages, and consideration of public policy factors are other elements of a negligence claim.).

<sup>279</sup> 2004 WI App 5, 269 Wis.2d 302, 674 N.W.2d 576.

<sup>280</sup> *Id.* at ¶¶ 4, 38, 40, 45.

<sup>281</sup> *Id.* at ¶¶ 3, 6.

<sup>282</sup> *Id.* at ¶ 41.

sporting event, in *Lestina v. West Bend Mutual Insurance Co.*,<sup>283</sup> the Wisconsin Supreme Court adopted a negligence standard, which is consistent with its general torts jurisprudence but contrary to the majority of other jurisdictions that permit recovery only for intentional or reckless conduct.<sup>284</sup> It affirmed a jury verdict finding defendant negligently injured plaintiff during an adult recreational soccer league game by “slide tackling” him in violation of the league’s rules.<sup>285</sup> Acknowledging that few cases allow recovery merely for proof of negligence because of concern that liability would discourage participation in sports, the court nevertheless concluded “the negligence standard, properly understood and applied, is suitable for cases involving recreational team contact sports” and is “sufficiently flexible” to enable vigorous athletic competition.<sup>286</sup> It identified several factors relevant in determining whether a player’s conduct is negligent:

[T]he sport involved; the rules and regulations governing the sport; the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); the risks inherent in the game and those that are outside the realm of anticipation; the presence of protective equipment or uniforms; and the facts and circumstances of the particular case, including the ages and physical attributes of the participants, the participants’ respective skills at the game, and the participants’ knowledge of the rules and customs.<sup>287</sup>

In response to *Lestina*, the Wisconsin legislature enacted the following statute:

A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with

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<sup>283</sup> 501 N.W.2d 28 (Wis. 1993).

<sup>284</sup> See MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 884 (3d ed. 2013).

<sup>285</sup> *Lestina*, 501 N.W.2d at 29, 33.

<sup>286</sup> *Id.* at 33.

<sup>287</sup> *Id.* (citation omitted).



intent to cause injury.<sup>288</sup>

Wisconsin courts have broadly construed this statute, particularly the terms “sport,” “physical contact,” and “amateur teams,” while demonstrating a reluctance to find that conduct injuring a co-participant is actionable. In *Noffke v. Bakke*,<sup>289</sup> the Wisconsin Supreme Court held that high school cheerleading is a sport for purposes of the statute because it is “[a]n activity involving physical exertion and skill that is governed by a set of rules or customs,” which involves physical contact because “cheerleaders touch one another.”<sup>290</sup> Therefore, a fellow cheerleader was immune from negligence liability for allegedly failing to properly spot the plaintiff who fell while practicing a cheerleading stunt before a basketball game.<sup>291</sup> It rejected plaintiff’s argument that the statute applies only to “competitive team sports,” specifically “‘aggressive’ [contact] sports such as football, hockey, or boxing.” because its language does not have either limitation.<sup>292</sup> The court concluded defendant was not reckless, which requires “conscious disregard of an unreasonable and substantial risk of serious bodily harm to another,” as a matter of law because his conduct was merely inadvertent, unskilled, or unreasonable, which does not satisfy this standard.<sup>293</sup>

The Wisconsin Courts of Appeals has applied *Noffke*’s definition of a “sport” broadly and extended the statutory scope of co-participant immunity from negligence liability to encompass injuries occurring during unorganized pick-up games<sup>294</sup> and recreational activities such as paintball.<sup>295</sup>

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<sup>288</sup> WIS. STAT. § 895.525(4m)(a) (2011–2012). The same liability standard applies to injuries occurring during athletic competition between “professional teams in a professional league.” § 895.525(4m)(b).

<sup>289</sup> 2009 WI 10, 315 Wis.2d 350, 760 N.W.2d 156.

<sup>290</sup> *Id.* at ¶¶ 17, 18 (quoting AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1742 (3d ed. 1992)).

<sup>291</sup> *Id.* at ¶ 23.

<sup>292</sup> *Id.* at ¶¶ 27, 30. In a concurring opinion, Chief Justice Abrahamson, while acknowledging dictionary definitions “plainly suggest that team sports involve competition . . . [and] the cheerleading squad . . . did not participate in any organized cheerleading competitions,” explained she agreed with the result, which is consistent with “the legislature’s express purpose of ‘decreas[ing] uncertainty regarding the legal responsibility for deaths or injuries that result from participation in recreational activities and thereby to help assure the continued availability in this state of enterprises that offer recreational activities to the public.” *Id.* at ¶¶ 61–62, 65, 67 (Abrahamson, J., concurring).

<sup>293</sup> *Id.* at ¶¶ 35–37 (quoting *Werdehoff v. Gen. Star Indem. Co.*, 600 N.W.2d 214, 222 (Wis. Ct. App. 1999) (citing *Kellar v. Lloyd*, 509 N.W.2d 87, 95 (Wis. Ct. App. 1993)).

<sup>294</sup> *See, e.g.*, *Kleeman v. Emerson*, 2011 WI App 1 ¶ 5, 330 Wis.2d 836, 794 N.W.2d 928 (ice hockey).

<sup>295</sup> *See, e.g.*, *Houston v. Freese*, 2012 WI App 97 ¶ 19, 344 Wis.2d 125, 820 N.W.2d 157.

Courts have uniformly rejected personal injury claims by sports event spectators under Wisconsin's "safe-place statute," which codifies the common law negligence standard, by requiring a public building such as a sports facility to be "safe," meaning it provides "such freedom from danger to the life, health, safety or welfare of . . . frequenters, or the public . . . as the nature of the . . . public building, will reasonably permit."<sup>296</sup> Although non-contractual assumption of the risk is not an affirmative defense to claimed violation of the safe-place statute, Wisconsin courts effectively hold that spectators assume the inherent risks of injury from flying projectiles such as balls and hockey pucks going into the seating area of an arena or stadium during sports events pursuant to a contributory negligence analysis.<sup>297</sup> In accordance with this rationale, courts generally have ruled that the organizer or producer of a sporting event and the operator or owner of the facility in which it is held are not liable for spectator injuries as a matter of law if customary structural safety precautions are provided.

In *Powless v. Milwaukee County*,<sup>298</sup> the Wisconsin Supreme Court determined that defendants Milwaukee County and the National League Baseball Club of Milwaukee were not liable for injury to a spectator who was struck by a foul ball while attending a Milwaukee Braves game at Milwaukee County Stadium.<sup>299</sup> It explained that the stadium owner and club are not insurers of the safety of spectators, who know that foul balls frequently enter unscreened areas of the stands.<sup>300</sup> Finding the position and size of the stadium's backstop complied with "standards and customs of all major league baseball parks"<sup>301</sup> and spectators' interest in obtaining a foul ball as a souvenir is "an integral part of the excitement and enjoyment of attending a baseball game," it noted the trial court's conclusion that requiring defendants "to screen the entire ball park for the adequate protection of all persons in the stands would be unreasonable."<sup>302</sup> In this case, the plaintiff chose not to purchase a seat behind the screen and was sitting 234 feet from home plate marking her scorecard when she was hit by the foul ball.<sup>303</sup> The Supreme Court ruled "that the evidence of [her] contributory

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<sup>296</sup> WIS. STAT. § 101.01(13) (2011–12).

<sup>297</sup> Under the Wisconsin comparative negligence statute, the plaintiff is barred from recovery of any damages if his contributory negligence is "greater than the negligence of the person against whom recovery is sought." WIS. STAT. § 895.045(1) (2011–12).

<sup>298</sup> 94 N.W.2d 187 (Wis. 1959).

<sup>299</sup> *Id.* at 188, 191.

<sup>300</sup> *Id.* at 189.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 190.

<sup>303</sup> *Id.* at 188.

negligence is so strong that it is unnecessary to decide whether” defendants violated the safe-place statute.<sup>304</sup>

Following *Powless*, in *Moulas v. PBC Productions, Inc.*,<sup>305</sup> the Wisconsin Court of Appeals denied recovery to a spectator who was hit by a hockey puck while attending a Milwaukee Admirals game at the Bradley Center, whose sideboards and Plexiglas complied with league rules.<sup>306</sup> Affirming the grant of summary judgment for defendants, the court explained, “[T]he fact that the accident occurred does not establish fault.”<sup>307</sup> Because plaintiff had attended more than ten previous hockey games and seen pucks flying into the stands, it concluded:

Because the risks associated with hockey should be known to the reasonable person attending a game, . . . [plaintiff] was aware of the risks, . . . and because she chose to attend despite her knowledge and the warnings espoused, we conclude that summary judgment was appropriate. [Plaintiff’s] contributory negligence—as a matter of law—was at least 1% more than any of the defendants.<sup>308</sup>

Although a contractual waiver of liability or exculpatory clause for personal injury suffered by a sports participant or spectator is not “invalid per se”<sup>309</sup> under Wisconsin law, such contracts “are not favored by the law because they tend to allow conduct below the acceptable standard of care” and will be construed “strictly against the party seeking to rely on them.”<sup>310</sup> In *Yauger v. Skiing*

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<sup>304</sup> *Id.* at 191.

<sup>305</sup> 570 N.W.2d 739 (Wis. Ct. App. 1997).

<sup>306</sup> *Id.* at 740–41, 745.

<sup>307</sup> *Id.* at 743.

<sup>308</sup> *Id.* at 745. See generally also *Shain v. Racine Raiders Football Club*, 2006 WI App 257, 297 Wis. 2d 869, 726 N.W.2d 869 (upholding summary judgment for defendants on safe-place statute claim by a youth football coach injured while his team was providing half-time entertainment during a minor league professional football game); *Heenan v. Fireman’s Fund Ins. Co.*, 2000 WI App 143, 237 Wis. 2d 695, 616 N.W.2d 923 (affirming summary judgment against spectator hit by a hockey puck during game at Bradley Center based on *Moulas*).

<sup>309</sup> *Atkins v. Swimwest Family Fitness Ctr.*, 2005 WI 4 ¶ 12, 277 Wis. 2d 303, 311–12, 691 N.W.2d 334, 338. See also *Eder v. Lake Geneva Raceway*, 523 N.W.2d 429, 433 n.4 (Wis. Ct. App. 1994) (invalidating spectator personal injury waiver because defendant’s alleged negligence not contemplated by parties at time it was executed, but declining to “make the general statement that exculpatory contracts involving spectators are void as against public policy”).

<sup>310</sup> *Yauger v. Skiing Enters., Inc.*, 557 N.W.2d 60, 62 (Wis. 1996) (citing *Richards v. Richards*, 513 N.W.2d 118, 121 (Wis. 1994)).

*Enterprises, Inc.*,<sup>311</sup> the Wisconsin Supreme Court stated that “public policy is the germane analysis”<sup>312</sup> and two requirements must be satisfied for a liability waiver to be enforced: “First, the waiver must clearly, unambiguously, and unmistakably inform the signer of what is being waived. Second, the form, looked at in its entirety, must alert the signer to the nature and significance of what is being signed.”<sup>313</sup>

*Yauger* held that the following waiver does not satisfy either requirement:

In support of this application for membership, I agree that: 1. There are certain inherent risks in skiing and that we agree to hold Hidden Valley Ski Area/Skiing Enterprises Inc. harmless on account of any injury incurred by me or my Family member on the Hidden Valley Ski Area premises.<sup>314</sup>

The court determined it did not state defendant’s negligence is an inherent risk of skiing and conspicuously identify the document as a liability waiver.<sup>315</sup> Therefore, it does not bar plaintiffs’ claim alleging defendant negligently failed to pad a ski lift tower causing their ten-year-old daughter’s death from a collision with it.<sup>316</sup>

Applying *Yauger*, a Wisconsin federal district court and the Wisconsin Court of Appeals upheld waivers absolving the organizers of recreational sports events from negligence liability for injuries suffered by participants.<sup>317</sup> Each document was clearly and conspicuously labeled as a “release and waiver of liability” and expressly stated participants are accepting the risk of personal injury from the defendant’s negligence.<sup>318</sup> Both courts recognized that a waiver exempting a party from liability for personal injury caused by recklessness or an intentional tort is void as against public policy.<sup>319</sup>

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<sup>311</sup> *Id.* at 60.

<sup>312</sup> *Id.* at 64.

<sup>313</sup> *Id.* at 63.

<sup>314</sup> *Id.* at 61.

<sup>315</sup> *Id.* at 64.

<sup>316</sup> *Id.* at 61, 65.

<sup>317</sup> *Rose v. Nat’l Tractor Pullers Ass’n*, 33 F. Supp. 2d 757, 762 (W.D. Wis. 1998); *Niese v. Skip Barber Racing Sch.*, 202 WI App 85 ¶ 6, 252 Wis. 2d 766, 642 N.W.2d 645.

<sup>318</sup> *Rose*, 33 F. Supp. 2d at 727; *Niese*, 2002 WI App 85 ¶ 15.

<sup>319</sup> *Rose*, 33 F. Supp. 2d at 766; *Niese*, 2002 WI App 85 ¶ 18.

Subsequently, in *Atkins v. Swimwest Family Fitness Center*,<sup>320</sup> the Wisconsin Supreme Court characterized *Yauger* as establishing two “factors”<sup>321</sup> relevant to the public policy analysis of liability waivers.<sup>322</sup> It then added a third factor, whether there was an “opportunity to bargain in regard to its terms,”<sup>323</sup> but created uncertainty by “not address[ing] whether a single objectionable factor is sufficient to invalidate an exculpatory clause.”<sup>324</sup> Finding it was overly broad because it may encompass an unenforceable reckless or intentional act, it did “not provide adequate noti[ce] of [its] nature and significance,” and it did not give the signatory an opportunity to negotiate its terms,<sup>325</sup> the court invalidated the following liability waiver:

#### WAIVER RELEASE STATEMENT

I AGREE TO ASSUME ALL LIABILITY FOR MYSELF WITHOUT REGARD TO FAULT, WHILE AT SWIMWEST FAMILIY FITNESS CENTER. I FURTHER AGREE TO HOLD HARMLESS SWIMWEST FITNESS CENTER, OR ANY OF ITS EMPLOYEES FOR ANY CONDITIONS OR INJURY THAT MAY RESULT TO MYSELF WHILE AT THE SWIMWEST FITNESS CENTER. I HAVE READ THE FOREGOING AND UNDERSTAND ITS CONTENTS.<sup>326</sup>

Since *Atkins* was decided in 2005, there are no reported Wisconsin cases upholding the validity of any sports-related liability waivers. In *Cass v. American Home Assurance Co.*,<sup>327</sup> the Wisconsin Court of Appeals ruled that a release of liability stating the plaintiff does hereby release and forever discharge defendant from liability for negligence does not bar plaintiff’s claim for injuries caused by the negligent operation of a snowmobile by defendant’s employee.<sup>328</sup>

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<sup>320</sup> 2005 WI 4, 277 Wis. 2d 303, 691 N.W.2d 334.

<sup>321</sup> *Id.* at ¶ 26.

<sup>322</sup> *Id.* at ¶ 27.

<sup>323</sup> *Id.* at ¶ 26.

<sup>324</sup> *Id.* at ¶ 36.

<sup>325</sup> *Id.* at ¶¶ 19, 23, 25.

<sup>326</sup> *Id.* at ¶ 47 (Wilcox, J., dissenting).

<sup>327</sup> 2005 WI App 126, 284 Wis. 2d 572, 699 N.W.2d 254.

<sup>328</sup> *Id.* at ¶¶ 2, 3, 13.

The court ruled this language “is not sufficiently clear, unambiguous, or unmistakable to release [defendant] from the alleged negligence,”<sup>329</sup> although it stated “CAUTION! READ BEFORE SIGNING. THIS DOCUMENT AFFECTS YOUR LEGAL RIGHTS AND WILL BAR YOUR RIGHT TO SUE.”<sup>330</sup> Thus, sports-related personal injury liability waivers now may be de facto invalid *per se*.

#### VIII. CONCLUSION

The Seventh Circuit and Wisconsin federal and state courts have made several important, and, in some cases, precedent-setting, contributions to American sports law jurisprudence. Their respective judicial decisions have significantly shaped the evolving legal framework that governs high school, college, Olympic, and professional sports, as well as the resolution of sports-related intellectual property and tort issues. Hopefully this identification, synthesis, and explanation of the sports law jurisprudence of the Seventh Circuit and Wisconsin will facilitate its future development in a consistent and predictable manner that guides and influences the law governing sports in other jurisdictions.

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<sup>329</sup> *Id.* at ¶ 9.

<sup>330</sup> *Id.* at ¶ 2.