

2012 Annual Survey: Recent Developments in Sports Law

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SURVEY

2012 ANNUAL SURVEY: RECENT DEVELOPMENTS IN SPORTS LAW

INTRODUCTION

This survey discusses sports-related cases decided by the courts between January 1, 2012, and December 31, 2012. Not every sports-related case decided in 2012 is included in this survey. Instead, this survey briefly summarizes a wide range of cases that impacted the sports industry in 2012. This survey intends to give the reader an insight into the growing industry of sports-related legal issues and to highlight the most recent developments in sports law. To better assist the reader, this survey is arranged alphabetically by the specific substantive area of law associated with each sports law case.

ADMINISTRATIVE LAW

Administrative law covers the actions of the federal, state, and local governments, such as adjudicating, rulemaking, and regulatory enforcement. Sports law cases rarely involve administrative law, but one occurred in 2012.

*Salt Lake City Corp. v. Jordan River Restoration Network*¹

This conflict arose when the Jordan River Restoration Network opposed Salt Lake City's efforts to validate municipal bonds to finance the construction of a regional sports complex. Jordan River argued that the district court violated the Bond Validation Act and the Local Government Bonding Act when it approved the City's validation proceedings. Jordan River asserted seven issues on appeal: (1) that the "validation proceedings are broad in scope and must include consideration of any matter that may affect the validity or legality of the bonds";² (2) that "notice of the validation hearing provided by the district court did not comply with the Validation Act";³ (3) that there was inadequate notice of the validation hearing; (4) that they were not given the opportunity to be heard; (5) that the complex proposed and being built was

1. *See generally* 293 P.3d 300 (Utah 2012).

2. *Id.* at 311.

3. *Id.*

substantially different from what the voters passed; (6) that the city did not follow proper procedures under the Bonding Act; and (7) that the “bond validation petition did not present a close case.”⁴ Nonetheless, the Utah Supreme Court upheld the district court’s decision and concluded that “the district court complied with due process and properly applied the Validation and Bonding Acts”⁵

ANTITRUST LAW

Antitrust law exists to protect consumers from unfair business practices and anticompetitive behavior, such as monopolies. The Sherman Antitrust Act prohibits monopolistic behavior and conspiracies to restrain trade. The application of antitrust law is different within the sports law context, as courts have noted that the sports industry is unique and presents issues not found in other industries. Namely, sports leagues require some degree of concerted action off the field to produce competition on the field. Thus, sports cases that implicate antitrust law are analyzed under the rule of reason analysis, which allows courts to balance the alleged anticompetitive behavior with any procompetitive justifications offered by the defendant. The following case demonstrates how antitrust law applied to the sports industry in 2012.

*Agnew v. NCAA*⁶

Two college football players, Joseph Agnew and Patrick Courtney, sued the National Collegiate Athletic Association (NCAA), alleging that two NCAA bylaws were anticompetitive and violated the Sherman Act. Specifically, they challenged bylaw 15.5.4, which restricts the number of scholarships available per team, and bylaw 15.3.3.1, which prohibits multi-year scholarships. After suffering career-ending football injuries, Agnew’s and Courtney’s scholarships were not renewed. As a result, Agnew and Courtney alleged that the anticompetitive bylaws harmed them directly because they had to pay for the full cost of their remaining years of education. Agnew and Courtney alleged that “the Bylaws resulted in a horizontal agreement to fix prices and reduce output, which caused a reduction of the supply of bachelor’s degrees and an increase in the price for bachelor’s degrees for those that did not have their scholarships renewed.”⁷

The district court dismissed the claim, stating that Agnew and Courtney

4. *Id.*

5. *Id.* at 307.

6. *See generally* 683 F.3d 328 (7th Cir. 2012).

7. *Id.* at 333.

failed to identify a relevant commercial market. The NCAA argued that Agnew's and Courtney's proffered markets were not commercial in nature and, therefore, were not subject to antitrust laws. Agnew and Courtney argued that the restriction on the number of scholarships was "a clear limitation on output (that is, the number of scholarships and, therefore, bachelor's degrees) and the NCAA's restriction of scholarships to one year is a clear limitation on price (that is, the price of bachelor's degrees and the cost that schools must pay for student-athletes)."⁸ The court went through a lengthy description of antitrust analysis but dismissed the complaint with prejudice because Agnew and Courtney failed to amend their complaint to include a relevant market after several opportunities to do so. The court noted that Agnew and Courtney had at least three opportunities to amend their complaint and stated, "Plaintiffs obviously could have established a relevant market from the outset, but they also had the opportunity to amend their complaint and include an identification of a cognizable market after the full briefing and argument of the NCAA's motion to dismiss in the California district court."⁹

CONSTITUTIONAL LAW

The U.S. Constitution and state constitutions protect individuals from government intrusions into various constitutional rights. The sports industry implicates constitutional law when federal or state governmental entities, such as athletic associations or educational institutions, violate the rights of individuals such as spectators, coaches, or student-athletes. Long-standing judicial precedent establishes that participation in high school and college sports is not a constitutionally-protected right and that, by choosing to participate in sports, those high school and collegiate athletes give up certain constitutional rights. In sports, constitutional law cases traditionally involve the First, Fourth, and Fourteenth Amendments.

*Doyle v. Lehi City*¹⁰

William Doyle, a former volunteer youth baseball coach for the Lehi City Recreation Department, was not selected to volunteer as a coach for the 2007 baseball season after the department received several complaints about Doyle's coaching behavior during the 2006 season. As a result, Doyle purchased a billboard along a highway that displayed the slogan "Something

8. *Id.* at 337.

9. *Id.* at 347.

10. *See generally* 291 P.3d 853 (Utah Ct. App. 2012).

stinks in Lehi City Recreation,”¹¹ and he was publicly vocal about his displeasure with the Recreation Department. After several meetings with county officials, Doyle was still unable to obtain a volunteer coaching position but was told he could reapply in 2008.

Doyle subsequently filed suit, alleging that the Recreation Department “violated his rights under the First and Fourteenth Amendments by denying him the opportunity to volunteer as a baseball coach . . . —a form of retaliation, . . . for exercising his free speech rights to raise concerns about the management of the City’s youth baseball program.”¹² He then appealed the lower court’s decision after it granted summary judgment in favor of the city. Doyle argued that the court “erred in striking portions of affidavits he submitted in opposition to [the city’s] motion for summary judgment, in concluding that [city employees] were entitled to qualified immunity, and in determining that his notice of claim was inadequate, thereby barring his defamation and breach of contract causes of action.”¹³

The court rejected these claims, stating that Doyle “failed to demonstrate . . . that an unpaid, limited-term, volunteer position is a valuable government benefit, and that failure to appoint or reappoint an individual to such a position because of the prospective volunteer’s exercise of his right to free speech triggers First Amendment scrutiny.”¹⁴ In affirming the lower court’s decision, the court further noted that if the city was protected by qualified immunity against the First Amendment claim, the city was protected from a Fourteenth Amendment claim as well.

CONTRACT LAW

Contracts play an important role in the collegiate, minor league, and professional sports industries through sponsorship agreements, athlete and coach contracts, spectator waivers, television deals, and other endorsement agreements. The following cases examine numerous contract issues that arose in the sports industry during 2012.

*Cook v. Kudlacz*¹⁵

Mary Ann Cook and Rachel Cook sued Cardinal Mooney High School; the school’s principal, Sister Jane Marie Kudlacz; and the school’s tennis

11. *Id.* at 857.

12. *Id.* at 858.

13. *Id.* at 856.

14. *Id.* at 862.

15. *See generally* 974 N.E.2d 706 (Ohio Ct. App. 2012).

coach, Sandra Ketchem alleging breach of contract. The lower court ruled in favor of the defendants, stating that there was no breach of contract and no evidence of harassment or intimidation. The lower court found that, though adolescents have particular sensitivities, there exists no remedy in law for hurt feelings.

The Cooks alleged that, during the 2008–2009 and 2009–2010 school years, Coach Ketchem and the tennis team harassed Rachel and that the principal and the school were aware of the conduct but failed to take action. The court first addressed the breach of contract claim. The Cooks argued that the Cardinal Mooney Handbook, which prohibited harassment and bullying behavior, created a contract between the school and the Cooks. Addressing this claim, the court noted that a breach of contract would only be found if one of two conditions were met: (1) where the evidence clearly showed that the school violated the contract, or (2) where “the private school clearly abuse[d] its discretion in applying its disciplinary standards in such a manner as to depart from the purpose of the educational contract”¹⁶

The alleged bullying included Coach Ketchem creating new team rules prohibiting unexcused absences from games and practices and using these rules to punish Rachel for going on a family vacation. The court ruled that it was within the coach’s discretion to determine which absences were excused or unexcused, and it found that this behavior did not amount to bullying or harassment. Additionally, the Cooks alleged that one of Rachel’s teammates sent Rachel a threatening text message and the school failed to take action. Cardinal Mooney presented evidence showing that the school investigated the text message incident and deemed the message non-threatening. The court ruled that the school’s investigation was sufficient and that the matter did not amount to a breach of contract.

The Cooks also introduced evidence that other girls on the team isolated Rachel by refusing to warm up with her or to tell her which uniform to wear because they were unhappy with her for missing matches. The court ruled that this behavior also did not amount to bullying or harassment. The Cooks further alleged that Coach Ketchem unfairly moved Rachel’s position in the lineup. The court stated that a player’s position is within the coach’s discretion and is not a matter in which the court should become involved. Accordingly, the court concluded that none of the Cooks’ allegations amounted to actionable claims; therefore, there was no breach of contract.

16. *Id.* at 713 (quoting *Frazier v. Cincinnati Sch. of Med. Massage*, No. C-060359, 2007 WL 1452586, at *6 (Ohio Ct. App. May 18, 2007)).

*Summey v. Monroe County Department of Education*¹⁷

In 2007, the Monroe County Department of Education hired Ronnie Summey as a teacher at Sequoyah High School. At this time, Summey signed an agreement to be the high school's head football coach. In 2008, when his original contract expired, Summey signed another one-year contract to teach at Sequoyah High School, which also included a coaching supplement. In May 2008, after a losing football season, the school district informed Summey that he could either resign from the head coaching position or be terminated. When Summey approached the director of schools about the dispute, the director reassigned him to another position as a physical education teacher at one of the district's middle schools. Summey refused to accept the position and did not return to work.

Summey sued the school district for breach of contract after it terminated him from his position as the head football coach at Sequoyah High School. The lower court ruled in favor of the school district, and Summey appealed. Summey argued that the school district breached the contract and that his subsequent reassignment was unlawful. The appeals court ruled against Summey, noting that his contract clearly stated that "the employee agrees to work in any building or department or perform such duty as may be assigned or required by the director of schools."¹⁸ Summey further argued that the school district's transfer was unlawful, but the appeals court again ruled against him, concluding that it was within the director's discretion to transfer a coach to a full-time teaching position. The appeals court concluded that Summey breached the contract when he refused his reassignment.

COURT OF ARBITRATION FOR SPORT

The Court of Arbitration for Sport (CAS) is an international arbitration body headquartered in Lausanne, Switzerland, that also has courts in New York and Sydney, Australia. CAS also sets up temporary courts (the CAS ad hoc Division) at the Olympic sites to hear disputes that arise out of the Games. Generally, CAS has jurisdiction to hear disputes based on arbitration agreements between the parties. Because of the large amount of cases involving the Olympic Movement, many national and international sports organizations consistently use CAS to resolve their disputes. As a result, CAS decisions have developed a type of precedent known as *lex sportiva*. The following CAS decisions represent some of the areas in which CAS hears and

17. See generally No. E2011-01400-COA-R3-CV, 2012 Tenn. App. LEXIS 343 (Tenn. Ct. App. May 29, 2012).

18. *Id.* at *9.

resolves disputes, including fines, fundamental rights, team member selection, and penalties.

*Adamu v. Fédération Internationale de Football Association (FIFA)*¹⁹

Dr. Amos Adamu, a former member of the FIFA Executive Committee, appealed a FIFA Appeals Committee's decision that found that he breached the FIFA Code of Ethics and that resulted in a ban from football-related activity for three years and a fine of 10,000 Swiss Francs. An undercover journalist for a British newspaper, the *Sunday Times*, recorded Dr. Adamu accepting bribes to support the United States' bid for the 2018 and 2022 FIFA World Cups. The Appeals Committee found that the proceedings before the FIFA Ethics Committee were properly carried out and that the recordings by the *Sunday Times* were admissible evidence against Dr. Adamu. The CAS panel concluded that Dr. Adamu was involved in a bribery scandal over FIFA World Cup votes; thus, the FIFA Appeals Committee did not issue a disproportionate sanction. Accordingly, the CAS panel upheld the original sanction in its entirety.

*Armstrong v. World Curling Federation (WCF)*²⁰

James Armstrong, a Canadian curler, appealed the WCF's decision that found him guilty of a doping offense. Armstrong submitted to an out-of-competition doping test in December 2011 and tested positive for Tamoxifen, a prohibited substance. As a result, the WCF suspended Armstrong for eighteen months. Armstrong appealed to CAS, seeking to overturn the WCF's decision and to reduce his suspension. Armstrong contended that he mistakenly took one of his deceased wife's medications (the Tamoxifen) in place of his own prescribed medication (ASA 81mg), which was similar in size, shape, and color to the Tamoxifen. Armstrong argued that the WCF erred when it suspended him for eighteen months because he did not intend to take the banned substance and it did not enhance his performance. The WCF contended that Armstrong did not meet the World Anti-Doping Agency (WADA) Code's Article 10.5 standards because he could not identify how the banned substance entered his body and, therefore, did not qualify for a reduced suspension.

The CAS panel concluded that Armstrong did bear a certain amount of fault for mixing his medication containers with his wife's; therefore, he was not entitled to a complete elimination of sanction. The panel also concluded

19. See generally CAS 2011/A/2426.

20. See generally CAS 2012/A/2756.

that Article 10.5 of the WADA Code applied because Armstrong established that the Tamoxifen entered his system when he accidentally took one of his wife's pills. The panel found that Armstrong did not take the Tamoxifen to enhance his performance because he took the medication by accident and provided expert testimony showing that taking Tamoxifen would be dangerous for him due to an existing medical condition. The panel ultimately concluded that Armstrong committed the doping offense through no significant fault or negligence of his own and reduced his suspension to six months.

*Balciunaite v. Lithuanian Athletics Federation (LAF) & International Ass'n of Athletics Federations (IAAF)*²¹

This arbitration proceeding arose from an LAF and IAAF decision to suspend Zivile Balciunaite, a Lithuanian marathon runner. After winning the marathon event at the 2010 European Championships, Balciunaite submitted a urine sample that tested positive for testosterone and epitestosterone, which are prohibited substances banned under the IAAF Anti-Doping Regulations. As a result, the LAF's Disciplinary Commission charged her with an anti-doping rule violation and suspended her from competition for two years. Balciunaite appealed the decision to CAS and argued that the LAF and IAAF violated her fundamental right to be present for the B sample's opening and testing, that they denied her a timely and fair hearing, and that the LAF's experts did not consider all of her arguments.

Balciunaite first alleged that the LAF violated "her fundamental right to be present when the B sample was opened and analyzed"²² because an IAAF rule states that an athlete has the right to observe the opening and testing of a B sample following a positive A sample. Balciunaite was present when the sample was unsealed, but she left the facility after giving her contact information and did not observe the testing of the sample. Upon review of the facts, the CAS panel found that no one forced Balciunaite away from the testing facility; thus, no violation of her right to be present occurred.

Balciunaite's second allegation was that LAF made a decision to suspend her more than seven months after the IAAF informed LAF of the violation, despite the fact that the LAF has a time limit of three months to make that decision. The CAS panel found that LAF held its first hearing on December 1 and that Balciunaite submitted additional evidence on February 23. Due to the extra evidence, the LAF's final decision on April 5 was within an appropriate amount of time because it occurred within three months of the submission of

21. See generally CAS 2011/A/2414.

22. *Id.* ¶ 6.1.

the additional evidence. Therefore, the CAS panel concluded that LAF did not violate Balciunaite's right to a fair and timely hearing.

Lastly, Balciunaite alleged that the LAF only made a partial evaluation before making its final ruling. Balciunaite argued that the LAF only saw partial documents and that the LAF's experts were not in a position to evaluate the documents that they received. The CAS panel found that the proof offered by the LAF clearly showed that the analysis used by IAAF was reliable and that the charges brought by Balciunaite did not have any merit. Ultimately, the CAS panel rejected all of Balciunaite's arguments and confirmed the LAF's decision.

*Beresford v. Equestrian Australia*²³

The Equestrian Australia Appeal Tribunal dismissed Haley Beresford's appeal challenging her exclusion from the Australian Equestrian team in favor of Kirsty Oatley. Beresford appealed the decision, contending that Equestrian Australia breached its rules and that the appeals tribunal based its decision on an error of law. In preparation for selection of the London Olympic Games Equestrian Dressage Team, Beresford was placed on the Short List for nomination on March 5, while Oatley was not added to the list until April 27. Beresford contended that to be considered for the Olympic Team, one must be placed on the Short List by March 5 and that Oatley did not meet this requirement.

The nomination criteria set forth by Equestrian Australia regulates election to the Australian Equestrian Team and states, "A Short List of up to eight (8) horse and [a]thlete combination[s] will be chosen . . . on or before 5 March 2012 to compete in the two Nomination Events . . ." ²⁴ Furthermore, following early nomination, the selection panel has discretion to nominate remaining members to the dressage team. The CAS panel noted that the selection panel's objective is ultimately to select the horse and athlete team that has the greatest potential to be successful in Olympic competition. As such, the CAS panel found that the nomination criteria does not proscribe that the candidates must be included on the Short List. Accordingly, the CAS panel dismissed Beresford's appeal.

23. See generally CAS 2012/A/2837.

24. *Id.* ¶ 13 (quoting 2012 AUSTRALIAN OLYMPIC TEAM: EQUESTRIAN AUSTRALIA, NOMINATION CRITERIA § A.3 (2012)).

*Brazilian Olympic Committee (BOC) & Brazilian Taekwondo Confederation (BTC) & Ferreira v. World Taekwondo Federation (WTF) & Comité Olímpico Mexicano & Federación Mexicana de Taekwondo & Villa*²⁵

The BOC, the BTC, and Márcio Wenceslau Ferreira, a Brazilian taekwondo athlete—collectively known as the appellants—appealed a WTF decision that precluded Ferreira from participating in the 2012 Olympic Games. In November 2011, Ferreira competed in the Pan-American Qualification Tournament in hopes of earning a place in the 2012 Olympics. Ferreira subsequently lost the bronze medal contest and did not earn one of the three available Olympic spots. After the competition, the BOC appealed the contested result to the WTF and alleged that there was a scoring mistake made that led to an unfair result. The WTF found that the scoring decision could not be challenged because Ferreira’s coach had used his allotted amount of appeals during the match itself. Furthermore, the WTF found that it could not give the BOC special consideration in the appeals process as it would violate the Olympic Charter.

The appellants requested that CAS set aside the WTF’s decision, declare Ferreira the victor of the match, and award him a spot in the 2012 Olympic Games. The appellants argued that the WTF’s decision was inaccurate because there was no implementation of a fair and transparent judging system and that mistakes made by the judges went uncorrected. Furthermore, the appellants argued that the decision was reviewable because it was not a field-of-play decision, but rather it was an error in precedent as the points in question related to an illegal kick to the head; therefore, a CAS panel could overturn the WTF’s decision. Upon review, the CAS panel found that the WTF’s decision was a field-of-play decision that would fall under the WTF competencies during the course of an event; thus, the result is strictly under the WTF’s control.

CAS jurisprudence allows for a review of field-of-play decisions only when there is direct evidence of bad faith or arbitrary decision-making showing prejudice for or against a specific athlete or team. Although this “places a high hurdle on the applicant seeking to review a field[-]of[-]play decision . . . , if the hurdle were to be lower, the flood-gates would be opened and any unsatisfied participant would be able to seek the review of a field[-]of[-]play decision.”²⁶ When it is a judge’s or referee’s responsibility to make a decision in a sport, athletes must accept that the judge or referee will make the decision from his point of view. The panel noted that although judges may

25. See generally CAS 2012/A/2731.

26. *Id.* ¶ 108.

make mistakes, not every mistake is reviewable. “The field[-]of[-]play decision doctrine prevents the [CAS p]anel from reviewing a field [-]of[-]play decision on the mere assertion that an applicant disagrees with it.”²⁷ Because this case involved a field-of-play decision, the CAS panel held that it did not have the authority to overturn the WTF’s decision.

*British Olympic Ass’n (BOA) v. WADA*²⁸

The BOA, the national Olympic committee of the United Kingdom, appealed WADA’s decision that a BOA bylaw did not comply with the WADA Code. The BOA bylaw in question stated that if an athlete is found guilty of a doping offense, he is not considered eligible by the BOA to receive the benefit or accreditation as a member of Team Great Britain for any Olympic Games. WADA challenged the BOA bylaw because it constituted a double sanction, which it argued violated the WADA Code. National Olympic committees, such as the BOA, are required to comply with the WADA Code’s anti-doping regulations.

The BOA bylaw’s effect was that once an athlete was found guilty of doping, the bylaw automatically rendered that athlete ineligible to be selected for Team Great Britain. Further, the BOA bylaw rendered an athlete immediately ineligible to compete for life. WADA argued that the bylaw imposed a permanent ineligibility punishment on athletes not found in the WADA Code. Additionally, this extra time period was a sanction on top of those sanctions already provided for in the WADA Code. The CAS panel found that the bylaw constituted an additional doping sanction; therefore, the BOA bylaw did not comply with the WADA Code.

*Fusimalohi v. FIFA*²⁹

Ahongalu Fusimalohi, a former member of FIFA’s Executive Committee, appealed a FIFA Appeals Committee decision that found him guilty of breaching the FIFA Code of Ethics, banned him from football-related activities for two years, and imposed a fine of 7500 Swiss Francs. Fusimalohi was on record accepting bribes from an “undercover *Sunday Times* journalist posing as a lobbyist purporting to support the [U.S.] football federation’s bid for the 2018 and 2022 FIFA World Cups.”³⁰ The Appeals Committee found that the FIFA Ethics Committee carried out the proceedings properly and that

27. *Id.* ¶ 110.

28. *See generally* CAS 2011/A/2658.

29. *See generally* CAS 2011/A/2425.

30. *Id.* ¶ 2.

the journalist's recordings were admissible evidence against Fusimalohi. The Appeals Committee concluded that the evidence was "necessary and appropriate, served a justified purpose . . . [,] and [was] achieved in the public interest, which 'clearly outweighed any disadvantages to the Appellant that might have resulted from the breach of any law during the procurement of the information in question.'"³¹

In May 2011, Fusimalohi filed a statement of appeal before CAS, arguing that it should overturn or reduce his sentence. He argued that he perceived he was at a job interview and that there was nothing inappropriate about the meeting with the undercover journalist. Fusimalohi also argued that FIFA's proceedings were too hasty and denied him due process. The CAS panel ultimately concluded that it is "essential for sporting regulators not to tolerate any kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted to consider adopting improper conducts for their personal gain"³² and upheld FIFA's sanction.

*Hui v. International Weightlifting Federation (IWF)*³³

This arbitration arose on appeal from the IWF's decision to suspend Liao Hui, a Chinese weightlifter, for four years based on an Adverse Analytical Finding (AAF) of prohibited substances in his urine sample. On the morning of September 2, 2010, a WADA-accredited Beijing laboratory gave Hui a mandatory anti-doping test, which reported a negative result. Later that same day, IWF doping control officers subjected Hui to another test. The results of the second test, both the A and B samples, showed an AAF for boldenone, a banned substance according to the WADA prohibited substance list. In a hearing in front of the IWF Doping Hearing Panel, the panel found that Hui "failed to establish on the balance of probabilities that a departure from the International Standard occurred"³⁴ in the transportation and testing of his sample. Thus, the IWF suspended Hui from competition for four years pursuant to Article 10.2 of the IWF Anti-Doping Policy (IWF ADP).

Hui appealed the IWF's decision to CAS on grounds that the IWF did not establish a doping violation and, if a violation was established, that he should only be suspended for a period of two years due to the fact that the IWF ADP provisions do not comply with the WADA Code. Article 10.2 of WADA

31. *Id.* ¶ 31 (quoting FIFA Appeals Comm. (Zurich, Switz. Feb. 2, 2011)) (emphasis omitted).

32. *Id.* ¶ 165.

33. *See generally* CAS 2011/A/2612.

34. *Id.* ¶ 15 (citation and internal quotation marks omitted) (emphasis omitted).

Code states that a first-time finding of use of prohibited substances shall result in two years of ineligibility, whereas the IWF ADP provides that the first-time finding of prohibited substances may result in up to four years of ineligibility. The WADA Code allows for a four-year sanction to be imposed upon athletes if it is established that there were aggravating circumstances surrounding the individual athlete that justify an increase in the sanction; however, if it is found that the athlete did not knowingly commit the doping offense, then the sanction is limited to two years.

In this case, the panel concluded that the IWF did not prove an existence of aggravating circumstances, and there was no indication that Hui committed the violation “as part of a doping plan or scheme, either individually or involving a conspiracy.”³⁵ Hui was aware at the time he submitted the first sample, which tested negative for banned substances, that another test would occur shortly thereafter. Additionally, he submitted further samples in the month prior to the sample in question that tested negatively as well. The CAS panel found that there was no justification behind the four-year period of ineligibility imposed by the IWF and that the offense committed was only subject to a two-year sanction. Thus, the CAS panel reduced Hui’s sanction from four years to two years.

*Köllerer v. Ass’n of Tennis Professionals (ATP) & Women’s Tennis Ass’n & International Tennis Federation (ITF) & Grand Slam Committee*³⁶

Daniel Köllerer, an Austrian professional tennis player, appealed a ruling by the ATP, the ITF, the Women’s Tennis Association, and the Grand Slam Committee (collectively referred to as the governing bodies) that found Köllerer guilty of three counts of attempted match fixing. In the appeal, Köllerer argued that they did not sufficiently prove the charges against him. The standard of proof that the Governing Bodies needed to meet was that the charges of “attempted match fixing [were] more likely to be true than not true[.]”³⁷ a standard of proof established in the consent form signed by Köllerer in 2009. The CAS panel found that the evidence the governing bodies presented during the hearing was more than sufficient to justify the charges against Köllerer; thus, the CAS panel upheld the governing bodies’ decision to suspend Köllerer for life

35. *Id.* ¶ 111 (quoting WADA MODEL RULES FOR INTERNATIONAL FEDERATIONS § 10.6 cmt. (2009)) (emphasis omitted).

36. *See generally* CAS 2011/A/2490.

37. *Id.* ¶ 82.

*Kutrovsky v. ITF*³⁸

Dimitar Kutrovsky, a professional tennis player from Bulgaria, appealed the ITF's decision that found him guilty of a doping offense and subjected him to a two-year ban. Kutrovsky submitted a urine sample during the SAP Open Tennis Tournament in San Jose, California, in February 2012. The sample tested positive for methylhexaneamine (MHA), and the ITF charged Kutrovsky with a doping offense. Kutrovsky allegedly purchased a supplement called Jack3d from a GNC store and cross-referenced the ingredients with the prohibited substance list. The product label included the ingredient "'1,3-Dimethylamylamine HCl,' which is another name for MHA, which name does not appear on the WADA Prohibited List."³⁹ Kutrovsky contended that the ITF should reduce his sanction because he did not knowingly take the prohibited substance with the intent to improve his performance. The ITF contended that "if an athlete takes a supplement in order to enhance his sport performance, knowing that it contains a particular substance, then he intends to take that substance to enhance his sport performance . . . even if he does not know that the substance is banned in his sport."⁴⁰

The CAS panel noted that under Article 10.4 of the WADA Code, Kutrovsky must satisfy two conditions to allow for a reduction in his sentence: first, the athlete must establish how the substance entered his body, and second, the athlete must establish that the use of the substance was not intended to enhance performance. The CAS panel found that Kutrovsky satisfied the first condition by identifying Jack3d as the source of the prohibited substance, but he failed to satisfy the second condition because he intended for Jack3d to enhance his performance by shortening his recovery time. The CAS panel also considered the fact that Kutrovsky did not list Jack3d as a supplement on his disclosure statement and concluded that Article 10.4 of the Code did not apply to Kutrovsky's situation. However, the CAS panel ultimately concluded that Kutrovsky's sentence should be reduced under Article 10.5.2 of the Code, which provides for reductions based on violations in which the athlete bears "No Significant Fault or Negligence." As a result, the CAS panel reduced Kutrovsky's ineligibility period to fifteen months.

38. *See generally* CAS 2012/A/2804.

39. *Id.* ¶ 8.2.1.

40. *Id.* ¶ 8.16.6.

*Lynch v. Horse Sport Ireland Ltd. (HSI) & Olympic Council of Ireland (OCI)*⁴¹

Denis Lynch, an Irish equestrian show jumping rider, appealed a decision of HSI, the governing body for Irish equestrian sport, and the OCI, the body responsible for selecting athletes to represent Ireland at the 2012 Olympics, that banned him from competing at the 2012 London Olympic Games. The OCI has absolute discretion when selecting athletes for competition in the Olympic Games; thus, it is not bound by the HSI's nominations. HSI nominated Lynch to be considered by the OCI, although the nomination was pending its review of Lynch's earlier disqualification from an event due to a finding of hypersensitivity of his horse's legs. Hypersensitivity is a particularly important concern for the OCI because a 2008 Irish Gold Medalist was disqualified for this same reason. Because of the HSI's concerns, Lynch met with OCI members prior to the selection of an athlete to discuss concerns arising from his disqualification.

After the meeting, HSI and the OCI were not satisfied with the explanation given by Lynch and formally conveyed their decision not to select him as a member of the 2012 Olympic Team. Following the notification, Lynch submitted a letter to HSI asking for details of the appeal procedure. Lynch was notified that he may appeal to the OCI pursuant to clause 5.2 of the Agreement for Selection of Athletes for the Sport Equestrian. Despite this notification, there was no further communication between Lynch and the OCI.

Subsequently, Lynch appealed to CAS, challenging HSI's decision to withdraw his nomination. The Arbitration Rules for the Olympic Games (CAS ad hoc Rules) and Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (PIL Act) govern CAS proceedings at the Olympics. Pursuant to Article 17 of the CAS ad hoc Rules, decisions must be made "pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."⁴² In the instant case, all parties resided in Ireland, all contractual relations between them were made in Ireland, and the dispute arose out of the athlete's ineligibility for the Irish Olympic Team; therefore, Irish law governed the dispute.

Article 1 of the CAS ad hoc Rules further provides that "in the case of a request for arbitration against a decision pronounced by a National Olympic Committee, the Claimant must, before filing a request for the dispute[,] . . .

41. See generally CAS ad hoc Division 2012/03 (O.G. London).

42. *Id.* ¶ 2.2.3 (quoting CAS, ARBITRATION RULES FOR THE OLYMPIC GAMES art. 13 (2012)).

exhaust[] all internal remedies”⁴³ Because Lynch did not proceed with the OCI after being notified by HSI that this was the next step in contesting a decision, the CAS panel did not have jurisdiction to hear the dispute pursuant to Article 1 of the CAS ad hoc Rules.

*Peternell v. South African Sports Confederation and Olympic Committee (SASCOC) & South African Equestrian Federation (SAEF)*⁴⁴

This arbitration proceeding arose out of a dispute between Alexander Peternell, a South African event rider, the SASCOC, and the SAEF about the selection of members to the South African Olympic team. Peternell appealed the SASCOC’s decision to include a different athlete and horse for the 2012 London Olympic Games, claiming it violated the selection criteria published by the SASCOC and the SAEF.

Peternell contended that he met the eligibility standards for selection to the 2012 Olympic Team when he represented South Africa at the World Equestrian Games and appeared on the Olympic Riders Rankings. Despite satisfying the eligibility requirements, Peternell argued that the SASCOC and SAEF failed to properly apply the selection criteria when selecting the team. The SASCOC and SAEF contended that Peternell did not meet their eligibility standards because he did not receive a recommendation from SASCOC to represent South Africa prior to the competitions.

The questions for this arbitration proceeding involved whether Peternell was eligible for selections and whether the SASCOC and SAEF properly applied the selection criteria in making the decision to exclude Peternell from the Olympic team. The SAEF did not set an express deadline for riders to submit requests for recommendation to represent a country in competitions; therefore, when Peternell appeared on the Olympic Riders Rankings, he met the requirements for eligibility. Accordingly, the CAS panel found that because Peternell was eligible for selection, the SASCOC and SAEF misapplied the selection criteria when they chose a rider who was over two hundred places behind Peternell in the world rankings. Accordingly, the SASCOC and SAEF had to place Peternell on the team.

*Rodriguez v. Real Federación Española de Atletismo (RFEA) & Comité Olímpico Español (COE), & Consejo Superior de Deportes (CSD)*⁴⁵

The RFEA and COE banned Ángel Mullera Rodriguez (Mullera) from

43. *Id.* ¶2.2.8.

44. *See generally* CAS ad hoc Division 2012/01 (O.G. London).

45. *See generally* CAS ad hoc Division 2012/06 (O.G. London).

competing in the 2012 London Olympics. Mullera appealed to CAS, challenging the legality of his exclusion from competing on the Spanish Olympic Team.

On July 9, 2012, RFEA selected Mullera to be a member of the Spanish Olympic Team. On July 19, 2012, a Spanish newspaper published an article that included an email conversation between Mullera and an unnamed trainer regarding doping practice; of particular importance was Mullera's statement explicitly asking the trainer for advice on doping protocols and passing anti-doping tests. Following the newspaper publication, RFEA met with Mullera and informed him that it received notification of the emails in the prior months, and it subsequently subjected Mullera to multiple anti-doping control tests, none of which resulted in any AAFs indicating doping. After the meeting, the Technical Commission of RFEA informed Mullera that, after reviewing the circumstances surrounding his case, it had decided to preclude him from participating on the Spanish team in the 2012 London Olympic Games.

Following the commission's notification, the RFEA Disciplinary Committee rejected an appeal by Mullera to open proceedings regarding his anti-doping violation. Days later, the committee opened proceedings against Mullera regarding his public acts that went against the Spanish sports community's dignity and decorum; this procedure is currently pending.

During this time, Mullera appealed to CAS and requested reinstatement to the Spanish Olympic Team. Specifically, he argued that the commission did not have the authority to sanction him for doping or to impose other disciplinary matters as that right was reserved for the disciplinary committee. In response, the commission submitted that it had the sole discretion in selecting members of the Spanish Olympic Team and that Mullera's exclusion was not a sanction but simply an exclusion from the team. Furthermore, RFEA suggested that, because of the publicity surrounding the doping inquiries in Mullera's emails, his inclusion on the team would disrupt the harmony of the Spanish contingent. Justifying their decision, RFEA cited to Rule 258/2011 of its selection criteria, which states that commission has the "right to make its choice of the athletes . . . [with] its own discretion and technical criteria prevailing in all cases over any other circumstance."⁴⁶

The CAS panel found that RFEA's consideration of the "team spirit" did not fall under the category of "technical reasoning" as prescribed by Rule 258/2011. Because RFEA did not provide sufficient evidence that including Mullera on the team would affect the team's spirit, the CAS panel found that

46. *Id.* ¶ 7.1 (citation omitted) (emphasis omitted).

Mullera was arbitrarily excluded from competition and that his exclusion violated RFEA's selection criteria. The CAS panel ultimately concluded that "under the current rules and considering the explanation given by the RFEA, the RFEA may not exclude Mr. Mullera from the Spanish team for the London Olympic Games."⁴⁷

*Russian Olympic Committee (ROC) v. International Sailing Federation (ISAF)*⁴⁸

This appeal arose out of a dispute between the ROC and the ISAF regarding the early termination of the Elliott 6m class of the Olympic women's match racing sailing competition between the Russian and Spanish teams. Semifinal races in the Elliott 6m division usually consist of a best of five format, with the winner being the first team to win three points. On August 10, during the 2012 Olympic competition, the ISAF terminated the semifinal round after three races, with the Spanish team leading 2-1, due to a lack of wind. Following the termination of the semifinal race, the ISAF declared the Spanish team the winner. The Russian team did not formally request redress or review to the ISAF's jury office after the event.

Subsequently, the ROC appealed to CAS on the evening of the race and asked CAS to overturn the cancellation of the last two races and to require the ISAF to conduct the fourth and fifth races on August 11. The ROC claimed that, per "Article 13.2.2 of the London 2012 Olympic Sailing Competition Notice of Race [(Sailing Notice)], 'the winner of all knockout rounds will be the first to score three points.'"⁴⁹ Furthermore, the ROC argued that, because article 33.2.4 did not specify that a winner could be declared in semifinal races unless a team had achieved three points, Spain should not have been declared the winner of the race. The ROC noted that given the urgency of the matter, an immediate decision by a CAS ad hoc Division was necessary.

In response to the ROC's appeal, the ISAF argued that the ROC failed to exhaust all available internal remedies before appealing to the CAS ad hoc Division; therefore, CAS did not have jurisdiction over the matter. Specifically, the ISAF argued that the ROC should have filed a request with the ISAF jury office following the termination of the race pursuant to article 62.1(a) of the racing rules. Article 62.1(a) allows parties two hours after a ruling to request further information if there is a challenge to an official ruling.

47. *Id.* ¶ 7.9.

48. *See generally* CAS ad hoc Division 2012/11 (O.G. London).

49. *Id.* ¶ 4.1 (quoting INTERNATIONAL SAILING FEDERATION & LONDON ORGANISING COMMITTEE OF THE OLYMPIC GAMES AND PARALYMPIC GAMES, LONDON 2012 OLYMPIC SAILING COMPETITION NOTICE OF RACE art. 13.2.2 (2012)) (emphasis omitted).

Furthermore, the ISAF stated that the decision to terminate the race was a field-of-play decision made in accordance with article C10.5 of the racing rules, which states that a team leading at termination is to be declared the winner of the competition.

The Olympic Charter, which governs disputes arising in connection with the Olympic Games, states that an appeal should be submitted directly to CAS in accordance with the Code of Sports-Related Arbitration. Article 1 of the CAS ad hoc Rules for the Olympic Games states that “[t]he purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes . . . , insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games.”⁵⁰ The CAS ad hoc Rules also provide that, before filing with CAS, the claimant must exhaust all internal remedies pursuant to the individual sporting body’s regulations.

Pursuant to Article 62 of the racing rules, the ROC was required to submit a request for redress with the ISAF within two hours of any disputed decision. The CAS ad hoc Division could not find any reasoning, nor did the ROC provide any reasoning, as to why the ROC did not submit a timely request to the ISAF jury office. Because the ROC failed to exhaust all internal remedies prior to appealing to the CAS ad hoc Division, CAS did not have jurisdiction over this matter.

*Rybka v. Union of European Football Ass’n (UEFA)*⁵¹

This case was an appeal of a UEFA decision to suspend Oleksandr Rybka, a professional soccer player, from playing soccer for two years because of a doping offense. In 2011, UEFA conducted an off-season doping control test on Rybka, which resulted in an AAF of Furosemide, a prohibited substance. Following the positive test, a hearing ensued between UEFA and Rybka. UEFA found that Rybka’s explanation as to how he ingested the substance (he alleged that his wife gave him a colorless, odorless glass of water spiked with the substance) was not sufficient to dismiss the claim. Subsequently, UEFA suspended Rybka from competition for the standard two-year period.

UEFA rules provide that it is the players’ duty to ensure that no prohibited substances enter their bodies; intent, fault, or knowing use on the players’ part is not required to establish a doping violation. If a player can establish that he bears no fault or negligence and can explain how the substance entered his body, the suspension may be lifted. If a player or another individual can

50. *Id.* ¶ 5.2 (CAS, *supra* note 42, art.1).

51. *See generally* CAS 2012/A/2759.

establish that the player bore no significant fault or negligence, the suspension may be reduced to no less than half of the otherwise applicable suspension period. To establish lack of significant fault or negligence, a player must show, on a balance of probabilities, how the substance entered his body.

After Rybka presented facts and various explanations as to how the substance entered his body, he failed to persuade the CAS panel that his degree of fault warranted a reduction in his suspension. Accordingly, the panel upheld UEFA's two-year sanction.

*Savic v. Professional Tennis Integrity Officers (PTIOs)*⁵²

David Savic, a Serbian professional tennis player, appealed the PTIOs' decision that found him guilty of committing a corruption offense. The PTIOs fined Savic \$100,000 and declared him permanently ineligible to play professional tennis. He appealed the PTIOs' decision to CAS, hoping it would annul the decision. The PTIOs found that Savic attempted to corrupt another professional tennis team by getting a player to throw one of his matches. This decision was based on evidence that Savic called and texted a player on the team, offering him \$30,000 to lose the first set of his first match at a professional tournament. The player declined the offer and reported Savic.

On appeal to CAS, Savic argued that a third party contacted the player and made it appear as if he was responsible. Savic's expert witness testified that the calls and texts "could quite easily have been sent/carried out by a [t]hird [p]arty without the knowledge or complicity of [Savic] but using his name, mobile phone, mobile phone number and Skype details', [sic] a practice known as 'spoofing[.]'"⁵³ The PTIOs argued that this argument was the "least plausible scenario in the present case, given all the personal and contact details to which such an impersonator would be required to be privy [and that] the fact that spoofing can occur is by itself no evidence that it actually occurred in this case."⁵⁴

On appeal, the CAS panel had to determine whether there was sufficient evidence to find that Savic violated the Uniform Tennis Anti-Corruption Program (UTAP) and, if so, whether the sanction was proportionate to the offense. After considering all the evidence, including that the phone calls came from Savic's telephone number, that the Skype call came from an account named David Savic, and that the other tennis player recognized Savic's voice, the panel concluded that there was enough evidence to find him

52. See generally CAS 2011/A/2621.

53. *Id.* ¶4.6 (quoting the report of expert Goran Bozic) (emphasis omitted).

54. *Id.* ¶4.18.

guilty of a corruption offense. Regarding the proportionality of the offense, the panel adopted the *Köllerer* panel's reasoning. The *Köllerer* panel noted that "the sport of tennis is extremely vulnerable to corruption as a match-fixer only needs to corrupt one player It is therefore imperative that, once a Player gets caught, the Governing Bodies send out a clear signal to the entire tennis community that such actions are not tolerated."⁵⁵ The CAS panel concluded that the PTIOs' punishment was proportionate to Savic's corruption offense and upheld the lifetime ban.

*Sterba v. WADA*⁵⁶

This appeal arose from a dispute between Jan Sterba, a Czech canoeing athlete, and WADA and regarded a suspension it imposed on Sterba. The suspension stemmed from an AAF from Sterba's sample taken in May 2012. In June 2012, the International Canoe Federation (ICF) notified Sterba of the AAF in his A sample. Following this notification, an International Canoe Federation Doping Control Panel (ICFDCP) found Sterba guilty of a rule violation and suspended him for a six-month period as of June 14, 2012. Following the ICFDCP ruling, Sterba filed an appeal with the International Canoe Federation Court of Arbitration (ICFCA), which found no anti-doping rule violation and set aside the ICFDCP's decision.

Sterba appealed to CAS for confirmation of the ICFCA's decision and for affirmation of Sterba's eligibility to compete in the 2012 London Olympic Games.

The respondent in this arbitration, WADA, was never a party to the initial proceedings involving the ICFDCP or ICFCA. However, per ICF Rules 13.2.1 and 13.2.2, WADA has the right to appeal ICFDCP or ICFCA decisions to CAS. However, WADA was not notified of Sterba's appeal at the time Sterba filed for this arbitration. As such, WADA contended that it lacked standing to respond in the arbitration because it was never a party to the case. Furthermore, WADA claimed that the ICFCA's decision was in full affect, and thus Sterba was eligible to compete in the 2012 London Olympic Games.

Because Sterba asked the CAS panel only to confirm the enforcement of the ICFCA decision, the panel did not have any valid legal standing to prevent Sterba from appearing in the 2012 Olympic Games. CAS jurisprudence establishes that "only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may

55. *Id.* ¶ 8.33(vi) (quoting *Köllerer* / ATP & WTA & ITF & GSC, CAS 2011/A/2490).

56. *See generally* CAS ad hoc Division 2012/05 (O.G. London).

appeal to CAS against that decision.”⁵⁷ Because Sterba did not submit an application against a decision, he had no legal standing to bring an appeal to CAS; therefore, the panel found that there was no need to address the matter further.

*Swedish National Olympic Committee (SNOC) & Swedish Triathlon Federation v. International Triathlon Union (ITU)*⁵⁸

In the 2012 Olympic Games women’s triathlon, Nicola Spirig won the Olympic gold medal and Lisa Norden won the Olympic silver medal. Because both women crossed the triathlon finish line with a time of 1:59:48, the referee declared a winner using the official photo-finish camera. The photo “focused on the upper bodies and heads of the athletes. Superimposed on the images were two red vertical lines—each one marking the foremost section of the athletes’ upper bodies at the exact time the race ended.”⁵⁹ The referee concluded that Spirig crossed the finish line first even though both athletes had the same finish time.

The SNOC appealed the referee’s decision to the CAS ad hoc Division. The SNOC requested a change in the rankings and that a second gold medal be awarded to Norden. The SNOC contended that the referee’s decision as to the winner was not a field-of-play decision; rather, it constituted a failure to apply the ITU’s rules and was, therefore, a rule violation. The ITU argued that the referee made a field-of-play decision and that CAS should not review the decision unless it was arbitrary or made in bad faith.

The CAS panel noted that reviewing the referee’s decision was within its jurisdiction, but when “there is a relevant procedure in place to resolve such issues, the CAS ‘accepts the decision reached by this procedure as final, except where it can be demonstrated that there has been arbitrariness or bad faith in arriving at this decision.’”⁶⁰ The CAS panel concluded that the referee applied the correct rule, and because it found no evidence of arbitrariness or bad faith on behalf of the referee, the panel did not review the referee’s final field-of-play decision.

57. *Id.* ¶ 7.7 (citation omitted) (emphasis omitted).

58. *See generally* CAS ad hoc Division 2012/10 (O.G. London).

59. *Id.* ¶ 2.3.

60. *Id.* ¶ 7.2 (quoting Lima & Brazilian Olympic Committee / IAAF, CAS 2004/A/727, ¶ 28) (emphasis omitted).

*Union Cycliste Internationale (UCI) v. Contador & Real Federación Española de Ciclismo (RFEC); WADA v. Contador & RFEC*⁶¹

Alberto Contador Velasco (Contador) participated in the 2010 Tour de France and was a member of ProTeam Astana. After the race's sixteenth stage, Contador submitted to a urine doping test under UCI Anti-Doping Regulations. Contador's sample tested positive for clenbuterol, a banned substance under the WADA prohibited substances list. Contador contended that the banned substance entered his body when he ate contaminated meat. The Comité Nacional de Competición y Disciplina Deportiva (CNCDD) accepted Contador's explanation and concluded that the positive test result was due to the contaminated meat.

The UCI appealed to CAS to issue sanctions against Contador for violating anti-doping regulations. The UCI submitted that Contador's claims and evidence of contaminated meat were not sufficient to satisfy the balance of probability standard; therefore, Contador did not meet his burden of proof. The CAS panel stated that "it is only if the theory put forward by the Athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario, that the Athlete shall be considered to have established on a balance of probability how the substance entered his system"⁶² The CAS panel applied this rule, found that Contador violated the anti-doping rules, and suspended him for two years.

*UCI v. Kolobnev & Russian Cycling Federation*⁶³

During the Tour de France in July 2011, Alexander Kolobnev submitted to a doping test in France. A WADA laboratory analyzed Kolobnev's sample, which tested positive for hydrochlorothiazide (HCT), a banned substance under the 2011 WADA list of prohibited substances. Kolobnev testified that the substance entered his body as the result of taking the active food supplement Natural kapillyaroprotector, which his doctor prescribed to treat chronic vascular disease. The tribunal was satisfied that Kolobnev did not use the substance with an intention to enhance his sport performance, determined that his fault was minimal, and fined him 1,500 Swiss Francs.

The UCI filed this appeal with CAS, seeking to increase Kolobnev's sanctions. The issues on appeal were whether the conditions were met for the application of a reduced sanction and whether the sanctions imposed on Kolobnev were appropriate. Upon review, the CAS panel upheld the

61. See generally CAS 2011/A/2384 & 2386.

62. *Id.* ¶ 265.

63. See generally CAS 2011/A/2645.

tribunal's reduced sanction and found that the fine imposed without any period of ineligibility was a proper sanction.

*UCI v. Rasmussen & National Olympic Committee and Sports Confederation of Denmark (DIF)*⁶⁴

This arbitration arose from the UCI's appeal to CAS challenging the DIF Anti-Doping Board's decision regarding the suspension of Danish road cyclist Alexander Rasmussen. As a member of the Danish Cycling Federation, Rasmussen was a member of the registered testing pool since 2009, which required him to provide regular updates to the UCI and the DIF as to his whereabouts for drug testing purposes. In February 2010, Rasmussen could not be found for testing and a whereabouts failure was recorded pursuant to the Danish National Anti-Doping Rules (NADR). Later, in October 2010, Rasmussen again failed to timely file his whereabouts information with NADR and received another whereabouts violation. In April 2011, the DIF was unable to locate Rasmussen for testing for a third time, which resulted in another whereabouts testing failure. Pursuant to NADR, Rasmussen was banned for one year from all DIF competitions, beginning on April 28, 2011, for two violations of NADR rules. DIF cancelled the April 2011 whereabouts testing failure because it did not notify Rasmussen within fourteen days that he missed a test; therefore, Rasmussen was penalized for only two NADR violations.

The UCI requested that CAS set aside the DIF's decision and suspend Rasmussen for a period of two years. The UCI argued that the April 2011 whereabouts testing failure met the required standards of proof to establish that Rasmussen committed the anti-doping rule violation. This violation would have resulted in three anti-doping rule violations in an eighteen-month period as opposed to the two violations found by DIF. The UCI argued that although the DIF did not notify Rasmussen within the required fourteen days, as indicated by article 11.6.3(b) of the WADA International Standard for Testing (IST), the IST did not apply due to the nature of the relationship between the UCI and Rasmussen. Instead, the UCI argued that the UCI Anti-Doping Rules should be applied. Unlike the IST, the UCI rules do not impose a deadline for notification of whereabouts testing failures. Furthermore, the UCI argued that even if the IST applied, a breach of article 11.6.3(b) was immaterial because the rule is in place to prevent athletes from committing the same type of error twice in a short time span, which was not the case with Rasmussen. The UCI argued that Rasmussen violated anti-doping regulations

64. See generally CAS 2011/A/2671.

on three separate occasions; therefore, a two-year ban was the appropriate suspension.

Rasmussen and the DIF requested that CAS uphold the DIF suspension because article 11.6.3(b) of the IST “‘applies regardless of explicit implementation in the UCI [rules,]’”⁶⁵ and athletes are required to comply with WADA rules; therefore, international federations should be held to the same standards. Rasmussen and the DIF also argued that “‘the right to be notified within a reasonable amount of time of an alleged missed test is crucial for an athlete’s ability to defend himself as well as his right to a speedy trial’”⁶⁶ Furthermore, Rasmussen argued that his failure to update his address for the periodic testing was merely negligent and that he did not try to evade doping controls; therefore, he should not be punished beyond the minimum required period.

The central question in this arbitration proceeding was whether Rasmussen committed three NADR violations within an eighteen-month period. The parties agreed that the February 2010 and October 2010 whereabouts testing failures constituted NADR violations. The primary disagreement concerned whether the April 2011 missed test constituted a third NADR violation. This dispute centered on whether the UCI failed to comply with IST rules regarding notifying Rasmussen within a fourteen-day period once he was unable to be located for testing.

The CAS panel found that despite the fact that UCI did not notify Rasmussen regarding the missed test, this did not preclude the UCI from recording it as a missed test. The panel concluded that, although the notice of the unsuccessful test was given past the fourteen-day window, Rasmussen was unable to justify his failure to comply with reporting requirements. Due to the unsatisfactory reasoning that Rasmussen provided, the CAS panel determined that the UCI’s failure to notify Rasmussen within a fourteen-day period was not inconsistent with respect to Rasmussen’s rights or the purposes of the rule. Furthermore, the basis of the rule violation was that Rasmussen was not available for the April 2011 test at the place he indicated, and the procedures that took place after the missed test do not affect this factual basis. Accordingly, the panel granted, in part, the appeal brought by the UCI against the Rasmussen and the DIF. Due to Rasmussen’s anti-doping violations, the DIF’s decision was set aside, and Rasmussen was suspended for a period of eighteen months beginning on October 1, 2011.

65. *Id.* ¶ 43 (quoting WADA, International Standard: Testing art. 11.6.3(b) (2009)) (emphasis omitted).

66. *Id.* ¶ 45 (citation omitted) (emphasis omitted).

*UCI v. Ullrich & Swiss Olympic*⁶⁷

In 2002, retired cyclist Jan Ullrich tested positive for amphetamines, which qualified as banned substances under UCI and the German National Cycling Federation (BDR) rules. The BDR suspended Ullrich for six months as a result of his anti-doping violation. In 2004, the Spanish Guardia Civil investigated Dr. Eufemiano Fuentes and uncovered evidence of doping violations by several athletes including Ullrich. The Commission for the Fight Against Doping (FDB) had jurisdiction to issue sanctions against Ullrich, but failed to do so. In 2010, UCI appealed to CAS, requesting that CAS declare Ullrich to have committed an anti-doping offense. The CAS panel determined that UCI had proper authority to initiate proceedings against Ullrich despite the fact that he resigned his UCI license. UCI argued that Ullrich engaged in blood doping in violation of UCI's anti-doping rules and offered evidence from the investigation of Dr. Fuentes to support this allegation. The evidence showed that Ullrich paid Dr. Fuentes substantial sums of money, and a DNA analysis confirmed that Ullrich's genetic profile matched blood bags found in Dr. Fuentes' possession. The CAS panel ultimately concluded that Ullrich engaged in doping activities and declared him ineligible to participate in sports for two years.

*Ward v. International Olympic Committee (IOC) & International Boxing Ass'n (AIBA) & Ass'n of National Olympic Committees (ANOC)*⁶⁸

Joseph Ward, an Irish Boxer, appealed the decision of the IOC, the AIBA, and the ANOC that left him without the opportunity to participate in the 2012 London Olympic Games. Ward argued that the qualification process in selecting competitors was flawed and that he should have been awarded a spot in the 2012 Olympic Games because he was the best-placed athlete in the AIBA rankings who had not yet qualified to compete in the Olympic Games.

The winners of the World Series of Boxing (WSB) Individual Championships and the European Boxing Olympic Qualification Tournament were awarded slots in the 2012 Olympic Games, but Ward did not place in either of these competitions. Additionally, ten boxers were selected based upon the results of the World Boxing Championships (WBC), where Ward finished sixteenth. Following the competitions, eight slots remained open, which were then assigned by the IOC, the AIBA, and the ANOC to boxers who were part of National Olympic Committees (NOCs).

Ward contended that the IOC misapplied its rules by awarding a NOC spot

67. See generally CAS 2010/A/2083.

68. See generally CAS ad hoc Division 2012/02 (O.G. London).

to a boxer from Montenegro because Montenegro did not qualify for NOC status. NOC status is an award granted to countries with an average of six or fewer athletes at the two preceding Olympic Games. Ward argued that Montenegro had nineteen athletes at the 2008 Olympics as the calculation should include the men's water polo team. Because the Montenegrin athlete should not have been counted, Ward argued he should have been offered a position because he was the next best-ranked athlete who had not yet qualified. Ward also argued that the term "ranked" referred not to the WBC results but rather to overall competition performance.

The CAS panel found that, according to AIBA regulations, the term "ranking" was used in an dual sense to cover both results in specific competitions and the placement on the AIBA World Ranking System. In the AIBA Qualification System for the 2012 Olympic Games, the rules stated that "[a]ll WSB boxers will be ranked through the result of the entire WSB team competition."⁶⁹ Accordingly, the CAS panel found that based upon the AIBA Qualification System, Ward was not the next best-ranked athlete; therefore, he did not qualify for a spot regardless of the NOC status of Montenegro.

DISABILITY LAW

The Americans with Disabilities Act (ADA) prohibits discrimination against those with disabilities in terms of employment, education, and access to public services. This area of law protects not only the athletes playing in sports but also the spectators watching sports events. Disability law imposes compliance requirements on sports organizations and facility owners. The following case addresses the ADA and the Rehabilitation Act and how they apply to spectators at a high school football game.

*Greer v. Richardson Independent School District*⁷⁰

Leslie Greer was the mother of a high school football player, and she attended her son's football game, which led to this litigation. Unfortunately, the football stadium was not set up to accommodate spectators in wheelchairs, so Greer watched the game through a chain fence. Greer sued the Richardson Independent School District for violating the ADA and Rehabilitation Act by not providing accommodation to her during the game. The district court granted summary motion in favor of the school district. Greer appealed, but

69. *Id.* ¶ 6.6 (quoting INTERNATIONAL BOXING ASSOCIATION, QUALIFICATION SYSTEM 2 (2010)) (emphasis omitted).

70. *See generally* 472 F. App'x 287 (5th Cir. 2012).

the appellate court determined that Greer failed to present a prima facie case of discrimination because the school district provided sufficient program access to football games held at the stadium. Because the football stadium was built in 1968, it qualified as an “existing structure” under the ADA, which only required that the public entity “operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.”⁷¹ The appellate court noted that Greer could park at the event, buy a ticket, purchase concessions, and view the event in a meaningful way, so the stadium substantially complied with the ADA. The appellate court ruled that she did not have enough contrary evidence to dispute the school district’s evidence that it provided adequate program access to disabled individuals who successfully and regularly attended events. As a result, the appellate court affirmed the district court’s decision.

DISCRIMINATION LAW

State and federal discrimination laws aim to protect one’s right to equal treatment and prevent discrimination based on race, gender, religion, age, and disability. Discrimination claims focus on the Equal Protection Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the ADA. The following cases demonstrate that, in the sports context, discrimination issues can affect coaches and media providers, not just athletes.

*Mollaghan v. Varnell*⁷²

John Mollaghan, John Vincent, and Ged O’Connor, all former women’s soccer coaches for the University of Southern Mississippi (USM), brought an action for gender discrimination and retaliation against Sonya Varnell, the senior women’s administrator for women’s sports at USM. Mollaghan and Vincent alleged that Varnell wanted to replace the male coaches on women’s teams with female coaches. Additionally, O’Connor alleged that Varnell sexually harassed him when she offered him her spare bed in her hotel room after hearing rumors suggesting he was uncomfortable sleeping in a room with a male roommate who may have been homosexual. At the end of the 2000 season, in which many parents and team members expressed dissatisfaction with the coaching staff, USM did not renew Vincent’s or Mollaghan’s contracts.

71. *Id.* at 291 (quoting 28 C.F.R. § 35.150(a) (2012)).

72. *See generally* 105 So. 3d 291 (Miss. 2012).

In the trial court, a jury rendered a verdict in favor of the coaches, and Varnell appealed. On appeal, the court determined that there was insufficient evidence to support the jury's verdict except for in regard to O'Connor's sexual harassment claim. Thus, the appellate court granted a judgment notwithstanding a verdict (JNOV) in favor of Varnell and USM on those claims. The Supreme Court of Mississippi upheld the appellate court's decision to grant the JNOV in favor of Varnell and USM, but it concluded that the appellate court erred when it denied a JNOV on the sexual harassment claim.

*TCR Sports Broadcasting Holding, L.L.P. v. FCC*⁷³

TCR Sports Broadcasting, owners of the Mid-Atlantic Sports Network (MASN), appealed a Federal Communication Commission (FCC) decision that declared that Time Warner was justified in declining to carry the MASN in North Carolina. In 2006, Time Warner and Comcast Corporation bought cable systems from Adelphia Communications Corporation. The FCC placed several restrictions on Time Warner to prevent it from unreasonably denying rival unaffiliated regional sports networks. MASN filed a complaint with the FCC when Time Warner denied it carriage on Time Warner's analog tier in North Carolina in violation of the 1992 Cable Act. The FCC concluded that Time Warner did not unfairly discriminate against MASN because it was willing to carry MASN on its digital cable tier. MASN appealed the FCC's decision.

To overturn the FCC decision, MASN had to prove that the FCC made an arbitrary or capricious decision. The court found that the FCC did not act arbitrarily or capriciously in rejecting MASN's appeal because Time Warner provided evidence that there was not enough consumer demand for the MASN coverage. Time Warner's decision not to provide MASN on its analog tier was in pursuit of legitimate business purposes. Thus, Time Warner had not acted discriminatorily against MASN, and the FCC decision was affirmed.

EDUCATION LAW

Education law is similar to sports law in that it encompasses a wide range of substantive areas of law and issues. Generally, education law refers to the body of law that governs the educational system. In the sports context, education law usually arises when student-athletes challenge the rules they are governed by or when a school terminates a coach. Constitutional law does not typically apply when student-athletes challenge a school, athletic association,

73. See generally 679 F.3d 269 (4th Cir. 2012).

conference, or NCAA rule. Thus, student-athletes must challenge the rule's application to them or challenge the rule as being arbitrary and capricious. The case that follows demonstrates one way in which education law applies to sports.

*Wilson v. Dallas Independent School District*⁷⁴

Stephen Wilson taught at a school in the Dallas Independent School District. One of his students was a student-athlete who missed a substantial number of classes. Wilson met with the student-athlete, the student-athlete's parents, and administration to discuss the student-athlete's class performance. Following this meeting, Wilson agreed to give the student-athlete a passing grade in the class if the student-athlete improved his class performance. However, the student-athlete decided to drop the class. Accordingly, Wilson changed the student-athlete's grade to a failing grade. The next school year, the school decided to cut the class that Wilson taught from its curriculum. Wilson sued the school district for firing him because he believed he was fired for reporting a No Pass, No Play violation. The district court granted the school district summary judgment.

Under the Whistleblower Protection Act, the school district would have waived governmental immunity if there had been an adverse personnel action taken against Wilson for reporting the violation of the law by the school district. The appellate court upheld the lower court's dismissal of Wilson's claim because Wilson failed to demonstrate that the student-athlete participated in any athletic event following the failing grade. Therefore, the school district did not violate the No Pass, No Play rule and the Act did not apply.

EMPLOYMENT LAW

Employment law governs all aspects of the employer-employee relationship and addresses issues such as compensation, benefits, discrimination, workplace safety, privacy, and job security. Employment laws apply when a collective bargaining agreement (CBA) does not exist between employers and employees. In the sports context, athletes, coaches, and league employees use employment law to protect themselves from their employer's illegal actions. Courts frequently determine if a coach or others are considered an "employee" for purposes of bringing claims under employment law statutes. The following cases examine employment law within the sports context.

74. See generally 376 S.W.3d 319 (Tex. App. 2012).

*Ohio ex rel. Cleveland Professional Football, LLC v. Buehrer*⁷⁵

Cleveland Professional Football, LLC (the New Gladiators) instigated this action after the Ohio Bureau of Workers' Compensation found that the New Gladiators were a successor employer of Cleveland AFL, LLC (the Old Gladiators). The Tenth Circuit referred this matter to a magistrate. The magistrate agreed with the bureau's determination that the New Gladiators were a successor employer, which meant that the New Gladiators were responsible for workers' compensation claims that came from employees from the Old Gladiators. However, the magistrate also determined that the bureau erred in concluding that the New Gladiators assumed all of the Old Gladiators' rate experience. Thus, the court ordered the bureau to reissue its decision on the New Gladiators to only include that the New Gladiators were a successor employer for the portion of the business that the New Gladiators actually assumed.

*Williams v. Smith*⁷⁶

The trial court found that the University of Minnesota and its head men's basketball coach, Tubby Smith, made a negligent misrepresentation when Smith offered James Williams an assistant coach position without proper authority. Minnesota and Smith appealed, arguing that they did not owe a duty of care in an arms-length transaction with Williams because Smith only made a verbal commitment and Williams should have known that Smith did not have the authority to hire him.

The Minnesota Supreme Court reversed the trial court's decision because the legal relationship between Smith and Williams did not rise to the type of relationship that would offer Williams legal protection. Williams knew that Smith had to get approval from his supervisor prior to hiring Williams, and they both were similarly situated businessmen negotiating at arm's length to maximize both of their individual interests. Thus, neither Smith nor Minnesota owed any duty of care to Williams.

GENDER EQUITY LAW

Gender equity issues in sports often implicate Title IX of the Education Amendments of 1972, which has had a significant impact on sports, especially for women at high school and college levels. In the sports context, Title IX requires entities that receive federal funding to take certain actions so that

75. See generally No. 11AP-428, 2012 WL 6647026 (Ohio Ct. App. Dec. 20, 2012).

76. See generally 820 N.W.2d 807 (Minn. 2012).

female athletes are treated equally to their male counterparts. The 1979 Title IX Policy Interpretation and other clarifications help provide guidance to those federally funded entities as to how to comply with Title IX.

*Biediger v Quinnipiac University*⁷⁷

The trial court held that Quinnipiac University violated Title IX when it miscounted its female athletes participating in track, cross-country, and competitive cheerleading. Because competitive cheerleading was not a varsity sport, none of the female athletes should have been counted. After recalculating the number of female and male athletes with these considerations taken into account, Quinnipiac had too large of a disparity between its athletes and student population. Thus, the trial court required Quinnipiac to submit a plan to comply with Title IX.

Quinnipiac challenged the lower court's ruling regarding the calculation of the indoor track and competitive cheerleading athletes and the notion that a 3.62% disparity between female athletes and the student body was sufficient to show disproportionate athletic opportunities for females. The appellate court upheld the trial court's decision because lower courts are given significant deference when interpreting Title IX, and Quinnipiac did not provide sufficient evidence to show that female students were offered sports participation opportunities substantially proportionate to their enrollment. Furthermore, because the NCAA neither accepted cheerleading as a "sport" nor an "emerging sport," and the level of competition of Quinnipiac's cheerleading team did not conform to expectations of a varsity sport, the appellate court upheld the district court's ruling not to count cheerleaders in determining if Quinnipiac offered substantially proportionate opportunities to female students.

*Parker v. Franklin County Community School Corp.*⁷⁸

Amber Parker, the mother of a high school basketball player, filed suit on behalf of her daughter and claimed that Franklin County High School discriminated against the girls' basketball team in violation of Title IX. Title IX prohibits schools that receive federal funds from discriminating against students on the basis of gender. Parker alleged that the school discriminated against the girls' basketball team in regard to practice and game times and that this discrimination caused the girls' team to suffer academic and psychological harm.

77. See generally 691 F.3d 85 (2d Cir. 2012).

78. See generally 667 F.3d 910 (7th Cir. 2012).

The court stated that Parker presented an equal treatment claim under Title IX and that the differences in the scheduling times for the teams had already been declared to be in violation of Title IX by the Department of Education's Office of Civil Rights fourteen years prior. The court ruled that Parker presented sufficient evidence of the disparity and the harm suffered by the girls' team, and it vacated the summary judgment ruling in favor of the school.

INTELLECTUAL PROPERTY

Intellectual property law continues to evolve and have an impact on the sports industry. Sports entities, such as teams, leagues, schools, athletic associations, and even athletes, seek to exploit their intellectual property rights and protect the value of their intellectual property. Trademark, copyright, patent, and publicity right claims significantly impact sports as merchandising, licensing, and domain name issues become increasingly popular. The following decisions demonstrate sports-related intellectual property issues that arose in 2012. These decisions include those from U. S. courts and the World Intellectual Property Organization (WIPO).

*Barclays Bank PLC v. Transure Enterprise Ltd.*⁷⁹

Barclays Bank, a financial institution active in over fifty countries, filed a complaint with the WIPO Arbitration and Mediation Center regarding the domain name "barclayspremierleague.com." Barclays held numerous trademarks for its brand, including the term "Barclays Premier League" in the United Kingdom. In 2011, Transure Enterprise registered the disputed domain name and held the domain name through a private domain service. Transure used the domain name for a pay-per-click service that would link visitors to other banks and financial institutions.

Barclays asserted that the domain name in dispute was confusingly similar to the registered Barclays marks and that Transure did not have legal rights or legitimate interests in the disputed domain name. Furthermore, Barclays noted that due to its notoriety, Transure should have been aware of Barclays when it registered the domain name.

The WIPO Panel examined the textual string of the disputed domain name and found that the name was confusingly similar to the Barclays trademark. Transure produced no evidence that it had rights or interests in the disputed domain name. Thus, the WIPO panel ordered Transure to transfer the domain name to Barclays.

79. See generally World Intellectual Prop. Org., No. D2012-0838 (June 1, 2012) (Bettinger, Arb.).

*Baseball Quick, LLC v. MLB Advanced Media, LP*⁸⁰

Baseball Quick, LLC sued MLB Advanced Media (MLBAM) for allegedly infringing on its patented baseball game-condensing software. Baseball Quick provides subscribers with an edited fifteen-minute version of a baseball game that had been played and shows the last pitch of every at-bat. Baseball Quick's developers filed for a provisional patent with the U.S. Patent Office in June 2000 and were granted a patent in December 2009. In August 2000, Baseball Quick asked if MLB wanted to license the Baseball Quick software. MLB declined to license the software on multiple occasions. Before Baseball Quick received a patent, MLBAM developed similar game-condensing software called Condensed Games. In its suit, Baseball Quick alleged that MLB's Condensed Games infringed on its patent for Baseball Quick and sought remedies for that infringement.

MLBAM moved for summary judgment and disputed Baseball Quick's claim three reasons. First, MLBAM argued that Condensed Games did not show the last pitch of every at-bat, which is an element of the Baseball Quick program. Second, MLBAM did not charge for Condensed Games, whereas Baseball Quick's patent implied that its software was designed for paying subscribers only. Lastly, MLBAM argued that to infringe upon a method patent, MLBAM would have had to infringe on all of the patent's method.

MLBAM argued that it did not infringe on all of the method's steps because several of the baseball games used in Condensed Games were recorded before the patent was issued. The court denied summary judgment on MLBAM's first two arguments because there were still issues of material fact to be decided. The court granted summary judgment on MLBAM's final argument because MLBAM could not have infringed on the patent by using games recorded prior to December 2009 given that MLBAM recorded these games, which was a step in the patent method, before the patent term commenced.

*Buday v. New York Yankees Partnership*⁸¹

Tanit Buday sued the New York Yankees for copyright infringement, alleging that the baseball club did not pay her uncle for his logo design. The district court dismissed Buday's complaint for a lack of subject matter jurisdiction and failure to state a claim. On review, the court of appeals upheld the district court's ruling but for different reasons. The court acknowledged that Buday presented a federal question because her alleged

80. See generally No. 11 Civ. 1735(TPG), 2012 WL 1071230 (S.D.N.Y. Mar. 30, 2012).

81. See generally 486 F. App'x 894 (2d Cir. 2012).

common law copyright claim would be protected under the 1976 Copyright Act. However, the court concluded that Buday did not have a copyright interest because the Yankees published the logo prior to the 1976 Copyright Act. The logo was published when Buday's uncle gave the logo to the Yankees, and they used it on their jersey in 1947. As such, the court stated that Buday's common law right of first publication had when her uncle gave consent to the Yankees to publish the logo. The court also noted that, even if that were not the case, the logo would have been considered a work for hire and would belong to the Yankees.

*Jordan v. Jewel Food Stores, Inc.*⁸²

In 2009, the Naismith Memorial Basketball Hall of Fame inducted Michael Jordan into its storied ranks. *Sports Illustrated* published a commemorative issue of its magazine to celebrate Jordan's accomplishment. The magazine offered several businesses, including Jewel Food Stores, the opportunity to design a page for the magazine that referenced Jordan. Jewel Food operated hundreds of grocery stores in Chicago and designed a page that displayed a pair of basketball shoes with Jordan's number spotlighted on a basketball floor and the company's logo and slogan. Jordan sued Jewel Food for making reference to him without his permission. Both Jewel Food and Jordan sought summary judgment. Jordan specifically argued that the Jewel Food design was an advertisement and commercial speech, and therefore, it required less First Amendment protection.

The court stated that the speech must propose a commercial transaction to be considered commercial speech and that Jewel Food's page did not propose a commercial transaction. In determining whether Jewel Food's page amounted to commercial speech, the court considered three factors: "whether: (1) the speech is an advertisement; (2) the speech refers to a specific product [or service]; and (3) the speaker has an economic motivation for the speech."⁸³ The court concluded that merely placing Jewel Food's logo and slogan on the page did not make it an advertisement, and it further noted that Jewel Food paid no money for the page. Jordan argued that the page effectively referred to all Jewel Food products, but the court found this argument unpersuasive. Lastly, the court concluded that Jewel Food's economic motivation for placing its page in the commemorative issue did not constitute commercial speech. Accordingly, the court granted Jewel Food's summary judgment motion and denied Jordan's motion for partial summary judgment.

82. *See generally* 851 F. Supp. 2d 1102 (N.D. Ill. 2012).

83. *Id.* at 1109 (quoting *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009)).

*PGA Tour, Inc. v. Paramartha*⁸⁴

The PGA Tour filed a trademark infringement complaint against Eka Paramartha, an Indonesian individual. The PGA Tour owned various trademarks revolving around the words “golf,” “world tour,” “PGA,” and “championship,” including the phrase “world golf tour.” Accordingly, the PGA Tour sued Paramartha for his use of the domain name “world-golf-tour.net,” which the PGA Tour argued was confusingly similar to its registered trademark.

Upon receiving notice of the WIPO complaint, Paramartha replied by email to the center and stated, in part, that the purpose of the not-for-profit website was to post news, articles, and tutorials about golf and not to confuse visitors. Paramartha indicated that he chose this domain name based upon research done through the Google keywords research tool. Furthermore, Paramartha stated that he immediately shut down the website upon receiving notification of the PGA Tour’s pending action and was willing to shut down the site and follow all rules and regulations.

The WIPO panel found that the PGA demonstrated that it owned the rights to the mark “world golf tour” in the United States. Upon the panel’s finding that the disputed domain name was confusingly similar to the PGA Tour’s trademark, the panel had to determine whether Paramartha registered the domain name in bad faith. Evidence that is used to determine if a disputed domain name is used in bad faith includes whether: (1) the registered domain name is used to prevent the trademark owner from using the marks; (2) the primary purpose for registering the name is to disrupt the business of the registered trademark owner; or (3) the disputed domain name is used intentionally to attract internet users for commercial gain by using the likeness of the registered trademark owner.

Paramartha noted that he was interested in the traffic that came from the usage of the disputed domain name, which reinforced the notion that he acted in bad faith. The panel found that Paramartha used the PGA Tour’s trademarks in the disputed domain name without the PGA Tour’s consent. For the forgone reasons, the panel ordered the disputed domain name be returned to the PGA Tour.

*University of Alabama Board of Trustees v. New Life Art, Inc.*⁸⁵

Daniel Moore painted realistic portrayals of the University of Alabama’s

84. See generally World Intellectual Prop. Org., No. D2012-1904 (Nov. 21, 2012) (Weston, Arb.).

85. See generally 683 F.3d 1266 (11th Cir. 2012).

football team. Moore had painted portraits of the team since 1979, and he eventually started making prints of the paintings for calendars, mugs, and other items. Starting in 1991, Moore entered into several licensing agreements with Alabama to produce and market officially licensed products. Moore continued to produce unlicensed products as well, and Alabama did not ask him to pay royalties on these products. In 2002, Alabama informed Moore that he did not have permission to use Alabama's uniforms in his products without a license from Alabama. Moore countered that his realistic portrayal of the past events meant that he did not need Alabama's permission. In 2005, Alabama sued Moore for breach of contract and trademark infringement.

The lower court concluded that Moore did not need Alabama's consent to portray the team's uniforms in paintings and prints because it was a fair use, which is protected under the First Amendment. However, the lower court concluded that the First Amendment did not protect Moore's use of prints on mugs and calendars that could create consumer confusion. Both parties appealed. The court of appeals concluded that Moore did not breach his 1995 licensing agreement because evidence showed the parties never intended "that Moore's portrayal of the uniforms in unlicensed paintings, prints, and calendars would violate the licensing agreements."⁸⁶ The court noted that several of Moore's unlicensed paintings were displayed in Alabama's athletic department buildings, Alabama sold his unlicensed calendars in the school store, and Alabama displayed several of his unlicensed paintings in the university's museum.

Next, the court of appeals addressed Alabama's claims for trademark infringement. Without deciding the strength of Alabama's logo or the likelihood of consumer confusion, the court determined that Moore's works were protected under the First Amendment. The court stated, "[T]he First Amendment interests in artistic expression so clearly outweigh whatever consumer confusion that might exist on these facts that we must necessarily conclude that there has been no violation of the Lanham Act with respect to the paintings, prints, and calendars."⁸⁷ The court explained that the use of Alabama's colors and trademark was necessary to produce realistic artistic portrayals of historical events. Additionally, the court noted that Moore's copyright in his paintings was not "an automatic defense to any trademark claims made by the University."⁸⁸

86. *Id.* at 1274.

87. *Id.* at 1276.

88. *Id.* at 1280.

LABOR LAW

Labor law governs the relationship between employers and employees who are unionized or are seeking to unionize. Federal labor law continues to have a significant impact on the sports industry as each of the major U. S. professional sports leagues is unionized. Through these unions, professional athletes negotiate CBAs with their respective leagues. Because a majority of American professional athletes are union members, many of the labor law claims in sports arise out of a dispute concerning a particular sport's CBA.

*Sacco v. Cranston School Department*⁸⁹

Craig Sacco and Charles Pearson sued the Cranston School Department for failing to submit their grievances regarding the loss of their coaching positions to arbitration in accordance with the CBA between the Cranston Teacher's Alliance and the school district. Both coaches filed grievances when they lost their coaching positions after receiving unfavorable reports on their annual evaluation. The school department refused to agree to arbitration and stated that the CBA only applied to Sacco's and Pearson's teaching positions and not to their coaching positions. The court agreed with the school department, stating that "[i]n the absence of clear language in the CBA providing that plaintiffs—in their capacities as coaches—have a right to submit grievances to the arbitration and grievance procedures, no such right will be read into the contract."⁹⁰ The court also noted that coaches were not specifically listed as "teachers" under the CBA, but other positions such as librarians, nurses, and guidance counselors were included. The court concluded that if the CBA permitted coaches to compel arbitration, the coaches would have been explicitly listed under the definition of "teacher" along with other non-teaching positions.

PROPERTY LAW

Property law concerns the rights involved with one's interest in both real property and personal property. Within the sports industry, property law issues usually arise with challenges pertaining to the use of a sports facility. These challenges include teams wanting to build a new facility as well as zoning and nuisance issues. The following case illustrates claims related to real property in the sports context.

89. See generally 53 A.3d 147 (R.I. 2012).

90. *Id.* at 150.

*Bear Creek Township v. Riebel*⁹¹

John Riebel, Harold Harris, and Brian Harris owned a parcel of land. They appealed the trial court's order permitting Bear Creek Township's taking of their property for the expansion of a charter school. The township previously approached the landowners about purchasing the property, which was adjacent to the charter school, but was unsuccessful. After the initial unsuccessful attempt, the township and the charter school devised a plan to secure land for a new school building by developing recreational facilities for township residents. The trial court ruled that the condemnation of the land could be upheld because the development of recreational facilities was a valid reason for the taking. The statute authorized the township to acquire lands or buildings for recreational purposes by "lease, gift, devise, purchase or by the exercise of the right of eminent domain for recreational purposes"⁹²

The appeals court reversed the trial court decision and concluded that the statute did not give the township the right to condemn land to expand the charter school. The court found that the school construction did not serve a recreational purpose.

SWISS FEDERAL TRIBUNAL

All CAS decisions are subject to review by the Swiss Federal Tribunal (SFT) under Swiss law. This review usually occurs when an unhappy party tries to vacate a CAS decision; however, this review is very limited, and the SFT is highly deferential to CAS.

*A. v. B.*⁹³

Company A, an Italian corporation, entered into a 2010 sponsorship agreement with company B, a Spanish company who managed cycling team C and its top cyclist, member D. In 2011, company A requested that the SFT find in favor of terminating the sponsorship contract, but an ad hoc tribunal rejected the request, finding that company A's contractual obligations fell under the 2010 agreement.

Additionally, company A requested revision of the prior decision based on the original 2010 agreement, which was undertaken to ensure that team C, and specifically member D, would not use any doping substances that would

91. See generally 37 A.3d 64 (Pa. Commw. Ct. 2012).

92. *Id.* at 68 (citation and internal quotation marks omitted) (emphasis omitted).

93. See generally BGer, Aug. 21, 2012, docket no. 4A_750/2011 (Switz.), available at <http://www.bger.ch>.

jeopardize company A's publicity. Company A claimed that company B breached its duty when the Italian press published articles relating to the opening of criminal doping proceedings against team C and member D. During a February 2012 arbitral tribunal, the SFT found that the facts from the newspaper articles or from the internet were not enough to prove that company B breached its contractual duty to company A.

Company A sought further SFT review, arguing that a petitioner may seek review of a prior award when a petitioner becomes aware of additional relevant facts or decisive evidence that was not available in the previous proceedings. In this case, company A presented information from the press regarding the initiation of criminal doping proceedings against team C and member D. Based on these media allegations, company A asserted that company B breached its duty to supervise team C and member D, therefore, justifying the termination of the sponsorship agreement. Company A failed to address how the alleged opening of a criminal investigation changed the factual findings of the February 2011 tribunal; thus, the facts alleged by company A were not considered relevant in reversing the original SFT decision. Accordingly, the SFT rejected the petition to annul the 2010 sponsorship agreement, and company A had to continue making payments to company B pursuant to the agreement.

*A. v. X. Federation*⁹⁴

A twelve-year-old Polish kart driver, whose racing club was part of the Polish Motor Racing Federation, tested positive for an illegal substance (Nikethamide) after placing second in a German Junior Karting Championship race. The Polish Motor Racing Federation anti-doping committee banned the driver from competing for two years. The driver appealed the decision to CAS, which upheld the appeal in part but reduced the ban to eighteen months. The driver then appealed to the SFT. The SFT noted that the driver's racing ban had already been lifted by the time the appeal came, which rendered his appeal moot. The SFT further held that the driver did not offer any valid arguments to appeal his disqualification from the race in Germany. Thus, the SFT declined to hear the case.

94. See generally BGer, June 18, 2012, docket no. 4A_636/2011 (Switz.), available at <http://www.bger.ch>.

*A. & B. v. WADA & Flemish Tennis Federation (VTV)*⁹⁵

VTV banned two Belgian tennis players, A and B, for one year after they each failed to report their whereabouts in accordance with anti-doping regulations. Both players appealed the VTV's decision to CAS and simultaneously appealed the decision to the Belgium state court. They further appealed to the SFT, arguing that CAS did not have jurisdiction to sanction the players and WADA should not be able to appeal VTV's decision for a harsher penalty.

On appeal to the SFT, A and B argued that CAS did not have jurisdiction over them and that the CAS panel's composition was irregular. The tennis players also alleged that WADA had a conflict of interest in the case and should not be a party. The SFT ruled that the conflict of interest claim was groundless and refused to hear the merits of the claim. Further, the players alleged that CAS was not independent due to its interests in the outcomes in doping matters. The SFT did not hear the merits of this claim because the players did not raise the issue during the arbitration proceedings; rather, they only raised it on the appeal.

Next, the players alleged that they did not consent to arbitration, so the CAS decision should be invalid. The VTV's anti-doping regulations specifically designated that CAS had jurisdiction over doping violations. Because both of the players were members of the VTV, CAS had jurisdiction over them whether or not Belgian law mandated it. Therefore, the SFT held that CAS had jurisdiction to hear the players' appeals.

The players also contended that CAS should not have accepted jurisdiction of the WADA appeal because WADA had no interest to appeal. The players argued that WADA was not a party to the original VTV proceedings and, thus, should be excluded in the appeal. WADA argued that the players were members of VTV, and as such, it did not need a specific interest to appeal the decision. The SFT concluded that the players lost on all of their appeals and ordered them to pay court costs.

*Club X v. Club Y*⁹⁶

This dispute arose from the transfer of a Honduran soccer player, D, to club X, an Italian soccer club. In 1999, club X paid club Y a transfer fee of \$2.2 million for the transfer of D. The contract stipulated that if club X

95. See generally BGer, Feb. 13, 2012, docket no. 4A_428/2011 (Switz.), available at <http://www.bger.ch>.

96. See generally BGer, May 31, 2012, docket no. 4A_682/2011 (Switz.), available at <http://www.bger.ch>.

transferred D to a third party in the future, club X would pay club Y a percentage of royalties on the transfer. If the transfer to a third party was for less than \$7 million, then club X would pay 20%, and if the transfer was for more than \$7 million, then club X would pay 15%. In 2007, club X entered into an agreement with club L to transfer D for €14 million and, thus, owed club Y over \$2.5 million in royalties. However, club X claimed that the 1999 contract was void because it was a forgery.

Club Y filed a claim with FIFA and received a favorable judgment in 2012 ordering club X to pay the royalties. Club X appealed to CAS, but the CAS panel upheld FIFA's decision that the 1999 contract was valid. Club X then appealed to the SFT, asking it to annul the arbitration award. Club X alleged that CAS violated club X's right to be heard because the expert looked only to the authenticity of the signatures and not to the contract as a whole, as club X had requested. The SFT noted that procedural issues raised on appeal would be heard only if they were brought up during the arbitral proceeding. In this case, club X did not allege that its due process rights were violated until after the CAS proceeding, so the SFT rejected club X's appeal and ordered it to pay the costs of the hearing.

*Football Ass'n of Serbia v. M.*⁹⁷

This SFT decision involved the appeal of a 2011 CAS decision by the Football Association of Serbia (FAS), a member of FIFA and UEFA, and M, a professional football coach who was a dual citizen of Spain and Serbia.

In 2008, the FAS and M entered into an employment contract for M to be Serbia's national football coach. After qualifying for the World Cup in 2009, FAS and M signed a new employment contract, which spanned from January 2010 to June 2012 and stipulated that M would be paid €70,000 for the first ten months and €100,000 for the balance of the contract. The parties also agreed to a bonus, which was to be determined based on the performance of the national team in the World Cup. Furthermore, the contract provided that any dispute would fall under the jurisdiction of the FAS, UEFA, and CAS.

On July 3, 2010, FIFA banned M for four matches. Following the 2010 World Cup, the parties discussed an amendment to the 2009 contract to provide a new compensation system. FAS offered a new amendment to the original contract and gave M five days to accept. On the same day, M emailed comments to the amendments to FAS. On the fifth day, FAS terminated the coach's employment contract without notice, citing a breach of contractual

97. See generally BGer, May 23, 2012, docket no. 4A_654/2011 (Switz.), available at <http://www.bger.ch>.

duties.

In a 2011 award, a CAS panel held that the FAS wrongfully terminated M's employment contract and required the FAS to pay M the net amount of the contract (€2,150,000). The FAS appealed to the SFT, alleging improper forum because Serbian law only permits parties to confer jurisdiction to foreign courts if one of the parties is not a Serbian citizen. The FAS argued that the CAS tribunal wrongly accepted jurisdiction; therefore, the CAS award should be vacated. In the instant case, both parties were domiciled in Serbia, as apparent from the employment contract; therefore, the submission to foreign arbitration was improper because it was prohibited by Serbian law. However, the SFT found that, if they overturned the award, CAS would lose the ability to provide parties with justice in its decisions. Accordingly, the SFT upheld the CAS award.

*International Ice Hockey Federation v. SCB Ice Hockey AG*⁹⁸

In April 2008, the International Ice Hockey Federation (IIHF) signed an agreement with the Swiss Ice Hockey Federation (SIHF) and the Swiss National Hockey League GmbH (NL-GmbH) to decide how Swiss clubs would be selected to play in the Champions Hockey League. In 2009, the Champions Hockey League's major financial backer withdrew, which forced it to cancel its 2009–2010 tournament. SCB Ice Hockey AG qualified for the 2009–2010 tournament, and sought CAS arbitration to recover potential prize money and other damages relating to players purchased in anticipation of the tournament. The Champions Hockey League Agreement stipulated that CAS would resolve any disputes between the parties, but the agreement was only between the IIHF, the SIHF, and the NL-GmbH. A CAS panel determined that it had jurisdiction over the dispute. IIHF appealed this decision to the SFT, which annulled the CAS decision.

Although the teams participating in the Champions Hockey League were not direct parties to the contract, the CAS panel concluded that the teams that qualified for the tournament could claim they had rights under the contract. The IIHF disagreed with this conclusion and stated that the agreement did not provide independent rights to teams that qualified for the tournament. The SFT agreed with the IIHF's interpretation of the Champions Hockey League Agreement and annulled the CAS arbitration award that was in favor of SCB Ice Hockey AG.

98. See generally BGer, Mar. 8, 2012, docket no. 4A_627/2011 (Switz.), available at <http://www.bger.ch>.

*Matuzalem v. FIFA*⁹⁹

Francelino da Silva Matuzalem, a professional football player who played for SS Lazio Spa in Rome, appealed a CAS decision that indefinitely banned him from playing football worldwide until he paid all of the damages from the CAS judgment. In a monumental decision, the SFT annulled a portion of the CAS decision because the decision violated Swiss public policy.

In 2004, Matuzalem entered into an employment contract with FC Shakhtar Donetsk that should have lasted until July 2009. In 2007, Matuzalem terminated the contract without cause and began playing with Real Saragossa SAD. The club agreed to hold Matuzalem harmless for possible damage claims arising from the early termination of his contract with FC Shakhtar Donetsk. In July 2009, Matuzalem transferred to SS Lazio Spa in Rome. In 2007, FIFA's Dispute Resolution Chamber ordered Real Saragossa SAD to pay FC Shakhtar Donetsk damages of €6.8 million. Real Saragossa SAD appealed the decision to CAS, which increased the damage award to over €11 million. Real Saragossa SAD then appealed the decision to the SFT.

The FIFA Disciplinary Code allowed for a worldwide and indefinite ban on any football-related activity if a player fails to pay a judgment that was entered against him. Matuzalem argued that FIFA's indefinite ban was void for being against public policy because the ban violated his freedom of profession and was an excessive limitation of personal freedom guaranteed under Swiss law. The SFT noted that actions by federations like FIFA, which significantly harm the persons who are subject to their decisions, are enforceable only when the federation's decisions are justified. FIFA argued that imposing damages against Matuzalem was meant to ensure that FIFA's member organizations were protected from breaches of contract. The SFT stated that CAS's sanctions would not achieve the purpose of getting the damages paid because the sanctions prevented Matuzalem from playing football and earning an income to pay the damages. Thus, the SFT annulled the portion of the CAS decision that banned Matuzalem from playing football because this was against public policy, but it upheld the fines against the club.

*X. v. UCI & Italian National Olympic Committee (CONI) & Italian Cycling Federation (FCI)*¹⁰⁰

The UCI created an anti-doping program called "Athlete's Biological

99. See generally BGer, Mar. 27, 2012, docket no. 4A_558/2011 (Switz.), available at <http://www.bger.ch>.

100. See generally BGer, June 18, 2012, docket no. 4A_488/2011 (Switz.), available at <http://www.bger.ch>.

Passport,” which can indirectly detect doping violations. In December 2009, the UCI determined that X, an Italian cyclist, violated the anti-doping rules after discovering an anomaly in his biological passport. The case proceeded to the CONI, which overturned the UCI’s decision. X appealed to CAS to recover attorney fees, and the UCI appealed to CAS to enforce its decision to ban X for four years and to annul his competition results. In March 2011, a CAS panel rejected X’s appeal, banned him from cycling for two years, and disqualified his competition results. X appealed CAS’s decision to the SFT.

First, X argued that the CAS panel wrongly accepted jurisdiction because UCI filed its appeal late. The SFT did not decide this claim on the merits because it did not want to assert a definitive answer that would limit CAS’s jurisdiction in cases with an untimely filing of an appeal.

Second, X argued that the CAS panel violated his right to be heard because it did not address all of the arguments he submitted. The SFT ruled that the CAS panel’s interpretations of law did not deprive X of the opportunity to be heard, and the SFT refused to review the CAS panel’s interpretation of law. The SFT stated that X’s allegation was really a challenge to the facts used in the arbitration award that was disguised as an argument concerning X’s right to be heard.

Lastly, X argued that the CAS award violated public policy because the biological passport program, which the CAS panel used to find X guilty of violating the anti-doping rules, was flawed. Specifically, X alleged that the biological passport program was not based on universally accepted science and that the program placed the burden of proof on the athlete instead of the UCI. The SFT rejected X’s appeal because X’s questioning of the evidence used against him had no relation to public policy.

X. v. UCI & Federation Z¹⁰¹

In June 2010, X, a professional cyclist, tested positive on two occasions for the prohibited substance clomiphene. In November, Federation Z’s anti-doping commission banned X for two years and fined him €7500. The UCI inquired about the federation’s fine because article 326 of UCI’s anti-doping regulations provides that a racer who is a member of the UCI has to pay a fine of 70% of the cyclist’s gross income if he is suspended for at least two years by a team registered with UCI. X made €154,000 in cycling income. The UCI appealed to CAS and demanded that X pay a fine of €104,432.30. At the CAS proceeding, X’s counsel opposed the selection of arbitrator Carrard by

101. See generally BGer, Oct. 9, 2012, docket no. 4A_110/2012 (Switz.), available at <http://www.bger.ch>.

the UCI and asked CAS to provide the awards of other cases decided by this arbitrator when he was appointed by the UCI. CAS declined to provide X's counsel with the information because pending decisions were confidential.

In February 2012, X filed an appeal with the SFT requesting to annul the CAS award and to disqualify Carrard as an arbitrator. X argued that Carrard failed to disclose that the UCI appointed him as an arbitrator more than three times within the last three years, as required by the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration. Both the UCI and CAS argued that X's right to object to the panel's composition had expired because X could only appeal the composition of the panel at the time the panel was initially confirmed. The SFT ultimately agreed with the UCI and CAS and determined that X forfeited his right to object to the panel's composition when he failed to object at the time of the appointment or within seven days thereof.

TAX LAW

Generally, tax law involves the rules that regulate federal and state taxation, which are derived from the U.S. Constitution, statutes, and common law. Many of the sports law cases in the tax law area involve the income tax filings of a coach, referee, or player as evidenced by the cases below, which center on whether such individuals may deduct certain expenses from their income.

*Mauer v. Commissioner of Revenue*¹⁰²

Kenneth Mauer, a National Basketball Association (NBA) referee, appealed the Tax Commissioner's order that he was a Minnesota resident for the 2003 tax year. Mauer alleged that a provision under the Residency Rule violated the Commerce Clause and his Equal Protection rights under federal and state law. The issue arose from the NBA's airline ticket refund policy that required the refunds to be reported as income. In 2003, Mauer informed the NBA that he changed his primary address from Minnesota to Fort Myers, Florida. Therefore, Fort Myers would be considered his "home city" when he booked flights to and from basketball games that he refereed. Despite the change, Mauer continued to fly primarily in and out of Minnesota, and the NBA expressed concern about his travel arrangements. The court upheld the commissioner's decision and ruled that Mauer was a Minnesota resident for tax purposes because he maintained a home in Minnesota and conducted most of personal business there. The court also ruled that the provision in

102. See generally No. 8117, 2012 Minn. Tax LEXIS 7 (Minn. T.C. Jan. 20, 2012).

Residency Rule did not violate the Commerce Clause or the Equal Protection provisions of the federal or state constitutions.

*Parks v. Commissioner*¹⁰³

The sole issue on review in this case was whether John Parks's coaching activity as a track coach amounted to an "activity not engaged in for profit" under Internal Revenue Code section 183.¹⁰⁴ Under section 183, a person cannot deduct expenses for activities in which the person does not act to make a profit. The court found that Parks's coaching activity was an activity for a profit because he approached coaching in a businesslike manner and spent considerable time coaching. Thus, he could list his losses related to his coaching on his tax returns.

*Sernett v. Commissioner*¹⁰⁵

The sole issue on review in this case was whether John Sernett's sprint car racing activity amounted to an "activity not engaged in for profit" under Internal Revenue Code section 183.¹⁰⁶ The court determined that Sernett's sprint car racing was not an activity for profit because he did not rely on the racing for his income, was not invested in the racing in a businesslike manner, and his racing appeared to be recreational. Thus, he could not claim his losses on his tax returns.

TORT LAW

Tort law continues to represent the most litigated area in sports law. Tort law governs the duty of care owed to co-participants in athletic events, spectators, and those using sports facilities. When determining whether to impose liability, courts balance those risks that are inherent to the sport with the degree of safety owed to the co-participants, spectators, and others using the sports facility.

*Bocelli v. County of Nassau*¹⁰⁷

John Bocelli fell on an exposed sprinkler head on a field owned by the

103. See generally No. 21600-11S, 21602-11S, T.C. Summ. Op. 2012-105 (T.C. Oct. 25, 2012).

104. *Id.* at *3 (quoting I.R.C. § 183(c) (2006)).

105. See generally 104 T.C.M. (CCH) 703 (T.C. 2012).

106. *Id.* at *4 (quoting I.R.C. § 183(c)).

107. See generally 940 N.Y.S.2d 600 (App. Div. 2012).

County of Nassau during a flag football game. The lower court found that Bocelli assumed the risk of injury by participating in the football game and granted the county's motion for summary judgment.

The owner of a facility is immune from liability if an athlete suffers an injury due to a field defect or feature if the risk of injury is inherently part of the sport. This doctrine of immunity applies when "the playing surface is as safe as it appears to be, and the condition in question is not concealed such that it unreasonably increases risk assumed by the players . . ." ¹⁰⁸ On appeal, the court overturned the summary judgment order because the county failed to demonstrate that the risk of injury from a sprinkler head on the field was an inherent risk of playing flag football. Previous courts have found that sprinkler heads could be inherent risks of sport, but the county failed to offer enough evidence to lead to such a conclusion in this case. Accordingly, the court remanded the case to the lower court for further review.

*Brabson v. Floyd County Board of Education*¹⁰⁹

The plaintiff, Carey Brabson, was a spectator at a cheerleading event when she tripped on the raised gymnasium floor. Cheer Elite, a privately owned company, organized the cheerleading competition. Prestonburg High School in Floyd County held this specific competition, and the cheerleading team's booster club managed the competition. However, the Floyd County Board of Education did not receive any profits, and no school board personnel were present during the competition.

Following her injury, Brabson sued both the board of education and Cheer Elite's owner, alleging that the defendants failed to properly warn invitees of the dangerous floor conditions that caused her injury. The court granted Cheer Elite summary judgment because the company did not own the gymnasium and, therefore, was immune from liability. The board of education also moved for summary judgment on the basis of governmental immunity. To be entitled to governmental immunity, the board must have acted in a governmental capacity.

The court examined the board of education's relationship with the booster club and found that, by allowing the competition to take place on school grounds, the board acted in a governmental capacity to further education. The board of education did not receive compensation for the rental of the gymnasium, which indicated that it did not act in a proprietary manner. The

108. *Id.* at 662 (quoting *Cotty v. Town of Southampton*, 880 N.Y.S.2d 656, 659 (App. Div. 2009)).

109. *See generally* 862 F. Supp. 2d 571 (E.D. Ky. 2012).

court permitted the governmental immunity defense and granted summary judgment to the board of education.

*Cope v. Utah Valley State College (UVSC)*¹¹⁰

Shawanna Rae Cope sued UVSC after she was injured during a practice session while participating on the Ballroom Dance Tour Team. The team's instructor pointed out that Cope and her partner were performing a lift incorrectly and told them that, if they did not get the lift right, they would have to cut it from their routine. While practicing the lift, Cope's partner lost his footing and dropped her, causing her to suffer head trauma. The trial court granted summary judgment in favor of UVSC, stating that neither the college nor the instructor had a special relationship with Cope, nor did they owe her a duty of care. The court noted that universities and colleges typically do not owe students any duty of care, except under certain circumstances when a special relationship is formed that would create a duty of care on the part of the school. A "special relationship is created when (1) a directive is given to a student (2) by a teacher or coach (3) within the scope of the academic enterprise."¹¹¹ Applying this test, the appellate court concluded that a special relationship existed and that the instructor owed Cope a duty of reasonable care. Therefore, the court reversed the summary judgment in favor of UVSC and remanded the case.

*Creel v. L & L, Inc.*¹¹²

This case was an appeal of a ruling that granted summary judgment to owners of a golf course, L & L, Inc., after a golf ball struck James Creel, a spectator, in the head while he was standing near one of the holes. The golfer who hit Creel saw Creel and other golfers on the putting green but chose to hit his golf ball after an L & L employee instructed him to do so. The lower court granted L & L's motion for summary judgment because Creel assumed the risk of a golf ball hitting him, and the Wyoming Recreational Safety Act bars actions against providers of recreational opportunities from injuries caused by an inherent risk of the activity. Furthermore, the Act states, "A provider of any sport or recreational opportunity is not required to eliminate, alter or control the inherent risks within the particular sport or recreational opportunity."¹¹³

110. See generally 290 P.3d 314 (Utah Ct. App. 2012).

111. *Id.* at 320 (citation omitted).

112. See generally 287 P.3d 729 (Wyo. 2012).

113. *Id.* at 734 (quoting WYO. STAT. ANN. § 1-1-123(b) (LexisNexis 2011)).

Creel argued that L & L's agent negligently increased the risk of injury to the spectators by instructing the golfer to hit his ball, an action that removed the protection afforded by the Act. Creel's central claim was that L & L negligently trained its employee, which resulted in the employee instructing the golfer to hit the ball when it was not safe to do so, and ultimately caused Creel's injury.

The Act defines inherent risk as the “‘dangers or conditions which are characteristic of, intrinsic to, or an integral part of any sport or recreational opportunity.’”¹¹⁴ The court clarified that an inherent risk may not be self-evident, and risks may occur from a choice made by a provider in specific instances that the legislature intended to exempt. The court ultimately reversed the summary judgment order because there was evidence that the employee's failure to heed the golfer's warning that he could hit spectators could constitute negligence.

*DeAtley v. Mutual of Omaha Insurance Co.*¹¹⁵

Kalee DeAtley, a senior in high school, participated on his school's wrestling team. The team qualified for the Missouri State Wrestling Tournament, but DeAtley did not qualify individually to compete. However, DeAtley was permitted to accompany the team to the tournament. While at the team's hotel, DeAtley was acting foolishly with other members of the team who did not qualify for the tournament, and he ruptured his spleen. DeAtley sought to be covered under the insurance policy that was issued to the Missouri State High School Activities Association (MSHSAA) for the tournament. The insurance company refused to pay because DeAtley did not participate in the tournament, as defined in the insurance policy. The policy defined eligible students to be “[a]ll student athletes, student managers, student trainers, student cheerleaders[,] and students participating in interscholastic competition.”¹¹⁶ DeAtley argued that the policy should have covered him because he was traveling as a student-athlete with the team to the covered event, and he was participating in the tournament by virtue of attending with the team. The court disagreed and stated that “DeAtley's only role at the tournament was as a spectator, and thus he was not participating in the wrestling tournament as a student athlete.”¹¹⁷ The appellate court affirmed the lower court's grant of summary judgment to Mutual of Omaha.

114. *Id.* (quoting § 1-1-122(a)(i))

115. *See generally* 701 F.3d 836 (8th Cir. 2012).

116. *Id.* at 838 (citation omitted).

117. *Id.* at 839–40.

*DiPietro v. Farmington Sports Arena, LLC*¹¹⁸

Michelle DiPietro was a minor child who was playing soccer at Farmington Sports Arena and injured her ankle when her foot stuck to the playing surface while running. Her mother sued Farmington Sports Arena for negligence, claiming that the playing surface was unsafe. Prior to DiPietro's injury, no standards had been set for regulating the playing surfaces of indoor soccer facilities. Farmington Sports Arena used carpet similar to that used by other indoor soccer facilities, and the Connecticut Junior Soccer Association had approved the facility and the carpet after an inspection.

The standard for negligence was that the Farmington Sports Arena owed a duty to DiPietro, and it had to have had actual or constructive notice of the unsafe playing condition before liability would apply. Specifically, the notice had to be related to the actual defect in the playing surface. To prove negligence, DiPietro's mother had the responsibility to prove that Farmington Sports Arena had such notice of the defect and that the arena failed to rectify the defect upon such notice. Given that there was no notice of the unsafe playing surface prior to the injury, the court found for Farmington Sports Arena on summary judgment, and DiPietro lost her case.

*Layden v. Plante*¹¹⁹

Diane Layden sued her personal trainer, Angela Plante, and the owner of No Limits Fitness, Deborah Greenfield, after Layden injured herself while exercising under Plante's direction. Plante instructed Layden to stop exercising after Layden herniated a disc in her back, but Layden continued exercising on her own using Plante's written instructions. Layden herniated two more of her discs. Layden then alleged that Plante failed to supervise and instruct her and that Greenfield negligently trained Plante. Layden appealed the district court's grant of summary judgment to Greenfield and Plante. Since Layden had weight-lifting experience and knew that she could injure her back, the appellate court found that she assumed the risk of injury. However, the appellate court remanded the case for the jury to decide whether Plante created unreasonable progression of those risks beyond normal weight-lifting risks.

*Leasure v. Adena Local School District*¹²⁰

Heidi Leasure sued Adena Local School District for its negligent

118. See generally 49 A.3d 951 (Conn. 2012).

119. See generally 957 N.Y.S.2d 458 (App. Div. 2012).

120. See generally 973 N.E.2d 810 (Ohio Ct. App. 2012).

configuration, installation, and maintenance of bleachers in a high school gymnasium. Leasure was watching a volleyball game in the gymnasium when she fell while walking down the bleacher steps. The district court denied summary judgment as the condition of the bleachers was an issue of material fact.

The school district argued that the court should have granted it immunity because the injury occurred on the school grounds in a gymnasium that was used for a governmental purpose. However, the issue in the case, which Leasure had to prove, related to whether the physical defect in the bleachers—that they were not operating as intended—caused Leasure’s injury. Leasure offered evidence that demonstrated that the bleachers did not operate as intended because they shifted while people were walking on them. Further, the bleachers were not set up according to the manufacturer’s specifications. The appellate court affirmed the denial of summary judgment because there was a question of material fact as to whether the bleachers were safe and operating properly.

*Leja v. Community Unit School District 300*¹²¹

Allison Leja sued Community Unit School District 300 after she was injured during a high school volleyball practice. Leja suffered facial injuries when the volleyball net crank that she was adjusting snapped back and struck her. After the trial court concluded that the school district was immune from suit, Leja appealed. On appeal, she argued that the school district had notice of the volleyball net crank’s risk of injury because there was a warning label on the crank; by allowing Leja to operate the crank with the warning label still on it, the school district showed disregard for her safety. To prove the school district had notice and acted with disregard for her safety, Leja had to prove that the school district knew that she was likely to suffer an injury by operating the crank. The court found that the warning label itself did not constitute notice of such a likelihood of injury, and Leja lost her appeal.

*Marcus v. City of Newton*¹²²

Edward Marcus brought suit alleging that the City of Newton negligently maintained a softball field because he was injured when a tree fell on him as he was awaiting his turn to bat during a recreational softball game. The city argued that it was entitled to summary judgment under the recreational immunity doctrine. The superior court denied summary judgment to the city,

121. See generally 979 N.E.2d 573 (Ill. App. Ct. 2012).

122. See generally 967 N.E.2d 140 (Mass. 2012).

and the city appealed.

The recreational use statute provides that anyone “‘having an interest in land . . . who lawfully permits the public to use such land for recreational . . . [activities] . . . shall not be liable for personal injuries . . . sustained by such members of the public . . . in the absence of willful, wanton, or reckless conduct by such person.’”¹²³ Furthermore, the statute provides that when a landowner charges a fee, so long as that fee is used for the sole purpose of reimbursing costs directly attributable to a user’s specific recreational use, the landowner still remains exempt from liability.

In this case, Marcus paid an \$80 registration fee to the organizers of the softball league, Coed Jewish Sports, who in turn paid the city a fee to secure a permit to use the field for purposes of the softball league. Although the city claimed that it used the fee for maintenance and administrative costs associated with the field, the city did not present evidence to support that the payment was dedicated solely to the costs directly attributable to the city’s maintenance of the field. The appellate court found that the lower court properly denied the city’s motion for summary judgment.

*Sams v. College Bowl Lanes, Inc.*¹²⁴

Lou Sams suffered an injury by slipping while bowling at a bowling alley owned and operated by College Bowl Lanes, Inc. Sams alleged the bowling alley negligently applied oil to the bowling lane, which caused excess oil to collect in the area where Sams stepped and resulted in her injury. The trial court granted summary judgment to College Bowl Lanes on the grounds that it did not breach its duty to exercise ordinary care regarding the maintenance of the bowling lane and that Sams’s claim was based on mere speculation.

To establish negligence, Sams had to prove that the bowling alley owed her a duty of care, that it breached that duty, and that the breach was a direct and proximate cause of her injury. It is undisputed that Sams was a business invitee; therefore, the bowling alley owed her a duty to maintain the premises of the bowling alley in reasonably safe manner. Sams failed to provide evidence showing that the bowling alley breached this duty of care. As a result, the appellate court affirmed the lower court’s grant of summary judgment for College Bowl Lanes.

123. *Id.* at 143 (quoting MASS. GEN. LAWS. ch. 21, § 17C (2010)).

124. *See generally* No. 2011CA00138, 2012 WL 134832 (Ohio Ct. App. Jan. 17, 2012).

*Sandholm v. Kuecker*¹²⁵

This case was an appeal regarding the applicability of the Citizen Participation Act to a lawsuit alleging multiple accounts of defamation per se. Steve Sandholm, a high school athletic director and basketball coach, alleged that fans of the basketball team defamed him by attempting to remove him as the head coach. In particular, Sandholm claimed that the fans wrote emails to the school board, commented in the local newspapers, and made website publications with malice and reckless disregard for the truth.

The fans filed a motion to dismiss on the basis that SLAPP (Strategic Lawsuits Against Public Participation) prohibited such a defamation claim because the claim was based on their right to free speech with the purpose of procuring a favorable governmental action to fire the coach. The district court agreed and dismissed the claim. However, the appellate court found that the statements were not furthering free speech. Sandholm had a right to seek damages for the harm he suffered due to the defamatory statements. The appellate court remanded the case to the district court for further proceedings.

*Smith v. Landfair*¹²⁶

Roshel Smith sued Donald Landfair in a personal injury action after sustaining injuries from one of Landfair's horses that was spooked while being unloaded from a horse trailer. Smith argued that Landfair negligently handled his horse when removing the horse from the trailer based on the horse's known temperament. The appellate court concluded that Smith was neither an equine activity participant nor a spectator; thus, Landfair was liable for Smith's injury.

However, the Ohio Supreme Court overturned the appellate court's finding that Smith was not an equine activity participant because Smith placed herself in the horse stable where equine activity was occurring. The case was remanded back to the circuit court.

*Steinbrink v. Greenon Local School District*¹²⁷

Tad Steinbrink, a high school teacher and assistant football coach, sued the Greenon Local School District for intentional infliction of emotional distress, defamation per se, libel, and tortious interference with a contract. Steinbrink was investigated for his conduct as an assistant football coach and

125. See generally 962 N.E.2d 418 (Ill. 2012).

126. See generally 984 N.E.2d 1016 (Ohio 2012).

127. See generally No. 11CA0050, 2012 WL 1080735 (Ohio Ct. App. Mar. 30, 2012).

was asked to resign from his position as coach. However, Steinbrink claimed that he did not have notice of the investigation and that the school district made damaging statements about his termination to the local newspaper.

The school district filed for judgment on the pleadings; it argued that there was no actionable claim of relief available and that the school district was immune from liability pursuant to the Ohio Code that provides immunity for political subdivisions and their employees against civil damages. However, the immunity for political subdivisions did not apply to matters arising out of an employment relationship between the school district and its employees. Further, Steinbrink's claims involved intentional conduct, which also prevented the governmental immunity defense. Thus, the appellate court denied the judgment on the pleadings.

*Stern v. Easter*¹²⁸

A golf ball struck Rachel Stern while she was at Guy Easter's golf course. Stern then sued Easter, seeking damages for the injuries she sustained. Stern had been sitting on a patio next to the golf course when an errant tee shot hit her. Easter introduced evidence to show that, in the fifteen years that the golf course had operated near the area Stern was seated, only two golf balls had ever struck the building, landing in areas at least seventy-five feet from where Stern was seated.

Although a property owner owes a duty to exercise reasonable care in preventing foreseeable injuries to individuals on adjoining properties, there was no duty to protect against occurrences extraordinary in nature. The evidence presented showed no indication that the occurrence in this case was foreseeable to Easter. The court found that the golf ball that hit Stern "was an extraordinary occurrence that a reasonably prudent golf course owner would not be expected to guard against[,]"¹²⁹ and the court dismissed the complaint.

*Wolfe v. AmeriCheer, Inc.*¹³⁰

Lindsay Wolfe was injured during an AmeriCheer cheerleading competition. She was on a private all-star cheerleading team and was the base during a cheerleading stunt, where she lifted another cheerleader (the flyer) into the air. During a lift, the flyer lost her balance and fell on Wolfe. Wolfe sued AmeriCheer for recklessly failing to provide spotters, which she claimed caused her injury.

128. See generally 92 A.D.3d 1250 (N.Y. App. Ct. 2012).

129. *Id.* at 1252.

130. See generally No. 11AP-550, 2012 WL 760778 (Ohio Ct. App. Mar. 8, 2012).

Prior to participating in the competition, Wolfe's mother signed a release waiver that stated that Wolfe understood she could be injured, that she assumed full risk of such potential injury, and that she released AmeriCheer from liability for any injuries. AmeriCheer moved for summary judgment because of this release waiver; it also argued that Wolfe assumed the risk of injury under the doctrine of primary assumption of risk. The trial court granted summary judgment to AmeriCheer based on these claims.

On appeal, Wolfe argued that the trial court erred in granting summary judgment due to material facts that Wolfe presented showing AmeriCheer's reckless conduct, which barred the waiver and the assumption of risk argument. To establish willful, reckless, or wanton conduct on the part of AmeriCheer, Wolfe had to show that AmeriCheer failed to exercise its duty of care in a situation where there was a high probability of harm that could result from the lack of care. At the time of the accident, AmeriCheer was under no duty to provide spotters, but it provided them anyway as a safety precaution. Additionally, there was no evidence that the spotters in this case were negligent. The appellate court found that there was no evidence suggesting that AmeriCheer acted with a reckless disregard to the safety of the participants, and the court upheld the trial court's order of summary judgment.

U. S. ANTI-DOPING AGENCY

The U. S. Anti-Doping Agency (USADA) is the United States' anti-doping organization. The non-profit organization manages the anti-doping program for various athletes, including those in the U.S. Olympic and Pan-American programs. USADA addresses positive drug tests for those athletes and imposes sanctions based on specific procedures. The decisions that follow demonstrate the anti-doping situations that involved USADA during 2012.

*Chelsea Football Club Ltd. v. Mutu*¹³¹

FIFA temporarily banned Adrian Mutu from playing worldwide soccer because he tested positive for cocaine in 2004. In 2009, a CAS panel upheld FIFA's ruling. Chelsea Football Club filed a petition to recognize and enforce the CAS decision to suspend Mutu pursuant the New York Convention. The court upheld the suspension because the rationale used by the CAS panel in calculating damages paid to Chelsea did not violate U.S. public policy.

131. See generally 849 F. Supp. 2d 1341 (S.D. Fla. 2012).

*USADA v. Arias*¹³²

Luis Arias, a middleweight boxer registered with USA Boxing, contested USADA's declaration of his third whereabouts failure in eighteen months. Arias claimed that he was not negligent in his failure to file a timely whereabouts notice and that the situation was beyond his control. Arias's coping control manager testified that USADA sent Arias four emails at the email address Arias provided and a voicemail message notifying him of the importance of his timely filing. Arias contended that he was busy with his college finals and was working with his lawyers and promoters to decide whether he was going to turn professional, which caused his late filing. Arias then stated that he could not log on to his USADA account because of a password problem and that he tried to call the USADA office, but USADA closed the office for the holidays. USADA presented evidence that its offices were open for three days between December 27 and December 29, that its call logs did not show any calls from Arias, and that it had called Arias during the last week of December to remind him of his whereabouts filing. The arbitrator noted that Arias had experience with properly making whereabouts filings, had received training, and knew of the consequences of failing to file adequately; thus, the arbitrator ruled that Arias was negligent in not filing his whereabouts and denied his appeal.

*USADA v. Hellebuyck*¹³³

In 2004, USADA cited Eddy Hellebuyck for a doping violation and suspended him for two years. In a 2010 interview with *Runner's World Magazine*, Hellebuyck admitted that he used erythropoietin (EPO), a banned substance. In October 2010, Hellebuyck contacted the chief executive officer of USADA to admit that he used EPO as early as 2001. Hellebuyck conceded that he had perjured himself in his 2004 arbitration hearing and his 2006 appeal to CAS when he claimed he had never used EPO prior to his positive test in 2004. On April 27, 2011, USADA sent Hellebuyck a charging letter, which informed him that USADA would be modifying his previous doping violation. Hellebuyck disputed USADA's ability to do this based on IAAF rule 55.2(iii), which provides that USADA cannot use stated admissions against an athlete if the violation occurred over six years ago. USADA argued

132. See generally Am. Arbitration Ass'n: N. Am. CAS Panel, AAA No. 77 190 E 00043 12 JENF (Mar. 27, 2012); Am. Arbitration Ass'n: N. Am. CAS Panel, AAA No. 77 190 E 00042 12 JENF (Feb. 25, 2012).

133. See generally Am. Arbitration Ass'n: N. Am. CAS Panel, AAA No. 77 190 168 11 JENF (Jan. 30, 2012).

that the statute of limitations had been tolled by Hellebuyck's fraudulent concealment at his 2004 hearing and that it could invalidate his results as early as his first admitted violation in 2001.

The panel ruled that the IAAF rule applied to Hellebuyck and that the statute of limitations had passed for USADA to use his admission against him. However, the panel also acknowledged the unclean hands doctrine, which states that those who "ask for help about the actions of someone else but have acted wrongly . . . may not receive the relief [they] seek."¹³⁴ The panel decided that Hellebuyck came with unclean hands when he "admitted he committed multiple doping offenses during the relevant time period that he lied about in the 2004 hearing . . ."¹³⁵ Further, the panel stated that Hellebuyck could not "assert that some procedural or substantive rule designed for the purpose of ensuring the adequate presentation of timely and reliable evidence should work to his benefit to avoid a determination that he committed the doping offense."¹³⁶ The panel ultimately ruled that Hellebuyck's false testimony tolled the statute of limitations until his admission to USADA in 2010, and the panel's holding invalidated his results back to 2001.

*USADA v. Jelks*¹³⁷

Mark Jelks, a track and field athlete, appealed USADA's decision to suspend him for two years following his failure to file three whereabouts filings within an eighteen-month period. The suspension began on August 23, 2010, but Jelks did not file his appeal until after he had already served half of his ineligibility period. He then contacted USADA to request a reduction in his suspension and gave the reasoning for his whereabouts failures. The reasoning helped to justify his failures and could have resulted in a less severe suspension had he communicated it to USADA at an earlier date.

Jelks argued that his case should have been reopened "based on general principals of law and in the interest of justice."¹³⁸ Jelks wanted to present evidence to USADA that he was unable to respond to its notices because he was severely depressed after his dad died, he lost his mentor, he had a child with his girlfriend, and he lost his means of income and home, all causing him to act unreasonably. USADA argued that section 11(e) of the USADA

134. *Id.* ¶ 8.3.

135. *Id.* ¶ 8.8.

136. *Id.*

137. *See generally* Am. Arbitration Ass'n: N. Am. CAS Panel, AAA No. 77 190 00074 12 (May 23, 2012).

138. *Id.* ¶ 6.1.

Protocol prohibits a judgment from being reopened unless the athlete can show that he failed to receive proper notice or the opportunity to contest the sanction; Jelks had already conceded that he received proper notice.

The issues at arbitration were whether there was a legal basis for reducing the suspension and whether Jelks' fact scenario merited a reduction. Typically, athletes only have fifteen days to appeal a sanction. Jelks contended that he was unable to object to the sanction in time because he was so severely depressed that he could not act as a reasonable person would. The arbitrator noted that Jelks had contested his second missed test and submitted a written appeal. The arbitrator also stated that Jelks had several people to whom he could reach out and that he managed to find time to compete and train. Finally, the arbitrator found that not a single doctor diagnosed Jelks as being clinically depressed, and Jelks did not present any evidence to prove such a diagnosis. Thus, the arbitrator concluded that there was no reason to reduce Jelks's suspension from two years to one and denied his appeal.

U. S. OLYMPIC COMMITTEE

The U. S. Olympic Committee (USOC) is the national Olympic committee for the United States, which supports American and Olympic athletes. The USOC supervises the national governing bodies for the various Olympic Sports. The USOC also protects and develops the Olympic Movement in the United States and is the United States' representative for Olympic matters. The following decisions represent the major issues relating to the USOC and its authority during 2012.

*DeRosier v. USA Track & Field (USATF)*¹³⁹

Phil DeRosier and Amanda Kimbers, two American track and field athletes, challenged a USATF ruling that denied the record times they ran on June 16, 2012, at the New Jersey International Invitational meet to qualify them to compete at the 2012 U.S. Olympic Trials. At the meet, both athletes achieved personal best times that met the USATF qualifying standards for the trials, but the USATF later determined that the timing devices used did not conform to USATF timing standards. Subsequently, the USATF decided to not accept the time, and the athletes were not able to compete in the trials.

The U.S. Olympic Trials rules require that the video-based timing systems have to use devices that produce at least fifty frames per second and incorporate a timing device that reads up to 1/110 of a second. USATF failed

139. See generally Am. Arbitration Ass'n: N. Am. CAS Panel, AAA No. 77 190 E 00189 12 JENF (June 22, 2012).

to prove that the New Jersey meet timing devices did not comply with regulations. Thus, the athletes were able to use their recorded times at the New Jersey meet to compete in the trials.

*Guarnier v. USA Cycling, Inc. (USAC)*¹⁴⁰

Megan Guarnier, an American cyclist who competed for a position on the 2012 Olympic Cycling Team and sought to be named a member of the Olympic team in the road-cycling event, brought a complaint against USAC. The complaint alleged that USAC misapplied and failed to follow its own established athlete selection procedures when it selected a specific member to the Olympic team instead of Guarnier.

USAC procedures define the discretionary criteria for selection to the road team in the following manner: (1) Medal Capability—the first and foremost requirement is that the selected athlete demonstrate he or she is capable of medaling in Olympic style events; (2) Capability of Enhancing Team performance—the athlete, based upon international experience and performance, must be able to contribute primarily to “the synergy of the team members and/or the ability to play a strong support role [in] . . . the success of the team[;]”¹⁴¹ and (3) Future Medal Capability. Guarnier asserted that neither she nor the specific member of the team she wanted to replace were medal capable, but she claimed that she would have been better able to assist the team as a support rider than the selected member. Guarnier relied on the wording in the selection criteria that there is a *primary* importance on being able to assist in the success of the team, arguing that her qualities as a support rider were far superior to those of the team member she was looking to replace. Guarnier, although qualified to be a support rider, was not medal capable. Alternatively, the rider Guarnier sought to replace was possibly medal capable, but she was not a proven support rider.

Due to the discretionary nature of the USAC selection criteria, the arbitrator found that USAC properly applied its selection criteria by choosing a medal capable member over a non-medal capable support rider. Therefore, the arbitrator dismissed Guarnier’s claim and left the team originally selected by the USAC intact.

140. See generally Am. Arbitration Ass’n: N. Am. CAS Panel, AAA No. 77 190 E 00198 JENF (July 9, 2012).

141. *Id.* ¶ VIII(B)(2.1).

*Merson v. USA Triathlon (USAT)*¹⁴²

Melissa Merson alleged that USAT failed to follow its procedure for nominating candidates to serve on the International Triathlon Union Executive Board (ITU Board). Merson had governed triathlons for over twenty years and served on the USAT Board of Directors, with per of her time compromising the role of chair of the USAT International Relations Committee (USAT IRC). In 2008, Merson started a four-year term as the United States' representative to the ITU Board, where she performed various tasks including evaluating rule changes and serving on competition juries.

In 2012, a member of the USAT Board solicited candidates to run against Merson and convinced a fellow board member to run for the position. Further, the board member who replaced Merson did not submit her nomination to the USAT IRC, as was requested, but instead, the member directly informed the president of her interest in the position. The USAT Board then held a meeting to vote on the nominations to the ITU Board. At the meeting the USAT Board did not vote for any of the recommended candidates, but it chose two of the nine open positions, including the Merson's position, to be open for a special discussion and a vote. During discussion, members spoke in favor of Merson and indicated that ITU executive officers had specifically requested Merson's renomination. Despite strong endorsements, the USAT Board did not vote to renominate Merson and instead nominated an individual with less experience who lacked support from the USAT athlete board. Subsequently, the athlete board members made a motion to reconsider the nomination, but it failed. Upon the motion's failure, athlete board members filled a complaint based upon the failure of the USAT Board to nominate a candidate who represented the views of the athlete board and the USAT IRC. Thereafter, the USAT Board nominated another highly respected businesswoman who could conduct sound international relations for Merson's desired position.

The arbitrator's de novo review of Merson's claims required her to carry the burden of proving the claim by a preponderance of the evidence. To succeed, Merson had to prove one of four factors: (1) the selection was not in accordance with the USAT's selection policy; (2) USAT misapplied the policy; (3) the decision maker showed bias or the selection process was demonstrably unfair; or (4) the decision was unreasonable. "So long as [the USAT] decision is the product of applying their policy and process as published, fairly and in good faith without the presence of the disqualifying factors . . . , for a proper purpose . . . , then that decision will be accorded

142. See generally Am. Arbitration Ass'n: N. Am. CAS Panel, AAA No. 77 190 00272 12 JENF (Oct. 12, 2012).

utmost respect”¹⁴³

Merson asserted that the USAT Board retaliated against her for expressing unpopular views regarding the operation of a USAT branch at a prior board meeting, and as a result, she was not reelected to her position on the ITU Board. Conversely, USAT asserted that the reason the USAT Board did not renominate Merson was partly because of her prior inappropriate conduct at past events where she was a representative of USAT and because of her negative position expressed at previous meetings. Further, the USAT Board did not have to adopt athlete boardmembers or USAT IRC recommendations. The USAT Board may use its discretion when electing representatives. Accordingly, the arbitrator found that the USAT Board had the express power to elect any individual that is qualified for the position, as it did in this case.

*Morgan & Theriault v. USA Synchronized Swimming (USA Synchro)*¹⁴⁴

Olivia Morgan and Michele Theriault appealed USA Synchro’s decision to keep Morgan from competing in the 2012 London Olympics with Theriault. Morgan and Theriault alleged that USA Synchro failed to follow its own established athlete selection procedure by choosing Theriault and pairing her with another swimmer, while USA Synchro selected Morgan as an alternate. Specifically, Morgan and Theriault stated the following: (1) USA Synchro did not follow its own procedures when it failed to give the required weight to the fitness evaluations during the selection process; (2) the director of the national team had a direct conflict of interest with the selection; and (3) the selection did not look at pairs as a duet but, rather, as individuals. Morgan declined the invitation to serve as the alternate. Ultimately, Morgan and Theriault did not have standing to bring a complaint regarding the Olympic selection because Morgan had declined the invitation and USA Synchro had appointed Theriault to the team.

*Robinson v. USA Taekwondo*¹⁴⁵

In February 2012, the hearing panel determined that USA Taekwondo was not fulfilling its obligations as a national governing body according to the Ted Stevens Olympic Amateur Sports Act. As a result, the USOC Board placed USA Taekwondo on probation for six months, and the hearing panel continued

143. *Id.* ¶ 5.5.

144. *See generally* Am. Arbitration Ass’n: N. Am. CAS Panel, AAA No. 77 190 00050 12 JENF (Mar. 26, 2012).

145. *See generally* In re USA Taekwondo’s Probation (U.S. Olympic Comm. Sept. 24, 2012) (on file with review).

to monitor USA Taekwondo's activities and progress. The panel later extended USA Taekwondo's probation for six additional months due to USA Taekwondo's progress failures. The USOC agreed with the extension of the probation and ordered USA Taekwondo to review its governance structure and to change its bylaws. Finally, the USOC ordered USA Taekwondo to hire a financial expert to audit USA Taekwondo's activities.

WORKERS' COMPENSATION

Generally, professional athletes are eligible to receive workers' compensation benefits for injuries they suffer during their term of employment. The athletes must give up the right to sue their employer if they choose to receive wage replacements or other medical benefits. Injured college athletes have also begun arguing that they are employees, even though the NCAA says they are not. The following cases show a variety of workers' compensation issues in the realm of sports.

*Matthews v. NFL Management Council (NFLMC)*¹⁴⁶

Bruce Matthews, a former professional football player, appealed a decision denying his motion to vacate an arbitration award that prevented him from receiving workers' compensation benefits. Matthews played in the NFL for nineteen years and filed a workers' compensation claim in California for injuries he sustained during his career. Matthews did not play for any team based in California, nor did he sustain any particular injury in California. After Matthews filed the California claim, the NFLMC filed a grievance and argued that Matthews had breached his employment agreement, which provided that Tennessee law would govern any workers' compensation claims. Thereafter, and pursuant to a clause in Matthews's employment contract, the grievance went to arbitration, where the arbitrator found that Matthews violated his employment agreement.

Matthews argued that the arbitration award was contrary to federal labor law and California's workers' compensation law. However, the court declared that Matthews had to prove that he was an employee under California law and that he was injured in California or played football in California. Further, Matthews's limited contact with California prevented him from establishing that any of his rights were taken away under federal labor law. Thus, the appellate court upheld the arbitration award.

146. See generally 688 F.3d 1107 (9th Cir. 2012).

*Stewart v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*¹⁴⁷

Andrew Stewart played in the NFL for three years, during which time he sustained various football-related injuries requiring surgical repair. Following his NFL career, Stewart played four additional seasons in the Canadian Football League (CFL). Fourteen years after retiring from the NFL, Stewart sought to collect benefits from the NFL Player Retirement Plan because he had constant pain from injuries he suffered while in the NFL.

The retirement plan offers four different types of monthly benefits for disabled players. The first category, active football benefits, is for athletes who became disabled while still playing in the NFL. The second type, active non-football benefits, is given to players who became disabled while playing in the NFL but not as a result of NFL activities. The third type, football degenerative benefits, is provided to athletes who suffered disabilities within fifteen years of retiring from the NFL. Finally, athletes can receive inactive benefits if disabled after the fifteen-year retirement period.

In order for Stewart to bring his claim before the retirement plan, a doctor had to diagnose him for his disability. Following the diagnosis, the retirement plan awarded Stewart inactive benefits because his disability did not arise from participating in NFL activities. Stewart requested football degenerative benefits and appealed the plan's initial determination to no avail. Stewart sued the retirement plan following the denial of his appeal for denial of his ERISA benefits.

Stewart prevailed in his ERISA claim because the retirement plan did not have a process that used adequate reference materials and did not act using reasoned and principled decision-making. The court concluded that the plan abused its discretion in denying Stewart the football degenerative benefits and awarded Stewart backdated benefits.

MISCELLANEOUS

The following sports-related cases do not involve any particular area of law but include gambling, federal law issues, and public records actions.

*Arlington Park Racecourse LLC v. Illinois Racing Board*¹⁴⁸

Arlington Park Racecourse appealed a circuit court ruling that affirmed the Illinois Racing Board's decision regarding the distribution of funds from the Horse Racing Equity Trust Fund. Arlington Park Racecourse alleged that the

147. See generally No. WDQ-09-2612, 2012 WL 2374661 (D. Md. June 19, 2012).

148. See generally 980 N.E.2d 72 (Ill. App. Ct. 2012).

board misinterpreted the distribution calculations detailed in the Illinois Horse Racing Act, which governs distributions from the trust fund. Under the Act, casinos located in Illinois that have annual adjusted gross receipts over \$200 million are required to deposit 3% of the daily receipts into the trust fund. The trust fund uses 60% of the money collected to pay out race purses and uses the remaining 40% to operate and market racing facilities.

The court found that the distribution calculation in the Act was ambiguous and that arguments could be made for both Arlington Park Racecourse and the board; however, the court deferred to the board's interpretation based on the board's experience in managing the racing industry.

*Davis v. Byers Volvo*¹⁴⁹

Byers Volvo, an Ohio automobile dealership, paid ESPN college football analyst Kirk Herbstreit to appear in television advertisements endorsing the dealership. Trace Davis asserted that Herbstreit's statements in those advertisements were deceptive under the Federal Trade Commission's Revised Regulations (FTC Revised Guidelines). Davis took the car to the dealership for service fourteen times without the dealership correcting the car's problems. Davis asserted that Herbstreit's statements regarding the dealership could not have been truthful based on the problems the dealership had in correcting Davis's car.

The trial court granted summary judgment for Byers Volvo. The appellate court found that the FTC Revised Guidelines did not apply to Byers Volvo because the advertisements occurred prior to the law's enactment and that Herbstreit's statements did not lead to any inference regarding his beliefs about Byers Volvo's service department.

*Ohio ex rel. ESPN, Inc. v. Ohio State University*¹⁵⁰

ESPN filed a public records request with The Ohio State University for records relating to an NCAA investigation regarding the school's football team and Fine Link Ink tattoo parlor. ESPN requested the information twenty-one times but was denied each time on the basis of the Family Educational Rights and Privacy Act (FERPA).

Under FERPA, the school could not release educational records without the consent of the student-athletes. The court denied ESPN's request on the basis that the records fell under FERPA guidelines because the records related to information regarding the student-athletes scholastic performance and were

149. See generally No. 11CA817, 2012 WL 691757 (Ohio Ct. App. Feb. 24, 2012).

150. See generally 970 N.E.2d 939 (Ohio 2012).

maintained by the school.

*Williams v. NFL*¹⁵¹

The NFL CBA at the time banned athletes from using steroids, stimulants, and human growth hormone. Genos Williams failed a drug test when his urine sample was deemed to not have been from a human. Accordingly, the NFL suspended him, and Williams appealed to an arbitrator who found that he violated the NFL's substance abuse policy.

Following the arbitration decision, Williams sued the NFL to vacate the award. The district court granted the NFL's motion for summary judgment and enforced the arbitration award because no facts were presented that would lead the court to overturn the arbitration award.

CONCLUSION

The decisions discussed above, decided by courts and other arbitral bodies during 2012, will have a strong impact on the sports industry and the ever-evolving body of sports law. This Survey does not include every sports-related decision from 2012; rather, it includes brief summaries of the most important and most interesting decisions related to sports law.

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151. See generally 495 F. App'x 894 (10th Cir. 2012).