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## 2018 Annual Survey: Recent Developments in Sports Law

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## SURVEY

### **2018 ANNUAL SURVEY: RECENT DEVELOPMENTS IN SPORTS LAW**

#### INTRODUCTION

This survey highlights sports-related cases decided by courts between January 1, 2018 and December 31, 2018. While every sports-related case may not be included in this survey, it briefly summarizes a wide range of cases that have impacted the sports industry in 2018. This survey intends to provide the reader with insight into the important legal issues affecting the sports industry and to highlight the most recent developments in sports law. To better assist the reader, this survey is arranged alphabetically by the substantive area of law for each case.

#### ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution involves an alternate form of adjudicating cases. Parties may choose to settle a dispute through arbitration instead of through the court system. These cases arose over contract disputes, in which the contracts involved an arbitration clause. If a party brings a dispute to court when the contract contains an arbitration clause, the opposing party may file a motion to compel arbitration. Other arbitration disputes stem from unfair arbitration decisions.

#### *St. Louis Reg'l Convention & Sports Complex Auth. v. NFL*<sup>1</sup>

The Plaintiffs sued the Rams, NFL, and the Rams' owner as third-party beneficiaries of the league's policy on relocation following the team's move to Los Angeles, California, in 2016. The Defendants moved to compel arbitration, arguing that the team's lease compelled mandatory arbitration and the Plaintiffs' claims concerned issues within the lease. The court here rules that the parties had not in fact entered into an arbitration agreement.

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1. No. ED106282, 2018 Mo. App. LEXIS 929 (Mo. Ct. App. Aug. 21, 2018).

## ANTITRUST AND TRADE LAW

Antitrust and trade regulation law exists to protect consumers from unfair business practices and anticompetitive behavior. The Sherman Antitrust Act, alongside various state antitrust laws, prohibits monopolistic behavior and conspiracies to restrain trade. Courts have historically applied the Sherman Antitrust Act in a unique fashion within the sports context, such as Major League Baseball's antitrust exemption. A number of recent antitrust cases focus on the NCAA's practices.

*Deppe v. NCAA*<sup>2</sup>

Several Division I football players filed a class-action suit alleging that the NCAA's "year in residence" rule was an unlawful restraint of trade, violation of the Sherman Act. The rule in question requires that any student-athlete that transfers to a Division I college or university is required to sit out one full academic year before they are able to compete for their new school. The court here affirmed the district court's dismissal of the lawsuit, concluding that the rule is in place to preserve the amateur characteristics of college athletics and it is presumptively procompetitive.

*Field v. NCAA*<sup>3</sup>

The Plaintiff in this case alleged that the Defendant's action of terminating a transaction of a company that sponsored an NCAA bowl game was a form of unfair competition, a clear violation of the Hawaiian antitrust laws. A summary judgment motion was brought forward by the Defendant. As a way to withstand the motion, the Plaintiff was required to show that the Defendant's conduct would have had a negative effect on competition; it is not required to make a showing that competition was actually harmed. The court concluded that the Plaintiff raised genuine issues of material facts and that the previous court's granting of summary judgment was erroneous. This case was remanded down to the circuit court level.

*Gold Medal LLC v. USA Track & Field*<sup>4</sup>

Run Gum, a manufacturer of a chewing gum contained vitamins and caffeine, alleged that, despite its interest in sponsoring athletes at the U.S. Olympic Trials, it was not permitted to do so because of logo and sponsorship

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2. 893 F.3d 498 (7th Cir. 2018).

3. 431 P.3d 735 (Haw. 2018).

4. 899 F.3d 712 (9th Cir. 2018).

restrictions in place. The manufacturer argued that the restrictions in place allowed some companies to sponsor athletes but restricted others from doing so. The manufacturer claimed that the actions by the Defendant consisted of an anticompetitive horizontal and vertical agreement among competitors, and that it also was an unlawful group boycott. The court here agreed with the district court's dismissal of this case, stating that the restrictions in place should be given antitrust immunity.

*In re NCAA Grant-In-Aid Cap Antitrust Litig.*<sup>5</sup>

Within a longstanding litigation concerning the NCAA's rule concerning grant-in-aid caps, the Defendants claimed that the market definition utilized, and expert opinions provided were wrongfully excluded. The Defendants stated that there was confusion within their stance on market definition within their summary judgment briefs and that a recent Supreme Court opinion covering market definitions must be called upon here. Considering the summary judgment briefs, the court here said that ruling in favor of the Plaintiffs was appropriate because the Defendants failed to show the existence of a disputed issue of fact within the market definition. Additionally, the court found that the expert's opinion must be excluded as it is irrelevant and lacks economic analysis as support. Finally, the court concluded that the recent Supreme Court ruling has no effects on its own rulings here.

*Kelsey K. v. NFL Enters., LLC*<sup>6</sup>

The Plaintiff, a professional football cheerleader, brought action against the National Football League for violating the Sherman Act and California's antitrust statute based on conspiracy to suppress wages and prevent recruitment. Plaintiff alleged that during her employment she was paid a flat fee for games, and not paid for any time rehearsing or other community events. Kelsey also alleged that the fee was consistent with four other teams in the league. However, the court held that the cheerleader failed to state a federal Sherman Act or a state Cartwright Act, and denial of discovery was proper.

CONSTITUTIONAL LAW

The U.S. Constitution and state constitutions serve to protect individuals from certain government acts. Constitutional claims are common in the context of sports law because public universities and most state athletic associations are

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5. No. 14-md-02541 CW, 2018 U.S. Dist. LEXIS 153318 (N.D. Cal. Sept. 3, 2018).

6. 2018 WL 6721730 (9th Cir 2018).

considered state actors, and therefore, are bound to the Constitution. The following cases highlight claims for violations of the First Amendment, Fourth Amendment, Equal Protection and Due Process Clauses of the Fourteenth Amendment, and various state constitutional provisions.

*Garza v. NFL*<sup>7</sup>

The Plaintiff is a current inmate in the California Correctional Institution. He claimed that each owner of the NFL teams violated his constitutional rights by allowing their players to kneel during the National Anthem; the Plaintiff classified these as treasonous acts. The court rejected the Plaintiff's claims, stating that a private individual does not have standing to assert such claims based upon criminal statutes.

*United States v. Gatto*<sup>8</sup>

This case is connected to the investigation surrounding representatives of athletics companies paying bribes to high-profile recruits for their commitments to attend specific NCAA Division I universities. Here, the Defendants have filed a motion to suppress the evidence obtained through searches of their cellphones. The court concluded that the motion to suppress must be denied because there was probable cause, the search warrants were not overbroad, and law enforcement acted in good faith.

CONTRACT LAW

Contract law plays a pivotal role in every facet of the sports industry given that contracts are the foundation for sponsorships, construction and renovation of sports facilities, insurance agreements, and employment and uniform player agreements.

*Callaghan v. U.S. Ctr. for Safe Sport*<sup>9</sup>

The Plaintiff, a professional figure skating coach, filed suit against the Defendant for breach of contract, breach of contractual due process, and a claim for declaratory judgment. The suit stems from the Plaintiff's allegations that the Defendant violated its own rules and procedures in investigating allegations of sexual misconduct filed against the Plaintiff by a former competitive figure

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7. No. 1:17-cv-1390-LJO-BAM, 2018 U.S. Dist. LEXIS 99335 (E.D. Cal. June 13, 2018).

8. 313 F. Supp. 3d 551 (S.D.N.Y. 2018).

9. No. 2:18-cv-336-FtM-99CM, 2018 U.S. Dist. LEXIS 147066 (M.D. Fla. Aug. 29, 2018).

skater. Following the review of the case, the court granted the Defendant's motion to dismiss.

*Dickey v. NFL*<sup>10</sup>

The Plaintiff was an agent who was unable to negotiate a contract for a football player landing on an active-roster within three years of his initial certification. The language of the league's CBA states that if this occurs, certification is automatically terminated. Plaintiff alleged that there was a disparity in the treated of the new and minority agents and that the league and players' association allowed many to circumvent the three-year rule by acting as a unit when signing players. Here, Plaintiff brought forth claims for breach of contract and breach of the implied covenant of good faith and fair dealing, along with some antitrust claims, against the NFL and the NFLPA. The NFLPA countered by filing a motion to compel arbitration and a motion for failure to state a claim; the NFL filed a motion to dismiss. The court denied the NFLPA's motion to compel arbitration but approved both the motions to dismiss.

*Knutson v. Foster*<sup>11</sup>

The Plaintiff was a standout competitive swimmer who chose to forego a scholarship offer and pursue competitive swimming. After numerous instances of disagreement between the Plaintiff's attorney and USA Swimming, a deal was eventually reached that USA Swimming would pay for Plaintiff's tuition so long as various lucrative performance markers were achieved. Due to various personal reasons, Plaintiff was unable to reach the set markers and eventually chose to retire from swimming. Plaintiff eventually learned of her attorney's conflicts of interest as it related to his connection to USA Swimming and filed for fraudulent concealment and breach of fiduciary duty. The jury in the original trial found for Plaintiff and awarded damages; Defendant filed a motion for a new trial. The court here concluded that the granting of a new trial was improper and that the original judgment for Plaintiff should be granted.

*NewSpin Sports, LLC v. Arrow Elecs., Inc.*<sup>12</sup>

New Spin and Arrow Electronics entered into a contract to manufacture goods. However, the Arrow Electronics products were defective and did not conform to NewSpin's specifications. NewSpin brought action against Arrow

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10. No. 17-cv-12295-IT, 2018 U.S. Dist. LEXIS 164934 (D. Mass. Sept. 26, 2018).

11. 236 Cal. Rptr. 3d 473 (Cal. Ct. App. 2018).

12. 910 F.3d 293 (7th Cir. 2018).

Electronics asserting breach of contract, breach of good faith and fair dealing, breach of warranty, fraud, fraudulent misrepresentation, unjust enrichment, and negligent misrepresentation. The court dismissed all of Plaintiff's claims except for fraud and fraudulent inducement. Further, the district court abused its discretion in refusing Plaintiff the opportunity to amend its complaint.

#### COURT OF ARBITRATION FOR SPORT (CAS)

The Court of Arbitration for Sport (CAS) is based in Lausanne, Switzerland and has jurisdiction to settle disputes over international sport federations through arbitration. This includes all Olympic federations. It also acts in compliance with the World Anti-Doping Agency (WADA). The cases stated below are some of the disputes CAS heard in 2018.

##### *AC Milan v. Union Des Associations Européennes de Football (UEFA)*<sup>13</sup>

In 2016, a shareholder of AC Milan decided to sell 99.99% of his interests to a Chinese investment management company HoldCo. To finance the purchase, HoldCo obtained a loan from Redblack. However shortly after closing, HoldCo failed to make the capital contributions demanded by AC Milan. Instead Redblack paid the full amount in lieu of HoldCo. Unfortunately, Holdco then also failed to re-pay the relevant amount back to Redblack leading to Redblack obtaining control as shareholder of AC Milan. UEFA began investigation of AC Milan to assess whether the transfer of ownership interest breached a regulation of UEFA's break-even requirements, determining the credibility of the business plan, and assessing any doubts relating to refinancing and ownership transfer. The CFCB Adjudicatory Chamber found that AC Milan had breached multiple regulations and therefore excluded participation in UEFA club competitions for the next two seasons. After multiple hearings and the evidence presented, the Panel concluded that the Decision of the CFCB Adjudicatory Chamber must be upheld insofar as it determines the extent of the breach of the break-even requirement. However, the Panel annulled any other decision and referred the case back to CFCB Adjudicatory Chamber to take a proportionate decision based on the findings in this Aware and a proper assessment of the relevant facts. All other claims were dismissed.

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13. CAS 2018/A/5808 (Oct. 1, 2018).

*Bahrain Olympic Comm. (BOC) v. Ju-Jitsu Int'l Fed'n (JJIF); Mr. Ali Seena Munfaredi v. Ju-Jitsu Int'l Fed'n (JJIF)*<sup>14</sup>

In April of 2018, JJIF suspended the Bahrain Martial Arts Federation (BMAF) for failure to participate in two previous competitions organized by the JJIF, however granted BMAF's athletes' able to participate in competitions during the suspension period albeit under the flag of JJIF. Upon further review, the athletes were also declared ineligible for participation at the 2018 Asian Games for participating in inappropriate behavior. The athlete lodged an application to CAS Ad Hoc Division requesting eligibility to participate in the 2018 Asian Games and lifting of any possible suspension. Under CAS Ad Hoc Division, jurisdiction can only be established for reconsideration of a decision if the decision was taken within the period commencing 4 days prior to the Opening Ceremonies of the XVIII Asian Games. CAS Ad Hoc Panel determined that the athlete's challenge of JJIF's suspension decision is outside the period, therefore CAS Ad Hoc Division has no jurisdiction to hear the case.

*Cox v. Fédération Internationale de Natation*<sup>15</sup>

A professional swimmer, Plaintiff Madisyn Cox, tested positive for Trimetazidine, a substance banned by the World Anti-Doping Agency (WADA). The swimmer had her sample tested a second time with the same result. After a hearing took place, the Fédération Internationale de Natation (FINA) suspended Cox for two years. Cox appealed the decision claiming she unknowingly ingested the prohibited substance. Cox had been taking the Cooper Complete Elite Athlete multivitamin for years; she had the vitamin tested at the SMRTL WADA-accredited laboratory. Trimetazidine was detected in minimal amounts. On appeal, CAS reduced the swimmer's suspension to six months.

*José Paolo Guerrero v. FIFA; WADA v. FIFA & José Paolo Guerrero*<sup>16</sup>

In October of 2017, Captain of the Peruvian National Football Team, Jose Paolo Guerrero, underwent an in-competition Anti-Doping control that tested positive for cocaine metabolite benzoylecgonine (BZE), which is banned under the 2017 WADA List of Prohibited Substances. The World Anti-Doping Agency (WADA) and Fédération Internationale de Football association (FIFA) submitted this appeal in response to a December 2017 decision from the FIFA

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14. CAS AG 18/07 (Aug. 23, 2018); CAS AG 18/08 (Aug. 23, 2018).

15. CAS 2018/A/5866 (Aug. 31, 2018).

16. CAS 2018/A/5546 (July 30, 2018); CAS 2018/A/5571 (July 30, 2018).



Disciplinary Committee, suspending Guerrero for a period of one year, later reduced to an ineligibility period of six months by FIFA Appeals Committee. In the CAS hearing, Guerrero contended that he should serve no period of ineligibility at all, and argued that BZE in his body was the result of ingesting tea containing coca leaves in the hotel two days before the match, therefore bore no fault or negligence. FIFA contends the ineligibility period should be six-months and WADA argues to impose ineligibility for a twenty-two-month period. CAS determined that the appropriate sanction for Guerrero is a period of ineligibility of fourteen-months.

*Korea Golf Ass'n v. Olympic Council of Asia; Indonesia Golf Ass'n v. Olympic Council of Asia; Singapore Golf Ass'n v. Olympic Council of Asia; Japan Golf Ass'n v. Olympic Council of Asia; Nat'l Golf Ass'n of the Philippines v. Olympic Council of Asia; India Golf Ass'n v. Olympic Council of Asia*<sup>17</sup>

The following six national golfing associations (Applicants) lodged an application against the Olympic Council of Asia to challenge the August 16, 2018 decision that extended eligibility criteria of athletes participating in the sport of golf at the XVIII Asian Games to include both professional and amateur athletes. The Applicants sought relief determining the OCA's decision be annulled and disregarded; thereby, reinstating adherence to the terms set out in the Handbook by all participating NOCs. OCA argued that the Constitution and Handbook do not provide any differentiation between amateur and or professional athletes nor is there proof that any of the athletes in question are professional golf players, therefore requesting dismissal of all claims. After considering all of the evidence at the hearing, the CAS Ad Hoc Panel held that the Applicants had not discharged their evidentiary obligation of establishing that any of the relevant athletes were of professional standing. Thus, the applications were dismissed.

*Rossi v. Int'l Shooting Sport Fed'n*<sup>18</sup>

Rossi is the president of the Italian sport shooting federation, which is affiliated with the ISSF. Rossi was a member of the ISSF's Executive Committee (ExCo) and had a particular interest in clay shooting. Rossi and his wife had a fairly significant stake in a clay target manufacturer company. The International Olympic Committee (IOC) met in 2016 to discuss the future of

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17. CAS AG 18/01 (Aug. 21, 2018); CAS AG 18/02 (Aug. 21, 2018); CAS AG 18/03 (Aug. 21, 2018); CAS AG 18/04 (Aug. 21, 2018); CAS AG 18/05 (Aug. 21, 2018); CAS AG 18/06 (Aug. 21, 2018).

18. CAS 2018/A/5770 (Oct. 10, 2018).

shooting in the Olympics, including the removal of pistol, rifle and trap shooting events. The majority of ExCo favored the IOC's proposal; Mr. Rossi opposed. Mr. Rossi made his opposition very clear by sending threatening letters and complaints to members of the ISSF and ExCo. However, he never disclosed his financial interest in clay shooting to ISSF. Other committee members raised this claim against Rossi for breaching his duties of loyalty and other sections of the ISSF Code of Ethics. CAS suspended Rossi for twenty weeks and required him to pay a fine of 50,000 euros.

*Uzbekistan Cycling Fed'n & Ms Olga Zabelinskaya v. Olympic Council of Asia (OCA)*<sup>19</sup>

In August of 2018, the Union Cycliste Internationale (UCI) confirmed in a letter to Zabelinskaya that her nationality is Uzbekistani for purposes of participation and eligibility. OCA orally informed Zabelinskaya of her ineligibility to compete at the XVIII Asian Games under the flag of Uzbekistan. On August 23, 2018, Zabelinskaya lodged an application to CAS Ad Hoc Division requesting relief to compete under the Uzbekistan flag. OCA requested relief to confirm Zabelinskaya's ineligible to compete. Under the Constitution and Rules of the OCA, a competitor who represented one country in the Olympic Games and who has since changed their nationality must wait three years after such change to participate in the OCA Games. In light of this provision, the CAS Ad Hoc Panel declared Zabelinskaya as ineligible to participate athlete XVIII Asian Games since the transitional period of three years after the acquisition of new nationality to be able to compete had not yet lapsed.

#### DISCRIMINATION LAW

Federal and state antidiscrimination laws are intended to protect individuals from discrimination on the basis of race, gender, age, religion, and various other protected attributes. Discrimination claims generally center on the Equal Protection Clauses of the Fourteenth Amendment<sup>20</sup> and Title VII of the Civil Rights Act.<sup>21</sup> In the sports context, discrimination can affect athletes, coaches, administrators, and other employees, as the following cases illustrate.

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19. CAS AG 18/09 (Aug. 23, 2018).

20. 42 U.S.C.A. §§ 1981, 1983 (2019).

21. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000 *et seq.* (2019).

*Hall v. Ala. State Univ.*<sup>22</sup>

The Plaintiff, former head softball coach at Alabama State University, alleging discrimination on the basis of her gender and retaliation for complaining about different treatment on the basis of gender. The Defendant countered by filing a motion for summary judgment. The court here determined that the motion must be granted in part and denied in part.

*Hernandez v. Office of Comm'r of Baseball*<sup>23</sup>

The Plaintiff, a Latino umpire for Major League Baseball, asserted that he has never been selected for a World Series assignment and has not been selected for the position of crew chief, because he is a Latino. He raised claims for race, color and/or national origin discrimination under Title VII, 42 U.S.C. Section 1981 and O.R.C. Section 4112.02 and seeks a declaratory judgment. However, the court lacked personal jurisdiction over Defendants and transferred the case to the Southern District of New York.

*McRae v. Sch. Reform Comm'n*<sup>24</sup>

The Plaintiff, an African American female former high school student-athlete, brought forth this lawsuit alleging violations of race and sex discrimination. The complaint was specifically that the Defendants did not provide equal opportunities and resources to play field hockey and lacrosse, resulting in Plaintiff's lost scholarship offer. The Defendant responded by filing a motion to dismiss, stating that Plaintiff did not have standing to state her claims, the claims are moot because Plaintiff has graduated or will graduate soon, and the facts presented are insufficient to state a claim for discrimination. The court agreed in part with the Defendant, concluding that Plaintiff does lack standing to pursue a claim for injunctive relief, however, the other portions of the motion to dismiss must be denied.

## EDUCATION LAW

Education law is an area of law that covers the laws and regulations governing federal and state education, including athletics. High school athletic associations and the NCAA both impose rules and regulations governing student-athlete conduct. The following cases involve challenges to various rules and regulations governing high schools and high school athletic associations.

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22. No.: 2:16-cv-593-GMB, 2018 U.S. Dist. LEXIS 145149 (M.D. Ala. Aug. 27, 2018).

23. 2018 WL 4761472 (S.D. Ohio 2018).

24. No. 17-4054, 2018 U.S. Dist. LEXIS 152364 (E.D. Pa. Sept. 6, 2018).

*Doe v. Ladue Horton Watkins High Sch.*<sup>25</sup>

Doe was a junior in high school that tried out for one of the three boys' soccer teams at his school. Following the tryout, Doe was not selected for any of the teams because, as according to his stepfather, the coach has a policy for not putting juniors on the junior varsity team and the C Team is essentially the freshman squad. Doe's stepfather responded by writing to the school district board, calling the policy a form of age-based discrimination and gender-based discrimination because the girls' teams did not have such a policy. The school district opened an investigation in to the complaint but was unable to find an evidence of such discrimination. This suit was brought forward, alleging the same discrimination complaints against the policy and requesting a TRO to be put in place to have Doe put on the JV team and to have the policy terminated. The court reviewed all applicable evidence and heard testimony by the head coach as to his reasoning for not selecting Doe for either varsity or JV. The court ultimately concluded that Doe lacked a legal interest in participation, that evidence shows that there was in fact not a specific policy of excluding juniors, and that the Plaintiff would likely not succeed on the merits; all of these were considered factors weighing against the issuance of the TRO.

*J.S. v. Laurel Cty. Bd. of Educ.*<sup>26</sup>

The Plaintiff in this case was a sixth-grade student who had earned a spot on the sixth-grade boys' basketball team. The Defendant had a rule in their athletics handbook that required students to play on the level that they were selected to; the rule was called the "Play Up, Stay Up" rule, precluding students from playing in multiple grade levels. As it is applied, female students in the district are exempt from this rule. The Defendants refused to change their rule and the Plaintiff's father subsequently filed an action for violations of the Fourteenth Amendment, Title IX, and various state laws. Following the filing of the action, both parties submitted cross-motions for summary judgment. The court here chose to grant the Plaintiff's summary judgment motion and deny the defendant's.

*St. Paul's Episcopal Sch. v. Ala. High Sch. Ath. Ass'n*<sup>27</sup>

The Alabama High School Athletic Association instituted a rule which would require those high school athletics programs that have seen consisted

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25. No. 4:18-CV-01637 JAR, 2018 U.S. Dist. LEXIS 169074 (E.D. Mo. Oct. 1, 2018).

26. No. 6:18-cv-00258-KKC, 2018 U.S. Dist. LEXIS 192157 (E.D. Ky. Nov. 9, 2018).

27. No. 18-0241-WS-B, 2018 U.S. Dist. LEXIS 107003 (S.D. Ala. June 27, 2018).

success on the field to move up a classification. Plaintiff would be directly impacted by this rule, having to move up from classification 5A to 6A. Plaintiff alleges that this new rule violates their constitutional rights and that the Defendant has breached their own duties found in their Constitution, Bylaws, and Handbook. With the filed complaint, Plaintiff filed a motion for preliminary injunction, looking to have Defendant enjoined from enforcing the new rule. The court considered all of the arguments and exhibits presented and determined that a preliminary injunction must not be ordered.

#### GENDER EQUITY/TITLE IX

Title IX of the Education Amendments of 1972 had a significant impact on female athletes' ability to gain equal rights to their male counterparts within the collegiate and high school settings. Despite the implementation of Title IX over forty years ago, it is ever-changing and continues to be a hotly contested issue.

##### *Brown v. Fla. Gulf Coast Univ. Bd. of Trs.*<sup>28</sup>

The Plaintiff was a women's basketball player at Florida Gulf Coast University and was dismissed from the team after receiving inadequate grades. The Plaintiff brought claims for a violation of her due process rights, multiple violations of Title IX, and breach of contract, amongst others. The Defendants moved to have the all of the claims dismissed. The court sided with the Defendants and granted the motions to dismiss but did allow time for the Plaintiff to file an amended complaint.

##### *Chisholm v. St. Mary's City Sch. Dist. Bd. of Educ.*<sup>29</sup>

The Plaintiff is a high school football player that alleges his coach sexually harassed him through derogatory terms and targeted insults. The Plaintiff also alleges that the School Board discriminated against him under Title IX and that his rights to equal protection and due process were violated. The School Board and the football coach each filed motions for summary judgment in this case. Follow a review of all the facts and evidence presented, the court granted the motions for summary judgment.

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28. No. 2:18-cv-157-FtM-29MRM, 2018 U.S. Dist. LEXIS 193948 (M.D. Fla. Nov. 14, 2018).

29. No. 3:16CV2849, 2018 U.S. Dist. LEXIS 216192 (N.D. Ohio Dec. 26, 2018).

*D.M. v. Minn. State High Sch. League*<sup>30</sup>

The two Plaintiffs, both male students within the Defendant's district, challenged the rule that dance team is a girls-only sport. The alleged that the rule violated both Title IX and their equal protection rights and sought a preliminary injunction to prohibit the further enforcement of the rule. Following a review of all requisite areas, the court denied the motion for a preliminary injunction.

*Doe v. Baylor Univ.*<sup>31</sup>

The Plaintiffs consist of a group of four students at Baylor University who were sexually assault by another student. It is alleged that after reporting the assault, the school did not respond to the report and that the school itself had policies that created a discriminatory environment and denied education opportunities for women. The Defendant moved to dismiss the claims made, arguing that the assaults were outside of the University's control, an investigation was unreasonable, and the policy prohibiting sex discrimination protects the University from certain Title IX claims. Following the review of all applicable evidence, the court granted to motion to dismiss for the state-law claims, but denied the motion as it connected to the heightened-risk and post-reporting claims.

*Haley v. Clarksville-Montgomery Cty. Sch. Sys.*<sup>32</sup>

A female high school wrestling coach filed suit against her former employer challenging her replacement with a male coach and alleging unequal treatment among male and female coaches. Haley alleged that the school system failed to provide female coaches with the same treatment, benefits and coaching opportunities as male faculty. The Plaintiff also alleged that the school system intentionally and consciously discriminated against female student-athletes for similar reasons. However, the court granted the Defendant's motion to dismiss the claim because the statute of limitations on Haley's claims had passed.

*Mayerova v. E. Mich. Univ.*<sup>33</sup>

Women student athletes at Eastern Michigan University, namely a tennis player and a softball player, sued the school after their programs were

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30. F. Supp. 3d 1136 (D. Minn. 2018).

31. 336 F. Supp. 3d 763 (W.D. Tex. 2018).

32. 353 F.Supp.3d 724 (M.D. Tenn. 2018).

33. 346 F.Supp.3d 983 (E.D. Mich. 2018).

eliminated. They sought a temporary restraining order/preliminary injunction claiming the sports' elimination violated Title IX and the Equal Protection Clause. The Plaintiffs challenge that the elimination of women's softball and tennis is a claim of intentional discrimination. The court held that (1) Plaintiffs had a private right of action to enforce their claim of intentional discrimination; (2) the fact that EMU also eliminated men's sports did not preclude the finding of intentional discrimination; (3) Plaintiffs were likely to succeed on the merits of their Title IX claim; (4) Plaintiffs suffered irreparable harm as result of EMU's decision; (5) the balance of harms favored preliminary injunction requiring EMU to rescind decision; and (6) public interest also favored a preliminary injunction.

*Pejovic v. State Univ. of N.Y. at Albany*<sup>34</sup>

The Plaintiffs consist of a group of former tennis players for Defendants. Their former coach brought action against Defendants as a way to redress alleged discrimination. The women's tennis program was dropped by the University, regardless of the recent success. A claim was filed with the OCR under Title IX, which led to a finding of Title IX violations. The Defendants in this case filed a motion to dismiss, while the Plaintiffs filed a motion for summary judgment, alleging that the OCR findings entitle them to summary judgment. Following a review of all relevant information, the court denied the Plaintiffs' motion for summary judgment and granted the Defendants' motion to dismiss.

*S.G. v. Jordan Sch. Dist.*<sup>35</sup>

Plaintiffs, members of recreational leagues of girls-only tackle football teams, brought a Title IX lawsuit for the lack of opportunities provided for girls in the three surrounding districts. The Plaintiffs sought to certify two classes within the lawsuit: one to represent female athletes and the other to specifically represent those female athletes looking for female high school football opportunities. The court chose to grant in part the motion to certify class, stating that the facts and legal issues presented must allow for the creation of the class representing female athletes looking for high school football opportunities.

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34. No. 1:17-CV-1092 (TJM/DTS), 2018 U.S. Dist. LEXIS 125597 (N.D.N.Y. July 26, 2018).

35. No. 2:17-CV-00677, 2018 U.S. Dist. LEXIS 174459 (D. Utah Oct. 9, 2018).

## HEALTH &amp; SAFETY LAW

Given the numerous inherent risks for injury in sports, health and safety have long been issues of legal concern for the sports industry. Recently, the NCAA and several professional sports leagues have faced legal challenges related to health and safety issues that revolve around student-athlete and player concussions.

*In re NHL Players' Concussion Injury Litig.*<sup>36</sup>

This suit is brought forward as an effort to propose a class of former NHL players. The proposed class brings an action for the concussive and sub-concussive impacts sustained by former NHL players during their careers, the NHL knew or should have known of the likelihood of long-term brain trauma, and the league failed to warn members of the proposed class. The court held a hearing on the motion for the proposed class and because of the evidence presented, denied the Plaintiff's motion for class certification.

*Mayall v. USA Water Polo, Inc.*<sup>37</sup>

The mother of a young water polo goalie brought suit against the Defendant when her daughter was allowed to return to play after being hit in the face by the ball and displaying concussion-like symptoms; upon her return she was hit again and suffered severely debilitating post-concussion syndrome. The suit alleged that the Defendant was liable for the injuries and that they failed to establish a proper concussion management protocol. The court found that the Defendant increased the risk of further injury and that they were aware of the severe risk of repeated concussions. Through these findings, the court held that sufficient facts were presented to support claims in which relief may be granted.

*Rose v. Nat'l Collegiate Athletic Ass'n*<sup>38</sup>

Football players are unquestionably exposed to risks of repetitive head trauma. Two former Purdue University football players brought a class action against the NCAA and Big Ten Conference alleging negligence, fraudulent concealment, breach of express and implied contract, breach of contract as third-party beneficiaries and unjust enrichment. The players allege the NCAA and Big Ten were uniquely aware of these risks and have no regard for player health and safety. The district court held that: (1) the action was not time-barred

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36. 327 F.R.D. 245 (D. Minn. 2018).

37. 909 F.3d 1055 (9th Cir. 2018).

38. 346 F.Supp.3d 1212 (N.D. Ill. 2018).



by the statute of limitations; (2) the Big Ten was not entitled to a more definite statement; (3) the players were not required to plead fraudulent concealment exception with particularity; (4) players sufficiently alleged the existence of a duty relationship; (5) players sufficiently alleged the NCAA and Big ten intended to induce players to have a false belief; (6) players sufficiently alleged they were required to enter into an express contract to play football; and (7) players failed to allege that NCAA or Big Ten requested players to play football for Purdue.

*Schmitz v. NCAA*<sup>39</sup>

Steven Schmitz was a former college football player who received repetitive concussive and sub-concussive brain impacts during his playing days. As a result of this, Schmitz was diagnosed with CTE, severe memory loss, Alzheimer's disease, cognitive decline, and dementia; all of these ailments the Plaintiff claims were caused or magnified by the repetitive impacts he sustained as a college football player. The Plaintiff, Schmitz and his wife, brought suit alleging that the college and the NCAA failed to educate and protect against the dangers of repetitive concussive and sub-concussive head impacts. The court here was asked to determine whether the allegations brought forward were sufficient to state a claim. The court ultimately held that the claims brought were time-barred and that the Plaintiff was unable to bring a claim within the two-year statute of limitations.

INTELLECTUAL PROPERTY

Trademarks, copyrights, and patents generate billions of dollars in revenue for the sports industry in the form of sponsorship deals, advertisements, licensing agreements, and merchandise sales. Therefore, these intellectual property rights have become a highly-contested issue within the sports context as entities seek all available measures to protect their intellectual property, as illustrated by the following cases.

*Daniels v. FanDuel, Inc.*<sup>40</sup>

Three former college football players contend that online fantasy-sports games violate the statutory right of publicity under Indiana law. FanDuel alleges that there is an exception to the statute that permits them to use players' names, likenesses and statistics without pay. The court of appeals held that the

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39. 2018-Ohio-4391 (Ohio 2018).

40. 909 F.3d 876 (7th Cir. 2018).

Indiana statute contained an exception for material with newsworthy value, including FanDuel's use of college players' names, pictures and statistics.

*Spinelli v. NFL*<sup>41</sup>

The Plaintiffs in this case consist of seven sports photographers who take and license photographs of NFL events to the league and other groups. They brought suit against the NFL and the Associated Press, alleging that they had thousands of photographs exploited without compensation, a breach of various copyright and contract theories. Upon review, the court here vacated the district court's judgment that would dismiss claims of copyright infringement, breach of the implied covenant of good faith and fair dealing, and claims of fraud. The case was remanded down to rehear the proceedings consistent with this opinion.

*SportFuel, Inc. v. PepsiCo, Inc.*<sup>42</sup>

SportFuel, owner of the trademark "SPORTFUEL" brought suit against PepsiCo, and its subsidiary Gatorade, over the use of Gatorade's advertising campaign which referred to Gatorade as "The Sports Fuel Company".<sup>43</sup> The claims centered around things such as trademark infringement, false designation of origin, and unfair competition. Gatorade moved to have expert testimony and survey evidence excluded due to a likelihood that it would cause consumer confusion, along with filing a motion for summary judgment on all counts. Additionally, Gatorade contended that the use of the slogan is fair use as provided under the Lanham Act. In walking through the fair use defense, the court found that Gatorade used their own logo more prominently and never attempted to claim the exclusive right to use, SportFuel was unable to show that Gatorade used the slogan as a descriptor, and Gatorade seemingly utilized the phrase in good faith. Ultimately, the court granted Gatorade's motion for summary judgment.

LABOR & EMPLOYMENT LAW

The National Labor Relations Act (NLRA) governs the relationship between private employers and their employees, which greatly impacts professional sports as most professional sports leagues are private entities. Further, most American professional sports leagues are unionized and covered by their respective collective bargaining agreements (CBAs). Additionally,

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41. 903 F.3d 185 (2d Cir. 2018).

42. No. 16 C 7868, 2018 U.S. Dist. LEXIS 99738 (N.D. Ill. June 14, 2018).

43. *Id.*

federal and state employment laws regulate employment relationships in the sports industry. Recently, many challenges to the employment classification of college student-athletes have occurred, leading the National Labor Relations Board (NLRB), to find that Division I FBS football and basketball student-athletes at private universities may be covered by the NLRA. The following cases highlight the intersection of labor and employment law and sports.

*Axakowsky v. NFL Prods.*<sup>44</sup>

The Plaintiff provided work for the Defendant over a decade in the form of reading scripted advertisements. The advertisers, not the Defendant, made the final decision as to whether an ad would be read and the way the Plaintiff should deliver the ad. The Plaintiff never truly became a salaried employee and would regularly invoice the Defendant for the work that was performed. The Plaintiff here brought several discrimination claims, however, the decision for the court to be made is whether she was an employee or simply an independent contractor; independent contractors are not afforded the same protections. The court concluded that a reasonable factfinder would only be able to determine that the Plaintiff was an independent contractor and that the state discrimination claims must fail.

MISCELLANEOUS

The following cases represent decisions that do not squarely fall within any particular area of law but are still significant to the sports industry.

*Dew-Becker v. Wu*<sup>45</sup>

Plaintiff and Defendant placed a \$100 head-to-head wager utilizing FanDuel, where each would create a roster by selecting from NBA players. Defendant's roster scored more points, resulting in him collecting the prize money. As a result of the loss of money, Plaintiff brought a small claims action against the Defendant where he sought relief under the Illinois Loss Recovery Act. The court found that the case must be found in favor of Defendant.

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44. No. 17-4730, 2018 U.S. Dist. LEXIS 193937 (D.N.J. Nov. 14, 2018).

45. No. 1-17-1675, 2018 Ill. App. LEXIS 955 (Ill. App. Ct. Dec. 14, 2018).

*NCAA v. Christie*<sup>46</sup>

This case arises from the action by Defendants and the state of New Jersey deciding to enact legislation which would allow for legalized and regulated sports betting within the state. The Plaintiffs argued that the action by the Defendants would outright violate PASPA. Following the ruling to allow the Defendants' actions, the present case involves the Defendants motion for judgment on \$3.4 million injunction bond plus interest and damages. The court here denied the Defendants' motion.

*Raisman v. United States Olympic Comm.*<sup>47</sup>

This case arises from the larger lawsuit in which the Plaintiff, a former standout gymnast for the United States national team, alleged that a former team doctor sexually abused her and several other athletes. The Plaintiff also states that the Defendant chose to place winning above the health and safety of the athletes. The Defendants looked to transfer the action to another district within the state and subsequently filed a motion to advance the hearing date or, alternatively, for expedited ruling on the transfer motion without a hearing. The court granted the motion for an expedited ruling on the transfer motion without a hearing and vacated the upcoming hearing on the transfer motion. Additionally, the transfer motion was denied due to a lack of consent from the Plaintiff or a showing by the Defendant that the motion could have been brought in an alternative district.

*Wani v. George Fox Univ.*<sup>48</sup>

Plaintiff injured his hand during football practice and required surgery to repair a torn ligament in his thumb. Plaintiff alleges that the Defendants denied him adequate medical attention and time away from practice to heal from his injuries and also responded inadequately to social media posts by a teammate about Plaintiff's injuries. In his suit, Plaintiff brought various claims including, but not limited to, cyberbullying, racial verbal harassment, negligence, intentional infliction of physical/emotional pain, medical fraud, and HIPAA violations. The Plaintiff later chose to submit a motion for summary judgment, a motion for leave to file an amended complaint, and a motion for sanctions. The Defendants responded by filing their own motion for judgment on the pleadings and motion for summary judgment. After reviewing all of the

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46. No. 14-6450 (MAS) (LHG), 2018 U.S. Dist. LEXIS 196335 (D.N.J. Nov. 16, 2018).

47. No. 18-cv-02479-BLF, 2018 U.S. Dist. LEXIS 198132 (N.D. Cal. Nov. 20, 2018).

48. No. 3:17-cv-01011-YY, 2018 U.S. Dist. LEXIS 195961 (D. Or. Aug. 8, 2018).

evidence, this court decided to deny all motions submitted by the Plaintiff and grant all of the motions submitted by the Defendants.

*White v. Cuomo*<sup>49</sup>

Residents of New York with gambling disorders, along with their relatives, brought action against the New York Governor, Andrew Cuomo, and the New York State Gaming Commission. They sought a declaration that fantasy sports contests for a monetary prize violated the anti-gambling provision of the New York Constitution. The court held that: (1) interactive fantasy sports for a prize are prohibited by the New York Constitution; (2) the New York statutes were unconstitutional to the extent that it authorized and purported to regulate interactive fantasy sports; and (3) the legislature declaring that interactive fantasy sports do not constitute gambling for purposes of penal law was not unconstitutional.

*Zimmerman v. Al Jazeera Am., LLC*<sup>50</sup>

Al Jazeera produced a documentary about the use of performance enhancing drugs in professional sports. Two professional baseball players, who were accused of using PEDs in the documentary, brought suit against Al Jazeera for claims of defamation and invasion of privacy. The Plaintiffs sought to compel deposition of Al Jazeera's director general and sanctions against Al Jazeera for costs and attorney's fees. The court held that the players could compel deposition but were not awarded costs or attorney's fees.

TAX LAW

Tax law involves rules that regulate federal and state tax obligations. Tax law plays a significant role in the professional sports context, particularly with respect to player earning and sports facilities.

*Cincinnati Reds, LLC v. Testa*<sup>51</sup>

In this case, the issue was whether the sale-for-resale exemption of the tax code applied to the Cincinnati Reds having to pay taxes on promotional items or giveaways, such as t-shirts, posters or bobble heads. Certain ticket prices included a promotional item; purchasers were not being charged a separate

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49. 62 Misc.3d 877 (N.Y. Sup. Ct. 2018).

50. 329 F.R.D. 1 (D.C. Cir. 2018).

51. 2018 WL 6177334 (Ohio 2018).

amount for the items. The transfer of the promotional items to fans was considered a sale and the items are subject to the sale-for-resale exemption.

#### TORT LAW

Tort law represents the most widely litigated issue within the sports context. Tort law governs the duty of care to participants, coaches, and spectators. Generally, courts must evaluate the inherent risks associated with the sports, in relation to the degree of safety due to others involved. The following cases illustrate how courts analyze tort claims within a wide variety of aspects of sports.

##### *Baranov v. World-Wide Anti-Doping Agency*<sup>52</sup>

This case centers around a defamation claim brought forth by the Plaintiff arising out of a report published by Defendant which stated that Plaintiff provided banned substances to professional athletes. Plaintiff alleges that because of the publication this report, his professional opportunities have diminished. The court granted the Defendant's motion to dismiss because the complaint does not allege any specific facts and it fails to demonstrate actual malice.

##### *Bertin v. Mann*<sup>53</sup>

The Plaintiff and the Defendant were playing golf when Defendant struck Plaintiff with the cart. At issue is whether being hit by a golf cart is in fact an inherent risk to golfing. The answer to this question would wholly determine the duty that was owed by the Defendant. The court determined that the answer to this question would be found if a factfinder asks whether the risk itself was reasonably foreseeable. Due to the fact that the lower courts did not apply this test, the judgment was reversed, and the case was remanded to the trial court.

##### *Hass v. RhodyCo Prods.*<sup>54</sup>

The Plaintiff filed a wrongful death action after her husband suffered a cardiac arrest, collapsed, and died upon completion of a half-marathon hosted by the Defendant. The action alleged that the Defendant was negligent in its organization and management of the race, specifically in regard to the medical services. The court here agrees with the lower court that a motion for summary

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52. No. 155881/2017, 2018 N.Y. Misc. LEXIS 4738 (N.Y. 2018).

53. 918 N.W.2d 707 (Mich. 2018).

54. 236 Cal. Rptr. 3d 682 (Cal. Ct. App. 2018).

judgment granted to the Defendant is improper, but they believe the lower court erred in requiring an amendment to the complaint to plead gross negligence.

*Horton v. Espindola*<sup>55</sup>

The Plaintiff, the former goalkeeper for D.C. United, alleges that his playing career came to an end when his teammate assaulted him, leaving him with a concussion and other injuries. He sought to hold the Club and the coach responsible for negligent supervision under the tort theory of respondeat superior. The Club filed a motion to dismiss, arguing that the claim is preempted by federal labor law as resolving would require the application of the league collective bargaining agreement and also that the only remedy available comes from the D.C. Workers' Compensation Act. Because the Club attached the league CBA to their motion, the court converted the motion into one for summary judgment. Here, the court denied the motion for summary judgment for a lack of factual support.

*Jabo v. YMCA of San Diego Cty.*<sup>56</sup>

The Plaintiffs brought suit after their family member died of sudden cardiac arrest after playing soccer on a field owned by the Defendant and rented out to a private organization. The court concluded that the rental of the field does not impose upon the Defendants the necessity to install defibrillators or other devices or to train their employees in any way.

*Talley v. Time, Inc.*<sup>57</sup>

In September 2013, Sports Illustrated published a five-part investigative article series on the Oklahoma State football program, specifically referencing the Plaintiff's role as a booster for the University. The Plaintiff stated that the passages in which he was referenced consisted of false statements on his actions and what he provided. The Plaintiff brought a suit alleging that the article invaded his privacy by publicly placing him in a false light. The Defendants countered by asserting that summary judgment must be granted because the Plaintiff was unable to establish all of the requisite elements of a defamation claim under state law; the said that the statements were in fact true, were not offensive to a reasonable person, and were not published with actual malice. The court concluded that the Plaintiff failed to demonstrate a dispute of material

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55. 319 F. Supp. 3d 395 (D.D.C. 2018).

56. 238 Cal. Rptr. 3d 588 (Cal. Ct. App. 2018).

57. No. CIV-14-853-D, 2018 U.S. Dist. LEXIS 161820 (W.D. Okla. Sept. 21, 2018).

fact to preclude summary judgment and because of this, summary judgment was granted.

#### CONCLUSION

The sports-related cases adjudicated in 2018 will likely leave a lasting impression on the sports industry and sports law. While this survey does not include every sports-related case decided in 2018, it does briefly summarize a number of interesting and thought-provoking sports law cases.

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