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Steven Olenick, Jenna Kochen, and Jason Sosnovsky

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All Quiet on the Digital Front: The NCAA's Wide Discretion in Regulating Social Media
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Get with the *Times*: Why Defamation Law Must be Reformed in Order to Protect Athletes and Celebrities from Media Attacks
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TRESL Symposium 2013 Panel Discussion: "Asking the Audience for Help: Crowdfunding as a Means of Control"
September 13, 2013 – The University of Texas at Austin

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Finding a Solution: Getting Professional Basketball Players Paid Overseas

Steven Olenick*, Jenna Kochen**, and Jason Sosnovsky***

INTRODUCTION

Recent history has shown that professional basketball teams, like any other business, are not immune to the fallout of the global financial crisis. If the economic situation affecting professional basketball could be categorized as a *disaster* like the rest of the global financial crisis at large, then Europe would be its ground zero. In recent years, American players such as Josh Childress and Carlos Arroyo have enjoyed the ability to garner more lucrative contracts playing overseas than they would have by playing stateside in the National Basketball Association ("NBA").[1] But European basketball[2] faces a conundrum, which if left unchecked, will vitiate its ability to attract and retain top American talent. Specifically, teams are failing and also neglecting to pay their players. In the most innocuous form, this trend is based on a team's inability to pay, but in its most insidious form, teams simply refuse to pay their players.

In the situation of non-payment, a player's only recourse is arbitration before a tribunal of the Fédération Internationale de Basketball ("FIBA").[3] That tribunal is the Basketball Arbitral Tribunal ("BAT").[4] Appeals of the BAT go to the Court of Arbitration for Sports ("CAS").[5] FIBA's system of arbitration is a seemingly straightforward solution at first blush, but upon closer inspection, it is neither straightforward nor a solution. On the

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1. *See Agent: Boykins to Stay in Italy*, ESPN.com, December 29, 2008, http://sports.espn.go.com/nba/news/story?id=3798680

2. Because there is no continental basketball league, "European basketball" is used to refer generally to the sport of basketball in Europe. While there are numerous basketball leagues in various countries throughout Europe, this paper will thus focus on FIBA and its role in the current problem.

3. FIBA governs basketball in Europe, and internationally. *FIBA: International Basketball Federation*, FIBA, http://www.fiba.com/pages/eng/fc/FIBA/quicFact/p/openNodeIDs/962/selNodeID/962/quicFacts.html (last visited Feb. 10, 2014).

4. *Basketball Arbitral Tribunal (BAT)*, FIBA, http://www.fiba.com/pages/eng/fc/expe/fat/p/openNodeIDs/16808/selNodeID/16808/pres.html (last visited Feb. 10, 2014).

5. *See Court of Arbitration for Sport*, FIBA, http://www.fiba.com/pages/eng/fc/expe/cas/p/openNodeIDs/16813/selNodeID/16813/cas_cases.html (last visited Feb. 10, 2014).

contrary, unlike adjudication before a U.S.-based tribunal, FIBA may indeed rule for a player, but the ruling itself comes with no guarantee of enforcement. Teams may be unable to comply, as in the case of bankruptcy, but teams may also show a brazen disregard for the ruling and refuse to comply.

The pervasive problem of non-payment, coupled with the costs and uncertainties of vindicating players' contractual rights, threatens to greatly diminish the American talent pool abroad. But there are possible solutions. One such answer is the technique of contractually earmarking advertising revenues in favor of players as third-party beneficiaries, and putting these revenues into an escrow account for the benefit of the players. As this solution implies, FIBA would require teams to have a mandatory provision in advertising contracts stating that a certain portion of revenues must be earmarked for the payment of player salaries.

There are two practical effects of this proposal. First, it provides players another party, along with the team, to hold legally accountable when contractual payment is not made. Creating a system in which advertisers are responsible for paying a player's salary is a novel concept and raises a question of why such a drastic step should be taken. The short answer is that giving players recourse against advertisers insures an additional and more likely solvent defendant. Making the players a third-party beneficiary of the advertiser's contract with the team essentially acts as payment insurance for the players. While this may lead to a potentially unjust outcome – a seemingly innocent company would pay for the transgressions of an unsavory team – upon closer inspection it becomes clear that third-party earmarking would more likely serve to put the team, and not the advertiser, on the proverbial *hook*. Second, there is a fund from which player salaries can be paid, at least partially, in the event of nonpayment: revenues from the advertisers will be held in trust for the benefit of the players, with the teams and the advertisers serving as the trustees, who will owe fiduciary duties to the players, allowing the players to access some funds in the event of non-payment. Under this system, players will receive a percentage of their salaries while awaiting a ruling by the BAT.

This article will serve to further describe the problem of non-payment in European basketball as well as the proposed solution of creating a relationship between advertisers and teams that is beneficial to the players. Part I of the article will describe FIBA's process for resolving payment disputes. A description of the BAT's arbitration rules will be given and the process of resolving these disputes will be outlined. Part II of this article will give a specific example of the problem – the case of Jared Homan. Homan played for Maroussi B.C. in the Greek Basketball League during the 2009-2010 season. After Maroussi B.C. failed to pay Homan his full salary, Homan initiated a BAT proceeding. The proceeding and its aftermath will be described in order to give the reader an example of European basketball's problem with paying players. Parts III and IV of the article will each describe a possible solution using the law of third-party beneficiaries and business trusts in order to insure payment of players. The law of third-party beneficiaries and business trusts will be discussed as well. Finally, Part V addresses the advantages and disadvantages of the proposed solutions.

I. FIBA'S ARBITRATION PROCESS

A. FIBA'S CREATION OF THE BAT

In Chapter VII of the FIBA Internal Regulations, FIBA establishes and empowers BAT through Article 3-289 of the General Principles: "FIBA establishes an independent

Basketball Arbitral Tribunal (BAT) for the simple, quick and inexpensive resolution of disputes arising within the world of basketball in which FIBA, its Zones, or their respective divisions are not directly involved and with respect to which the parties to the dispute have agreed in writing to submit the same to the BAT."[6]

As the regulations state, the "BAT is primarily designed to resolve disputes between clubs, players, and agents,"[7] and "BAT awards shall be final and binding upon communication to the parties."[8]

B. THE BAT RULES OF DISPUTE RESOLUTION

As the FIBA Internal Regulations state, "[arbitration] proceedings before BAT will be conducted in accordance with the BAT Arbitration Rules."[9] These rules are extensive and cover the full BAT arbitration process which is used "whenever the parties to a dispute have agreed in writing to submit the same to the BAT."[10] BAT disputes are "decided by a single Arbitrator appointed by the BAT President"[11] and "commence on the date of receipt by FIBA of a Request for Arbitration."[12] After the BAT receives the Request for Arbitration, the BAT President makes a "prima facie determination whether the arbitration can proceed, in particular, whether the Request complies with the requirements of Article 9.1 . . . and whether an arbitration agreement exists providing for the dispute to be adjudicated under [the BAT Arbitration Rules]."[13] If arbitration can proceed, an Answer is required of the defendant.[14] Then, "the Arbitrator shall determine in his/her sole discretion whether a further exchange of submissions is necessary."[15]

Arbitration under the BAT does not require a hearing.[16] In fact, the majority of the time, the arbitrator avoids a hearing and makes a determination based on the Request for Arbitration, the Answer, and any additional submissions.[17] As Article 13.2 states, if a hearing is requested by participants or required by the arbitrator, "[the] Arbitrator shall determine in his/her sole discretion whether a hearing is to be held by telephone or video conference or whether a hearing in person is to be held."[18]

Because it states the standard of review for arbitration, one of the most important articles in the BAT Arbitration Rules is Article 15.1: "Unless the parties have agreed otherwise the Arbitrator shall decide the dispute *ex aequo et bono*, applying general

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6. FIBA Internal Regulations, Chapter VII, art. 3-289 (2010), http://www.fiba.com/downloads/v3_expe/bat/FIBA_Internal_Regulations_FAT.PDF [hereinafter FIBA Regs.].

7. *Id.* at art. 3-291.

8. *Id.* at art. 3-290.

9. *Id.* at art. 3-293.

10. Basketball Arbitral Tribunal Arbitration Rules, Article 1.1 (2011), http://www.fiba.com/downloads/v3_expe/agen/docs/11-BASKETBALL-ARBITRATION-TRIBUNAL.pdf [hereinafter BAT Rules].

11. *Id.* at art. 8.1.

12. *Id.* at art. 9.1.

13. *Id.* at art. 11.1.

14. *Basketball Arbitral Tribunal (BAT)*, FIBA, http://www.fiba.com/pages/eng/fc/expe/fat/p/openNodeIDs/16808/selNodeID/16808/pres.html (last visited Feb. 10, 2014) ("Hearing . . . upon application only").

15. BAT Rules, *supra* note 10, at art. 12.1.

16. BAT Rules, *supra* note 10, at art. 13.1.

17. *See* BAT Rules, *supra* note 10, at arts. 9-12.

18. BAT Rules, *supra* note 10, at art. 13.2.

considerations of justice and fairness without reference to any particular national or international law."[19]

Literally, *ex aequo et bono* translates from Latin into "according to the right and good." Thus, the arbitrator is given the ability to make a judgment that he believes to be fair. No national or international law will govern his decision, and he must focus simply on a just outcome. The arbitrator's decision must be written according to the rules, and it "shall be final and binding upon communication to the parties."[20]

C. HONORING AND ENFORCEMENT OF THE BAT AWARDS

Both the FIBA Internal Regulations and the BAT Arbitration Rules state that the BAT awards will be final and binding.[21] Nevertheless, they are occasionally ignored by the parties – an increasingly frustrating problem faced by basketball players in Europe. Article 3-300 of the FIBA Internal Regulations speaks to the case in which a BAT award is ignored: "In the event that a party to a BAT Arbitration fails to honor a final award or any provisional or conservatory measures (the "first party") of BAT or CAS, the party seeking enforcement of such award (the "second party") shall have the right to request FIBA to sanction the first party."[22]

According to Article 3-300, four sanctions are available for FIBA: "(a) A monetary fine of up to CHF 150,000. . .; this fine can be applied more than once; and/or (b) Withdrawal of FIBA-license if the first party is a player's agent; and/or (c) A ban on international transfers if the first party is a player; and/or (d) A ban on registration of new players and/or a ban on participation in international club competitions if the first party is a club."[23]

Obviously, the only sanctions in Article 3-300 that are applicable to a basketball team are (a) and (d), and it is fairly common for these sanctions to be issued, as evidenced by FIBA's website.[24] FIBA posts a list of clubs currently banned from registration of new players, and thirty-six teams from fifteen countries are listed.[25] By contrast, only three players are currently banned from international transfers, which is the penalty under Article 3-300 (c).[26] Of the fifteen countries, the country with the most teams sanctioned by FIBA is Greece with eight.[27] Included in those eight is Maroussi B.C., a team that has a recent history of failing to pay its players, even after the BAT awards the players the enforcement of their contract.[28] Part II of this article will describe such a case which was decided by the BAT in May 2011.

19. BAT Rules, *supra* note 10, at art. 15.1 (emphasis added).

20. BAT Rules, *supra* note 10, at art. 16.5.

21. BAT Rules, *supra* note 10, at art. 16.5; *also see* FIBA Regs, *supra* note 6, at art. 3-290.

22. FIBA Regs., *supra* note 6, at art. 3-300.

23. FIBA Regs., *supra* note 6, at art. 3-300.

24. FIBA Regs., *supra* note 6, at art. 3-300(a) and (d)

25. *Sanctions*, FIBA, http://www.fiba.com/pages/eng/fc/expe/fat/p/openNodeIDs/19681/selNodeID/19681/sanctions.html (last visited Nov. 20, 2013).

26. *Id.*

27. *Id.*

28. *See generally* Homan v. Maroussi B.C., BAT 0134/10, (May 18, 2011) (Parker, Arb.), http://www.fiba.com/downloads/v3_expe/fat/deci/11/0134_Homan_Maroussi.pdf (Example of an arbitration award requiring Maroussi B.C. to pay a player according to the contract.).

II. THE PROBLEM WITH ENFORCING AWARDS: HOMAN V. MAROUSSI B.C.

A. FACTS

On July 29, 2009, Jared Homan signed a contract (the "First Contract") to play basketball for Maroussi B.C., a Greek basketball club located in Maroussi, Greece.[29] Homan, who played college basketball at Iowa State University, was a veteran of international basketball and had played on teams in Greece, Poland, Croatia, and Turkey.[30] In fact, 2009-2010 was to be his second season with Maroussi B.C., after playing for the Greek team during the 2005-2006 season.[31] Homan's contract called for Maroussi B.C. to pay $170,000 in ten installments, to be paid monthly starting in September 2009 and ending in June 2010.[32] Additionally, Homan was eligible for bonuses depending on the team's performance.[33] If the club finished its season in at least third place of the Greek Basketball League ("GBL"), Homan would be entitled to a bonus of $10,000.[34] If the club finished in the EuroLeague top 16, Homan would be entitled to a bonus of $15,000.00.[35] Just like the salary, both bonuses would be net amounts to be paid after Greek taxes.[36] Pursuant to the First Contract, Homan was also entitled to housing, including "color TV, Multi-system VCR, DVD player, microwave, clothes washer, clothes dryer, satellite dish and decoder."[37]

Seemingly, financial trouble began for Maroussi B.C. soon after the First Contract was signed, as evidenced by two documents that were created between Homan and the club – a second employment contract (the "Second Contract") and a settlement arising from Maroussi B.C.'s failure to pay salaries to many of its players (the "Settlement").[38] The Second Contract was signed on September 20, 2009 and reduced Homan's remaining monthly payments to 785 euros.[39] Regarding the bonuses, Homan would only receive 7,000 euros for the team's third place finish in the GBL, and 10,500 euros if the team reached the EuroLeague top 16.[40] Decreasing Homan's salary and bonuses in the second contract, plus changing payment from dollars to euros certainly impacted the contract's value.

After the team's failure to wholly honor the Second Contract throughout the basketball season, Isidoros Kounoupas, a basketball agent who placed Homan with his team, and Maroussi B.C., entered into the Settlement on July 25, 2010.[41] The Settlement promised to pay 67,800 euros to Homan.[42]According to the settlement, this payment was owed to Homan "as balance of [his] fees, signature bonus and goals achievement bonus."[43] Maroussi

29. *Id.* at 3.
30. *Jared Homan basketball profile*, EUROBASKET, http://basketball.eurobasket.com/player/Jared_Homan/Russia/Spartak_StPetersburg/46989 (last visited Feb. 10, 2014).
31. *See id.*
32. *Homan*, BAT 0134/10 at 3.
33. *Id.*
34. *Id.*
35. *Id.* at 4.
36. *Id.*
37. *Id.*
38. *Homan*, BAT 0134/10 at 4-5.
39. *Id.* at 4.
40. *Id.* at 4-5.
41. *Id.* at 5.
42. *Id.*
43. *Id.*

B.C. failed to pay full salary obligations to many of its players and decided to enter into the Settlement to avoid legal action.[44] Homan had no knowledge of the settlement.[45]

When payments under the Settlement were not made to Homan, on November 2, 2010, Homan filed a Request for Arbitration in accordance with the BAT rules and asked for enforcement of the First Contract.[46] At the time of his request, Homan had only received $95,247 of the $170,000 owed to him on the First Contract. He had not received payment of $25,000 in earned bonuses pursuant to the First Contract, and had spent $372.86 of personal money for the installation of a satellite dish in his home.[47] In total, Homan requested an award of "[$100,253.00] net plus interest at the applicable Swiss statutory rate, starting from the 30th of October 2009."[48]

B. THE CASE

The arbitrator in Homan's case faced several issues. First, was a question of jurisdiction: whether the First Contract or the Second Contract would govern the forum for the dispute's hearing.[49] This The First Contract called for "[any] dispute arising from or relating to the [First Contract to be] submitted to the FIFA Arbitration Tribunal (FAT) in Geneva, Switzerland [to] be resolved in accordance with the FAT Arbitration Rules by a single arbitrator appointed by the FAT President."[50] An addendum to the Second Contract stated that "[any] dispute arising from or related to the [Second Contract], shall be submitted to the relevant committee for the resolution of financial disputes of HEBA [Hellenic Basketball Clubs Association]," which is the governing body of the GBL.[51] To determine which contract governed, the arbitrator focused on "which contract the Parties appear to have performed their obligations under" and weighed multiple facts.[52] Payment from Maroussi B.C. to Homan had been arbitrary and at the team's convenience under both the First Contract and Second Contract.[53] What's more, the payments made by Maroussi B.C. pursuant to the First Contract and Second Contract did not match what was promised in the settlement.[54] The team had already paid more money to Homan than it was obligated to pay under the Second Contract, and on top of that sum, it promised more money to Homan in the Settlement.[55] Clearly, payments were not being made according to only the First or Second Contract, yet the team seemed to pay Homan a salary closer to the First Contract. Thus, the arbitrator found "that, in relation to payment obligations, the First Contract governed the Parties' relations for the 2009/2010 season."[56] The arbitrator also

44. *See Homan*, BAT 0134/10 at 5.

45. *Id.* at 17-18.

46. *Id.* at 5.

47. *Id.* at 8-9.

48. *Id.* at 9.

49. *Id.* at 11.

50. *Homan*, BAT 0134/10 at 10. According to paragraph 20, FAT was renamed to BAT, and on April 4, 2011, the BAT Secretariat informed the parties of the change. *Id.* at 7. None of the parties raised an objection, and BAT was applied to the proceedings in place of FAT. *Id.* at 8. Thus, BAT can be read into this quote where FAT is written.

51. *Id.* at 11.

52. *Id.* at 11-12.

53. *See id.* at 20.

54. *Id.* at 5.

55. *Id.* at 8.

56. *Homan*, BAT 0134/10 at 12.

found "that the BAT [did] have jurisdiction to determine the present dispute" because it was a dispute "that [arose] out of the First Contract," which called for BAT to settle disputes.[57]

Second, the arbitrator decided the standard that would govern his decision. Once again, because the First Contract governed the dispute, the BAT Arbitration Rules applied.[58] Thus Article 15.1 was applicable.[59] The arbitrator stated that the principle of *ex aequo et bono* would apply to the arbitration hearing.[60] The concept calls for the arbitrator to focus on what is fair rather than what any law may dictate; thus, it is a purely subjective standard.[61] Covenant 8 of the First Contract did, in fact, call for *ex aequo et bono* to be used, so the arbitrator in Homan's case had "a mandate to give a decision based exclusively on equity."[62]

The third issue to be decided was the amount of compensation due, requiring a decision as to whether Homan was due compensation, and if so, how much.[63] Under the doctrine of *ex aequo et bono*, the arbitrator found that Homan was owed money by Maroussi B.C.[64] To determine the amount due, the arbitrator first had to reconcile Homan's request for $99,753 owed from the First Contract's salary and bonus responsibilities with the Settlement's agreed upon value of 67,800 euros.[65] Because Homan responded to pre-arbitration inquiries by stating "that [he] did not sign the [Settlement], nor was he aware of its existence," and because Maroussi B.C. failed to respond to pre-arbitration inquiries about the Settlement's validity, the arbitrator found that Homan was entitled to the amount due under the First Contract.[66]

The arbitrator also found that the Settlement was invalid.[67] This was an important finding because if the settlement was valid, Homan would have agreed to waive "all legal remedies to recover outstanding sums."[68] Instead, because the settlement was invalid, Homan would have to wait for the team to make "scheduled repayments of the outstanding sums."[69] Even though Kounoupas signed the Settlement on behalf of Homan, this was not sufficient to bind Homan.[70] The arbitrator held that "[Homan had] not signed the [Settlement] and [submitted] that [Kounoupas] did not have authority to enter into the [Settlement] on his behalf."[71] In deciding to honor the First Contract, the arbitrator also "[found] that [Homan was] entitled to [$372.86] in relation to the satellite dish."[72] The arbitrator concluded his written decision by applying a 5% per annum interest rate to the

57. *Id.*

58. *Id.* at 14.

59. *Id.*

60. *Id.*

61. *Id.* at 14-15 (quoting JdT 1981 III, p. 93) ("When deciding *ex aequo et bono*, the arbitrators pursue a conception of justice which is not inspired by the rules of law which are in force and which might even be contrary to those rules.").

62. *Homan*, BAT 0134/10 at 14 (quoting Poudret/Besson, Comparative Law of International Arbitration, London 2007, No. 717, pp. 625-26).

63. *See id.* at 15-17.

64. *Id.* at 16-17.

65. *Id.* at 16.

66. *Id.* at 16-17.

67. *Homan*, BAT 0134/10 at 18.

68. *Id.* at 17.

69. *Id.*

70. *Id.* at 18.

71. *Id.*

72. *Id.* at 19.

award[73] and awarding attorneys' fees and a reimbursement for arbitration costs to Homan.[74] In Section 9 of the decision, the arbitrator outlined the full award including the amounts for salary, the satellite dish, attorneys' fees, arbitration costs, and interest.[75]

C. AFTERMATH

The arbitrator's decision was handed down on May 9, 2011 with the requirement to pay Homan the remainder of his salary, his bonuses, and the reimbursement for the satellite dish.[76] Unfortunately, Homan was a victim of a team owner who ignored the arbitrator's decision and refused to pay his player.[77] As a result, FIBA was forced to take action against Maroussi B.C. and sanctioned the club on May 18, 2011 by banning the team from signing new players.[78]

Even after the sanction, Homan remained unpaid and Maroussi B.C. was not hampered by the sanction. As Homan told heinnews in early 2011, "I went to FIBA and won the case but figured out that the FIBA way isn't always the best route to go. When the (2010-11) season started they were not allowed to sign players, but somehow FIBA allowed them to sign players."[79] Heinnews reported, "Homan suggested that FIBA or European basketball leagues should force clubs to have some sort of security for players, possibly by putting money into an account before the season."[80] As Part III of this article will discuss, allowing players to be third-party beneficiaries to advertising contracts is a possible way to ensure the type of "security" that Homan mentioned.[81]

III. THE FIRST SOLUTION: PLAYERS AS THIRD PARTY BENEFICIARIES TO ADVERTISING CONTRACTS

As Homan's case shows, players are at an extreme disadvantage in the current European system. The economic problems plaguing this system leave players unpaid, while FIBA and the BAT provide an inadequate remedy to unsympathetic owners. Thus, a solution is necessary that will protect the most important asset of each basketball team – the players. The first solution proposed herein is to create a FIBA-mandated system in which players could bring a third-party advertiser to court, and a fund from which at least partial payment can be recouped without a BAT decision.

A. AN OVERVIEW OF THE SOLUTION

First, FIBA would require each contract between a team and an advertiser to provide that the contract is entered into for the benefit of the players. In so doing, the players would

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73. *Homan*, BAT 0134/10 at 19.

74. *Id.* at 24.

75. *Id.* at 25-26.

76. *Id.*

77. *Why Maroussi? Five Reasons to Care*, KINGS OF MAROUSSI (Feb. 3, 2012), http://kingsofmaroussi.com/tag/jared-homan.

78. *BAT 0134/10 (Homan v/ BC Maroussi)*, FIBA (May 18, 2011), http://www.fiba.com/pages/eng/fc/expe/fat/p/newsid/46809/deci.html

79. *Jared Homan: An Iowa farm boy on European adventure*, heinnews (Feb. 15, 2012), http://www.heinnews.com/basketball/nba/jared-homan-an-iowa-farm-boy-on-european-adventure/.

80. *Id.*

81. *Id.*

become third-party beneficiaries of the contract between the team and the advertisers. In this solution, FIBA should also require explicit language stating that all players for such team are third-party beneficiaries of the contract with respect to a specific amount of the contract; this would make the intention of the contract clear for a court's potential analysis. Second, a specific portion of the funds from the contract – 10%, for example – would be placed in an escrow account for the benefit of the players. A certain percentage of these revenues – again, 10%, for example – would be set aside for the players. This account would serve as a safety net in the event that a team defaults on its responsibility to pay its players. Even if the account could not pay each player in full, it would allow for partial payment while the players await a decision from BAT, or another court, with regard to their contracts.

In Homan's case, this solution would have provided a solvent party to sue and a fund from which to receive partial payment for his play. This proposed solution protects a player's salary by changing the calculus of the situation. As it stands, a team can choose not to honor its obligation to pay a player, *and* it may disregard any FIBA arbitration award in favor of such player, resulting in one disgruntled, unpaid player. The same disregard of a FIBA arbitration award under third-party earmarking, with a related escrow account, would change the previous scenario, resulting in a slightly less disgruntled and slightly more paid player, and an angry advertiser. The effect is twofold: first, existing advertisers that are forced to bear the cost of a team's non-payment would doubtless be inclined to cease business dealings with that team, as such practices would result in an increased and unbargained-for cost of doing business. Second, would-be advertisers would likely think twice before using a potentially deadbeat team to market its products, given the potential exposure to additional liability. Thus, teams would be put in a difficult situation: pay players or lose valuable ad revenue. This result would create an actual, tangible penalty for teams, above any illusory FIBA penalty. Strictly speaking, it may not seem *fair* to make advertisers act as insurers of players' salaries, but the alternative of losing talent is equally, if not more, unpalatable.

B. THIRD-PARTY BENEFICIARIES UNDER EUROPEAN LAW

In the United States, third-party beneficiary law is well understood and accepted. For purposes of the problem described above, it is necessary to examine European law regarding third-party beneficiaries, as well as contracts in general. In examining European law, focus will be made on four countries home to some of the major European basketball leagues: Greece, France, Spain, and Germany. FIBA can of course create a third-party beneficiary relationship on its own accord, but a review of European law shows which countries have accepted this concept in their own law.

1. GREECE

Based on the discussion of Homan and the major problems with collecting salaries experienced by Greek basketball players, Greece is a logical place to begin a survey of third-party beneficiary law. Although principles "governing Greek law of contracts differ in many respects from principles prevailing in [the United States]," third-party beneficiaries

are recognized.[82] In Greece, "[contracts] for [the] benefit of third parties are valid and generally the third party acquires a direct right of enforcement."[83] Nonetheless, it is important to note an important part of Greek contract law that may allow parties, such as basketball teams, not to honor contracts:

> Nonperformance of a valid contract may be excused, mainly (a) if performance of the contract has become impossible due to a cause for which debtor is not responsible, (b) if debtor has retained right to withdraw from the contract, and (c) if the other party is obliged to perform first his presentation and has not done so. Also, nonperformance may be excused in certain circumstances if performance may cause undue hardship to debtor (Art. 388 C.C.) and if to demand performance may be considered as an abuse of a right (Art. 281 C.C.)[84]

Thus, although a player has the ability to enforce a contract as a third-party beneficiary in Greece, there is the possibility that teams may still be able to succeed in their nonperformance of the contract. For example, Greek teams can argue that the financial crisis has made payment of their players impossible. However, the other requirements should be able to save the players; even if the player has given the team a right to withdraw, the player has most likely performed under his contract and thwarted the third requirement for excusing nonperformance. Although some nonperformance may be excused in Greek law, players should be protected by third-party beneficiary law.

2. FRANCE

In France, a provision creating a third-party beneficiary is called a *stipulation pour autrui*.[85] As in the United States, a *stipulation pour autrui* provides "that the performance to be rendered by one of the parties thereto is to run to the benefit of a third party who is not a party thereto."[86] In a case where such a relationship is created, the third-party beneficiary has a revocable right to demand the performance of the contract. Thus, French law is clear in its acceptance of third-party beneficiaries to a contract.

3. SPAIN

In Spain, the American notion of third-party beneficiary law is found in the concept of a *fianza*, or bond. Spanish law defines a *fianza*:

> By means of a bond one person undertakes to pay or comply on behalf of a third party should the latter fail to pay. The main characteristics of a bond are:
>
> (1) The bond is *accessory* to the main obligation. The bond may not exist if the secured obligation does not exist.

82. Contracts, 2007 GREECE LAW DIGEST REVISER [GREECE LAW DIGEST] at 2-3.
83. *Id.* at 2.
84. *Id.* at 3.
85. Three-Party Situations, 1-6 DOING BUSINESS IN FRANCE § 6.04 (Matthew Bender, rev. ed.).
86. *Id.*

(2) The bond is *subsidiary* to the degree that the guarantor performs the debtor's obligation if the latter does not. This characteristic is not essential to a bond; the guarantor may assume the obligation joint and severally.

(3) The bond is *unilateral* since it creates obligations only for the guarantor.[87]

Under this law, the team would be the debtor, the advertising company would be the guarantor, and the player would be the third party. Further, a third-party beneficiary contract, as proposed in this article, would be considered a conventional bond because it is created "at the will of the parties."[88]As well, the bond would be a determined bond because it "involves a specified amount of money."[89]

4. GERMANY

Under German law, a third party beneficiary is known as a *vertrag zugunsten dritter*, and under the solution proposed herein, a "true" contract for the benefit of a player would be created.[90] The "true" contract seems to be the default in Germany, as the "beneficiary accrues his right to claim performance automatically with the respective agreement between promisor and promisee."[91] The alternative to the "true" contract is the "false" contract, and this alternative does not give the beneficiary a right to claim performance – a right that is necessary for Europe's unpaid basketball players.[92] Thus, German law has the concept of a third-party beneficiary and by default gives the beneficiary a right to enforce performance.

IV. THE SECOND SOLUTION: ADVERTISING REVENUE IN A TRUST ACCOUNT

A. AN OVERVIEW OF THE SOLUTION

A second possible solution to the failure of European teams to pay their players is to put all revenues a team collects into a trust account. Individual leagues or FIBA can mandate that each team is required to keep a certain percentage of their revenue in a separate account in order to protect against nonpayment of player salaries. In the event a team does not pay, then the fund is used to pay a player's salary. Further, when players appeal to the BAT, they will no longer be subject to a team owner's refusal to abide by a BAT determination. Instead, sufficient money in the trust account will allow players to recover as the beneficiaries for any awards that the BAT rules in their favor.

This solution would protect players from teams that outright refuse to pay salaries or honor BAT decisions. By keeping a completely separate account, the team will not be able to co-mingle earned revenues with the percentage of revenues that are required to be put

87. Bonds (*Fianza*), 1-7 FERNANDO POMBO, DOING BUSINESS IN SPAIN § 7.02 (Matthew Bender, rev. ed.) (emphasis in original).

88. *Id.*

89. *Id.*

90. 1-10 RUSTER, BUSINESS TRANSACTIONS IN GERMANY § 10.09 (Matthew Bender, rev. ed.).

91. *Id.*

92. *Id.*

into this trust account. The percentage can be determined proportionally to how much player salaries cost versus the amount of revenue the team brings in. The money for the trust can come from any combination of revenue, including from sponsors, ticket sales, concessions, or any other basketball-related revenue. Each season the account can be reconciled to ensure that each of the players' contracts is fulfilled. Then, the team may take out a portion of the remaining money as necessary to pay other debts. However, a mandated minimum sum should always remain in the trust to guarantee player salaries for the following season.

B. EUROPEAN TRUST LAW

The Hague Conference on Private International Law (HCCH), formed in 1893, is the leading institute for private international law.[93] Since 1893, the HCCH has executed numerous conventions, including the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition.[94] This convention established "common provisions on the law applicable to trusts" and dealt with "the most important issues concerning the recognition of trusts."[95] The Convention explains that a trust refers to the legal relationship created "when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose."[96] To be characterized as a trust, the funds need to be held separately and not together with the trustee's own assets and the trustee has the duty to manage the assets accordingly.[97] With the implementation of this Convention, trusts are increasingly recognized in civil law countries.[98]

The purpose of a trust is to separate legal and equitable title.[99] While the trustee holds legal title to the trust property, the beneficiary holds equitable title.[100] Therefore, if an employer is putting money into a trust and the employer becomes insolvent, the beneficiary still retains his or her interest in the trust property, as the true owners of that property. In this situation, the players would be the beneficiaries. Even if the team cannot pay them, they are still entitled to the revenues that have been placed in a trust for them. The fact that they have equitable title to those proceeds entitles them to forego the insolvent team and look to the trust for payment of their earned revenues.

Since the beneficiaries are the true owners, "their equitable property interests prevail not only over the trustee's own creditors but also against persons to whom the trustee wrongfully transferred the property."[101] Therefore, even if a third-party like FIBA is the trustee, and a team took money out of the trust, the players will still have an interest in the

93. *See* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php (last visited Feb. 11, 2014).

94. *See Conventions*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.listing (last visited Feb. 11, 2014).

95. *Convention on the Law Applicable to Trusts and on their Recognition*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (July 1, 1985) *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=59.

96. *Id.* at art. 2.

97. *Id.*

98. *See Status table (30: Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition)*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (August, 17, 2010) (lists the contracting states to the Convention).

99. *See Convention on the Law Applicable to Trusts and on their Recognition*, *supra* note 95, at art. 2.

100. *See id.*

101. DAVID HAYTON, MODERN INTERNATIONAL DEVELOPMENTS IN TRUST LAW 153 (1999).

trust property. By characterizing a trust as its own entity, "trusts will gain stronger-than-ever asset-partitioning attributes, putting them truly on par with corporations."[102] In addition, by treating a trust as a legal entity, the trust will become more easily recognized by the different legal systems throughout Europe. Each country, however, is a bit different in how they recognize a trust.

1. ITALY

Because Italy is part of the Hague Convention,[103] many of the specifications of trusts are consistent with the Convention. For example, there is a difference between the title and ownership of trust assets, with the "owner" being "afforded the highest possible level of protection."[104]

Moreover, when most of the elements of a trust are connected with Italy, it is called *interno*.[105] There are rules within Italy to govern the trust drafting instruments in accordance with governing foreign law, because the Italian civil code is outdated and not capable of governing trusts properly.[106] For example, one of the requirements is that the deed has to explain the reasons why the trust is being formed.[107] Because Italian laws are unable to accomplish the purpose of the trusts, the Italian assets have to be placed under foreign rules.[108] Therefore the Italian approach to trusts is that "trusts are not seen as tax-planning tools or as instruments for the management of wealth, but as the only viable solution to problems that cannot be solved under Italian law."[109] Trusts, therefore, are a great way to accomplish something that Italians may not have otherwise been able to achieve. Consequently, for the basketball leagues in Italy, trusts will be feasible for the teams to create, but foreign laws regarding trusts will probably have to govern them.

2. FRANCE

A trust does not exist in France because the concept of "'split ownership' between trustee and beneficiary is contrary to the exclusive and absolute nature of the concept of ownership under French law . . . [and] French law does not generally allow assets to be set aside for a special purpose."[110] It should be noted that with the implementation of the Hague Convention in France, at least the concepts of trusts may begin to be more widely recognized, even if the actual law is not developed internally. However, France does give broad recognition to common law trust funds by recognizing it as a bilateral contract with

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102. M.W. LAU, THE ECONOMIC STRUCTURE OF TRUSTS 77 (2011)

103. *Members*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=states.listing (last visited October 20, 2013).

104. PRINCIPLES OF EUROPEAN TRUST LAW 125 (David J. Hayton, Sebastianus C.J.J. Kortmann & H.L.E. Verhagen eds.) (1999).

105. Maurizio Lupoi, *The Hague Convention, The Civil Law and The Italian Experience*, 21.2 TRUST LAW INTERNATIONAL 80, 83 (2007).

106. *Id.* at 83-84.

107. *Id.* at 85.

108. *Id.* at 84.

109. *Id.*

110. PRINCIPLES OF EUROPEAN TRUST LAW 131 (David J. Hayton, Sebastianus C.J.J. Kortmann & H.L.E. Verhagen eds.) (1999).

rights to third parties. Essentially, this is consistent with the first solution above: allowing the players to sue as third party beneficiaries.[111]

3. GERMANY

In Germany, when assets are transferred to a *Treuhänder* (trustee) and given to a third-party for beneficiaries, it is entitled the *fiduziarische Treuhand.*[112] This is different than the common law trust because German law imposes less strict standards on the trustees of a *fiduziarische Treuhand* than does common law. For the beneficiaries to be given priority over other creditors, the assets must be paid by the third party directly into a *Treuhandkonto* (escrow account).[113] Therefore, for this type of solution to work in Germany, the best scenario would be for the organizations that owe the team money to deposit the funds directly into a *Treuhandkonto* as opposed to paying the team and the team subsequently putting the revenue into the account.

4. NETHERLANDS

In the Netherlands, multiple principles are similar to the common law idea of a trust. There is the concept of *fiducia cum amico* (fiduciary ownership); while the beneficiary does not own the assets, they still have an economic interest in those assets.[114] If the person that is holding the assets violates his or her contractual duties, then the beneficiary can sue.[115] Another type of account that is similar to a trust is a *nominee account*, which is an account held by an agent for the benefit of certain people.[116] While the agent does not have all of the responsibilities of a trustee, it is still a third party that maintains and manages the property.[117] Another type is a *bewind*, which allows the beneficiary to directly become the complete legal owner of the assets, subject to certain restrictions placed on the beneficiary.[118] Usually those assets are placed in a separate fund, so as to shield them from creditors that are outside the scope of the *bewind.*[119] While all these different types of accounts exist in Dutch law, there does not seem to be any exact equivalent to the common law trust. However, the introduction to the Hague Convention in the Netherlands may be increasing the use of foreign trusts.

In the countries where trusts are not recognized in the traditional meaning of a *trust*, it may be more difficult for FIBA and the individual teams to implement this concept. Each team will have to adjust and use an account that works in their specific country, even if the results deviate a bit from each other. The goal for these trusts is to ensure that players are paid, and the means to the end are of less importance.

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111. *See supra* Part III.

112. PRINCIPLES, *supra* note 110 at 89.

113. *Id.* at 94.

114. PRINCIPLES, *supra* note 110 at 196-198. Spain also recognizes the concept of *fiducia cum amico. Id.* at 160.

115. *Id.*

116. *Id.* at 198.

117. *Id.*

118. *Id.* at 199.

119. PRINCIPLES, *supra* note 110 at 199-200.

V. WEIGHING THE FEASIBILITY OF EACH SOLUTION

A. ADVANTAGES OF THE SOLUTIONS

There are numerous advantages to the use of third-party beneficiary law and trust accounts in the solutions proposed herein. First, the players are protected. This is a simple and clear advantage. The players are providing the talent that the leagues require for their existence, so protecting the players is integral in maintaining the leagues. Under the current system, the BAT has shown to be insufficient in protecting the players. The use of third-party beneficiary law will allow players to have recourse in the event that a team ignores its responsibility to pay a salary. Although it will introduce the cost of litigation to the equation, players will be able to hold advertisers and sponsors responsible for paying their salaries. In the event of nonpayment, the players can bring a breach of contract suit against the advertisers and sponsors to enforce their third-party rights. As stated above, this gives the players a solvent party to bring to court and an opportunity to receive compensation.[120] In Homan's case, he would have been able to bring suit against sponsors and advertisers of Maroussi B.C. to recoup a portion of his salary from these corporations. Even though Maroussi B.C. ignored the BAT's decision, a third-party beneficiary relationship with advertisers and corporations may have allowed Homan to obtain some monetary remedy.

An assumption of this enforcement mechanism is the idea that players will not play for teams where these safeguards are unavailable. Eventually, players will refuse to sign with teams who have a history of not paying players. By utilizing the trust account solution players will have confidence that there is always money available to pay their salaries. Even if the team is not liquid enough to sign the paychecks when they are due, the flexibility of having the funds available at all times will be a safety net for both the players and the team.

If players continue to see that the BAT decisions lack teeth, they will shy away from European basketball, depleting the talent pool available to multiple leagues. Most notably, American basketball players will stay away from European basketball. Players such as Childress and Arroyo did not choose to play in Europe because they had no other opportunities in the United States; they chose to play in Europe because they believed the opportunity in Europe to be better.[121] In particular, Childress, the number-six pick of the 2004 NBA Draft, had the opportunity to play in the NBA on a multi-million dollar long-term contract.[122] He was offered a five year deal in the range of $33,000,000 by the Atlanta Hawks.[123] Still, Childress decided to go overseas to play for Olympiacos Piraeus B.C. in Greece because he received a more lucrative deal with the Greek club.[124] After seeing how the financial crisis impacted Europe and caused the current problems that players are experiencing with European clubs, Childress's decision may have been different. Leagues in countries such as Greece, France, Spain, and Germany are big business, and in order to continue attracting fans and the revenues from advertisers and sponsors, the leagues must

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120. *See supra* Part III.A.

121. *See* Marc Stein, *Agent: Boykins to Stay in Italy*, ESPN (Dec. 29, 2008), http://sports.espn.go.com/nba/news/story?id=3798680.

122. *Id.*

123. *Id.*

124. *See id.*

continue to maintain competition and exciting play. Thus, protecting players and their salaries is necessary for the survival of league business.

Another benefit of creating a third-party beneficiary relationship is acknowledging the importance of the sponsor-player relationship and holding the corporations responsible for supporting, at least in part, the talent that creates the relationship with basketball. This solution of holding advertisers and sponsors responsible for paying a player's salary should the team default on its obligation to pay said player may seem unfair. Advertisers and sponsors are not in the business of managing the operations of a basketball team. Holding these organizations liable would be punishment for actions outside of their control. At the same time, advertisers and sponsors benefit greatly from their association with the team and the players. Globally, corporations may spend millions of dollars for the right to associate themselves with athletes and teams. Sponsors receive the benefit of brand recognition and business development from being associated with the team. Therefore, it seems natural for advertisers and sponsors to be held liable to ensure that the talent creating their benefits is protected. In Homan's case, Maroussi B.C. enjoyed success during his time with the club, as evidenced by the fact that Homan earned his bonuses for the team's performance.[125] Because advertisers and sponsors want to be associated with these successful teams and the players, it can be argued that it is their responsibility to support the talent providing their benefits.

Finally, by creating a third-party beneficiary contract for the players, sponsors and advertisers are encouraged to partner with and support teams that act properly in their business operations. Team owners who pay their players and uphold their obligations should be rewarded with loyalty from advertisers and sponsors; advertisers and sponsors should shy away from owners who are unscrupulous. Sponsors and advertisers held accountable will weed out deceitful owners who do not uphold their obligations. If sponsors continue to work with irresponsible owners, then they are only facilitating the mistreatment of the players and should be held accountable.

B. DISADVANTAGES OF THE SOLUTIONS

The disadvantages in the solutions are clear – the loss of revenue from advertisers and sponsors who fear liability for paying player salaries. Again, advertisers and sponsors are not in the business of managing basketball teams. It is not the intention of these advertisers and sponsors to go into business with teams and take on financial risk. Inevitably, teams would lose revenues because of decreased advertising and sponsor revenue, and in turn, the mechanism that is created to protect players would decrease player salaries. With lower revenues, teams would pay their players lower salaries. Although players would be protected, they would take a financial hit and the top talent would look to other leagues. This lack of revenue would affect each team differently. For example, European teams such as FC Barcelona Regal of Spain and Olympiacos Piraeus B.C. of Greece might not suffer as much as teams in smaller markets and or with histories of financial trouble.

Even though advertisers and sponsors would shy away from the risk of liability, and teams and players would suffer, there may be a silver lining. Initially sponsor revenues would most likely fall, but, in the long term, a FIBA rule creating the third-party beneficiary relationship would result in better and more responsible owners. Owners would receive a

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125. *See* Homan v. Maroussi B.C., BAT 0134/10, 8 (May 18, 2011) (Parker, Arb.), http://www.fiba.com/downloads/v3_expe/fat/deci/11/0134_Homan_Maroussi.pdf.

clear message that if they did not pay their players, and, in turn, punished their advertisers and sponsors, their own revenues would decline. This would create a strong incentive for owners to be more responsible and make sure that they can meet their financial obligations. Owners would have to reconsider their previous behavior – namely, signing players to lucrative contracts that cannot be sustained, deciding to own a basketball team, and ignoring the decisions of the BAT in favor of players. Although the disadvantage is clear in the short run, in the long run, a third-party beneficiary relationship in favor of players would create a more responsible and solvent ownership situation.

Furthermore, being mandated to put a portion of their revenues into a separate account may limit the team's spending in other aspects of the team's business. Because the trust accounts will be identified for the benefit of the players, any other debts or creditors that the team has will not have access to the funds. Therefore, financial responsibility would become an increasingly essential feature in running a successful team.

CONCLUSION

Economic market conditions have changed how, and if, professional basketball players are paid overseas. Present remedies for non-payment of player salaries are insufficient, and more responsibility is necessary. An enhanced, plausible, solution is needed for non-payment and legal recourse. Third-party beneficiary law and trust accounts present solutions; however, like any legal remedy, heightened scrutiny will exist and suggest otherwise.

Analyzing the United States – Japanese Player Contract Agreement: Is this Agreement in the best interest of Major League Baseball players and if not, should the MLB Players Association challenge the legality of the Agreement as a violation of federal law?

By Robert J. Romano, Esq.*.

INTRODUCTION

Baseball may be considered America's *national pastime*, but the game has no boundaries. The first baseball league outside of the United States was founded in Cuba around 1878.[1] International tours spread the game throughout the world, resulting in professional baseball leagues forming in countries such as the Netherlands (1922),[2] Japan (1936),[3] Puerto Rico (1938),[4] Venezuela (1945),[5] Mexico (1945),[6] Italy (1948),[7] the Dominican Republic (1951),[8] South Korea (1982),[9] and Taiwan (1990).[10]

With the expansion and globalization of the sport, a desire for professional clubs to secure talented prospects from foreign leagues grew. At the same time, talented prospects looked to foreign leagues, in particular the United States' Major League Baseball ("MLB"), for lucrative player contracts, for profitable endorsement and sponsorship opportunities, or as just an opportunity to lengthen their playing careers. So as players moved from one country's professional baseball league to another's, rules and protocols were enacted to protect both the interests of the leagues and the players themselves.

This article analyzes the legality of one such protocol, the *United States – Japanese Player Contract Agreement* (hereafter referred to as the "Protocol"), and in particular the "posting system" as defined within the Protocol, as accepted and approved by the MLB and the Japanese professional baseball league, Nippon Professional Baseball ("NPB").[11]

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1. ROBERTO GONZÁLEZ ECHEVARRÍA, THE PRIDE OF HAVANA: A HISTORY OF CUBAN BASEBALL 16 (1999).
2. PETER C. BJARKMAN, DIAMONDS AROUND THE GLOBE: THE ENCYCLOPEDIA OF INTERNATIONAL BASEBALL 356 (2005).
3. *Id.* at 366.
4. *Id.* at 233.
5. *Id.* at 229.
6. *Id.* at 275.
7. BJARKMAN, *supra* note 2, at xv.
8. *See id.* at 167.
9. *See id.* at 362.
10. *Id.* at 368.
11. United States – Japanese Player Contract Agreement, Major League Baseball-Nippon Professional Baseball, Dec. 15, 2000, *available at* http://jpbpa.net/up_pdf/1284364663-401673.pdf [hereinafter Protocol].

The Protocol raises several key questions. The Protocol allows for the transfer of capital that could be used to pay salaries of current or future MLB players from MLB franchises to owners of franchises in Japan.[12] Is such practice in the best interest of MLB and its players? Does the Protocol in any way restrain the rights of players? Does the Protocol impede the eligibility and free movement of players from one team to another? And, as a result of the Protocol, are players' salaries affected in any way?

If the answer to any of these questions is yes, the issue becomes whether the Protocol, and in particular the posting system as defined within it, violates either federal labor law or federal antitrust law. If it does violate federal law, should a professional baseball player or the MLB Players Association ("MLBPA"), either through the court system or collective bargaining, compel Major League Baseball to terminate the Protocol? This article will explore and attempt to answer these questions.

I. WHY MAJOR LEAGUE BASEBALL ENTERED INTO THE PROTOCOL WITH THE JAPANESE PROFESSIONAL BASEBALL LEAGUE

A. HISTORY OF THE PROTOCOL

The initial *United States – Japanese Player Contract Agreement* was entered into in 1967 after a dispute arose between MLB's San Francisco Giants and NPB's Nankai Hawks over the rights to pitcher Masanori Murakami.[13] Prior to the original agreement, Murakami, on loan from NPB, was playing for the Giants' minor league affiliate.[14] In 1964, Murakami was called up from the minor leagues by the Giants and became the first Japanese-born player to appear in a MLB game.[15] Following the 1965 season, Murakami, over the Giants' objection, was required to return to Japan to fulfill his contractual obligation with the Nankai Hawks.[16]

As a result of the subsequent dispute that arose over the rights to Murakami, the initial United States – Japanese Player Contract "Working Agreement" was entered into between MLB and NPB.[17] This agreement created a *de facto ban* which declared that all Japanese professional baseball players will stay in Japan and play for NPB, and all American professional baseball players, at either the major or minor league level, will stay in the United States and play for MLB.[18]

By the 1990s, salaries for MLB players increased significantly as a result of free agency and advances made by the MLBPA through collective bargaining.[19] Talented

12. *See infra* Part IV.C.1.

13. Jim Albright, *Why Haven't We Had More Japanese Players in the Majors?*, BASEBALLGURU.COM, http://baseballguru.com/jalbright/analysisjalbright15.html (last visited Mar. 14, 2014).

14. *Id.*

15. Molly Fitzpatrick, *49 years ago today, Masanori Murakami became the first Japanese Major Leaguer*, CUT4 (Sept. 1, 2013), http://wapc.mlb.com/cutfour/2013/09/01/59242586/49-years-ago-today-the-first-japanese-mlb-player-made-his-debut.

16. *Id.* The Hawks told Murakami that if he stayed with the Giants he would never be able to return to NPB. Albright, *supra* note 13.

17. Albright, *supra* note 13. A key element to this agreement is that each league respects the other's reserve rights over players. *See id.*

18. *Id.*

19. *See* MICHAEL COZZILLIO, MARK LEVINSTEIN, MICHAEL DOMINO & GABE FELDMAN, SPORTS LAW: CASES AND MATERIALS, 382-400 (2007).

Japanese players, aware of these high salaries, were tempted to come to the United States to see if they too could secure a lucrative contract with an MLB franchise.

In 1995, Hideo Nomo was the first Japanese baseball player who successfully *cashed in* by signing with an MLB franchise.[20] After retiring from his NPB team in 1994, he signed a three-year, $4.3 million contract with the Los Angeles Dodgers.[21] Nomo was able to sign with the Dodgers because the reserve clause, which governed a team's rights to a player after a contract expired, within NPB's uniform players contract only controlled the actions of Japanese players within NPB.[22] The reserve clause was silent when it came to Japanese players signing with a non-Japanese baseball team.[23]

A second Japanese player, pitcher Hideki Irabu, wanted to play for the New York Yankees and asked for a trade from his current NPB club, the Chiba Lotte Marines.[24] The Chiba Lotte club, however, opted to sell his reserve rights to the San Diego Padres instead.[25] After a lengthy series of *negotiations* between MLB and the MLBPA, MLB ordered the Padres to relinquish all rights in Irabu, allowing him to sign with the Yankees.[26]

Another player, Alfonso Soriano, wanted to leave Japan as well.[27] Soriano desired an increase from the league minimum his current NPB team, the Hiroshima Toyo Carps, was paying him.[28] The Carps failed to make Soriano a significant offer so he, like Hideo Nomo before him, retired from NPB to pursue a career with an MLB franchise.[29] Soriano was successful despite the Carps' claim that they had reserve rights over Soriano that MLB was obligated to recognize.[30] On this occasion, as opposed to most others, MLB disregarded the Japanese team's reserve rights over a player, but, most likely, only for its own self-interest.

Soriano was born in the Dominican Republic and MLB rules provide that a Dominican player cannot sign with an MLB franchise until he turns sixteen years of age.[31] However, NPB rules at the time allowed for a Japanese team to sign players from the Dominican

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20. *See Sports People: Baseball; Dodgers Sign Nomo To Three-Year Deal,* N.Y. TIMES (Feb. 23, 1996), *available at* http://www.nytimes.com/1996/02/23/sports/sports-people-baseball-dodgers-sign-nomo-to-three-year-deal.html.

21. *Id.*; *see also* Michael Street, *The Asian Equation*, BASEBALL PROSPECTUS (Apr. 13, 2011), http://www.baseballprospectus.com/article.php?articleid=13555.

22. Street, *supra* note 21.

23. *Id.*

24. *Id.*

25. *See* Victoria J. Siesta, *Out at Home: Challenging the United States – Japanese Player Contract Agreement Under Japanese Law,* 33 Brook. J. Int'l. L. 1069, 1079 n.85 (2008). San Diego had an agreement with Chiba Lotte that included "exclusive rights" to Irabu. *Id.* at n.82. MLBPA was unsuccessful in its attempt to invalidate the agreement. *Id.* at n.85. MLBPA Asst. General Counsel, Gene Orza, referred to the agreement as "trafficking in human flesh." *Id.*

26. Richard Sandomir, *Baseball: Irabu's Legacy is a High-Stakes Auction – Sports – Int'l Herald Trib.*, N.Y. TIMES (Nov. 5, 2006), *available at* http://www.nytimes.com/2006/12/05/sports/05iht-base.3784196.html?_r=0.

27. STAR WARS Alfonso Soriano Is Second to None, But it Took a Fight Against an Entire Country, NY Daily News (July 7, 2002), http://www.nydailynews.com/archives/sports/star-wars-alfonso-soriano-fight-entire-country-article-1.497070?pgno=2.

28. *Id.*

29. *Id.* (Soriano's *retirement* from NPB occurred when he was twenty-one years old. *See id.*).

30. Reserve rights: a player placed on a reserve list of a team shall not be eligible to play or negotiate with another team until that player is removed from such list by the team. *See reserve clause*, DICTIONARY.COM, http://dictionary.reference.com/browse/reserve%20clause?&o=100074&s=t (last visited Mar. 14, 2014).

31. *See* Jorge Aranguré Jr. & Luke Cyphers, *It's Not All Sun and Games*, ESPN, http://webcache.googleusercontent.com/search?q=cache:C2Yntv6jnn0J:sports.espn.go.com/espnmag/story%3Fid%3D3974952+&cd=6&hl=en&ct=clnk&gl=us (last visited Mar. 14, 2014).

earlier than the age of 16.[32] The NPB would thus have reserve rights over him from that time forward, which MLB teams must honor under the Protocol, foreclosing MLB teams from negotiating with or signing that player.[33] In theory then, NPB could sign every talented Dominican player and shut MLB out of the market. When MLB failed to recognize the Carps' reserve rights over Soriano, who was fifteen years old when he signed with the team, they effectively put an end to NPB's practice of signing young Dominican players.[34] Because MLB did not recognize the Carps' reserve rights over Soriano and because there were no rules in place to preclude a player from retiring from NPB and then signing with an MLB franchise, Soriano was deemed a free agent.[35] Once deemed a free agent, Soriano signed a five-year, $3.1 million contract with the New York Yankees.[36]

Following this series of player departures, Japanese baseball club owners became concerned that players were exploiting loopholes in the 1967 Protocol, namely its reserve clause.[37] The reserve clause, the owners believed, allowed a Japanese player to escape his NPB contract and play for an MLB team without that team compensating the former Japanese club for the rights to the player.[38] Feeling they were being left with nothing, NPB petitioned for a new agreement with MLB that would govern when a player could be released from his NPB contract and play for an MLB franchise.[39]

In 2000, a new Protocol came into effect.[40] The Protocol, written by Orix Blue Wave general manager Shigeyoshi Ino,[41] created a plan wherein NPB players can be traded to an MLB franchise in exchange for monetary compensation.[42] The Protocol applies only to players currently under contract with an NPB team.[43] Free agents and players who have completed nine years of service are exempt from the rules and can negotiate with foreign

32. Telephone interview with Gene Orza, former MLBPA Asst. General Counsel (March 14, 2013).

33. Protocol, *supra* note 11, at para. 5 (explaining reserve rights for Japanese clubs under the current version of the Protocol).

34. Telephone interview with Gene Orza, former MLBPA Asst. General Counsel (March 14, 2013).

35. Jeff Pearlman, *He's Arrived*, Sports Illustrated (Aug. 26, 2002), *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1026510/2/index.htm; see *also* 2012-2016 Basic Agreement, art. XX(B)(2), MLBPLAYERS.COM, *available at* http://mlb.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB CBA] ("Players who . . . become a free agent under the Agreement shall be eligible to negotiate and contract with any (MLB) Club without restriction or qualifications.").

36. Robert Whiting, THE MEANING OF ICHIRO: THE NEW WAVE FROM JAPAN AND THE TRANSFORMATION OF OUR NATIONAL PASTIME, 94 (2009). *See also*, *Alfonso Soriano Player Card*, BASEBALL PROSPECTUS: http://www.baseballprospectus.com/card/card.php?id=1608.

37. *See* Albright, *supra* note 13.

38. *See id.*

39. *See id.*

40. *United States – Japanese Player Contract Agreement:* December 15, 2000. *(Appendix B)* (MLB and NPB began negotiating for a player transfer system in 1998 and officially entered into the Agreement on July 10, 2000. Although the agreement was signed in July 2000, it was not effective until December 15, 2000.)

41. PAUL DICKSON, THE DICKSON BASEBALL DICTIONARY, 664 (3d ed. 2009).

42. Protocol, *supra* note 11, at para. 11 ("If the highest bid is not acceptable to the Japanese Club making the Japanese Player available, the Japanese Player's posting will be withdrawn and another request for posting with respect to that Japanese Player shall be prohibited until the following November 1. If the highest bid is acceptable to the Japanese Club, the U.S. Commissioner shall award the sole, exclusive, and non-assignable right to negotiate with and sign the posted Japanese Player to the U.S. Major League Club that submitted the highest bid. That U.S. Major League Club then shall have 30 days from the date of the notice by the U.S. Commissioner that the bid is acceptable to the Japanese Player's Japanese Club in which to sign the Japanese Player. If the Japanese Player signs a contract with the U.S. Major League Club within a 30-day period, the U.S. Major League Club shall pay the Japanese Club the amount of its successful bid within five business days of the confirmation of terms with the Major League Baseball Players Association in the case of a Major League Contract or within five business days of the reporting of terms to the U.S. Commissioner's Office in the case of minor league contract.").

43. *Id.* at para. 4.

professional baseball leagues without restraint.[44] The restrictions under the Protocol do not apply to Japanese players who never played professionally in Japan, or American players playing with an NPB franchise.[45] The new version of the Protocol was valid for two years initially, then subject to modification or termination on a year-to-year basis upon notice by one of the leagues.[46] To date, neither MLB nor NPB have opted for termination.

B. THE MECHANICS OF THE "POSTING SYSTEM."

The Protocol contains a series of clauses that restrict a professional baseball player's ability to sign with a foreign professional baseball club.[47] For professional baseball players under contract with an MLB franchise, the Protocol limits the rights of Japanese clubs:

> If the American player is on the Reserve, Military, Voluntarily Retired, Restricted, Disqualified, Suspended or Ineligible List of any Club, that is a member of the National League or American League of Professional Baseball Clubs as such Lists are described in the Major League Rules as adopted, the Japanese Club shall not contact or engage the American Player unless approval to do so has been given by such U.S. Major League Club through the U.S. Commissioner.[48]

For a Japanese professional baseball player in the Japanese Professional Baseball League who desires to play in the U.S., the Protocol necessitates that the player be "posted."[49] This posting system works in a series of stages.[50] First, a Japanese player must request to be posted by his current NPB club.[51] If the team agrees to grant the player's request, and only if the team agrees, it will notify the NPB Commissioner's Office of its

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44. *Id.* at para. 6 ("If the Japanese Player is not one concerning whom approval must be obtained under paragraph (5), the Japanese Commissioner shall so notify the U.S. Commissioner and the U.S. Major League Club may then contact and engage the Japanese Player. If approval is required under paragraph (5), the Japanese Commissioner shall transmit to the U.S. Commissioner the approval or disapproval of the Japanese Club. If approval is granted, the procedures set forth in paragraphs (8) through (12) shall apply.").

45. *Id.* at para. 4.

46. *Id.* at para. 17. (The original agreement "terminated" on December 15, 2002 unless the Commissioner of either League notified the other "180 days prior to the Initial Termination Date of his intention to modify or terminate the agreement." *Id.*)

47. *See* Protocol, *supra* note 11.

48. *Id.* at para. 2.

49. *Id.* at para. 5.

50. Geoffrey R. Smull, *International Player Trades and Japan's Anti-Monopoly Law: A Look at the Continued Viability of the United States – Japanese Player Contract Agreement,* 1 Asia L. News 1, 1-2 (2005).

51. Protocol, *supra* note 11, at para. 9 ("All requests by Japanese Clubs for postings must be made during the period commencing on November 1 of a given year and ending on March 1 of the following year and must be accompanied by the Japanese Club's medical records, i.e., trainers' reports and doctors' reports in the possession of the Japanese Club for the Japanese Player in question, which will be made available to the U.S. Major League Clubs. Within four business days of the posting of the availability of the Japanese Player by the U.S. Commissioner, any interested U.S. Major League Club must submit to the U.S. Commissioner a bid, composed of monetary consideration only, to be paid to the Japanese Club as consideration for the Japanese Club relinquishing its rights to the player in the event that the U.S. Major League Club reaches an agreement with the Japanese Player. No direct or indirect contact may be made between a U.S. Major League Club and the Japanese Club concerning a posted player and/or the amount of the bid to be submitted by a U.S. Major League Club. The U.S. Commissioner shall have the authority, pursuant to paragraph (13) below, to take action that he deems appropriate in the event he concludes that a contact prohibited by the preceding sentence has been made concerning a posted player.").

decision.[52] The NPB Commissioner then contacts the MLB Commissioner, who in turn notifies all American and National League front offices.[53]

A Japanese player can only be posted between November 1st and March 1st.[54] Once he is posted, MLB franchises have four days to bid on the right to a thirty-day window of exclusive contract negotiations with the posted player.[55] A team is not aware of another team's bid amount because it is sealed and sent directly to the MLB. Commissioner's Office.[56]

Following the completion of the four-day period, MLB then notifies the posted player's NPB club, via the NPB Commissioner's Office, of the winning bidder and bid amount.[57] If the NPB team rejects the bid, it forfeits any amount offered by the MLB franchise and the posted player cannot negotiate with an MLB franchise.[58] If, however, the NPB team accepts the bid, it in turn agrees to grant that MLB franchise a thirty-day period of exclusive contract negotiations with the posted player.[59] The MLB franchise must come to contract terms with the player within that thirty-day period.[60] If an agreement is not reached between the posted player and the MLB franchise within that period, the player returns to his NPB club and the MLB franchise is relieved of its obligation to pay the bid amount to the NPB team.[61] If a contract is reached, the MLB franchise has to pay the bid amount, or posting fee, to the NPB team.[62] This posting fee is paid in addition to whatever amount the team has contracted to pay the posted player for his services.[63]

The posting system as defined within the Protocol is what is commonly known as a *no-tampering clause.*[64] This no-tampering clause limits the players', and not the owners',

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52. *Id.*

53. *Id.* at para 8.("With respect to a player covered by paragraph 5 whom a Japanese Club wishes to make available to the U.S. Major League Clubs, the Japanese Club shall request that the Japanese Commissioner notify the U.S. Commissioner of the Japanese Club's desire to make the Japanese Player available. The U.S. Commissioner then shall post the Japanese Player's availability by notifying all U.S. Major League Clubs of the intention of the Japanese Club to make the player available.").

54. *Id.* at para. *9.*

55. *Id.* (This paragraph is criticized because a team may submit an artificially high bid as a way of preventing a team from obtaining that player's rights.)

56. *Id.* (The MLB Commissioner has the authority to oversee the bidding process. The Commissioner also has the power to revoke a team's exclusive rights or to declare the contract between the NBP player and the winning bidder void if he deems the contract a result of conduct inconsistent with the *Agreement* or otherwise not in the best interest of professional baseball.)

57. Protocol, *supra* note 11, at para. 10 ("At the conclusion of the bidding period, the U.S. Commissioner shall determine the highest bidder among the U.S. Major League Clubs and that determination of the highest bidder shall be conclusive and binding on all parties. The U.S. Commissioner then shall notify the Japanese Commissioner of the amount of the bid submitted by the successful bidder, and the Japanese Commissioner will have four business days to notify the U.S. Commissioner of whether that bid is acceptable by the Japanese Club involved.").

58. *Id.* at para 11. (The NPB Club, not the player, decides whether or not to accept the bid amount. *Id.* This is because it is the one that receive the bid award from the MLB franchise, not the player. *Id.*)

59. *Id.*

60. *Id.*

61. *Id.* at para. 12 ("If the U.S. Major League Club fails to sign the Japanese Player within a 30-day period, the negotiation rights shall lapse and the Club shall have no obligation to pay the Japanese Player's Japanese Club the amount of its successful bid. Further, another request for posting with respect to that Japanese Player shall be prohibited until the following November 11.").

62. *See id.*

63. Protocol, *supra* note 11, at para. 11.

64. The term *no-tampering* has another common meaning in connection with professional sports leagues. *See* Lewis Kurlantzick, *The Tampering Prohibition, Antitrust, and Agreements Between American and Foreign Sports Leagues,* 32 Colum. J. L. & Arts 271, 271 (2009). A league will typically have a *no-tampering* rule wherein no

ability to determine if and when they can negotiate with another club, while also dictating which league the players can play for professionally.[65] Courts have found no-tampering clauses to be at odds with traditional labor policies and practices.[66] The anticompetitive effects of these restrictions have been found to impede the market, in that they interfere with the free and open bidding for services.[67]

It is logical to assume that if an individual player's contract contains a no-tampering clause wherein he agrees that he will not negotiate with a prospective team, no labor law or antitrust question could be raised because it is presumed the player has been compensated for accepting such a restriction. If, however, the leagues have imposed such no-tampering rules on their own, outside of collective bargaining and the consent of the players, issues arise regarding "potential conflicts with systemic and individual interests expressed in federal antitrust laws."[68]

Over the last fifty years, no-tampering rules and other forms of player restraints have been reduced or eliminated as a result of antitrust litigation and federal labor polices favoring collective bargaining.[69] Therefore, the question becomes whether this no-tampering clause, or *posting system* as described within the Protocol, is a violation of federal law, and, if it does violate federal law, whether a player or the Players Association, either through the court system or collective bargaining, should compel the MLB to terminate the Protocol with NPB.

II. IS THE PROTOCOL A VIOLATION OF FEDERAL ANTITRUST OR LABOR LAW?

The issue presented is whether the Protocol violates federal law because it restrains the rights of professional baseball players regarding issues of employment. Determining whether the Protocol violates federal law raises complex issues that intersect both federal antitrust law and labor law policies. The problem is that these two areas of law inherently conflict.[70]

Federal antitrust law, specifically Section 1 of the Sherman Act, was enacted to encourage competition in the marketplace, while also condemning cooperation among competitors.[71] Congress passed the Sherman Act, together with other federal antitrust laws, with the intent of ending trusts and illegal monopolies and their anticompetitive effects.[72]

Federal labor law, as opposed to antitrust law, encourages cooperation among competitors in employment situations, while also allowing "at least one sort of

team is permitted to negotiate prior to the draft with any player eligible to be drafted and no team can negotiate with, or sign, any player chosen by another team in the draft. *Id.*

65. *Id.*

66. *Id.* at 290.

67. *Id.*

68. *Id.* at 291.

69. Kurlantzick, *supra* note 64, at 294.

70. Douglas L. Leslie, *Principles of Labor Antitrust,* 66 Va. L. Rev. 1883, 1884 (1980) ("The antitrust statutes promote competition and economic efficiency, while the federal labor statutes sanction activity that is arguably anticompetitive.")

71. The Sherman Act, 15 U.S.C. §§ 1-7 (2007).

72. *See* 15 U.S.C. § 1 (forbidding every "contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States").

anticompetitive behavior, the attempt by unions to control the labor market."[73] Congress implemented a series of federal labor laws because it felt that "employees should be able to band together so that they could have greater power in the labor market than they would if they were all competing individually and against one another."[74]

Federal labor law and antitrust law differ both procedurally and substantively, and a cause of action in one area of law may exclude a litigant from seeking recourse in the other.[75] Therefore, if the legality of the Protocol is to be challenged, it is essential to determine whether federal labor law or federal antitrust law applies.

III. THE PROTOCOL AND FEDERAL LABOR LAW

As stated, federal labor policies encourage cooperation among competitors in areas concerning employment.[76] A fundamental principle of labor law is that employees may eliminate competition among themselves through the formation of a union. This union then serves as the employees' exclusive representative.[77] As the labor movement in the United States developed, the emphasis on labor policy shifted from employee organization to that of collective bargaining and the relationship between employees and employers.[78] Labor policies were created which emphasized "collective bargaining as a way to govern the relationship between employers and unionized employees."[79] The focus turned to employers and unionized employees collectively bargaining in good faith over subjects involving wages, hours, and other terms and conditions of employment.[80] It was Congress's intent to develop a collective bargaining process that encouraged employers and employees to reach voluntary agreements regarding economic issues.[81] Ironically, however, voluntary employment agreements violate federal antitrust law.[82] Therefore, to curtail this inherent conflict, Congress enacted a series of federal labor acts as a way to limit a federal court's ability to enjoin certain labor-related activities.

A. THE STATUTORY LABOR EXEMPTION

One of the laws enacted to curtail this conflict wherein voluntary labor agreements violate antitrust law was the Norris-LaGuardia Act.[83] The Norris-LaGuardia Act mandates that, regardless of whether or not a labor dispute goes beyond the normal bounds of conflict between an employer and its employees, federal courts cannot enjoin strikes, pickets or other forms of employee self-help.[84] Congress also enacted Sections 6 and 20 of the Clayton

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73. Douglas E. Ray, Calvin William Sharpe, Robert N. Strassfeld, *Understanding Labor Law,* 323 (Matthew Bender & Company, Inc. 3d ed. 2011).

74. *Id.*

75. *See supra* note 70.

76. *Id.*

77. United Mine Workers of Am. v. Pennington, 381 U.S. 657, 666 (1965).

78. John C. Weistart, *Judicial Review of Labor Agreements: Lessons from the Sports Industry,* 44 Law & Contemp. Probs. 109, 114 (1981).

79. NLRB v. Am. Nat. Ins. Co., 343 U.S. 395, 401 (1952).

80. *Id.* at 401-02.

81. *Id.*

82. *See* 29 U.S.C §§ 101-115 (2006).

83. *Id.*

84. Paul C. Weiler, Gary R. Roberts, Roger I. Abrams & Stephen F. Ross, *Sports and the Law: Text, Cases*

Act, which together state that "the labor of a human being is not a commodity or article of commerce" and that antitrust laws do not prohibit labor organizations.[85] Altogether, this assemblage of federal labor acts is commonly referred to as the statutory labor exemption.[86]

The Supreme Court has interpreted the provisions afforded under these federal labor acts as a protection of union activities from antitrust litigation.[87] Specifically, in *United States v. Hutcheson,*[88] the Supreme Court held that these federal labor acts immunize labor unions from the Sherman Act, stating that the conduct protected by the "Clayton Act taken together with, and expanded by the Norris-LaGuardia Act, was to be shielded from antitrust liability."[89] The Court commented, "so long as a union acts in its own self-interest and does not combine with non-labor groups, peaceful conduct in the course of a labor dispute is not covered by the Sherman Act."[90]

Additionally, as the court articulated in *Powell v. National Football League,*[91] the "statutory labor exemption removed from the coverage of the antitrust laws certain legitimate, albeit anticompetitive, union activities because they are favored by federal labor policy."[92] The reasoning behind extending antitrust protection to unions was because, as the court stated, "it makes little sense to allow a union to strike to get a collective agreement from the employer, but then to subject the agreement itself to antitrust liability."[93]

The difficulty, however, in determining if the Protocol violates federal law is that neither the Norris-LaGuardia Act nor Sections 6 and 20 of the Clayton Act immunizes the process of collective bargaining or collective bargain agreements themselves from potential antitrust liability.[94] The statutory labor exemption was established to shield a union from antitrust attacks asserted by an employer only in matters where "one side in a labor-management struggle over union recognition or the terms of a collective agreement has sued the other, alleging that tactics employed in that struggle constituted an illegal restraint of trade."[95] A union is entitled to the statutory exemption only if it "acts in its self-interest and does not combine with a non-labor group in the course of the labor dispute."[96] The statutory exemption does not apply if the union enters into an agreement with the employer because the act of entering into an agreement with the employer (a non-labor group) extinguishes the exemption.[97] Federal courts, in recognizing the limited authority the statutory labor exemption lends to unions and the collective bargaining process, responded by creating, through a series of court decisions, commonly referred to as the nonstatutory labor exemption.[98]

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and Problems, 224 (4th ed. 2011).

85. 15 U.S.C § 17 (2006); *see* Brown v. Pro Football, Inc. 50 F.3d 1041, 1048 (D.C. Cir 1995).

86. *See Brown,* 50 F.3d at 1048; *see also* Mackey v. NFL, 543 F.2d 606, 611 (8th Cir. 1976).

87. Brown v. Pro Football, Inc., 50 F.3d 1041, 1048 (D.C. Cir 1995).

88. United State v. Hutcheson, 312 U.S. 219 (1941).

89. *Id.* at 231.

90. *Id.* at 235-36.

91. Powell v. National Football League, 678 F. Supp. 777 (D. Minn. 1988).

92. *Id.* at 784-85.

93. *Id.* at 785.

94. Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22 (1975).

95. *See* WEILER, ET AL. *supra* note 84, at 224.

96. DOUGLAS E. RAY, CALVIN WILLIAM SHARPE, & ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW, 338 (3d ed. 2011).

97. *Id.* at 338.

98. *See* Mackey v. NFL, 543 F.2d 606, 611-12 (8th Cir. 1976); *see also* Brown v. Pro Football Inc., 518 U.S. 231, 235-36 (1996).

B. THE NONSTATUTORY LABOR EXEMPTION

The nonstatutory labor exemption removes certain anticompetitive union-employer activity from antitrust liability not protected by the statutory labor exemption. In *Brown v. Pro Football,*[99] the Supreme Court stated:

> As a matter of logic, it would be difficult, if not impossible, to require a group of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.[100]

The Supreme Court found that "some restraints on competition imposed through the bargaining process must be shielded from antitrust sanction in order to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place."[101] The nonstatutory labor exemption acts as a limitation on antitrust laws so that the "statutorily authorized collective bargaining process can work."[102] The rational for implementing this court-created exemption was the recognition of an advantage for all parties involved in resolving collective bargaining disputes through voluntary agreements rather than through litigation.[103]

One of the leading cases which helped define the terms and scope of the nonstatutory labor exemption was the Supreme Court's decision in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*[104] In this matter, employers challenged on antitrust grounds a clause found in the collective bargaining agreement.[105] The Court, in defying the employers, held that clauses within the collectively bargained agreement are exempt from antitrust attack because they were "of immediate and direct concern to the employees."[106] The Supreme Court stated:

> [T]he issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so *intimately related to wages*, hours, and working conditions [mandatory subjects of collective bargaining] that the unions' successful attempt to

99. Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

100. *Id.* at 237.

101. *Id.* at 237.

102. *Id.* at 238.

103. *See Connell, supra* note 88 at 622. The nonstatutory labor exemption represents a "proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Id.* Additionally, the exemption "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Id. See also,* Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of A Broad Exemption,* 38 Wm. & Mary L. Rev. 1663, 1669-1700 (1997) (discussing how union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of antitrust laws).

104. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co., 381 U.S. 676 (1965).

105. The clause in the collective bargaining agreement in question prohibited meat markets from operating before 9:00 a.m. or after 6:00 p.m. *Id.* at 679-80. In *United Mine Workers v. Pennington,* a companion case to *Jewel Tea,* the Court refused to grant an exemption from the antitrust laws to an agreement between a union and large coal companies that was part of an effort to disadvantage smaller, competitor coal companies. United Mine Workers v. Pennington, 381 U.S. 657, 661 (1965).

106. *Jewel Tea,* 381 U.S. at 691.

obtain that provision through bona fide arm's-length bargaining in the pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[107]

The Supreme Court's decision in *Jewel Tea* significantly broadened the scope of labor law and the protection it provides by holding that the nonstatutory labor exemption immunizes "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act" from antitrust attack.[108] The question therefore becomes, has the nonstatutory labor exemption ever been applied in a non-traditional business model such as professional sports, and, if so, would the exemption protect the Protocol from antitrust litigation?

1. THE NONSTATUTORY LABOR EXEMPTION AND PROFESSIONAL SPORTS

Professional sports leagues operate under a different business model than that of a typical corporation. The sports industry is a nontraditional multiemployer bargaining unit wherein teams are dependent on one another for league survival. Professional sports teams involved in league play need to reach agreements, between themselves and with the players, in order for continued existence. As the Second Circuit articulated in *NBA v. Williams:*[109]

> In the sports industry, multiemployer bargaining exists [in part] because some terms and conditions of employment must be the same for all teams . . . . Unlike the industrial context in which many work rules can differ from employer to employer . . . sports leagues need many common rules. Number of games, length of season, playoff structure, and roster size and composition, for example, are just a few of the many kinds of league rules that are typically bargained over by sports leagues and unions of players.[110]

In addition, professional sports entities engage in multiemployer bargaining with players associations as a way of reaching agreements that contain "minimum terms above which individual players may negotiate."[111] In fact, through a variety of player restraints, professional sports leagues have been able to constrain players' salaries and the bidding on talent by implementing rookie drafts, team payroll caps or luxury taxes, and by placing restrictions on free-agency.[112] Because of these player restraints, courts have had to

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107. *Id.* at 689-90 (emphasis added).

108. *Id.*

109. NBA v. Williams, 45 F.3d 684 (2d. Cir. 1995).

110. *Id.* at 689. *See also* at 692 (noting that "sports leagues are an exception to the principle of voluntariness" that typifies multi-employer bargaining in other industries.); Jeffrey L. Harrison, Brown v. Pro Football, Inc.*: The Labor Exemption, Antitrust Standing and Distributive Outcomes,* 42 ANTITRUST BULL., 565, 585 (1997) (recognizing that "opting out of multiemployer bargaining would add even further to the antitrust exposure of owners'" and stating that "it is either impossible or impractical for owners to opt out of a regime of collective bargaining with multiemployer bargaining"); Gary R. Roberts, *Brown v. Pro Football, Inc.,: The Supreme Court Gets It Right for the Wrong Reasons,* 42 ANTITRUST BULL., 595, 630 (1997) ("A sports league and its joint venture partners are not a multiemployer bargaining group in the traditional sense of that term.").

111. N. Am. Soccer League v. NLRB, 613 F.2d 1379 (5th Cir. 1983) (affirming the NLRB's determination that teams in a soccer league must bargain as 'joint employers').

112. *See, e.g., NFL Collective Bargaining Agreement,* NFL PLAYERS ASSOCIATION (Aug. 4, 2011), *available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf*; MLB CBA, *supra* note 34, at art. XX(B)(2).

consider to what extent the nonstatutory labor exemption protects sports entities, when acting as employers, from antitrust exposure.

The Eighth Circuit Court of Appeals, in the matter of *Mackey v. NFL,*[113] attempted to establish the applicable boundaries regarding the nonstatutory labor exemption as it applies in the sports context. In *Mackey,* the NFL Players Association ("NFLPA") challenged on antitrust grounds what was then known as the "Rozelle Rule."[114] The "Rozelle Rule" was a term found in the collective bargaining agreement, incorporated by reference from an earlier agreement that restricted the ability of a player to sign with a different team upon the expiration of that player's current contract.[115] The Eighth Circuit determined that the nonstatutory labor exemption protects the terms of a collective bargaining agreement when the agreement meets three specific requirements:[116]

1) The restraint of trade primarily affects only the parties to the collective bargaining agreement;
2) The agreement concerns a mandatory subject of collective bargaining; and
3) The agreement is a product of bona fide arm's-length bargaining.[117]

If a court determines that all three of these factors are met, federal labor law has preeminence over antitrust policy.[118]

In applying the three-part test, the *Mackey* court concluded that the "Rozelle Rule" was a mandatory subject of bargaining that affected only the parties involved with the collective bargaining agreement, finding:

> The labor exemption presupposes a violation of the antitrust laws. To hold that the subject relating to wages, hours, and working conditions becomes non-mandatory by virtue of its illegality under the antitrust laws obviates the labor exemption. We conclude that whether the agreements here in question relate to a mandatory subject of collective bargaining should be determined solely under federal labor law.[119]

The court noted that even though the "Rozelle Rule" did not, on its face, deal directly with wages, hours, and working conditions, restrictions on a player's ability to move from one team to another are related to the concept of wages because they have the effect of depressing player salaries.[120] The Eighth Circuit then shifted gears and focused on whether the nonstatutory labor exemption's protection for terms contained in the current agreement applied since the "Rozelle Rule" had been incorporated by reference from a previous agreement.[121] In other words, was the "Rozelle Rule" a product of bona fide arm's-length bargaining?

The NFL argued that the nonstatutory labor exemption protects the terms of an existing agreement that the NFLPA agreed to and was therefore legally bound to accept.[122] The Eighth Circuit disagreed, concluding that even though the "Rozelle Rule" dealt with

113. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).
114. *Id.*
115. *Id.* at 610.
116. *Id.* at 609.
117. *Id.* at 609.
118. *Id.* at 615-16 (illustrating the court's ultimate holding that the "Rozelle Rule" was not protected by the exemption because it was not a product of good faith, arm's-length negotiations).
119. *Mackey*, 543 F.2d at 615.
120. *Id.*
121. *Id.* at 615-16.
122. *Id.* at 616.

mandatory subjects of bargaining, the nonstatutory exemption was inapplicable under the facts, stating:

> On the basis of our independent review of the record, we find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the 'Rozelle Rule' preceding the execution of the 1968 and 1970 agreements. The Rule imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963. The provisions of the collective bargaining agreements which operated to continue the 'Rozelle Rule' do not in and of themselves inure to the benefit of the players or their union.[123]

The Eighth Circuit, finding that the "Rozelle Rule" was not a product of bona fide arm's-length negotiations, held that the agreement between the NFLPA and the NFL did not qualify for the nonstatutory labor exemption.[124] The court then proceeded with an analysis under antitrust law to determine the NFL's liability.[125]

The concern with the *Mackey* court's three-part test is that it has limited jurisdictional value because other circuits have declined to follow it, in whole or in part, due to disagreements as to the boundaries of the nonstatutory labor exemption for cases where the "only alleged anticompetitive effect of the restraint is on a labor market organized around a collective bargaining relationship."[126] Specifically, the Second Circuit in *Clarett v. National Football League*[127] opined, "the suggestion that the *Mackey* factors provide the proper guideposts in this case simply does not comport with the recent treatment of the nonstatutory labor exemption as articulated in *Brown v. Pro Football, Inc.*"[128]

In *Brown v. Pro Football, Inc.*,[129] the court was presented with a situation wherein, after the collective bargaining agreement between the NFL and the NFLPA expired, the parties continued to negotiate in an attempt to reach a new agreement.[130] Under the terms of the lapsed agreement, individual teams were allowed to negotiate with non-roster players who practiced with the club and were available in case a roster player got injured.[131] During negotiations of the new deal, the NFL proposed the implementation of a "developmental squad" consisting of six players who would be compensated at a rate of $1,000.00 per week.[132] This was different from the lapsed system where salaries for non-roster players were negotiated on a case-by-case basis. When negotiations concerning a new collective agreement reached an impasse,[133] the NFL unilaterally implemented its "developmental

123. *Id.*

124. *Id.*

125. *Mackey*, 543 F.2d at 616.

126. WEILER, ET AL. *supra* note 83, at 262.

127. Clarett v. National Football League, 369 F.3d 124 (2d Cir. 2004) (concerning individual athletes who were not current members of a bargaining unit cannot be regulated by collective bargaining agreement rejected; potential employees are within purview of labor exemption).

128. *Id.* at 128.

129. Brown v. Pro Football Inc., 518 U.S. 231, 234 (1996).

130. *Id.*

131. *Id.*

132. *Id.*

133. An "impasse" occurs when "good faith negotiations have exhausted the prospects of concluding in an agreement, leading both parties to believe that they are at the end of their rope." NLRB v. Whitesell Corp., 638 F. 3d 883, 890 (8th Cir. 2011). *See also* PHILLIP E. AREEDA & HEBERT HOVENKAMP, ANTITRUST LAW (2d ed. 2000). The legal significance of an impasse under labor law is that when reached, the employer may introduce unilateral

squad" plan.[134] The NFL was not just continuing with the policies that existed under the lapsed agreement, but implementing new restraints upon the players that had never been agreed upon by the NFLPA.[135]

As a result of the NFL's unilateral implementation of the plan after the impasse, the "developmental squad" players brought an antitrust action against the NFL.[136] The federal district court rejected the NFL's defense that the nonstatutory labor exemption shields it from antitrust liability, finding that the exemption expired upon the expiration of the collective bargaining agreement and that the salary compensation arrangements under the "developmental squad" plan violated federal antitrust law.[137] After determining such, the "developmental squad" players were awarded $10 million in damages, which was trebled to $30 million plus legal costs.[138]

The D.C. Circuit Court of Appeals reversed, holding that the nonstatutory labor exemption "waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."[139] The Court of Appeals adopted the approach that the nonstatutory labor exemption protects a sports league from antitrust litigation brought by a players association regarding conduct engaged in during the collective bargaining process if it "concerned only the parties to the collective-bargaining relationship."[140] Or, in other words, a players association cannot assert an antitrust claim so long as it continues to be a union and while a labor relationship with the sports property is still in place. The Supreme Court affirmed the lower court's judgment and, as a result, the exemption shielded the NFL from antitrust liability.[141]

The proposition that a players association cannot assert antitrust claims while a labor relationship with the league is in existence was also supported by the federal courts in the matter of *Wood v. NBA*.[142] In *Wood,* the National Basketball Association (NBA) faced antitrust litigation when Leon Wood, a disgruntled basketball player, challenged the player draft and salary cap provisions of the NBA collective bargaining agreement.[143] The Second Circuit rejected Wood's antitrust assertion, finding that "if the antitrust claim were to succeed, all of these commonplace arrangements would be subject to similar challenges, and federal labor policy would essentially collapse."[144] The court found that the nonstatutory labor exemption was to be interpreted in a way that immunizes the terms found

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changes in working conditions, provided these changes are not materially different from those proposed during negotiations and do not affect elements not discussed during bargaining. *See Whitesell*, 638 F. 3d at 890.

134. *Brown,* 518 U.S. at 235.

135. *See id.* at 234-35.

136. *Brown,* 518 U.S. at 235

137. *Id. See also* Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.C.C. 1991); Brown v. Pro Football, Inc., 50 F.3d 1041, 1056 (D.C. Cir. 1995).

138. *See Brown*, 782 F. Supp. at 131-32; *Brown*, 50 F.3d at 1045; *see also* 15 U.S.C. § 1 (2006). Antitrust law is a powerful weapon in that it provides private plaintiffs with treble damages. *See* Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. Rev. 212, 213 (2009) (referring to antitrust litigation as "the collective bargaining equivalent to an AK-47").

139. *Brown*, 50 F.3d at 1056.

140. *Id.*

141. Brown v. Pro Football, Inc., 518 U.S. at 249-50. *See also id.* at 237. ("Federal labor policy accepts that the prevailing principle should be freedom of contract: the parties can agree to whatever terms they wish, and courts will not inquire into the wisdom or reasonableness of the bargain struck.").

142. Wood v. NBA, 809 F.2d 954, 963 (2d Cir. 1987).

143. *Id.* at 956.

144. *Id.* at 961.

within a collective bargaining agreement because to hold otherwise means "employers would have no assurance that they could enter into any collective agreement without exposing themselves to an action for treble damages."[145]

The rationale behind the findings in both *Brown* and *Wood* is consistent with Supreme Court's nonstatutory labor exemption analysis that "an implied repeal of the antitrust laws is warranted if it is necessary to protect federal labor policy and the labor process when labor law and antitrust law conflict."[146] As a result, litigation involving the sports industry and the nonstatutory labor exemption has established, for the most part, that terms and conditions involved in and resulting from collective bargaining are immune from antitrust claims. In other words, it is the players association engaging in the collective bargaining process that creates protections offered through the nonstatutory labor exemption for the leagues.

However, the nonstatutory labor exemption lasts only until the "collapse of the collective-bargaining relationship."[147] Decertifying a players association and failing to participate in the collective bargaining process allows for players to assert an antitrust challenge against the league.[148] Therefore, in order for professional athletes to file a claim against a professional sports league for violating antitrust law, the players association that represents these athletes must first decertify itself.

Professional athletes and their union have an either-or proposition: they can choose labor law and engage in collective bargaining, or they can give up their labor rights, refrain from collective bargaining, and choose antitrust law."[149] This places the players at a severe disadvantage when challenging a league because they have to pursue their antitrust action alone, without the benefit of union support.[150] A league, on the other hand, typically well-financed and organized, has the benefit of the different franchises standing together as one multiemployer bargaining unit.

2. THE NONSTATUTORY LABOR EXEMPTION AND THE PROTOCOL

The question therefore becomes whether or not the nonstatutory labor exemption would be applicable and would shield the Protocol from antitrust liability. Following the *Mackey* court, to determine if an antitrust violation is present, the questions are whether: a) the Protocol concerns a mandatory subject of collective bargaining; i.e. wages, hours, and terms and conditions of employment; and b) the Protocol is a product of arm's-length negotiations agreed upon by MLB and the MLB Players Association during collective bargaining that primarily only affects the parties involved.

In following the *Mackey* test, the Protocol unquestionably concerns a mandatory subject of collective bargaining. The Protocol, similar to the Rozelle Rule, does not, per its

145. *Id.*

146. Brown v. Pro Football, Inc., 50 F.3d 1047, 1051 (D.C. Cir. 1995).

147. Brown v. Pro Football Inc., 518 U.S. 231, 250 (1996) (citing *Brown,* 50 F.3d at 1051).

148. 29 U.S.C. § 159(e)(1) (2006). To decertify a union, at least 30% of the employees must sign a card expressing that they no longer desire to be represented by the union. *Id.* An election will be held, where at least a majority of the employees must vote in favor of decertification. *See id.* Following that vote, the union will no longer represent the employees. *See id.*

149. *Brown,* 50 F.3d at 1054-55.

150. However, the decertification of a union need not be permanent. *Brady v. NFL,* 779 F. Supp. 2d 992, 1015 (D. Minn. 2011) (noting that "there is no legal support for any requirement that a decertification be permanent") In fact, if the employer consents, there is no limit on how quickly a union can reform. *See id.*

express terms, deal with wages, hours, or working conditions.[151] However, the posting system within it restricts a player's ability to move from one team to another and from one league to another.[152] The posting system governs the movement of players between MLB and NPB and has an indirect effect on wages and working conditions of current and future MLB players.[153] The reserve restrictions have the effect, as the *Mackey* court articulated, of depressing player salaries – therefore having a direct effect on wages – a mandatory subject of collective bargaining.[154] As a result, this is most likely a scenario wherein antitrust scrutiny would be permitted.

As to whether or not the Protocol is a product of arm's length negotiations agreed upon by both MLB and the MLBPA during collective bargaining, the answer is no.[155] The MLPA never was and never has been a party to the agreement.[156] The MLBPA has never participated in the negotiations or creation of the Protocol.[157] And, most importantly, the MLBPA has never formally approved of the Protocol, either by implication or by expressed terms.[158]

In fact, only two sections of MLB's 2012-2016 Basic Agreement mention the Protocol.[159] First, Attachment 46, International Amateur Talent, § I(D)(11) states: "[t]he Committee will be charged with advising the [MLB Players Association] and the Office of the Commissioner on . . . what actions are necessary in order to achieve the negotiation of revisions to the protocol agreement with the . . . Japanese Professional Baseball League."[160] Second, Attachment 46 § I(E)(2) states: "no draft of international amateur players may be implemented in 2013 unless the following conditions are satisfied by June 1, 2012: The protocol agreement... with the Japanese Professional Baseball League, is revised, consistent with I(D)(11)."[161] Neither section is a product of arm's-length negotiations between MLB and the MLBPA even though they concern a mandatory subject that requires collective bargaining over their terms.

MLB would likely claim that the MLBPA assented to the Protocol because the MLBPA is unquestionably aware of it and never forced the league to bargain over the terms of the Protocol. Moreover, because the Protocol has an effect on the terms and conditions of employment, the MLBPA, as powerful and organized as it is, would never have allowed the Protocol to continue on for so long unchallenged without acquiescing to its terms either expressly or implicitly.

Furthermore, MLB would likely point out that the Protocol grants players certain rights they would otherwise not be entitled to because of the limited reserve clause found in all player contracts. That is, if the Protocol were not in place, MLB players would never have the opportunity to play for a Japanese team. The Protocol therefore, MLB could

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151. Protocol, *supra* note 11, at paras. 2, 5.

152. *Id.*

153. *See id.*

154. *Mackey,* 543 F.2d at 615.

155. *See* Kurlantzick, *supra* note 63, at 331 n.175 (construing Telephone Interview with Donald Fehr, Executive Director, MLBPA (Aug. 22, 2007); Liz Mullen, *Upshaw: Pension Issue Beyond Ditka's Grasp,* Sports Business J., May 29-June3, 2007, at 18) ("At most there were a few communications about peripheral matters. The question of whether the MLB was obliged to engage the union did not arise. . . . Fehr[, however,] has indicated that the posting system is likely to be an issue for union attention in future years.").

156. *See id.*

157. *See id.*

158. *See id.*

159. MLB CBA, *supra* note 35, at 266-67

160. *Id.* at 266.

161. *Id.* at 267.

argue, is a player benefit, because without it, MLB players would continue to be under reserve by their current MLB franchise and never allowed to explore the opportunity of playing overseas.[162]

Most importantly, however, MLB would likely argue that the Second Circuit[163] and the holding in *Brown v. Pro Football, Inc.* have all but rendered the *Mackey* court's three-part analysis moot because many jurisdictions have adopted the broadened scope of labor law and the protection it provides. Under this argument, the pertinent question to be answered in determining if a violation of federal antitrust law is present is whether or not a bargaining relationship is still in existence between the league and the players association. If a relationship were still in place, an antitrust analysis of the Protocol would not be necessary because MLB would be entitled to the protections afforded by the nonstatutory labor exemption.[164] This is true unless the collective bargaining relationship has collapsed and the MLBPA has decertified itself as a union. Only if the labor relationship has ended by the MLBPA decertifying itself will a court determine whether the Protocol can be challenged on antitrust grounds. If it has, individual players could then assert an antitrust claim against the league.

MLB's possible argument are persuasive, but not conclusive. Specific issues regarding the applicability of the nonstatutory exemption, together with the status of the employer-employee relationship, leave open room for court interpretation and implementation. Therefore, because the Protocol has exposure, however limited, to antitrust litigation, an antitrust analysis must be conducted to determine MLB's possible liability.

IV. THE PROTOCOL AND FEDERAL ANTITRUST LAW

If a federal court finds that neither the statutory nor nonstatutory labor exemptions are applicable and cannot act as a shield for MLB against an antitrust challenge, the issue becomes whether or not the Protocol violates federal antitrust law by contractually placing restraints on the eligibility and mobility of professional baseball players. The difficulty from the players' perspective is that Major League Baseball has a longstanding antitrust exemption.

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162. This is also true for former MLB players who have voluntarily retired. *See* Protocol, *supra* note 11, at para. 2 ("[I]f the American player is on the . . . Voluntarily Retired List . . . the Japanese Club shall not contact or engage the American Player unless approval to do so has been given by the U.S. Major League Club through the U.S. Commissioner.") A retired player's eligibility is restrained because he is not allowed to speak with a Japanese club without MLB's permission. Protocol, *supra* note 11, at para. 2. Interestingly, however, a retired player is not part of the MLBPA and therefore not subject to the boundaries imposed by the Second Circuit in bringing an antitrust claim against MLB. *See* Wood v. NBA, 809 F.2d 954, 961 (2d Cir. 1987). It is logical to assume that because a retired player is not a member of a union, a labor relationship with MLB does not exist, the nonstatutory labor exemption could not shield MLB from an antitrust attack. Though logical, this position is not correct because a former player who voluntarily retires from MLB is still subject to reserve system in that his former MLB franchise retains his rights. *See* Protocol, *supra* note 11, at para. 2.

163. It is important to note that the major sports property's headquarters are located in New York City. *See, e.g.*, *MLB Official Info*, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/ (last visited Mar. 18, 2014); *NBA.com – Fan Relations FAQ*, NBA.COM, http://www.nba.com/help/fan_relations_faq.html#fanfaq18 (last visited Mar. 18, 2014) (giving the NBA's address in New York City). Therefore, the Second Circuit has jurisdiction over many sports' legal issues because, when the league or a team is the plaintiff, that is where the cause of action is filed. *See About the Court*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, http://www.ca2.uscourts.gov/about_the_court.html (last visited Mar. 18, 2014).

164. Brown v. Pro Football, Inc., 50 F.3d 1047, 1062-63 (D.C. Cir. 1995).

A. MAJOR LEAGUES BASEBALL'S ANTITRUST EXEMPTION

Major League Baseball is the only major sports entity in the United States with the luxury of having immunity from antitrust law and the time-consuming and costly litigation involved with defending such claims.[165] MLB has had this protection since 1922, when the Supreme Court ruled in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* that the game of baseball is not "commerce amongst the States" and therefore not subject to federal antitrust law.[166] As a result of the Court's holding, the antitrust exemption for Major League Baseball was born and with that the ability for its franchise owners to control their business without the fear of court intervention or oversight.

The Court's decision in *Federal Baseball* was likely rooted in two historical baseball idioms: the "National Agreement" and the reserve clause. Around the turn of the twentieth century, franchise owners in both the National League of Professional Baseball Clubs and the American Association of Baseball Clubs (collectively referred to as "MLB") entered into the National Agreement that proscribed, in part, a uniform players' contract.[167] According to the Uniform Players' Contract, all contracts were for one year, and, once a player's contract expired, the club, and only the club, could unilaterally renew the contract for another season.[168] The National Agreement allowed a team to reserve the rights to a player season after season, or in perpetuity, without interference from other teams looking to poach a player, or a player looking to competing teams for a more lucrative contract. As a practical matter, this meant that when the contract expired, all the franchise owners colluded, agreeing not to make an offer for another team's player. Thus, each player could only negotiate with one club, a *monopsony* in economic terms.[169] A player who was offered an unsatisfactory contract had no power or leverage to solicit offers from a competing team. The only options the professional baseball player had were to sign to the terms dictated by his current club or retire.

Together the National Agreement and its reserve clause were a central part of professional baseball and allowed MLB to assert its control over players. However, this control was challenged in 1914 when the Federal League of Professional Baseball formed

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165. The NFL has been granted two congressional exemptions from antitrust law. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 Duke L.J. 339, 404 (1989). In 1961 Congress granted the NFL an exemption from the antitrust laws, permitting the league to pool the broadcast rights to its games and sell them as a package, with the revenues to be shared equally by the teams. *Id.* at 357-58. In 1966, Congress granted an antitrust exemption to the NFL and the American Football League that allowed them to merge into a single league. *Id.* at 407. The two leagues had been competing for the services of elite professional football players. *Id.* Not surprisingly, this competition led to a large increase in average player salaries. *Id.* The exempted merger eliminated competition for players, and a significant drop in player salaries followed. *Id.*

166. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922). The Court likely saw the leagues were merely umbrella organizations only responsible for arranging schedules and setting rules, while the *business* aspect of the game was an entirely local function, run by the individual franchises. *See id.*

167. William J. O'Sullivan, *Baseball Law 101*, CONN. LAWYER, April 2007, at 24, 24-25.

168. *Id.* ("In Article 18, the uniform contract provided that 'the party of the first part [team] shall have the right to 'reserve' the said party of the second part [player] for the season next ensuing the term mentioned in paragraph 2 . . . [provided that] the said party of the second part shall not be reserved at a salary less than that mentioned in the 20th paragraph herein.'").

169. WEILER, ET AL. *supra* note 84, at 128; *See also, monopsony*, DICTIONARY.COM, http://dictionary.reference.com/browse/reserve%20clause?&o=100074&s=t (last visited Mar. 18, 2014) ("a situation in which the entire market demand for a product or service consists of only one buyer").

as a professional baseball league.[170] The Federal League recruited players away from MLB by enticing them with multi-year contracts that did not include a reserve clause.[171] As a result, over 200 players left MLB for the more player-friendly Federal League.[172]

MLB, fearful this exodus of talent would leave it with a substandard on-field product, and thus a negative effect on attendance and league revenue, began negotiations with the Federal League.[173] MLB, more powerful and financially sound, put an end to the upstart league by buying out the franchise owners.[174] All of the Federal League owners settled with MLB except the owners of the Baltimore Terrapins.[175] As a result, the owners of the Terrapins sued, claiming damages against MLB for injuries from the dissolution of the league and resulting shutdown of its franchise.[176] The Terrapin owners asserted that MLB had conspired to restrain trade, and therefore violated the Sherman Act.[177] The trial court, in finding against MLB, agreed with the Terrapins and awarded a verdict of $240,000 in damages, which was trebled from the original award of $80,000, plus attorney's fees and costs in accordance with federal antitrust law.[178]

MLB, not exultant with the unfavorable court decision, appealed to the Court of Appeals for the D.C. Circuit.[179] The Court of Appeals reversed, finding that the "interstate" component of the business of professional baseball was merely incidental to the production of a local event.[180] The Court of Appeals stated, "the players, it is true, travel from place to place in interstate commerce, but not until they come into contact with their opponents on the baseball field and the contest opens does the game come into existence. It is local in its beginning and in its end."[181] The Court of Appeals, in applying the narrow meaning of "trade or commerce" prevalent at the time, explained:

> The game affects no exchange of things according to the meaning of 'trade or commerce' as defined. The transportation in interstate commerce of the players and the paraphernalia used by them were but an incident to the main purpose of the appellants, namely, the production of the game. It was for it they were in business – not for the purpose of transferring players, balls, and uniforms. The production of the game was the dominant thing in their activities.[182]

The owners of the Baltimore Terrapins, displeased with the Court of Appeal's reversal, appealed to the Supreme Court.[183] The Supreme Court, in what would be surprising by today's standards regarding the business of professional baseball, agreed that

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170. O'Sullivan, *supra* note 167, at 25.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 682 (D.C. Cir. 1920).
177. O'Sullivan, *supra* note 167, at 25.
178. *Nat'l League*, 269 F. at 682. Antitrust law provides private plaintiffs with treble damages. *See* 15 U.S.C. §1 (2006).
179. *Nat'l League*, 269 F. at 682.
180. *Id.*
181. *Id.* at 684-85.
182. *Id.* at 685.
183. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

professional baseball has no effect on interstate commerce.[184] Justice Oliver Wendell Holmes writing for the Court's majority declared:

> The business is giving exhibitions of baseball, which are purely state affairs. The fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and play for their doing so is not enough to change the character of business. The transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal effort, not related to production, is not a subject of commerce.[185]

Thus, the antitrust exemption for Major League Baseball was born.

Based upon the Supreme Court's holding in *Federal Baseball*, together with the subsequent cases that failed to override it,[186] there is apparently no justification to challenge the Protocol for violating federal antitrust law. It is logical to assume that if an antitrust action were filed, MLB would immediately respond with a motion to dismiss, claiming its long-standing exemption. The court, based upon the legal doctrine of *stare decisis*, would inevitably grant such a motion. The only way to circumvent MLB's exemption would be to determine if any limitations have been placed upon the exemption and then analyze whether or not the Protocol exceeds the boundaries of the limitation. Fortunately, from the players' perspective, one such limitation does exist: The Curt Flood Act of 1998.[187]

B. THE ROLE OF THE CURT FLOOD ACT OF 1998 IN DETERMINING WHETHER THE PROTOCOL VIOLATES FEDERAL LAW

The Curt Flood Act of 1998 is named after St. Louis Cardinals' outfielder, Curt Flood. Flood, in 1969, after being unceremoniously traded by St. Louis to Philadelphia, sued MLB and then Commissioner Bowie Kuhn, claiming the reserve clause present in all uniform players' contracts violated federal antitrust law as delineated in the Sherman Act.[188]

The Supreme Court, in a 5-3 decision found against Curt Flood and the MLBPA, which legally and financially backed the litigation, and the Court affirmed MLB's antitrust exemption.[189] The Court came to this conclusion even though it characterized the *Federal Baseball* decision as an "aberration"[190] and acknowledged that professional baseball "is a business engaged in interstate commerce."[191] However, the Court reasoned, "the remedy, if any is indicated, is for congressional, and not judicial, action."[192]

Flood and the MLBPA may have lost their court challenge to overturn the reserve system and MLB's antitrust exemption, but seventy-five years after the Supreme Court's ruling in *Federal Baseball,* Major League players received some relief when Congress

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184. *Id.*

185. *Id.* at 208-09.

186. The Supreme Court has twice upheld MLB's antitrust exemption. Toolson v. New York Yankees, 346 U.S. 356, 364-65 (1953); Flood v. Kuhn, 407 U.S. 258, 285 (1972).

187. Curt Flood Act of 1998, 15 U.S.C. § 26b (2007).

188. *Flood*, 407 U.S. at 271.

189. *Id.* at 282.

190. *Id.*

191. *Id.*

192. *Id.* at 285.

passed the Curt Flood Act of 1998.[193] The reason why Congress passed the Curt Flood Act is twofold. First, Congress responded to the Supreme Court's requests in both *Toolson v. New York Yankees* and *Flood v. Kuhn* to seek a congressional solution to the exemption created in *Federal Baseball*.[194] Second, Congress acted on an agreement between MLB and the MLBPA to appeal to Congress for legislation to change this antitrust exemption "anomaly" and "aberration" that continued to be recognized and reaffirmed by the Supreme Court.[195]

Congress's passage of the Curt Flood Act provided narrow relief to MLB players from MLB's antitrust exemption.[196] The Act does grant standing to an MLB player to sue MLB, with a "major league player" being defined as including any party to a major league players' contract, anyone who is playing baseball at the major league level, or a former major league player or a former party to a major league contract who alleges an antitrust violation for one injured in his efforts to secure a subsequent major league players' contract.[197] Additionally, Section 2 of the Act provides that "major league players are covered under the antitrust laws."[198] However, this allocated right has restrictions. Per Section 3 of the Act, the rights granted to players only involve "the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players."[199]

So, does the Protocol involves the business of organized professional baseball as relating to or affecting *issues of employment* of either current or former professional baseball players? The answer to this question lies within both MLB's Rules and the Protocol itself.

193. The Curt Flood Act of 1998 was codified, and will hereinafter be referred to, as 15 U.S.C. § 26b (2007).

194. *See* cases cited *supra* note 186.

195. *Flood*, 407 U.S. at 282.

196. The Curt Flood Act of 1998 contains limitations that do not change the application of the antitrust laws in any other context or with respect to any other person or entity. *See* 15 U.S.C. § 26b(b) (2007). Thus it assures that all other aspects of the business of baseball will remain free from antitrust challenges. *See id.*

197. 15 U.S.C. § 26b(c) (2007) ("For the purposes of this section, a major league baseball player is - (1) a person who is a party to a major league player's contract, or is playing baseball at the major league level; or (2) a person who was a party to a major league player's contract or playing baseball at the major league level at the time of the injury that is the subject of the complaint; or (3) a person who has been a party to a major league player's contract or who has played baseball at the major league level, and who claims he has been injured in his efforts to secure a subsequent major league player's contract by an alleged violation of the antitrust laws: *Provided however*, that for the purposes of this paragraph, the alleged antitrust violation shall not include any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to or affecting employment to play baseball at the minor league level, including any organized professional baseball amateur or first-year player draft, or any reserve clause as applied to minor league players; or (4) a person who was a party to a major league player's contract or who was playing baseball at the major league level at the conclusion of the last full championship season immediately preceding the expiration of the last collective bargaining agreement between persons in the business of organized professional major league baseball and the exclusive collective bargaining representative of major league baseball players.")

198. Curt Flood Act of 1998, P.L. 105-297, § 2, 112 Stat. 2824 ("It is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity").

199. 15 U.S.C. § 26b(a) (2007) ("Subject to subsections (b) through (d), the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.").

According to Rule 2, 13-16, MLB's Reserve List consists of major and minor league professional baseball players currently under contract.[200] The Protocol affects reserve-listed players, together with major and minor leaguers under contract, former, voluntarily retired players, restricted, disqualified, suspended, and ineligible players by restraining their right to play professionally in either the United States or Japan.[201] Because paragraph 2 of the Protocol directly relates to and affects a player's employment, the Curt Flood Act of 1998 provides a former or current major league player standing to challenge the Protocol as a violation of federal antitrust law. In this scenario, MLB cannot claim its long-standing antitrust exemption.

Interestingly, however, the authority granting major league players the right to sue MLB for antitrust violations is further limited. The Curt Flood Act has to be read in conjunction with federal case precedent, in particular *Brown v. Pro Football, Inc.*[202] Under these cases and the nonstatutory labor exemption, if a player is represented by the MLBPA, which engages in collective bargaining, the MLBPA would have to decertify itself before a player could bring an antitrust action against MLB.[203] Even though the Curt Flood Act opens a door for players to sue MLB for antitrust violations that deal with *issues of employment*, the nonstatutory labor exemption, which broadens the scope of labor law and the protection it provides to MLB, presents another door which may foreclose a major league player from bringing such an antitrust action. The interesting question then is what rights, if any, did the Curt Flood Act actually provide MLB players? The Curt Flood Act may open a door for players, but the nonstatutory labor exemption represents another locked door right behind it.

C. THE SHERMAN ACT

Federal antitrust laws, and in particular the Sherman Act, were enacted to promote competition while condemning cooperation among competitors, with Section 1 of the Act prohibiting "every contract . . . or conspiracy, in restraint of trade or commerce among the several States."[204] In order for a professional baseball player, or the MLBPA on his behalf, to establish that a violation of the Sherman Act has occurred, it must be shown that by entering into the Protocol, MLB engaged in (1) a conspiracy (2) to unreasonably restrain trade in the relevant market.[205]

A conspiracy "must comprise of an agreement or meeting of the minds of at least two competitors for the purpose or with the effect of unreasonably restraining trade."[206] The making of the illegal agreement itself is the violation.[207] Completing the conspiracy, an act

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200. Summary of *Major League Rules 2, 13-16 - Reserve & Inactive Lists*, *in* PROFESSIONAL BASEBALL RULES BOOK, SOXPROSPECTS WIKI, http://wiki.soxprospects.com/Rule+2 (last visited Mar. 19, 2014).

201. Protocol, *supra* note 11, at para. 2.

202. *See supra* Part III.B.1.

203. *See supra* Part III.B.1.

204. 15 U.S.C. § 1.

205. *Summit Health, Ltd. v. Pihas*, 500 U.S. 322, 330 (1991).

206. Meredith E.B. Bell & Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 359 (1999) (citing 15 U.S.C. § 1 (1994)).

207. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940) (holding that an agreement to reduce output by independent members of a cartel violated section 1 of the Sherman Antitrust Act, even though the agreement did not directly fix prices).

furthering the conspiracy, or the success of the conspiracy, does not have to be shown by a plaintiff because these factors are not elements of the offense.[208]

Professional sports leagues engage in multiemployer bargaining pursuant to which separately owned teams join together, or conspire, to bargain as one unit.[209] Professional sports entities form such coordinated units because of the recognized interdependence of teams and the need for these teams to reach agreements for the league to survive.[210] As the Second Circuit explained:

> In the sports industry, multiemployer bargaining exists in part because some terms and conditions of employment must be the same for all teams . . . . Unlike the industrial context in which many work rules can differ from employer to employer . . . sports leagues need many common rules. Number of games, length of season, playoff structure, and roster size and composition, for example, are just a few of the many kinds of league rules that are typically bargained over by sports leagues and unions of players.[211]

The Protocol is an agreement between all thirty MLB club owners collectively and the Japanese Professional Baseball League.[212] MLB's act of collectively entering into the Protocol constitutes a concerted action and is enough to establish that MLB owners engaged in a *conspiracy* to restrain trade–the first element of the Sherman Act has been violated.

Because the Protocol constitutes a conspiracy to restrain trade as designated by the Sherman Act, the next issue is determining what should be considered the relevant market. One argument sports leagues could use when confronted with antitrust suits, although likely unsuccessful, could be that courts should define the relevant market in the broadest of terms. Leagues could assert that the relevant market for professional sports includes anything that can be considered entertainment, from professional and college sports to horse racing, movies, comedy clubs, concerts, and any other form of general entertainment. Professional sports entities could argue for a more expansive relevant market thinking that the more expansive the market, the less consequential the challenged practice.

However, the suggestion that all entertainment outlets should be considered when defining the relevant market seems inaccurate. If an action were brought challenging the Protocol, the relevant market would likely be more limited than general entertainment, such as the worldwide market for baseball players. The focus in determining the relevant market is not on the sports entity, in this context MLB, but on the market for raw materials, that being players' services.[213]

After showing that the Protocol involves a conspiracy by the owners of MLB franchises and that the relevant market is that of players' services, the next step in

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208. *Id.* at 223-24.

209. *See American Needle, Inc. v. NFL*, 560 U.S. 183, 185 (2010). ("The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.");

210. *Id.*; *see also Reynolds v. NFL*, 584 F. 2d 280, 287 (8th Cir. 1978) ("Precise and detailed rules must of necessity govern how a sport is played. While some freedom of movement after playing out a contract is in order, complete freedom of movement would result in the best franchises acquiring most of the top players. Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades.").

211. *NBA v. Williams*, 45 F.3d 684, 689 (2d. Cir. 1995).

212. *See* Protocol, *supra* note 11, at para. 1.

213. Kurlantzick, *supra* note 64, at 309.

challenging the Protocol as a violation of antitrust law is to illustrate how the effect it has on player eligibility and mobility constitutes an unreasonable "restraint of trade."[214]

The Supreme Court in the case of *Standard Oil Co. v. United States* found that any contract, "by obligating one party to another," must restrain trade to some extent.[215] The Court determined, however, that only those restraints of trade that are "unreasonably restrictive of competitive conditions," are to be deemed illegal.[216] An "unreasonable restraint of trade" refers to a "particular economic consequence, which may be produced by quite different sorts of agreements."[217] Economic consequences may include eliminating competition, creating a monopoly, price fixing, or interfering with free market forces.[218] Courts have developed two different methods for analyzing agreements to determine whether they constitute a conspiracy to unreasonably restrain trade: the per se rule analysis and the Rule of Reason analysis.

Under a per se rule analysis, courts have found that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate commerce is illegal per se."[219] An agreement is illegal per se when the "restraint of trade has no legitimate justification, lacks any redeeming competitive purpose, and would always or almost always tend to restrict competition and decrease output."[220] Examples of per se antitrust violations include price fixing, allocations of markets, and group boycotts. When an agreement is illegal per se, no facts need to be proven beyond the making of the agreement.[221]

In the sports industry, because of its unique nature and characteristic that each team has a stake in the successes of the other, courts have generally withheld from ruling that an agreement is a per se violation of the Sherman Act. The reason being that the business of sport is a distinct enterprise and, as the court explained in *Board of Regents of the University of Oklahoma, et al v. NCAA*, "[w]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[222] If a federal court cannot or, as in the sports context, will not find that an agreement is illegal per se, it will then turn to the second form of analysis known as the Rule of Reason to determine if a violation of federal antitrust law has occurred.[223]

The Rule of Reason analysis focuses on the state of competition with, as compared to without, the relevant agreement.[224] The question is whether or not the agreement harms competition—is anti-competitive—by increasing the ability or incentivizing a price increase above, or reduce output, quality, service, or innovation below what likely would prevail in

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214. 15 U.S.C. § 1.

215. Standard Oil Co. v. United States, 221 U.S. 1, 25 (1910).

216. *Id.* at 58.

217. Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731 (1988).

218. Meredith E.B. Bell & Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 360 (1999).

219. Bd. of Regents of the Univ. of Okla., et al. v. NCAA, 468 U.S. 85, 106-07 (1984).

220. Broad. Music v. Columbia Broad. Sys., 441 U.S. 1, 19-20 (1979) (holding that a blanket license arrangement which literally involved price fixing was not a per se violation of the Sherman Act because the arrangement so significantly reduced transaction costs that it effectively made mass marketing of performance rights feasible).

221. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223-24 (1940).

222. *Bd. of Regents,* 468 U.S. at 110.

223. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century,* 16 GEO. MASON L. REV. 827, 827 (2009) ("One of the most amorphous rules in antitrust is the Rule of Reason. One of the most important rules in antitrust is the Rule of Reason. One of the most misunderstood rules in antitrust is the Rule of Reason. Put together these three propositions and you have the making of real trouble.").

224. Nat'l Soc'y of Prof'l. Eng'rs. v. United States, 435 U.S. 679, 692 (1978).

the absence of the relevant agreement.[225] Under a Rule of Reason analysis, however, courts can consider evidence that the allegedly anticompetitive conduct may increase economic efficiency and competitiveness, and therefore does not constitute a violation of the Sherman Act.[226] In other words, the pro-competitive components of the agreement can outweigh the anticompetitive components, and thus render the agreement not a violation of the antitrust law. As the Court of Appeals for the Second Circuit stated:

> Establishing a violation of the Rule of Reason involves three steps. First, the plaintiff bears the initial burden of showing that the challenged action has an *actual* adverse effect on competition as a whole on the relevant market. Then, if the plaintiff succeeds, the burden shifts to the defendant to establish the pro-competitive redeeming virtues of the action. Should the defendant carry this burden [of proving that the restraint is net pro-competitive], the plaintiff must then show that the same pro-competitive effect could be achieved through an alternative means that is less restrictive of competition.[227]

In applying the Rule of Reason analysis in the sports context, courts have recognized that sports teams are interdependent on one another and that professional leagues cannot exist without multiemployer agreements.[228] However, agreements involving the sports industry are subject to antitrust scrutiny, and lawsuits have involved players, owners, prospective owners, ownership restrictions, player restraints, and a variety of alleged anticompetitive practices.[229]

1. THE ANTICOMPETITIVE EFFECTS OF THE PROTOCOL

The anticompetitive restraints of the Protocol are clear. The restrictive covenants within it constrain mobility, eligibility, market price, and bidding for professional baseball players.[230] The two leagues, as the employers of player services, reserve the rights of

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225. *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (Apr. 2000), *available at* http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-doj-issue-antitrust-guidelines-collaborations-among-competitors/ftcdojguidelines.pdf.

226. *Prof'l Eng'rs,* 435 U.S. at 687-89.

227. Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997).

228. Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462 (6th Cir. 2005) (recognizing that sports leagues function as multi-actor joint ventures with members who act in concert to promote league rules); Sullivan v. NFL, 34 F.3d 1091, 1102-03 (1st Cir. 1994) (noting that joint ventures enable pursuit of common goals that separate entities cannot pursue alone); L.A. Mem'l Coliseum Comm'n v. NFL (Raiders I), 776 F.2d 1381, 1992 (9th Cir. 1984) ("Collective action in areas such as League divisions, scheduling, and rules must be allowed, as should other activity that aids in producing the most marketable product attainable"); United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953) ("[I]t is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the NFL in fairly even balance").

229. *See* COZZILLIO, ET AL., *supra* note 19, at 301-15. Commentators have argued that application of the Rule of Reason to the internal rules of professional sports leagues is inherently arbitrary, unpredictable, and unfair and that application of section 1 of the Sherman Act to sports leagues "is confusing, internally inconsistent, and at odds with the basic objective of section 1 – consumer wealth maximization." Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry,* 32 UCLA L. Rev. 219, 221 (1984). *See also id.* at 293 ("Judicial second-guessing about the wisdom of [internal decisions of sports leagues] inherently creates arbitrary and unproductive rules for restraining intraenterprise rivalry, and causes confusion as to what is lawful, thereby deterring efficiency-enhancing league conduct. Further, as a practical matter, courts and juries are not well equipped to determine what is in a league's interest.").

230. *See supra* Part I.B.

players and agree among themselves that they will only pursue players they deem eligible in accordance with the limitations codified within their Protocol.[231]

The leagues have agreed that Japanese clubs cannot contact or engage an MLB player without prior approval from his MLB team if the player is on the "Reserve, Military, Voluntarily Retired, Restricted, Disqualified, Suspended or Ineligible List."[232] In return, MLB franchises will not contact a Japanese player under reserve with a Japanese team unless he has been posted by that team.[233] The Protocol constitutes a concerted refusal to deal because each league agrees that certain players are not eligible and cannot be approached unless certain rules are adhered to.[234] This concerted refusal to deal restrains a baseball player's mobility and right to provide his skills and talents to an organization willing to pay the most for such services.[235]

The leagues' prohibition on communicating with each other's players strengthens the anticompetitive restraint argument. Presumably, a team will want to speak with a prospective player from another country in an attempt to measure his overall value before risking a substantial amount of money in securing his services. What if after the team interviews the player it is no longer interested in pursuing his talents? Under the Protocol, a NPB player is foreclosed from negotiating with any other franchise.[236] If it is an MLB player, the player would again have to seek the permission of his current team and the Commissioner's office to negotiate with NBP teams.[237] These conditions restrain a player's rights because he is only allowed to negotiate with one team. By prohibiting every other franchise from negotiating with that player, the player's market value is kept low. In a purely open and competitive market, a professional baseball player from either the United States or Japan could negotiate openly, without constraint, with any MLB or NPB franchise for the possibility of a lucrative contract. There would be no restrictions on a player's ability to negotiate a contract with a team, for an amount of his choice.

Conversely, what if the selected Japanese player is not interested in playing for the winning bidder's organization and the organization finds out only after it has won the bid? The club cannot trade the negotiation rights with the player to another franchise.[238] The only option for the organization is to forgo negotiations and seek retrieval of its bid amount.[239] The anticompetitive consequences of the Protocol are obvious in that both the players and the member teams of MLB and NPB are prevented from entering into agreements that all may prefer. This interference with free market forces is strongly disfavored by well-established antitrust doctrine.[240]

The Protocol's restrictive covenants regarding player mobility are comparable to other forms of employment limitations found in professional sports, most notably the rookie draft. The draft's purpose is to "equalize playing talent among the teams within the league, and the selection process is designed to enable the least successful teams to obtain the best of the new talent entering the league."[241] The mechanics of the draft involve teams selecting

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231. *See supra* Part I.B.
232. Protocol, *supra* note 11, at para. 2.
233. *Id.* at para. 5.
234. *Id.* at paras. 2, 5.
235. *See id.*
236. *Id.* at para. 12.
237. *Id.* at para. 2.
238. Protocol, *supra* note 11, at para. 11.
239. *Id.* at para. 12.
240. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 159 (1940).
241. Kurlantzick, *supra* note 64, at 323.

prospects in the reverse order of their final standings during the prior season.[242] This allows the worst team to select a player first, or at least have more opportunities to select first.[243] Once drafted, a player can only negotiate for a contract with the selecting team and is forbidden to negotiate with any other franchise.[244] A drafted player's choice is simple: negotiate a contract with the club that selected you, or not play in the league. Since a player can only negotiate with one team, his market value, and thus his final contract value is kept artificially low. The player has diminished leverage under the system and is denied his "maximum earning potential."[245]

In *Robertson v. National Basketball Association*, the court found that the NBA's rookie draft has the effect of restricting the competition for player services and therefore violates federal antitrust law.[246] The court stated, "it is difficult to conceive any theory pursuant to which a college draft would be saved from Sherman Act condemnation."[247] Also, federal courts have found that draft eligibility rules are subjects of collective bargaining because they have tangible effects on wages and working conditions.[248]

The posting system within the Protocol imitates the rookie draft by:

1) limiting eligibility,[249] and

2) only allowing a player to negotiate with one particular team.[250]

Under the rules of the rookie draft, the team that selects the player retains negotiation rights.[251] Under the rules of the posting system, the team that wins the bid retains negotiation rights.[252] Both systems limit a player's eligibility and rights to negotiate in a free and open market. The mechanics may be different, but the results are the same.

Major League Baseball might allege that the posting system differs from the rookie draft in that all MLB franchises have the opportunity to bid for the right to negotiate with a

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242. *First-Year Player Draft Official Rules*, MLB.COM, www.mlb.com/mlb/draftday/rules.jsp (last visited Mar. 19, 2014).

243. *Id.*; Kurlantzick, *supra* note 64, at 323. Accordingly, the team with the best record is the last to pick a rookie. *Id.* at 331, n.183 ("The NHL and NBA conduct a lottery for drafting position among the teams that miss the playoffs, but this mechanism is still heavily weighted towards the teams with the worst records that season. The lottery system for the first round of picks was introduced by these leagues to address the moral hazard problem - low-ranked teams that intentionally lose end-of-season games in order to secure the first pick.").

244. *See* Kurlantzick, *supra* note 64, at 323-24.

245. Tim Kurkjian, *Posting Process Needs to be Altered,* ESPN, (Dec. 15, 2006), http://sports.espn.go.com/mlb/columns/story?colunminst=kurkjian_t.

246. *See* Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 890 (S.D.N.Y. 1975). While opponents of the draft may assert that it permits exploitation of new players left with no choice but to accept a *take it or leave it* offer by the selecting team – the only team they can negotiate with, the rookie draft still takes place every year in the NBA (also in the NFL and NHL) because the NBA and NBPA have collectively bargained over its terms and have agreed between themselves that the draft is in the best interest of the game and made it part of the Collective Bargaining Agreement. *See id.* at 890 n.41 ("Even if the challenged practices were determined to be mandatory subjects, a court might nonetheless hold that they are not exempt.").

247. *Id.* at 890; *See also* Smith v. Pro Football, Inc., 593 F.2d 1173, 1189 (D.C. Cir. 1978) ("Because the NFL draft as it existed in 1968 had severe anticompetitive effects and no demonstrated procompetitive virtues, we hold that it unreasonably restrained trade in violation of § 1 of The Sherman Act.").

248. Wood v. NBA, 809 F.2d 954, 961-62 (2d. Cir. 1987).

249. Protocol, *supra* note 11, at paras. 1-2, 5-6.

250. *Id.*

251. *First-Year Player Draft Official Rules*, MLB.COM, www.mlb.com/mlb/draftday/rules.jsp (last visited Mar. 19, 2014).

252. Protocol, *supra* note 11, at para. 11.

posted player.[253] But, either way, the focus of the issue is not on the franchise owners. The issue is whether the posting system restricts the eligibility and negotiation rights of both American and Japanese players, restraining a player's right to use the open market as a way of being compensated by a team willing to pay the most for his services.

The fact that a bid amount has to be paid in order for a club to gain access to a *posted* player adds weight to the anticompetitive restraint argument. Per the Protocol, an MLB franchise can bid on the right to negotiate with a Japanese player who has been *posted* by his Japanese club.[254] If a contract is agreed upon between the *posted* player and the MLB franchise that has won the bid, that franchise has to pay the bid amount, or *posting fee*, to the NPB team.[255] This *posting fee* is paid in addition to whatever amount the MLB franchise has contracted to pay the Japanese player for his services.[256] This process satisfies an MLB's franchise's interest in obtaining talent, while assuaging NPB's fear that it is becoming nothing more than a farm system for MLB.[257] As a result, the MLB franchise acquires a player it hopes will make an impact on the field, the NPB franchise collects a transfer fee that could possibly reach into the millions, and the Japanese player plays for an MLB franchise for less money than he would have received if he were allowed to sell his services on the open market.

The fact that MLB teams pay a posting fee to an NPB franchise has an indirect effect of depressing player salaries. A sports franchise, as in the case of most businesses, only has a limited amount of revenue to spend on its employees. If a MLB club spends a substantial amount on the posting fee, it limits the revenue available to pay the player, potentially reducing the player's contract amount. Because of the Protocol, a player's *purchase price* becomes a combination of the posting fee and the resulting contract terms.[258]

For example, when the Boston Red Sox were negotiating with pitcher Daisuke Matsuzaka, the Red Sox figured the posting fee into the contract amount it offered to Matsuzaka.[259] The two sides eventually came to an accord, but what amount could Matsuzaka have secured for himself if his prior team, the Seibu Lions, did not receive over $51 million from the Red Sox?[260] It is reasonable to assume that the posting fee, together with the contract price, represents Matsuzaka's worth in MLB terms.[261] Therefore,

253. *See id.* at para. 8.

254. *Id.* at para. 9.

255. *Id.*

256. *Id.* at para. 11. The Protocol prevents the loss of non-free agent players without compensation to the teams. *See id.* at para. 9-12. The requirement of team consent to the initial posting and the acceptability of the bid amount provide a team with significant control over the release of its players. *See* Protocol, *supra* note 11, at paras. 9-12.

257. Robert Whiting, *Batting Out of Their League,* TIME, Apr. 30, 2001, at 24, *available at* http://content.time.com/time/magazine/article/0,9171,1956569,00.html.

258. *Id.* at para. 11.

259. Mike Petraglia, *Red Sox no longer need to hide secret,* MLB.COM (Dec. 14, 2006, 9:55 PM), http://boston.redsox.mlb.com/news/article.jsp?ymd=20061214&content_id=1761535&vkey=hotstove2006&fext=.jsp.

260. Tom Goldman, *Red Sox Pay $51 Million to Talk to Japanese Pitcher,* NPR (Nov. 15, 2006), http://www.npr.org/templates/story/story.php?storyId=6490343.

261. *See* Kurlantzick, *supra* note 64, at 331, n.185 ("The division of that total between player and Japanese team per se is of no concern of the antitrust laws. Rather, the laws' focus is on anti-competitive allocative restrictions on the labor market, and therefore the division scheme is of interest only to the extent it is structured in a way that may have restrictive effect. For example, a scheme under which the player receives 90% of the posting bid may discourage teams from posting players and thereby letting them move. Presumably, the combined bid amount and contracted player salary will be closer to the free market wage than the player salary resulting from the rookie draft.").

Matsuzaka's *baseball worth* is over $100 million. Matsuzaka, however, only realized half of this amount and had little choice in doing so.

2. THE PRO-COMPETITIVE RATIONALE FOR THE PROTOCOL

If a federal court finds that the Protocol is anticompetitive, it does not necessarily mean that MLB has violated federal antitrust law. The burden then shifts to MLB to prove a pro-competitive rationale for implementing the Protocol.

There are several pro-competitive rationales for the Protocol.

First, the Protocol is pro-competitive because it tracks the obligations under a player's current contract. The Protocol protects Japanese clubs who have players under contract from being poached by MLB franchises, while also protecting MLB franchises from having their contracted players abscond to a Japanese club.[262] However, in *PermaLife Mufflers, Inc. v. International Parts Corp.*, the Supreme Court observed that antitrust law generally does not care about the inducement of a breach of contract.[263] The Court seemed to signal that "punishing unfair behavior is not antitrust's role. Its purpose is to make markets perform more competitively."[264] The Court seemed to suggest that if a breach of contract does occur, the proper recourse would be for an aggrieved party to file a breach of contract claim, not an antitrust claim.[265]

Second, MLB could continue with its pro-competitive argument by alleging that the Protocol is a justified restraint because professional franchises have a legitimate interest in receiving a return on the investment put forth for training and developing young talent. This development cost needs to be recovered and, while the posting fee allows for a Japanese club to be made whole when it loses a player to the U.S.'s Major League, there is no such protection for MLB. Indeed, some economists have suggested that this is necessary because it helps promote competitive balance.[266] However, the *Mackey* court rejected the NFL's argument that the Rozelle Rule was justified as a player restraint based upon the need for a team to recoup its investment in training and developing talent.[267] The court held "there is nothing about sports leagues that would justify this defense.[268] We agree that the asserted need to recoup player development costs cannot justify the restraint of the 'Rozelle Rule.' The expense is an ordinary cost of doing business and is not peculiar to professional football."[269]

Third, MLB could argue that the Protocol promotes competitive balance by allowing for the best *product* to be on the field. Each franchise is free to bid on a posted player, so therefore if a team needs to fill a certain roster position it has the opportunity to do so by offering a substantial posting fee to the Japanese club.[270] The theory is that if the organization can secure quality talent, it will have a more competitive team, and more

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262. Protocol, *supra* note 11, at paras. 1, 4.

263. PermaLife Mufflers, Inc., v. Int'l Parts Corp, 392 U.S. 134, 136 (1968).

264. Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution: An Introduction,* 31 J. Corp. L. 287, 291 (2006).

265. *See id.* at 288-89.

266. *See, e.g.*, Stefan Szymanski, *The Economic Design of Sporting Contest,* 41 J. Econ. Lit. 1137 (2003).

267. Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976).

268. *Id.*

269. *Id.*

270. Protocol, *supra* note 11, at paras. 4, 9.

competitive teams equates to parity throughout the league.[271] This argument is unpersuasive for several reasons including a weak correlation between signing a certain player and team performance on the field,[272] and economic studies showing that more balanced competitions are not necessarily more attractive to fans than imbalanced ones.[273]

A fourth position MLB can take is that the issue of the Protocol's legality falls under the jurisdiction of the National Labor Relations Act (NLRA).[274] The NLRA was enacted by Congress to allow employees to organize as a union and then, as a union, engage in collective bargaining with employers.[275] The tribunal responsible for interpreting and enforcing labor-related issues under the NLRA is the National Labor Relations Board (NLRB).[276] Therefore, if the Protocol falls under NLRA jurisdiction, MLB can argue that the proper course to challenge the legality of the Protocol is for an aggrieved player to charge the MLBPA with unfair representation of employees.[277] This position, that *issues of employment* involving sports leagues should be deferred to the NLRB, has gained momentum in the courts over the last twenty years.[278]

Additionally, federal courts have emphasized that one of the fundamental principles of federal labor law is that it allows employees to seek the best deal for the greatest number by the exercise of collective representation rather than individual bargaining power.[279] The Second Circuit in *Wood v. NBA* commented:

> If Wood's antitrust claim were to succeed, all of these commonplace arrangements would be subject to similar challenges, and federal labor policy would essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes. Employers would have no assurance that they could enter into any collective agreement

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271. In sports, parity is when participating teams have roughly equivalent levels of talent. *See parity*, DICTIONARY.COM, http://dictionary.reference.com/browse/reserve%20clause?&o=100074&s=t (last visited Mar. 14, 2014) ("equality, as in amount, status, or character). This leads to more competitive contests where the winner cannot be easily predicted in advance.

272. WEILER, ET AL. *supra* note 84, at 186.

273. Stefan Szymanski, *The Economic Design of Sporting Contest,* 41 J. Econ. Lit. 1137, 1155-56 (2003).

274. National Labor Relations Act, 29 U.S.C. §§ 141-197 (2006).

275. 29 U.S.C. § 159(a) ("Representatives designated or selected by the majority of the employees in a unit shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining . . . ."). Labor law permits employees to seek the best deal for the greatest number by exercising collective rather than individual bargaining power. *See id.* Once an exclusive representative has been selected, the individual employee is forbidden by federal law from negotiating directly with the employer. *See id.*

276. 29 U.S.C. § 160.

277. *See* Wood v. NBA, 809 F.2d 954, 961-62 (2d. Cir. 1987). Judge Winter observed that this is the proper course of action. Id. at 962 ("Even if some such arrangements might be illegal because of discrimination against new employees (players), the proper action would be one for breach of the duty of fair representation.").

278. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 240 (1996) ("[P]layers must realize that if they wish to use the NLRA for purposes of collective bargaining, they must forfeit their rights to use the Sherman Act to challenge collective self-help by owners."); *see also,* Brown v. Pro Football, Inc. 50 F.3d 1041, 1054-55 (D.C. Cir 1995) ("We think the inception of the collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. Once employees organize a union, federal labor law necessarily limits the rights of individual employees to enter into negotiations with their employer . . . . Once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiations – a paradigm that itself contemplates collusive activity on the parts of both employees and employers."); *see also id.* at 1057 ("In our view, the nonstatutory labor exemption requires employees involved in labor disputes to choose whether to invoke the protections of the NLRA or the Sherman Act. . . . We believe that employees, like all other economic actors, must make choices. If they choose to avail themselves of the advantages of the collective bargaining process, their protections are defined by the federal labor laws.").

279. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

> without exposing themselves to an action for treble damages. Moreover, recognition of a right to individual bargaining without the consent of the exclusive representative would undermine the status and effectiveness of the exclusive representative, and result in individual contracts that reduce the amount of wages or other benefits available for other works.[280]

The Second Circuit noted that there is an incompatibility between an antitrust challenge and federal labor policy that "attaches prime importance to freedom of contract between parties to a collective agreement."[281] The court went on to say that issues of employment such as the rookie draft are "at the center of collective bargaining in much of the professional sports industry" and that collectively bargained agreements in sports are just a "unique bundle of compromises."[282] It is the court's position that issues specific to the sports industry reflect agreements between teams and players associations that stabilize salaries and spread talent throughout the league and "were a court to intervene and strike down the draft, the entire agreement would unravel . . . forc[ing] [leagues] to search for other avenues of compromise that would be less satisfactory."[283] In essence, what the federal courts are classifying *issues of employment* in the sports context are labor law issues, not antitrust matters.

Finally, in addition to the proposition that the NLRA may have jurisdiction over legal issues involving the Protocol, MLB's strongest non-legal position is that if a player or the MLBPA challenges the Protocol as a violation of antitrust law, MLB will exercise its termination option and end the Protocol altogether.[284] The Protocol grants MLB and NPB players certain rights they would not otherwise be entitled to because of the reserve clause found in both leagues' uniform players' contracts.[285] It is the Protocol which allows for a player to compete in a foreign league; without the benefits granted under it, a player would be subject to a league's reserve system and unable to seek opportunities elsewhere.[286] MLB's leverage is the Protocol itself. If it were terminated, MLB players would never have the opportunity to play for a Japanese team and NPB players would never have the opportunity to play for an MLB team.

CONCLUSION

This article was written to answer two questions:

1) Is the Protocol in the best interest of Major League Baseball players, and;

2) If it is found not to be in their best interest, should a player or the MLB Players Association challenge the legality of the Protocol as a violation of federal law?

Interestingly, the answers to both questions are no.

The Protocol provides that a MLB player cannot be contacted or engaged by a Japanese professional baseball club unless approval to do so has been given by the player's

280. *Wood*, 809 F.2d at 961.
281. *Id.*
282. *Id.* at 961-62.
283. *Id.*
284. Protocol, *supra* note 11, at para. 17.
285. *See supra* note 30 and accompanying text.
286. *See supra* Part I.A.

current club through the Commissioner's Office.[287] In return, players playing for the NPB cannot be contacted or engaged by an MLB franchise unless the players are posted by their Japanese club wherein that club temporarily forfeits any reserve rights over the player in exchange for possible monetary compensation from an MLB franchise.[288]

The Protocol unquestionably restrains the rights of professional baseball players regarding issues of employment.[289] The Protocol is a conspiracy that restrains trade.[290] It would be difficult for a federal court to find that these restraints are reasonable because their anticompetitive components are not outweighed by the pro-competitive rationale for implementing them.[291] The anticompetitive effects of the Protocol's restrictions impede the player market because they interfere with the free and open bidding for an athlete's services.[292] These restraints are unreasonable and, therefore, the Protocol appears to be a violation of federal antitrust law.

However, Major League Baseball has a longstanding antitrust exemption, granted in 1922 by the Supreme Court ruling in *Federal Baseball* that professional baseball is not "commerce amongst the States" and therefore, federal antitrust law does not apply.[293] As a result, MLB has had the ability to control its business without fear of court intervention or oversight. The Curt Flood Act of 1998, however, has limited MLB's exemption, providing that an MLB player has standing to sue MLB for antitrust violations as long as the alleged violation concerns *issues of employment*.[294] The Protocol deals directly with *issues of employment*, but because of the decision in *Brown v. Pro Football, Inc.*, together with other federal court precedent, the coverage provided by the Curt Flood Act is limited.[295] The MLBPA would have to decertify itself before an antitrust suit could be instigated by a player against MLB.[296]

This is true because a judicially-created antitrust exemption, the nonstatutory labor exemption, immunizes employers, i.e. sports leagues, when the challenged act is deemed an *issue of employment*.[297] Therefore, if the Protocol were challenged on antitrust grounds, MLB could undoubtedly proclaim that the nonstatutory labor exemption protects it from an antitrust liability. MLB may have some difficulties, however, if the matter were litigated in a jurisdiction that follows the *Mackey* test, wherein federal labor law and the shield provided by the nonstatutory labor exemption would not be applicable.[298] Many jurisdictions though, have adopted the broadened scope of labor law and the protection it provides as articulated in *Brown v. Pro Football, Inc.*[299]

The reality of the matter is that MLB has the leverage when it comes to the Protocol because it can terminate it at any time.[300] The Protocol grants players rights they would not otherwise be entitled to in the reserve clause.[301] The Protocol allows for a player to compete

287. Protocol, *supra* note 11, at para. 1.
288. Protocol, *supra* note 11, at paras. 4, 9.
289. *See supra* Part IV.B.
290. *See supra* Part IV.C.
291. *See supra* Part IV.C.
292. *See* discussion *supra* Parts I.B., IV.C.1.
293. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922).
294. *See* 15 U.S.C. 26b(a).
295. *See* discussion *supra* Part I.B.
296. *See supra* Part III.B.1.
297. *See* discussion *supra* Part III.B.
298. *See* discussion *supra* Part III.B.1.
299. *See* discussion *supra* Part III.B.2.
300. *See* Protocol, *supra* note 11, at para. 17.
301. *See* discussion *supra* Part I.

in a foreign league; without the benefits granted under it, a player would be subject to a leagues' reserve system and be unable to seek opportunities elsewhere.[302] Therefore, while the Protocol on the whole may not be in the best interest of professional baseball players, because professional baseball players are subject to a reserve system that limits their options to play for teams both domestically and overseas, they should not challenge the legality of the Protocol as a violation of federal law. If a player or the MLBPA decides to challenge the Protocol, there would be no turning back. MLB could terminate the agreement, leaving the player in a worse position than they are in with the Protocol in place.

302. *See* discussion *supra* Part I.

All Quiet on the Digital Front: The NCAA's Wide Discretion in Regulating Social Media

Aaron Hernandez

INTRODUCTION

Imagine being an administrator at the National Collegiate Athletic Association ("NCAA") during the end of the 2012 college football season. There are angry bowl sponsors and host cities, fracturing perceptions of student-athletes, and a media frenzy—all stemming from student-athletes' use (or misuse) of social media. When student-athletes take to expressing themselves through social media, their words can cause headaches for public relations and compliance departments at universities, as well as the NCAA. Vitriolic language forever cemented into the servers of Twitter or misleading the public through various social media outlets projects a poor image for the student-athlete, his school, and the NCAA. Social media misuse[1] by student-athletes can expose the university to both NCAA sanctions and public relations damage. College athletic departments have already started restricting athletes' social media use,[2] and the NCAA has regulations on how social media can be used for recruiting prospective student-athletes.[3]

Due to the recent embarrassing issues involving social media misuse by student-athletes, the NCAA has a substantial incentive to limit social media use by student-athletes—possibly by banning its use altogether. This Note explores how far the NCAA can go in limiting the speech of student-athletes through social media by considering the current rules regulating social media and proposing a hypothetical regulation to test the NCAA's power. Part I provides examples of recent social media misuse by student-athletes and how the NCAA has begun to regulate social media use. Part II focuses on the NCAA's current rules for governing social media. Part III defines the NCAA's legal status as a private entity and examines how private association law impacts challenges to the NCAA's power. Part IV illustrates why challenges to NCAA regulations governing social media use by student-athletes will not be successful. Finally, Part V focuses on the policy justifications for a wider regulation of student-athlete use of social media and considers the pros and cons of an outright ban on the use of social media by student-athletes.

1. For the purposes of this Note, the term *misuse* will be employed to describe use of social media which led to either a violation of NCAA rules or negative publicity for a school.

2. *See, e.g.*, Mark Boxley, *UK and U of L Monitoring Many Athletes' Social Media Postings*, COURIER-JOURNAL (Louisville, Ky.), Aug. 21, 2012, at A1.

3. *See generally* 2012–2013 NCAA DIVISION I MANUAL §§ 10-33 [hereinafter NCAA BYLAWS]; *see, e.g.*, *id.* at 13.4.1.2, 13.4.1.2.1, and 13.1.6.2.

I. THE USE OF SOCIAL MEDIA BY STUDENT-ATHLETES

A. STUDENT-ATHLETE *MISUSE* OF SOCIAL MEDIA

College athletics have been fraught with student-athlete misuse of social media during recent years. In 2012, University of Michigan wide receiver Roy Roundtree tweeted[4] at a high-school recruit in the upcoming 2013 recruiting class.[5] The tweet specifically mentioned the recruit by name[6] and congratulated him on committing to the Michigan football program.[7] As innocent as the tweet was, Roundtree's communication with the recruit was a violation of NCAA bylaw 13.4.1.2, which limits electronic communication with a prospective student-athlete to private electronic mail or facsimile.[8] The football department at Michigan immediately reported the incident to its compliance office which then referred the incident to the NCAA for consideration as a secondary violation of NCAA rules.[9] Another Michigan player tweeted at the same recruit just hours after Roundtree, and the school also reported that as a secondary violation to the NCAA.[10] Misuse of social media by a student-athlete tweeting at a recruit becomes nothing more than a minor headache when the school's compliance office is diligent in monitoring for such violations, like the University of Michigan was with Roundtree. However, student-athletes can misuse social media in ways that lead to much more serious consequences for the school.

In 2012, the University of North Carolina suffered much more than a small slap on the wrist due to student-athletes misusing social media. North Carolina received a ban from post-season bowl games and a reduction in scholarships after several football players were found to be involved with professional agents.[11] Of particular interest was an allegation by the NCAA enforcement staff that North Carolina had an affirmative duty to monitor the student-athletes' social media profiles. According to the NCAA enforcement staff, monitoring the profiles could have led to an earlier discovery of the impermissible benefits from agents.[12] However, the NCAA Committee on Infractions, the committee in charge of determining sanctions, ruled that an institution did not have a "blanket" duty to monitor

4. Twitter is a social media platform that allows users to send public messages, known as *tweets*, to other users. *See About Twitter*, TWITTER, https://about.twitter.com/ (last visited Feb. 21, 2014).

5. *See* Kyle Meinke, *Michigan Football Team Alerts Compliance Department After Receiver Roy Roundtree Commits Possible Minor NCAA Violation*, ANN ARBOR NEWS (Mar. 6, 2012), http://www.annarbor.com/sports/um-football/michigan-football-team-alerts-compliance-after-receiver-roy-roundtree-commits-possible-ncaa-violatio/.

6. *See What are @Replies and Mentions?* TWITTER, https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/14023-what-are-replies-and-mentions (last visited Mar. 3, 2013). Twitter has a function where a user can "mention" another user by tagging the user in the Tweet. *Id.* The "mention" function serves as an open communication between the two users as all of the people following each user can see the communication. *Id.*

7. *See* Meinke, *supra* note 5.

8. *Id.*

9. *Id.* This is the old scheme under which NCAA violations were reported. *See* MATTHEW MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 178–79 (2d ed. 2009). There were two main categories for rules infractions: secondary and major. *Id.* Secondary infractions, like the Roy Roundtree case, were small cases usually calling for minor or no discipline from the NCAA and were regularly self-reported by institutions. *See id.* Major infractions were more serious and called for an NCAA investigation of the matter, with a public report of the infractions coming at the end of the investigation. *Id.*

10. *See* Meinke, *supra* note 5.

11. NCAA, UNIVERSITY OF N.C., CHAPEL HILL PUBLIC INFRACTIONS REPORT, NO. 22–25 (2012) [hereinafter N.C. REPORT].

12. *Id.* at 11.

student-athlete social media profiles.[13] The Committee on Infractions did acknowledge that "if the institution receives information regarding potential rules violations, and if it is reasonable to believe that a review of otherwise publically available social networking information may yield clues to the violations, [the] committee will conclude that the duty to monitor extended to the social networking site."[14] In essence, the Committee on Infractions ruled that schools must monitor social media when potential violations come to the schools' attention.[15] Given the large number of violations that stem from social media misuse, the safest course of action to avoid NCAA wrath is to simply monitor social media all of the time (not just in the situation cited by the Committee on Infractions).[16] Had North Carolina more effectively monitored the social media profiles of its student-athletes, the school may have discovered the relationships between the student-athletes and agents and the school may not have been found to violate NCAA rules for failing to monitor the compliance of its athletic program.[17]

Schools want to prevent the costly effects of NCAA rules violations and sanctions as a result of student-athlete misuse of social media, but negative publicity from such misuse can cause equally damaging effects. Before traveling to the 2012 Hyundai Sun Bowl, a University of Southern California ("USC") senior football player expressed via Twitter his displeasure of having to go to El Paso, Texas during his winter break.[18] Another USC football player decided to echo his teammate's sentiments by expressing his views on Twitter during the stay in El Paso.[19] Both tweets caused public relations damage for the City of El Paso and the USC football team.[20] Likely as a reaction to the bad publicity, the USC athletic department even purchased a full-page spread in the local El Paso newspaper the day of the game to thank the people of El Paso for their hospitality.[21] The local Sun Bowl crowd was not persuaded by the apology; the Trojans were booed as they entered the stadium.[22]

The final example of social media misuse by student-athletes is one of the more bizarre stories to ever come out of college sports. Manti Te'o was the starting middle linebacker for the 2012 University of Notre Dame Fighting Irish football team.[23] He was also a 2012 Heisman Trophy candidate and narrowly missed winning the prestigious award after playing an exemplary season as the defensive captain of the title-contending Irish.[24] The week of an important game against Michigan State in his senior season, Te'o suffered through the death of both his grandmother and girlfriend within a span of twenty-four

13. *Id.*

14. *Id.* at 12.

15. *Id.*

16. *See* Michelle Brutlag Hosick, *Social Networks Pose Monitoring Challenge for NCAA Schools*, NCAA (Feb. 14, 2014), http://fs.ncaa.org/Docs/NCAANewsArchive/2013/february/social%2bnetworks%2bpose%2bmonitoring%2bchallenge%2bfor%2bncaa%2bschoolsdf30.html.

17. *Id.*

18. Gary Klein, *Trojans Get an El Paso Howdy*, L.A. TIMES, Dec. 29, 2012, at C7.

19. *Id.*

20. *See* Bill Plaschke, *Trojans and Kiffin Can't Hide from the Dreadful Truth*, L.A. TIMES, Jan. 1, 2013, at C1.

21. *Id.*

22. *Id.*

23. Player Profile for *Manti Te'o*, NOTRE DAME, http://www.und.com/sports/m-footbl/mtt/teo_manti00.html (last visited Mar. 3, 2013).

24. *Johnny Manziel Wins Heisman*, ESPN (Dec. 8, 2012), http://espn.go.com/college-football/story/_/id/8727326/johnny-manziel-texas-aggies-wins-2012-heisman-trophy.

hours.[25] Te'o still played in the game and performed remarkably well.[26] The emotional story helped launch Te'o into the national spotlight as a true role model.[27] However, not long after the Heisman race had been decided, a shocking report claimed Te'o never really had a girlfriend; his *girlfriend* was a fictitious personality created through a number of social media profiles.[28] The news was a bombshell and the original media report suggested Te'o helped create the fake girlfriend to aid his quest for the Heisman Trophy amidst Notre Dame's national title run.[29] Whether Te'o was complicit with the scheme is still unclear,[30] but the effect the hoax had on his popularity is undoubtedly clear: the hoax went viral.[31] There were interviews with Katie Couric[32] and Dr. Phil,[33] Notre Dame athletic director Jack Swarbrick called a press conference in an attempt to ease the public relations hemorrhage,[34] and Te'o was listed by Forbes as tied with Lance Armstrong for the notorious distinction of "Most Disliked Athlete in America."[35]

The previous examples illustrate how student-athletes' social media misuse can be detrimental not only to themselves but also to teammates, fans, boosters, peers, professors, sponsors, and a variety of other stakeholders. The NCAA and individual colleges are the most significant stakeholders in this context, and both have strong economic incentives to mute student-athlete social media.[36] Millions of dollars and institutional reputations should not hang in the balance of the next student-athlete tweet.

B. THE NCAA AND ITS MEMBER INSTITUTIONS' REGULATION OF SOCIAL MEDIA

"The NCAA has no bylaw, policy or recommendation that directs schools to monitor social media," said Naima Stevenson, NCAA associate general counsel.[37] "We would

25. *See* Matt Fortuna, *Manti Te'o's Irish Farwell*, ESPN (Nov. 13, 2012), http://espn.go.com/college-football/story/_/id/8623174/as-manti-teo-says-goodbye-south-bend-leaves-impact-larger-football-ncf.

26. *Id.*

27. *Id.*

28. *See* Matt Gutman, *Timeline of Manti Te'o Girlfriend Hoax Story*, ABC NEWS (Jan. 21, 2013), http://abcnews.go.com/US/timeline-manti-teo-girlfriend-hoax-story/story?id=18268647 (a timeline of the bizarre story).

29. Timothy Burke & Jack Dickey, *Manti Te'o's Dead Girlfriend, the Most Heartbreaking and Inspirational Story of the College Football Season, is a Hoax*, DEADSPIN (Jan. 16, 2013), http://deadspin.com/5976517/manti-teos-dead-girlfriend-the-most-heartbreaking-and-inspirational-story-of-the-college-football-season-is-a-hoax.

30. Michael S. James, *Manti Te'o Denies 'Faking It' in Girlfriend Hoax, Admits He 'Tailored' Story*, ABC NEWS (Jan 19, 2013), http://abcnews.go.com/US/manti-teo-denies-faking-girlfriend-hoax-admits-tailored/story?id=18255156.

31. Andy Hutchins, *Why the Manti Te'o Girlfriend Hoax Story Matters*, SB NATION (Jan. 28, 2013), http://www.sbnation.com/college-football/2013/1/28/3915364/manti-teo-hoax-girlfriend-story.

32. *Katie: Manti Te'o Interview* (ABC television broadcast Jan. 24, 2013).

33. *Dr. Phil: The Man behind the Manti Te'o Girlfriend Hoax Comes Clean* (NBC television broadcast Feb. 1, 2013).

34. Tom Fornelli, *Notre Dame AD Jack Swarbrick Addresses Manti Te'o Girlfriend Hoax*, CBS SPORTS (Jan. 16, 2013, 8:56 PM), http://www.cbssports.com/collegefootball/blog/eye-on-college-football/21564269/jack-swarbrick-addresses-manti-teo-girlfriend-hoax.

35. Robert Wynne, *America's Most Disliked Athletes*, FORBES (Feb. 5, 2013), http://www.forbes.com/sites/tomvanriper/2013/02/05/americas-10-most-disliked-athletes/. To give a better idea of how impactful the fake girlfriend story actually was, the report shows Te'o had a popularity rating of 88% on January 6, 2013 but nosedived to 15% by the time of the Forbes report—a little less than one month later. *Id.*

36. *See infra* Part I.B.

37. Michelle Brutlag Hosick, *Social Networks Pose Monitoring Challenge for NCAA Schools*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/February/social+networks+po

certainly not ask member institutions to require student-athletes to provide username and password information for purposes of monitoring social networking activities."[38]

While NCAA lawyers like Stevenson seem to insist there is no interest in regulating social media, these words ring hollow—especially to fans of the North Carolina football program—given the actions the NCAA has taken.[39] The NCAA enforcement staff specifically cited the need to monitor student-athlete social media, and the Committee on Infractions only somewhat limited this pervasive standard.[40] Further, the NCAA made both social media and handling student-athlete use of social media main topics of its 2013 convention.[41] Additionally, the NCAA actively monitors which states have passed laws making active monitoring of student-athlete (or the general public) social media use illegal.[42]

The NCAA has an interest in regulating social media because its member schools have an interest in regulating social media. Those schools must deal with the brunt of the headaches caused by student-athletes misusing social media.[43] The NCAA derives its power from these member institutions.[44] Membership in the NCAA is not mandatory; there are other options for intercollegiate athletic competition (e.g. the National Association of Intercollegiate Athletics).[45] The NCAA is governed by a constitution and a manual of rules approved by the member institutions and the presidents of those institutions.[46] These rules govern student-athlete eligibility and fair recruiting practices.[47] As a governing body, the NCAA is responsible for enforcing the rules drafted by the member institutions.[48] The member institutions subject student-athlete use of social media to regulation,[49] and the NCAA issues sanctions to an institution for not diligently monitoring student-athlete social media accounts.[50] It was member institutions who passed NCAA bylaw 13.4.1.2 in 2005, making it impermissible to contact recruits by any electronic means other than e-mail or facsimile.[51] Therefore, member institutions are responsible for pressuring further regulation of student-athletes' use of social media, not the NCAA national office.

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se+monitoring+challenge+for+ncaa+schools (last visited Mar. 6, 2013).

38. *Id.*

39. *See supra* Part I.A.

40. *See* N.C. REPORT, *supra* note 11, at 12.

41. *2013 NCAA Convention: Social Media and Student-Athletes*, NCAA (Jan. 14, 2013), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Events/2012+Convention/Educational+Sessions/Social+Media+and+Student-Athletes [hereinafter *NCAA Convention*]. It is interesting to note that this educational session was set before the Manti Te'o story broke two days later. One can only assume the topic gained even more traction after the Te'o debacle.

42. *Social Media Legislation*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/TEST (last visited Sept. 23, 2013).

43. *See supra* Part I.A.

44. *See About the NCAA*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+NEW (last visited Sept. 23, 2013).

45. *Id.*

46. *See generally* NCAA BYLAWS, *supra* note 3; 2012–2013 NCAA DIVISION I MANUAL §§ 1–6 [hereinafter NCAA CONSTITUTION] (providing the Constitution and the Operating and Administrative bylaws used by the NCAA).

47. *See, e.g.*, NCAA BYLAWS, *supra* note 3, at art. 13.1.6.2.

48. *See* MATTHEW MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 178–79 (2d ed. 2009).

49. NCAA BYLAWS, *supra* note 3, at art. 13.4.1.2.

50. N.C. REPORT, *supra* note 11, at 12.

51. NCAA BYLAWS, *supra* note 3, at art. 13.4.1.2.

The recent examples of social media misuse by student-athletes show that colleges need to also worry about the negative publicity that can surround such gaffes. Substantial public relations risks exist when young student-athletes discuss sensitive issues on an open public platform to that a school cannot filter. The NCAA admits as much in discussing its upcoming educational session on the issue: "[W]elcome to social media, in which the lives of student-athletes can be treated like unending press conferences just a click away from that national microphone."[52] Nobody wants to be the subject of the next Manti Te'o scandal. The only way to make sure student-athlete social media misuse completely stops is by taking away social media from the student-athlete.

II. CURRENT TRENDS IN NCAA REGULATION OF SOCIAL MEDIA

The NCAA already restricts student-athlete use of social media through recruiting rules.[53] The purpose of these rules is to limit the contacts between coaches and prospective student-athletes.[54] Generally, the rules are aimed at keeping recruiting private between the prospective student-athlete and the coach,[55] but the rules also operate to limit contact between the prospective student-athlete and an athletic program generally.[56] NCAA rules strictly limit electronic communication with prospective student-athletes to electronic mail or facsimile.[57] The rules only allow social media contact during recruiting in the men's basketball setting, but even in that context the social media usage is only permitted if the communication is private.[58] Otherwise, current student-athletes are not allowed to contact prospective student-athletes through social media platforms.[59]

This established framework shows that the NCAA has already undertaken the regulation of social media and such regulation was driven by its member institutions. The explicit bylaws and the implicit direction from the Committee on Infractions in the North Carolina case suggest that the NCAA is expanding its control over student-athlete usage of social media.[60] While a Division III rule allowing more social media recruiting contact has been adopted,[61] the rule only allows private communication between recruits and coaches. Division III schools also have fewer public relations concerns about student-athlete use of social media because the schools tend to be smaller and do not warrant as much media attention.[62] Further, the Division III rule is beneficial because it saves money for smaller

52. *See NCAA Convention*, *supra* note 41.

53. NCAA BYLAWS, *supra* note 3, at art. 13.1.6.2.

54. *Id.*

55. NCAA BYLAWS, *supra* note 3, at art. 13.4.1.2.

56. *See, e.g.*, Kyle Meinke, *Michigan Football Team Alerts Compliance Department After Receiver Roy Roundtree Commits Possible Minor NCAA Violation*, ANN ARBOR NEWS (Mar. 6, 2012), http://www.annarbor.com/sports/um-football/michigan-football-team-alerts-compliance-after-receiver-roy-roundtree-commits-possible-ncaa-violatio/.

57. NCAA BYLAWS, *supra* note 3, at art. 13.4.1.2.

58. NCAA BYLAWS, *supra* note 3, at art. 13.4.1.2.1. A private communication through social media is a bit of a misnomer but the regulation aims to capture functions of social media platforms that are not wholly public, such as the "direct message" function on Twitter. *What's in a Tweet?*, TWITTER, https://discover.twitter.com/learn-more#tweet (last visited Feb. 21, 2014).

59. NCAA BYLAWS, *supra* note 3, at art. 13.4.1.2.

60. *See supra* Part I.A.

61. Gary Brown, *Social Media Proposal Passes in DIII*, NCAA (Jan. 20, 2013), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/January/Social+media+proposal+passes+muster+in+DIII.

62. *See* Mark Montgomery, *Division I vs. Division III: Sports as a Job, or Scholar-Athlete?*, MONTGOMERY

schools with small recruiting budgets. Ultimately, the Division III rule is limited in its scope and should not be interpreted as a step toward less social media regulation by the NCAA; rather, the proposal should be viewed as evidence that the NCAA already has rules governing the use of social media and will continue to employ such rules.

Since the NCAA already seeks to further regulate student-athlete social media, consider how far the NCAA could regulate social media usage. With the stakes extraordinarily high for the member institutions—in the form of potential infractions and public relations fallout—a complete ban on social media is a legitimate possibility. Individual institutions (or athletic programs within the institutions) have already placed such bans on student-athletes and continue to look for new ways to monitor social media usage.[63] The remainder of this Note analyzes the composition of the NCAA to consider whether a hypothetical NCAA *complete ban* on student-athlete social media usage is legal.

III. CHALLENGES TO NCAA RULES AND THE LEGAL STATUS OF THE NCAA AS A PRIVATE ENTITY

The workability of an association-wide ban on student-athlete social media usage depends on whether the NCAA is a private association. Because the NCAA is not a state actor and is a private association, the legal prospects for the hypothetical ban are promising.

A. THE NCAA IS NOT A STATE ACTOR

In August of 1977, the NCAA released a report detailing several major violations against the University of Nevada, Las Vegas ("UNLV") and its head basketball coach Jerry Tarkanian.[64] The report included a "show cause" order that demanded UNLV demonstrate why the NCAA should not further penalize UNLV if the school did not disassociate itself from Tarkanian.[65] UNLV suspended Tarkanian, who responded by asserting his Fourteenth Amendment rights were violated under 42 U.S.C. §1983.[66] *Tarkanian* reached the Supreme Court and the Court had to determine whether the NCAA conduct constituted state action, therefore forcing the association to ensure the constitutional rights of its membership when making decisions.[67] The landmark decision ended with the majority of the Court ruling in favor of the NCAA, holding the NCAA did not engage in state action.[68] Further, the Court opined the NCAA looked like a private actor as much (if not more) than a state actor, citing

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EDUCATIONAL CONSULTING (Mar. 9, 2008, 9:30 PM), http://greatcollegeadvice.com/division-i-vs-division-iii-sports-as-a-job-or-scholar-athlete/.

63. *See, e.g.*, Sam Laird, *College Football Coach Bans Players from Twitter*, MASHABLE (Oct. 25, 2012), http://mashable.com/2012/10/25/mike-leach-twitter-ban/; Chris Vannini, *Basketball Coach Bans Twitter, Winning Streak Follows*, COACHINGSEARCH (Feb. 26, 2013), http://www.coachingsearch.com/news/2594-basketball-coach-bans-twitter-winning-streak-follows.html.

64. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 186 (1988).

65. *See id.*

66. *Id.* at 180.

67. *Id.*

68. *Id.* at 199.

the large number of private schools voluntarily part of the association [69] and the alternative options for UNLV (such as leaving the NCAA) that made the action not compulsory.[70]

The Court's holding that the NCAA is not a state actor is important for the prospects of a complete ban on social media because the association is not a guarantor of constitutional rights. As the Court in *Tarkanian* noted, "[e]mbedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be."[71]

Though *Tarkanian* held that the NCAA rules-enforcement mechanism is not state action, the decision in *Cohane v. NCAA* created a possible exception.[72] In 2007, the Second Circuit Court of Appeals ruled in *Cohane* that there are circumstances when the NCAA enforcement mechanism may qualify as state action.[73] Two factors appear to be crucial in the decision: (1) impropriety by the NCAA in issuing the sanctions,[74] and (2) the Second Circuit's desire to cure the fraudulent behavior of the NCAA while simultaneously refraining from challenging Supreme Court precedent by issuing an unpublished decision.[75] While unlikely, the *Cohane* decision could suggest the legal status of the NCAA as a private entity has changed. If the *Cohane* decision stands for the NCAA's enforcement mechanism possibly being state action, then constitutional violations could occur at the university level—effectively overturning *Tarkanian*.

Nonetheless, universities and the NCAA could still enforce a social media ban despite constitutional protections for the athletes. A touchstone of United States constitutional law is the protection of free speech on college campuses.[76] However, the Court has allowed higher educational institutions to mute students indirectly, even if the institution is a state actor. In *Christian Legal Society v. Martinez*, the Court ruled that Hastings Law School—a state actor—could choose not to recognize the Christian Legal Society as an official school club eligible for subsidies from the school.[77] The Court found that Hastings Law School was not directly interfering with the club's free speech rights, but instead was choosing not to subsidize a club based on a viewpoint-neutral policy of antidiscrimination.[78]

As *Martinez* indicates, a qualifier in cases where the Court upheld a limitation on speech is that the limitations were placed on the student body generally, rather than on a specific subset of the student population, like student-athletes. In *Crue v. Aiken*, the Seventh Circuit held that University of Illinois could not restrict students from contacting

69. *Id.* at 194.

70. *Tarkanian*, 488 U.S. at 198.

71. *Id.* at 191 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)); *See also* Michael G. Dawson, Nat'l Collegiate Athletic Ass'n v. Tarkanian: *Supreme Court Upholds NCAA's Private Status under the Fourteenth Amendment, Repelling Shark's Attack on NCAA's Disciplinary Powers*, 17 PEPP. L. REV. 217, 250 (1990).

72. *See* Cohane v. Nat'l Collegiate Athletic Ass'n, 215 F. App'x 13, 16 (2d Cir. 2007).

73. *Id.* at 16.

74. *Id.* at 13.

75. *Id.*

76. *See* Healy v. James, 408 U.S. 169, 180 (1972) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); Sweezy v. N.H., 354 U.S. 234, 249-50 (1957)) ("[T]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.").

77. 130 S.Ct. 2971, 2994 (2010).

78. *Id.* The Christian Legal Society required members to adhere to views on sexual orientation and religion which directly conflicted with Hastings' "All-Comers" policy of antidiscrimination when accepting members into school-sponsored clubs. *Id.* at 2975. The school policy was considered viewpoint neutral because it applied to all students and potential clubs. *Id.*

prospective student-athletes to inform the athletes about the university's use of a Native American mascot.[79] When the university received word that some members of faculty were planning to contact prospective student-athletes, the university turned to the NCAA for guidance.[80] The NCAA informed the school that contact by *a faculty member* with a prospective student-athlete would be a violation of NCAA rules.[81] In order to prevent one of these violations, the university told its faculty Senate that *any* contact by students or staff with a prospective student-athlete would result in a violation.[82] The Seventh Circuit emphasized that the NCAA, through the guidance letter on recruiting rules to the university, was not encouraging the broad regulations on student-athletes as described by the university.[83] Accordingly, the case should not be interpreted as courts stymieing free speech regulation by the NCAA, because the NCAA did not guide the conduct. Rather, the University of Illinois simply misinterpreted the guidance.[84] Thus, the University of Illinois was acting more on its own than as a member of the NCAA.

While the University of Illinois could not assert the speech limitation, the Eighth Circuit has held public universities can mute or punish speech when its detrimental impact outweighs the free speech rights therein.[85] In *Richardson v. Sugg*, the Eighth Circuit ruled that former University of Arkansas basketball coach Nolan Richardson, Jr. could be fired for public statements he made about his contract.[86] Richardson equated his basketball program to a business and noted he could be bought out at any time.[87] The university found the statements damaging to recruiting and the overall atmosphere of the athletic department.[88] The court was convinced that this detrimental impact outweighed Richardson, Jr.'s free speech rights and no violation of his constitutional rights had occurred.[89]

The constitutionality of muting free speech should be considered within the context of a college athletics program. Participation in sports at the intercollegiate level is a choice secured by a contract.[90] As such, free speech interests can be muted by the contract.[91] Mary Margaret Penrose, a law professor at Texas A&M University, makes the thoughtful analogy of the student-athlete to a member of the military, both choosing to enter strictly-regulated programs:

> College athletes choose to participate in a university structured program where grade and conduct regulations are heightened. They are far from "free" to do as they choose like their classmates who opt out of, or are otherwise unsuited for, college athletics. Such participation is a privilege, not a right. And, this privilege is heavily regulated by every major university, every national conference and the NCAA. Thus, college athletes' claims of free

79. 370 F.3d 668, 677 (7th Cir. 2004).

80. *Id.* at 675.

81. *Id. at* 675-76.

82. *Id.* at 676.

83. *Id.* at 677.

84. *Crue,* 370 F.3d at 677.

85. *See* Richardson v. Sugg, 448 F.3d 1046 (8th Cir. 2006).

86. *Id.* at 1050.

87. *Id.* at 1051.

88. *Id.*

89. *Id.* at 1062-65.

90. *See generally* Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992); Bd. of Regents v. Roth, 408 U.S. 564 (1972) (providing explanations of the contractual obligations of intercollegiate sports).

91. *See, e.g.*, Hysaw v. Washburn Univ. of Topeka, 690 F. Supp. 940, 943 (D. Kan. 1987); Colorado Seminary v. NCAA, 570 F.2d 320, 321 (10th Cir. 1978); Justice v. NCAA, 577 F. Supp. 356, 366 (D. Ariz. 1983).

speech should be subjected to a much lower level of constitutional scrutiny, one on par with military members, when asserting First Amendment challenges.[92]

College athletes choose to enter heavily regulated programs where individualism is traded for team concepts, like in the military, and the hierarchical structure prevails.[93] Due to the similarities "like uniforms, strict curfews, minimum control over their schedules and conduct... courts should adhere to the limited First Amendment approach for both [student-athletes and servicemen]."[94]

Student-athletes' First Amendment rights are limited in an athletic context.[95] *Martinez* suggests public universities can regulate speech for students who choose to join activities officially recognized by the school.[96] Further, due to the similarities between a student-athlete and a serviceman, the Court has shown it would consider allowing student-athletes' First Amendment rights to be curbed because of their choice to join a highly regimented athletics program.[97] Together, these factors demonstrate that even if the NCAA enforcement mechanism is ever considered a state actor, a ban on social media could still pass constitutional muster.

B. THE NCAA AS A PRIVATE ASSOCIATION

Private associations are composed of member entities freely choosing to join together under the governance of an association. Private associations can be medical societies,[98] social clubs,[99] fraternal orders,[100] athletic leagues,[101] or many other organizations. Common law developed two basic requirements to determine if an organization is a private association. First, the association membership must be voluntary, meaning members cannot be compelled to join the association.[102] Second, the association itself must be wholly private. That is, it cannot be a state actor or associate for the purpose of implementing state action.[103] If the association can meet these two basic requirements, it will be deemed a private association and receive substantial deference from courts reviewing the association's internal decisions.[104]

This does not mean private associations are completely immune from judicial scrutiny. The Seventh Circuit says the general rule of deference to private associations has two exceptions: "1) where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the

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92. Mary Margaret Penrose, *Free Speech Versus Free Education: First Amendment Considerations in Limiting Student Athletes' Use of Social Media*, 1 MISS. SPORTS L. REV. 71, 91 (2012).

93. *Id.* at 92.

94. *Id.* at 93.

95. *Id.*

96. Christian Legal Soc'y v. Martinez, 130 S.Ct. 2971, 2994 (2010).

97. Penrose, *supra* note 92, at 93.

98. Falcone v. Middlesex Cnty. Med. Soc'y, 162 A.2d 324, 325 (N.J. Super. Ct. Law Div. 1960).

99. Dixon v. The Club, Inc., 408 So. 2d 76, 77 (Ala. 1981).

100. Moran v. Vincent, 588 S.W.2d 867, 868 (Tenn. Ct. App. 1979).

101. Finely v. Kuhn, 569 F.2d 527, 528 (7th Cir. 1978).

102. *Id.* at 544.

103. *Id.*

104. *Id.*; Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004) ("Courts are reluctant to intervene, except on the most limited grounds, in the internal affairs of the voluntary association.").

association and 2) where the association has failed to follow the basic rudiments of due process of law."[105] Essentially, to avoid judicial intervention, a private association must follow its internal rules and not act in an arbitrary or capricious manner.[106]

Several courts have referred to the NCAA as a private association when analyzing its actions.[107] The NCAA is composed of voluntary membership and nothing compels institutions to join the NCAA; in fact, the universities comprising the NCAA could choose to join other associations, such as the National Association for Intercollegiate Athletics.[108] Further, the Supreme Court has determined the NCAA is not a state actor.[109] With voluntary membership and no state action, the NCAA is a private association that is afforded deference in court when it is interpreting and enforcing its own rules and regulations.

As a private association, the NCAA has wide discretion in managing its internal affairs. Student-athletes contractually agree to be subjected to NCAA rules by contractually agreeing to such compliance with a member university.[110] Accordingly, the student-athlete joining a university that is a member of a "voluntary association subjects himself or herself to the organization's power to make and administer its rules."[111]

IV. LEGAL CHALLENGES TO THE NCAA REGULATION OF SOCIAL MEDIA

Two issues arise when considering a challenge to the NCAA regulation of social media. The first issue is whether current rules regulating social media could be successfully challenged given the NCAA's status as a private entity and jurisprudence on NCAA eligibility decisions. The second issue is whether expansion of the current rules to an outright ban could be successfully challenged.

A. CURRENT RULES REGULATING SOCIAL MEDIA WILL WITHSTAND CHALLENGE

Due to the NCAA's status as a private association, challenging the current NCAA rules regulating social media would be difficult. As a private association, the NCAA is given wide deference in managing its internal affairs. The NCAA only needs to follow its own rules when enforcing social-media-recruiting rules and courts will generally defer to the association's decisions. Such deference is usually shown by courts after the NCAA decides whether to waive a rule for a student-athlete to remain eligible.[112]

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105. *Id.*

106. *See, e.g.*, Coke v. United Transp. Union, 552 S.W.2d 402 (Tenn. Ct. App. 1977); Moran v. Vincent, 588 S.W.2d 867 (Tenn. Ct. App. 1979); NCAA v. Lasege, 53 S.W.3d 77 (Ky. 2001); California State Univ., Hayward v. NCAA, 121 Cal. Rptr. 85 (Cal. App. 1975).

107. *See, e.g.*, Hispanic College Fund, Inc. v. NCAA, 826 N.E.2d 652 (Ind. App. 2005); Gulf S. Conference v. Boyd, 369 So.2d 553 (Ala. 1979); Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004); NCAA v. Brinkworth, 680 So. 2d 1081 (Fla. Ct. App. 1996).

108. *See About the NAIA*, NATIONAL ASSOCIATION OF INTERCOLLEGIATE ATHLETICS, http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019 (last visited Mar. 5, 2013).

109. NCAA v. Tarkanian, 488 U.S. 179, 180 (1988).

110. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992).

111. 6 AM. JUR. 2D *Associations and Clubs* §6 (2013).

112. *See, e.g.*, Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004).

In *Bloom v. NCAA*, the Colorado Court of Appeals refused to substitute its own interpretation of an NCAA rule for that of the NCAA's own interpretation.[113] Jeremy Bloom challenged the NCAA's decision not to waive a rule prohibiting him from receiving endorsement and advertising money.[114] The rule had the effect of depriving Bloom of several paid entertainment opportunities if he wanted to remain eligible to play football.[115] The court in *Bloom* held that the rules were "rationally related to the legitimate purpose of retaining the 'clear line between intercollegiate athletics and professional sports.'"[116]

Bloom illustrates that the NCAA only needs to follow its own internal procedure when implementing rules.[117] Unless the NCAA has arbitrarily applied the social media recruiting rules, legal challenges to such rules are unlikely to succeed because of this "outcome determinative" deferential review standard.[118] Accordingly, the current social media recruiting rules will withstand challenge, under the law of private associations.

B. AN NCAA BAN OF SOCIAL MEDIA WILL WITHSTAND CHALLENGE

An association-wide ban of social media use by student-athletes serves two practical functions: (1) it helps the members of the NCAA avoid costly public relations nightmares, and (2) it reduces the cost of compliance departments having to monitor student-athlete social media accounts for potential NCAA violations. These functions can be connected to many of the general purposes of the NCAA set forth in its constitution.[119] One purpose of the NCAA is "to uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of [the] Association."[120] A ban on social media usage by student-athletes is rationally related to compliance with NCAA rules.

Consider also the principle of recruiting: "Recruiting regulations shall... shield [student-athletes] from undue pressures that may interfere with the scholastic or athletics interests of the prospective student-athletes or their educational institutions."[121] A ban on social media surely helps alleviate the "undue pressures" in recruiting by preventing recruiting communication in a public forum.[122] The NCAA also has a principle of economy: "Intercollegiate athletics programs shall be administered in keeping with prudent management and fiscal practices to assure the financial stability necessary for... a quality educational experience."[123] Accordingly, a ban on social media use helps prevent potential economic damages resulting from student-athlete misuse of social media.

The First Amendment concerns of such a wide ban on speech are not an issue for the private association. The NCAA merely needs to show that the ban has: (1) a rational relationship to the purposes of the NCAA and (2) non-arbitrary application. The purposes

113. *Id.* at 625.
114. *Id.* at 623.
115. *Id.*
116. *Id.* at 626.
117. *See* Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 144 (2008).
118. *Id.*
119. 2012–2013 NCAA DIVISION I MANUAL §§ 1–6 [hereinafter NCAA CONSTITUTION].
120. NCAA CONSTITUTION art. 1.2(b).
121. NCAA CONSTITUTION art. 2.11.
122. *See id.*
123. NCAA CONSTITUTION art. 2.16.

and principles of the NCAA illustrate that an NCAA rule regulating social media use will generally be legal on its face if, like in *Bloom*, the rule is rationally related to a legitimate purpose set out in its constitution.[124] With so many principles to choose from, including some of the most basic purposes of the NCAA, a ban on social media use is rationally related to the general purposes of the association.

The most likely challenger to the ban would be a student-athlete whose speech has been silenced. However, student-athletes agree to NCAA rules contractually and have alternatives to participating in intercollegiate athletics at an NCAA institution. "They can opt to savor the college experience by retaining their right to... Facebook and Twitter. Or, they can accept limitations on their behavior in exchange for a college athletic career, oftentimes including a free education."[125] One of the drawbacks to being a student-athlete is a restriction of free speech, and courts are not likely to interfere with the student-athlete's choice to subject himself or herself to such regulation under the purview of a private association.

V. POLICY CONCERNS WITH THE NCAA BAN OF SOCIAL MEDIA

This Note has already mentioned several potential justifications for a ban of social media use by student-athletes. Athletics compliance departments across the NCAA have enough potential rules violations to monitor and social media is another dimension that ameliorates the problem.[126] Many alumni of Notre Dame probably wish Manti Te'o had never operated a Twitter account after his online debacle. The ban has compelling justifications for protecting colleges from these costs of student-athlete social media misuse.

However, such a ban could be costly as well. First, the ban has feasibility issues. Compliance offices do not want to scour student-athlete social media profiles for potential rules violations, but having to monitor for the mere existence of a profile seems to be only a marginally better option. Ensuring student-athlete compliance with the ban could be costly and directly rebut the economic justification of the hypothetical ban.

Second, the ban creates social costs. While student-athletes do lead regimented lives requiring control over their speech, severe limitations on such speech seem to run afoul of higher educational purposes. Student-athletes are not just athletes after all, and self-expression is a large part of going to college. The NCAA prides itself on putting the athlete within the context of being a student. The ban is such a large contravention of social media—a modern modem of speech used by nearly all students—that the ban instead seems to be putting the student within a separate context of being an just an athlete.

The negative policy concerns with the ban still might not outweigh the current policy concerns with student-athlete misuse of social media. First, there are billions of dollars at stake in major college sports and letting an immature young adult compromise such money through irresponsible use of social media should be curbed. Second, NCAA member institutions have many concerns when an athlete misuses social media: public perception of the institution, student body atmosphere, pressure on teammates, etc.[127] Banning social media could stymie these problems at their source. Finally, college athletes already have

124. Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 626 (Colo. App. 2004).

125. Penrose, *supra* note 92, at 91.

126. *See supra* Part I.

127. *See supra* Part I.A.

plenty of opportunities to express themselves publicly and in more responsible ways than through unfettered social media use.

CONCLUSION

The NCAA is a private association acting under the authority granted to it from its member institutions. The NCAA is not a state actor and is not a guarantor of U.S. constitutional rights.[128] This legal designation means the NCAA has wide discretion in governing its own affairs. Accordingly, the NCAA can institute bans on usage of social media by student-athletes without running afoul of private associations law, as long as such bans rationally relate to the purposes of the association.

The question remains whether such a ban is ultimately worth implementing. While a large-scale ban on social media would prevent many public relations headaches like the Manti Te'o incident, such an invasive ban could have negative consequences. The perception of the NCAA could erode further into a picture of an authoritarian machine rather than an association promoting education first. Further, with many states seeking to pass laws outlawing the limitation or monitoring of social media, legal issues will arise when a state institution must comply with divergent state law and NCAA rules.

Even though many issues remain to be solved, or uncovered, as social media usage by student-athletes evolves, the fact remains clear that the NCAA has wide discretion to limit such usage. It should be no surprise to see more regulation in an area that has been problematic for the NCAA and its member institutions. Student-athletes' social media misuse is a costly problem that needs to be addressed, and the NCAA has already taken affirmative steps to engage the problem.

Manti Te'o's actions left a lot of people speechless. Student-athletes might literally be next.

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128. *See supra* Part III.A.

Get with the *Times*: Why Defamation Law Must be Reformed in Order to Protect Athletes and Celebrities from Media Attacks

Matthew T. Poorman*

INTRODUCTION

"As a public figure, Vilma has the burden of showing that Goodell made the statements with 'actual malice'. . . ."[1]

With those words, the District Court for the Eastern District of Louisiana essentially ended Jonathan Vilma's hopes of winning his defamation lawsuit against the National Football League (NFL).[2] Vilma, a current NFL player, sued the commissioner of the league, Roger Goodell, for defamation as a result of Goodell accusing Vilma of implementing a "bounty program."[3] Allegedly, Vilma orchestrated a program designed to pay his teammates for intentionally injuring opposing teams' players.[4] As a result of this accusation, Vilma was suspended for the entire season, and his reputation was tarnished among league officials, fans, and advertising companies.[5] Vilma's defamation case effectively ended because of two words in the District Court's opinion: "*public figure*."[6]

Many people have never heard of Jonathan Vilma. The name may escape even the average sports fan. So how did the court conclude that Vilma was a public figure? What analysis determined Vilma's public figure status? The answer, oddly enough, is that there was no analysis, none apparent in the court's opinion anyway. Apparently, under Court precedent, the answer was clear and obvious.

The first section of this Note is an historical overview of the relevant Supreme Court cases addressing defamation. The second section gives a brief synopsis of important cases

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1. Vilma v. Goodell, 917 F.Supp. 2d 591, 596 (E.D. La. 2013).
2. *Id.*
3. *Id.* at 593.
4. Judy Battista, *N.F.L. Inquiry Says Saints Set Bounty for Hits*, N.Y. TIMES, Mar. 3, 2001, at A3.
5. *Jonathan Vilma files defamation lawsuit against Roger Goodell,* Star Ledger (N.J.), May 17, 2012, http://www.nj.com/sports/index.ssf/2012/05/jonathan_vilma_files_defamatio.html.
6. *Vilma*, 917 F.Supp. 2d at 595.

involving athletes filing defamation actions. The third section presents constitutional arguments in support of labeling athletes as public figures and the shortcomings of each of these arguments. The fourth section summarizes current standards in modern journalism and contextualizes the need for a new standard. Finally, the Note concludes by showing how removing the *public figure* and *actual malice* standards is appropriate and necessary for protecting all constitutional safeguards available to the press and the public.

I. THE SUPREME COURT AND DEFAMATION: AN HISTORICAL OVERVIEW

A. SIGNIFICANT CASES

Before discussing why the Court automatically labeled Jonathan Vilma a public figure without any explanation in the opinion, it is important to note why this classification is important. In 1964, the Supreme Court handed down a landmark defamation decision in *New York Times v. Sullivan.*[7] The Court in *Sullivan* held that to guarantee certain constitutional protections such as freedom of the press, "actual malice" or "reckless disregard of the truth" by the publisher had to be proven before a "public official" could win damages in a defamation lawsuit.[8] The plaintiffs in this case were city commissioners, so the Court did not need to expand on the definition of "public official, as the plaintiffs clearly were public officials in their role with the city government."[9] The *Sullivan* decision had an immediate impact on the law, and the seemingly narrow protection the Court had previously given to newspapers writing about public officials was quickly broadened in the following decades.[10] Entire articles have been dedicated to breaking down the opinion in *Sullivan*[11], but it is the Court's broadening of the *Sullivan* opinion four years later that is of greater importance to athletes bringing defamation cases.

In 1968, the Supreme Court extended *Sullivan's* increased burden on "public officials" to "public figures" in *Curtis Publishing Co. v. Butts.*[12] The Court in *Butts* held that because public figures command similar public interest and have the same access to the public forum as public officials, they too should be held to same standard as public officials in defamation cases.[13] *Butts* was particularly detrimental to athletes pursuing a defamation claim because of the specific facts in the case. Butts was a college athletic director accused in a newspaper of fixing one of his school's football games.[14] A plurality opinion written by Justice Harlan held that Butts was a public figure based on his position alone because of the public interest in education and his university's sports program.[15] Justice Warren, in a concurring opinion, would have held that Butts was a public figure based on his access to

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7. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

8. *Id.* at 280.

9. *Id.* at 256.

10. Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 608 (1983).

11. Lee Levine, *Implied Label, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237 (1993).

12. Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).

13. *Id.*

14. *Id.* at 135-36.

15. David Elder, *Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan*, 33 BUFF. L. REV. 579, 597-98 (1984).

the media, which supposedly gave him the ability to defend himself against defamation.[16] While the *Butts* opinion involves many nuances, the most important takeaway from the decision is that anyone deemed a public figure has the burden of proving actual malice by the publisher in a defamation lawsuit.[17] "Ultimately, the policy here [in *Butts*] is still on the side of the press, it aims to allow the press freedom to purvey news and ideas about public figures without fear, so long as they do not demonstrate an 'extreme departure' from responsibility."[18]

In 1974, the Supreme Court finally slowed what seemed to be a movement toward complete press immunity in *Gertz v. Robert Welch, Inc.*[19] In *Gertz*, the Court reversed lower court holdings that the actual malice standard was necessary to protect the press even when the plaintiff was not a public figure.[20] This case has particular relevance for athletes pursuing defamation litigation, because the Court analyzed the necessity of a distinction between public and private figures.[21] One commentator summarized the reasons:

> [S]ince private individuals have less effective opportunities of rebuttal than do public figures and public officials, they are more susceptible to injury from defamation and the state's interest in protecting them is greater. . . . [P]rivate figures are more deserving of recovery because they have not voluntarily exposed themselves to the risk of harm from defamation. Finally, the Court stated that Gertz was not a public figure and that without "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public figure for all aspects of his life.[22]

B. SUBSEQUENT DECISIONS

While the Court attempted to set out clear standards for defamation in cases like *Sullivan, Butts,* and *Gertz*, the law has only become more confusing and complicated in subsequent decisions.[23] The Court has since handed down a number of decisions deciding the fate of defamation lawsuits, including whether a blatantly false statement can be defamatory[24] and whether any statement of opinion should be protected from defamation.[25]

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16. *Id.*

17. *Butts*, 388 U.S. at 149-55.

18. Travis S. Weber, *The Free Speech Protection Act of 2009: Protection Against Suppression*, 22 REGENT U. L. REV. 481, 491-92 (2010).

19. 418 U.S. 323 (1974).

20. *Id.* at 329-32.

21. *Id.* at 344-52.

22. Stacey L. Hayden, *Limited-Purpose Public Figures: Spence v. Flynt As an Illustration of the Need for A More Complete Test*, 1992 B.Y.U. L. REV. 827, 829 (1992) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

23. *See* Deeann M. Taylor, Dun & Bradstreet, Hepps *and* Milkovich*: The Lingering Confusion in Defamation Law*, 1992/1993 ANN. SURV. AM. L. 153, 200 (1993).

24. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (holding that blatantly false speech used in the form of satire was protected speech).

25. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (holding that opinions would not receive absolute immunity in defamation lawsuits).

The lower courts applying these decisions have dismissed athlete claims by labeling the athletes public figures, and determining that they have not met the actual malice standard.[26] These decisions are slowly becoming more problematic because, as the media world continues to expand, athletes are becoming more vulnerable to false statements and accusations that harm their reputations.[27] Courts seem unprepared to deal with the potential rise in defamation resulting from the Internet becoming the public's primary news outlet. The Supreme Court needs to address this issue to ensure athletes are not vulnerable to attacks that harm their reputations.

II. ATHLETE DEFAMATION CASES

A. ATHLETES AS PUBLIC FIGURES

Courts, with virtually no exceptions, have found professional athletes to be public figures.[28] Just as the court in *Vilma v. Goodell* labeled Jonathan Vilma a *public figure* with minimal analysis, courts throughout the United States have been similarly quick to label athletes as public figures, almost as a per se rule.[29] Arguably the most recognized sports defamation case, one which most articles writing on sports defamation examine[30], is the 1979 Third Circuit's holding in *Chuy v. Philadelphia Eagles Football Club*.[31] In *Chuy*, the court held that the plaintiff, a professional football player, was a public figure.[32] The court noted that professional players "generally" are considered public figures, but nevertheless considered other factors.[33] One factor was that he was a starting player on his team. Additionally, the player was frequently in the news because of a contract dispute at the time of the alleged defamatory statement.[34] However, the trend since this case has been that courts have considered athletes to be public figures regardless of the factors and circumstances surrounding their individual cases.[35] The following cases illustrate this trend.

In the 1984 case of *Holt v. Cox Enterprises*, the District Court for the Northern District of Georgia held that a college football player had become a "limited purpose public figure" when he participated in a game that obtained high public interest.[36] The allegedly defamatory articles in *Holt* contained comments concerning a football game that occurred 18 years prior to the article, in which the plaintiff had played as a member of the number-one-ranked team.[37] Even though 18 years had elapsed, the court held that "given the public's continued interest in the incident . . . Holt's status as a public figure was not so

26. *See e.g.*, Time, Inc. v. Johnston, 448 F.2d 378, 382 (4th Cir. 1971); Gomez v. Murdoch, 193 N.J. Super. 595, 597, 475 A.2d 622, 624 (App. Div. 1984); Bell v. Associated Press, 584 F. Supp. 128, 130 (D.D.C. 1984).

27. *See* Jonathan Deem, *Freedom of the Press Box: Classifying High School Athletes Under the Gertz Public Figure Doctrine*, 108 W. VA. L. REV. 799, 815 (2006).

28. *Id.* at 800.

29. *See* Vilma v. Goodell, 917 F.Supp. 2d 591, 596 (E.D. La. 2013); *see also* Time, Inc. v. Johnston, 448 F.2d 378, 382 (4th Cir. 1971); Gomez v. Murdoch, 193 N.J. Super. 595, 597, 475 A.2d 622, 624 (App. Div. 1984); Bell v. Associated Press, 584 F. Supp. 128, 130 (D.D.C. 1984).

30. *See* Deem, *supra* note 27, at 800.

31. Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979).

32. *Id.* at 1280.

33. *Id.*

34. *Id.*

35. *See* Deem, *supra* note 27, at 800.

36. Holt v. Cox Enterprises, 590 F. Supp. 408, 412 (N.D. Ga. 1984).

37. *Id.* at 410.

diminished that the press is afforded correspondingly diminished protection to comment on the incident and the controversy."[38]

The court in *Holt* reached two conclusions that stretch the Supreme Court decisions in *Sullivan, Gertz,* and *Butts* beyond their holdings. First, even though the case involved a plaintiff who was a college athlete, not a professional athlete, the court rejected the notion that the plaintiff's amateur status had any relevance to whether he was a public figure.[39] Under this reasoning, the court could hold that a five-year-old soccer player is a *public figure* if the media legitimately began reporting on her soccer league. The court could also hold that kids playing in the Little League World Series are public figures because the games are nationally televised.[40] Additionally, the court's conclusion that non-professional athletes like Holt "voluntarily" engage in highly publicized sporting events[41] is surprising. Under this reasoning, it is assumed that students choosing to play on a college sports team are able to predict when their games will be "highly publicized events."[42] This is not always the case. An athlete may choose to play for a team that has never had one of its games televised. However, if that team outperforms expectations, it may receive some media attention. A statement claiming the athletes on this team *voluntarily* engaged in a highly publicized sporting event does not seem accurate.

Second, the court held that Holt was a "limited purpose public figure," despite the fact that the allegedly defamatory comments were made about a game played eighteen years earlier, because the public maintained a "continued interest" in the incident.[43] The court's reasoning ignores the rationales the Supreme Court established for creating the *public figure* classification. Specifically, that public figures supposedly can defend themselves because they have access to the media.[44] However, a retired athlete, especially an athlete who has not played in over a decade, may not have adequate access to the media to address attacks on their reputation. The *Holt* opinion illustrates how lower courts have seemingly forgotten the rationales behind labeling an individual a public figure, and instead label athletes public figures because they received any amount of public spotlight at any time in their lives.

Courts have not stopped at merely labeling the athletes on the playing field public figures. College coaches, and even college athletic directors, have been labeled public figures for purposes of defamation lawsuits.[45] In *Moore v. University of Notre Dame*, the U.S. District Court for the Northern District of Indiana held that the offensive line coach for the University of Notre Dame was a public figure and therefore had to prove actual malice to win his defamation case against the University.[46] The District Court provided the following – startling – analysis: "[T]his court need not determine whether Moore was a

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38. *Id.* at 412.

39. *Id.* ("The court finds no merit in Holt's argument that his status as a non-professional distinguishes this case from other sports figure cases. By *voluntarily engaging* in a *highly publicized sporting event*, Holt necessarily attracted publicity." (emphases added)).

40. *See generally Full TV Listings*, Little League, http://www.littleleague.org/worldseries/tvlistingsFULL.htm (last visited Feb. 26, 2014) (providing a complete listing of all the current Little League World Series televised games).

41. *Holt*, 590 F. Supp. at 412.

42. *Id.*

43. *Id.* at 412.

44. *See* Gertz v. Robert Welch, Inc., 418 U.S. 395 (1974).

45. *See, e.g.*, Curtis Pub. Co. v. Butts, 388 U.S. 130, 162-63 (1967) (holding that a college athletic director was a public figure); Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975) (holding that a college track coach was a public figure).

46. Moore v. Univ. of Notre Dame, 968 F. Supp. 1330, 1336 (N.D. Ind. 1997).

public figure. The 'actual malice' standard applies so long as the allegedly defamatory statements relate to issues of public concern."[47] In this case, the plaintiff coach was suing about comments made over the reasons surrounding his termination as a coach, comments the court found were of such "public concern" as to warrant constitutional protection.[48]

The Notre Dame football program is popular and polarizing amongst fans and the media.[49] There is no denying that the program commands a great amount of public attention.[50] However, classifying the firing of a low-level college athletic coach like Moore as a matter of "public concern"[51]—so much so that it requires the press to have extra constitutional protection in reporting on the matter—is outrageous. A college athletic coach, particularly a lower-level assistant coach, is not someone who has any effect on the lives of the public beyond pure entertainment. The firing of an elected official who represents voters may affect citizens' rights and livelihoods, so a reasonable argument can be made that the press should have protection to report freely on such matters. The actual malice standard may be appropriate for a coach who also serves as a professor, or a coach fired after a publicly controversial issue (e.g., Jerry Sandusky). However, to claim the firing of an athletic coach has any such impact on the public is a statement that is simply false and unfounded, regardless of the team's popularity. Unfortunately the courts have interpreted the public figure doctrine as being a popularity analysis, and continue to treat individuals employed in athletics as public figures.

B. ACTUAL MALICE AND SPORTS JOURNALISM

The importance of classifying athletes as public figures may not be immediately apparent. Is it really a big problem to force an athlete to prove actual malice instead of a lesser burden? Or, should someone pursuing a defamation lawsuit should have to prove actual malice in any circumstance to ensure that freedom of the press is protected? Ultimately, the actual malice burden has proved too burdensome, becoming nearly impossible for an athlete to meet. The actual malice standard is not necessary to protect the constitutional guarantee of freedom of the press; instead, a change in the law is needed to adapt to the shift from print news to less reliable Internet news.

The *Sullivan* Court defined actual malice as: "with knowledge that it was false or with reckless disregard of whether it was false or not."[52] The first part of the *Sullivan* definition of actual malice, "with knowledge that it was false," is clear and self-explanatory, placing a very high burden on the plaintiff.[53] It is difficult for a plaintiff to prove a publisher knowingly printed a false statement; and, realistically, most publishers will not print statements they know to be false. The second part of the actual malice definition allows the plaintiff an opportunity to win a defamation lawsuit by proving the publisher was "reckless."[54] The question the second part of the definition presents to the court becomes: what constitutes *reckless disregard for the truth*? Assuming the plaintiff can prove a

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47. *Id.*

48. *Id.*

49. *See, e.g.*, Richard Sandomir, *COLLEGE FOOTBALL; Football Bedfellows: If Notre Dame Loses, NBC and ABC Do, Too*, N.Y. TIMES, Oct. 12, 1994, at B10.

50. *Id.*

51. *See Moore*, 968 F. Supp. at 1337.

52. Sullivan, 376 U.S. at 280.

53. *Id.*

54. *Id.*

publisher released false defamatory statements, what does the publisher have to prove to avoid being liable?

One suggestion is that the defamation defendant would at least have to show that they made a *reasonable* effort to confirm that what they were publishing was true. However, many courts have held that a failure to investigate the truthfulness of a statement does not constitute actual malice.[55] This interpretation has made it nearly impossible for the *public figure* defamation plaintiff to recover because even a lack of due diligence by a publisher into confirming the truth of their statements is not enough.[56]

This interpretation of *reckless disregard for the truth* presents an even greater problem for the modern day athlete. Courts have routinely held that the *actual malice* standard is a subjective standard focusing on the defendant's (publisher's) actual state of mind at the time the alleged defamatory statement was published.[57] Essentially, this interpretation means that unless a plaintiff can prove a publisher had reason to know that what they were publishing was false, there is no actual malice. A closer look at the recent trends in sports journalism demonstrates why this presents a major issue for the defamed plaintiff athlete.

Sports writers today heavily rely on anonymous *sources* as the backbone for printed stories.[58] A 2005 study showed that thirteen percent of front-page stories used anonymous sources throughout the United States.[59] The fact that sports writers are relying on sources, named or anonymous, for the information they publish opens the door to a plethora of issues. First, given the subjectivity that has been applied to the actual malice standard,[60] defendants can simply show that they had reason to believe their *source* was credible and be off the hook for defamation. This fact not only gives unnecessary protection to the defendant, but opens the door for publishers and sources alike to fabricate stories for their own self-interest.[61] Writers including the "*New York Times*' Jayson Blair, *The Washington Post*'s Janet Cooke, *The New Republic*'s Stephen Glass and *USA Today*'s Jack Kelley" are among a list of journalists who were caught "fabricat[ing] stories and attributing quotes to sources, both anonymous and named."[62] If writers at reputable newspapers such as the *Times*, *Post*, and *USA* Today have been caught fabricating stories through *sources*, then might the growing number of bloggers and social media *journalists* fabricating stories in a similar fashion be at an alarmingly higher rate?[63]

Whether it is a jealous teammate, a disgruntled fan, or an angry coach, there will always be someone willing to be a *source* for publishers, with the goal of harming an

55. *See, e.g.*, Austin v. Inet Technologies, Inc., 118 S.W.3d 491, 496 (Tex. App.—Dallas 2003, no pet.); Bunton v. Bentley, 176 S.W.3d 1, 7 (Tex. App.—Tyler 1999, pet. granted); State ex rel. Suriano v. Gaughan, 198 W. Va. 339, 342, 480 S.E.2d 548, 551 (1996).

56. *See Proving Fault: Actual Malice and Negligence*, DIGITAL MEDIA LAW, http://www.dmlp.org/legal-guide/proving-fault-actual-malice-and-negligence.

57. *Id.*

58. *See* Don Ohlmeyer, *Root of All Evil?*, ESPN (May 25, 2010), http://sports.espn.go.com/espn/columns/story?columnist=ohlmeyer_don&id=5220492.

59. *Id.*

60. *See* E.H. Schopler, *Libel and Slander: What Constitutes Actual Malice, Within Federal Constitutional Rule Requiring Public Officials and Public Figures to Show Actual Malice,* 20 A.L.R. 3d 988 (1968).

61. *See* Harvey Araton, *Exposing the Truth About Exposing the Truth*, N.Y. TIMES, March 2, 2009, http://www.nytimes.com/2009/03/03/sports/baseball/03araton.html?_r=0.

62. Ohlmeyer, *supra* note 58.

63. *See generally* Roy Morejon, *How Social Media is Replacing Traditional Journalism as a News Source*, SOCIAL MEDIA TODAY, June 28, 2012, *available at* http://socialmediatoday.com/roymorejon/567751/how-social-media-replacing-traditional-journalism-news-source (highlighting changes in news delivery due to social media).

athlete's reputation.[64] Sometimes these sources will produce factual stories.[65] However, these sources can also produce false and vengeful stories. In November of 2012, *USA Today* ran a story with information from an "anonymous source" concerning an NFL player named Richard Sherman, who had been suspended from the league for using a banned substance.[66] The article stated that "[t]he person, who spoke to USA TODAY Sports on condition of anonymity because neither Sherman nor his agent have discussed the details of the case publicly, said Sherman says he accidentally drank from a bottle into which a teammate poured a crushed Adderall pill."[67] Sherman denied this allegation[68], and ultimately his story proved true when he won an appeal against the NFL that showed his test results were false.[69] Despite this appeal victory, it is unlikely Sherman would be able to make out a case against *USA Today* for defamation despite the fact it printed a false story about him. As an NFL player, Sherman, like Vilma, would be considered a public figure, requiring him to prove actual malice.[70] *USA Today* would be able to defend itself by saying it believed the *anonymous source*, and thus acted with no actual malice in printing the story.

Precisely how often these *sources* are providing publishers with knowingly false stories is unknown. But, even if publishers often receive accurate information and stories from sources, publishers should still have a duty of due diligence to confirm that the received information is true, especially if the story involves publishing negative information, or making a negative accusation, against someone other than a public official, such as an athlete. Our criminal justice system is founded on the principle of "innocent until proven guilty."[71] However, in the court of public opinion, particularly in the world of sports, athletes are often assumed guilty any time an accusation is made against them.[72] This fact is highlighted by a close look at the recent voting results for Major League Baseball's Hall of Fame.[73] Many players who have never been found to be steroid users, or even implicated as a suspected user by any reputable source, are still losing out on Hall of

64. *See, e.g.*, Doug Ferguson, *Phil Mickelson on Cheating Accusation: "I Was Slandered,"* HUFFINGTON POST, Jan. 30, 2010, *available at http://www.huffingtonpost.com/2010/01/30/phil-mickelson-on-cheatin_n_443361.html* (illustrating a professional golfer who falsely accused another competitor of cheating); Toni Monkovic, *Tebow Expresses Disappointment at Being Called a Quitter*, N.Y. Times, Dec. 27, 2012, http://fifthdown.blogs.nytimes.com/2012/12/27/tebow-expresses-disappointment-at-being-called-quitter. (concerning a professional quarterback defending himself against accusations by media sources about whether he quit on his team).

65. *See, e.g.*, Mike Adams, *Lance Armstrong Empire Implodes Under Mountain of Lies, Intimidation, Doping and Betrayal*, NATURAL NEWS, Oct. 18, 2012, http://www.naturalnews.com/037591_Lance_Armstrong_doping_NIKE.html.

66. Mike Garafolo, *Sherman's Adderall Defense: Accidently Drank it*, USA TODAY, November 26, 2012, http://www.usatoday.com/story/sports/nfl/2012/11/26/richard-sherman-adderall-suspension-appeal/1728385/.

67. *Id.*

68. Chris Sullivan, *Sherman Denies Accidental Ingestion Report*, Nov. 27, 2012, http://mynorthwest.com/275/2138261/Sherman-denies-accidental-ingestion-report.

69. Judy Battista, *Seattle Player Wins Appeal of Drug Test*, N.Y. TIMES, Dec. 27, 2012, *http://www.nytimes.com/2012/12/28/sports/football/nfl-roundup.html.*

70. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

71. Terese L. Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in A Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 208 (1991).

72. *See, e.g.*, Joe Nocera, *Guilty Until Proven Innocent*, N.Y. TIMES, Jan. 20, 2012, http://www.nytimes.com/2012/01/21/opinion/nocera-guilty-until-proved-innocent.html?_r=0; STUART TAYLOR JR. & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2008).

73. *See* Nate Silver, *Suspicion of Steroid Use Could Keep Bagwell and Piazza Out of Hall*, Jan. 8, 2013, *at http://fivethirtyeight.blogs.nytimes.com/2013/01/08/suspicion-of-steroid-use-could-keep-bagwell-and-piazza-out-of-hall* (alleging that hall of fame "voters seem[] to be punishing . . . players for mere suspicion of steroid use").

Fame votes because of the general public's assumptions about steroid use.[74] While it would be a debatable issue as to whether losing Hall of Fame votes would be considered *damages* in a court of law, the Hall of Fame illustrates how athletes are often assumed guilty merely on the basis of public suspicions.

III. THE CONSTITUTIONAL ARGUMENT

Should professional athletes have a high burden to overcome in order to be successful in defamation cases? This section presents the reasons courts have held in favor of the defendant in sports defamation cases and then provides counterarguments addressing the Court's specific concerns.

A. THE SUPREME COURT'S CONSTITUTIONAL REASONS FOR PROTECTING THE PRESS

The primary argument in favor of the courts' defamation opinions regarding athletes can be found in the First Amendment of the U.S. Constitution: the freedom of the press.[75] The relevant portion of the First Amendment reads: "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."[76] The *Sullivan* Court, in analyzing why the public official doctrine was necessary, stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[77]

As noted in the introduction,[78] the Court later found that these constitutional guarantees required a rule that also applied to public figures[79] and matters of legitimate public concern.[80]

The most important question that must be examined in determining whether the actual malice standard is appropriate is why this burden is "required to guarantee constitutional safeguards." In other words, does an athlete really have to prove *actual malice* to make sure that a publisher's constitutional right is protected? The Supreme Court has given two primary reasons why the standard is necessary to protect the freedom of the press. The first reason is that an *actual malice* standard is necessary to avoid publishers "self-censorship" for fear of libel lawsuits.[81] The *Sullivan* Court stated "[a]llowance of the defense of truth,

74. *Id.*

75. U.S. CONST. amend. I.

76. *Id.*

77. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

78. *See supra* Introduction.

79. Curtis Pub. Co. v. Butts, 388 U.S. 130, 130 (1967).

80. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751 (citing Gertz v. Robert Welsh, Inc., 418 U.S. 323).

81. *See Sullivan*, 376 U.S. at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable 'self-censorship'"). I have omitted from this Note the *Sullivan* Court's discussion of reasons the press should be able to freely report on political matters, since that discussion does not apply to the issue of athletes.

with the burden of proving it on the defendant, does not mean that only false speech will be deterred."[82] If plaintiffs could win a defamation case by simply proving that a published statement made about them was false and defamatory, then the press would lose their constitutional *right*; the press would be afraid to print stories they believed were true because they had not confirmed the statements as true, or would be too worried about the litigation costs of publishing the statements.[83] While the publisher should not have the burden of proving truth, would a publisher otherwise be so concerned about litigation that it would be unfairly censored? In a situation where a publisher has a truly noteworthy story, it seems there would be a greater incentive to verify the information rather than a decision to censor the story.

The second reason the Court has articulated for the actual malice standard is that public figures have adequate access to the media to defend themselves against potentially false accusations.[84] The Court in *Gertz* reasoned:

> Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.[85]

B. COUNTER-ARGUMENT #1: THE SUPREME COURT HAS GREATLY EXAGGERATED THE "FEAR" PUBLISHERS WOULD FACE WITHOUT THE PUBLIC FIGURE AND ACTUAL MALICE DOCTRINES

Focusing on several main points, the reasoning behind the public figure and actual malice doctrines is flawed. First, why would requiring a publisher to consider *censoring* be an issue if the publisher had been unable to confirm specific facts in the story? A publisher should be required to verify a harmful fact, particularly a fact that has the potential to cause damage to someone. It is hard to believe that the framers of the Constitution intended the First Amendment to give publishers the *freedom* to publish potentially false statements that may harm others without putting in at least a reasonable investigation as to whether the facts were true. In fact, procedurally similar requirements are seen in several other portions of the Bill of Rights, such as the probable cause requirement in the Fourth Amendment[86], or the Due Process clause of the Fifth Amendment.[87] In the case of the *anonymous* source, the Sixth Amendment right to confront the witness in a criminal action indicates the Framers may not have approved of such behavior.[88] A common sense reading of the Bill of Rights seems to indicate that the Framers' intention of *freedom of the press* was not to allow publishers freedom from liability if they were to publish false statements.

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82. *Sullivan*, 376 U.S. at 279.

83. *Id.* ("[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.")

84. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974); Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967).

85. *Gertz*, 418 U.S. at 344.

86. U.S. CONST. amend. IV.

87. U.S. CONST. amend. V.

88. U.S. CONST. amend. VI.

Moreover, the notion that publishers will be hesitant to publish stories because of the fear of lawsuits and litigation costs is misguided and fails to consider other relevant factors. If a published statement is false and harms someone, the publisher should expect to be responsible for compensating the wronged person. While the argument that publishers will have to think twice before publishing a story is understandable, this argument fails to consider the numerous factors that athletes (and any public figures) have to balance when deciding whether to pursue a defamation lawsuit. One factor is litigation costs, which are a concern for the plaintiff in a defamation case just as they are for the defendant.[89] Although many will not be sympathetic to the financial concerns of athletes given the amount of money that athletes are making in today's market[90], this Note has already highlighted cases involving college athletes[91], coaches[92], and athletic directors[93] who would have had to face these financial concerns. Another factor is that even when a false statement is published about an athlete, there is still the difficult burden of proving damages occurred because of the statement.[94] The fact that the athlete has to demonstrate damages may prevent the pursuit of defamation lawsuits.

In addition to having to prove damages, another factor the athlete must prove is falsity of the statement.[95] Proving a statement is false presents several problems for defamation plaintiffs that may prevent them from filing a lawsuit. The first, and most obvious, issue is that under certain circumstances it may not always be possible for the plaintiff to prove the statement is false. For instance, short of having voluntarily given blood for testing at a specific time, how could an athlete prove he or she was not doing steroids if accused of doing so by a newspaper? Additionally, an athlete who files a defamation lawsuit, and ultimately fails to prove the falsity of the statement, may receive far worse backlash from the public than if they had decided not to file a lawsuit at all. Further, by filing a lawsuit and attempting to prove falsity, athletes could open their private lives to scrutiny. In the course of a lawsuit, athletes may risk other matters of their private lives coming out that they did not want in the public eye. This risk can deter athletes from filing a defamation lawsuit even when they have a valid claim for damages.

Athletes must also consider whether they want to have the defamatory statement plastered in the news over the course of weeks, or even months by filing a lawsuit.[96] The ESPN network alone features three daily talk shows dedicated solely to debating the day's "hottest" sports topics, and a sports-related defamation lawsuit is almost certainly going to be discussed as a hot topic.[97] Additionally, social media provides platforms such as blogs,

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89. Andrew K. Craig, *The Rise in Press Criticism of the Athlete and the Future of Libel Litigation Involving Athletes and the Press*, 4 SETON HALL J. SPORT L. 527, 546 (1994).

90. Mihir Bhagat, *Do Professional Athletes Get Paid Too Much Money?*, BLEACHER REPORT, March 21, 2010, http://bleacherreport.com/articles/366795-do-athletes-get-paid-too-much-money.

91. *See* Holt v. Cox Enterprises, 590 F. Supp. 408, 409 (N.D. Ga. 1984).

92. *See* Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975).

93. *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 162-63 (1967).

94. Craig, *supra* note 89, at 547. *See also* RESTATEMENT (SECOND) OF TORTS § 558 (1977).

95. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

96. *See* Matt Powell, *Suing for Slander, Are You Really Prepared?*, Oct. 17, 2012, *available at* http://mattlaw.com/blog/personal-injury/suing-for-slander-are-you-really-prepared/.

97. ESPN regularly airs the sports based talk shows *First Take*, *Around the Horn*, and *Pardon the Interruption*, among other shows devoted almost exclusively to debating daily topics, in their daily rotation. *See ESPN On Air*, ESPN, http://sports.espn.go.com/espntv/espnGuide (providing a full listing of daily shows). These shows are designed to stir up controversy surrounding athletes in order to gain ratings, oftentimes with their hosts making outrageous accusations about athletes that are close to defamatory in their own right. *See* Mark Feinsand, *Yankees Captain Derek Jeter suggests Skip Bayless for HGH Usage*, N.Y. DAILY NEWS, Aug. 22, 2012, *available*

Facebook, and Twitter allow the public to publish their uncensored thoughts against athletes and celebrities at all hours.

One commentator, Andrew Craig, describes the stories of two athletes who declined to pursue defamation lawsuits.[98] The first story involves arguably the most wealthy and prominent athlete of all time, Michael Jordan.[99] The second story involves a notably less popular and less wealthy athlete, Tonya Harding.[100] Both stories highlight the arguments made in this Note. Craig summarizes the Michael Jordan story as follows:

> In the instance of Michael Jordan, his reasons for not suing over statements connecting his gambling to his father's murder can be . . . inferred. The cost of bringing a libel claim against increasingly aggressive press defendants, in both time and money, is prohibitive. . . . Finally, despite the fact that Jordan's gambling probably had nothing to do with his father's death, he may not have wanted his private matters brought up at trial.[101]

While it seems unlikely that an athlete as wealthy as Michael Jordan would worry about the financial concerns of a lawsuit,[102] this story does demonstrate the fact that the concern of private information reaching the public is a deterring factor in athletes filing defamation lawsuits.

Tonya Harding's story illustrates the monetary factors:

> The Tonya Harding case presents the most illustrative example of why public figures do not sue for libel, and how the freedom of the press remains sufficiently protected. Despite her plea of guilty to charges stemming from the hindering of prosecution, she could have sued over the press' linking her to the planning and execution of the attack [of another athlete]. Unlike Jordan . . . Harding is not wealthy, and her potential pecuniary loss from these allegations is both substantial and quantifiable. Thus, one can infer that the reason that she did not file suit is because of the difficulty in proving actual malice and falsity in libel cases, combined with the high cost of litigation and a desire to avoid further embarrassment.[103]

The inferences made in these passages are admittedly speculative, as neither Jordan nor Harding have ever publicly admitted their reasons for not pursuing defamation cases. However, it appears likely that the factors highlighted in Craig's article were influential in deciding not to pursue litigation. As the Supreme Court justifies the public figure and actual malice doctrines by noting the *burdens* the press would face without the doctrines, the Court should also consider the *burdens* that these doctrines place on athletes (and other public figures) harmed by a defamatory statement. Athletes have a number of concerns and hurdles to overcome in winning a defamation lawsuit, so any fear that excessive or frivolous lawsuits would arise without the actual malice standard is simply unfounded. Therefore,

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at http://www.nydailynews.com/sports/baseball/yankees/yankees-captain-derek-jeter-suggests-skip-bayless-check-hgh-usage-article-1.1142392 (reporting on a story where *First Take* host Skip Bayless questioned whether Yankees shortstop Derek Jeter was taking steroids).

98. Craig, *supra* note 84, at 548-49.

99. *Id.*

100. *Id.*

101. *Id.* at 549.

102. *See Michael Jordan Net Worth*, CELEBRITY NET WORTH, http://www.celebritynetworth.com/richest-athletes/nba/michael-jordan-net-worth/ (estimating Jordan's net worth to be $650 million).

103. *Id.*

removing the actual malice standard should not give publishers a greater reason to fear litigation.

C. COUNTER ARGUMENT #2: THE SUPREME COURT IS MISTAKEN WHEN IT STATES THAT PUBLIC FIGURES CAN DEFEND THEMSELVES THROUGH THE MEDIA

The most glaring flaw in the majority of Supreme Court defamation decisions is the belief that public figures have "access to the channels of effective communication and hence have a . . . realistic opportunity to counteract false statements."[104] In simpler words, because of their fame and notoriety, athletes (at least those who are labeled public figures) should be able to defend themselves against false claims because they have the ability to get their side of the story out to the public. This Note has already illustrated how the *access to media* reasoning is flawed and simply not true, and that athletes are considered guilty on mere accusations alone.[105] Without regard to how athletes were perceived when *Sullivan*, *Butts*, or *Gertz* were decided, athletes today cannot defend themselves in the media simply by denying a false allegation. A recent story illustrates this point.

Roger Clemens is considered one of the greatest pitchers in the history of Major League Baseball.[106] In 2007, Senator George Mitchell released a report (hereinafter "The Mitchell Report") based on an investigation he conducted into the use of steroids and other performance enhancing drugs in Major League Baseball.[107] The Mitchell Report named Clemens as a player who had taken banned steroids on multiple occasions during his baseball career.[108] The accusations came as the result of statements made by Clemens' former trainer Brian McNamee, who claimed he injected Clemens with steroids.[109] On February 13, 2008, Clemens denied these allegations before the House Committee of Oversight and Government Reform at a Congressional Hearing on the subject in an attempt to clear his name from the steroid accusations.[110] But the government did not believe Clemens, and the U.S. Attorney General indicted Clemens with "one count of obstruction of Congress, three counts of making false statements and two counts of perjury in connection with his February 2008 testimony."[111]

In the years after the Mitchell Report but prior to his perjury trial, Clemens' reputation was publicly tarnished and he was widely regarded as a guilty "steroid user."[112] Just as the

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104. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

105. *See* Nocera, *supra* note 72.

106. *See* Dave Studeman, *The Best Pitchers of All Time*, THE HARDBALL TIMES (Feb. 8, 2007) http://www.hardballtimes.com/main/article/the-all-time-best-pitchers (listing Clemens as the third-best pitcher of all time).

107. GEORGE MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (Dec. 13, 2007), *available at* http://files.mlb.com/mitchrpt.pdf.

108. *Id.* at 169-172.

109. *Id.* at 169.

110. *See* 154 CONG REC D 134, 138 (LEXIS); Dave Sheinin & Spencer Hsu, *Pitching Legend Roger Clemens is Indicted on Charges of Lying to a Congressional Committee*, THE WASHINGTON POST, Aug. 20, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/19/AR2010081904125.html

111. Sheinin, *supra* note 110.

112. *See, e.g.*, Jacob Sprecher, *Roger Clemens is Guilty: Get Over It*, SYNTHESIS (Feb. 13, 2008), http://synthesis.net/roger-clemens-is-guilty-get-over-it/; KP Wee, *Roger Clemens Fallout: Legacy? What Legacy?*, BLEACHER REP. (Feb. 24, 2008), http://bleacherreport.com/articles/10847-roger-clemens-fallout-legacy-what-

Supreme Court opined in *Butts* and *Gertz*, Clemens as a *public figure* had access to the public through media sources, which he used to proclaim his innocence.[113] Clemens continued to maintain his innocence and four years later prevailed in court by being found not guilty of perjury.[114] Clemens did indeed have access to the media to defend himself as the Supreme Court stated athletes would. However, the cold truth—a truth ignored by the Supreme Court—is that despite his supposed victory, Clemens is still overwhelmingly viewed as a guilty steroid user by the media and public.[115]

The Clemens story is a unique case that differs in many aspects from the athlete defamation cases that have been discussed in this Note. Although Clemens did go on to pursue a defamation action against his former trainer, which was dismissed due to his former trainer's statements being ruled as "protected,"[116] the Clemens story demonstrates that it should not be presumed that athletes can adequately defend themselves through the media. Athletes have obtained a reputation among many as being spoiled, overpaid, and privileged, which makes them the target of public outcry in the event of the slightest negative allegation or accusation.[117] Clemens' case proves that even defending oneself successfully in court may not convince the public that statements made about an athlete's reputation may be false.[118]

IV. THE SEARCH FOR A SOLUTION

The rise of television, the Internet, and social media is changing the way sports journalism is being conducted.[119] Because anyone with access to a computer can now be a journalist, the standards of professional conduct in the industry are dramatically decreasing.[120] When the Supreme Court handed down the opinions of *Sullivan* and *Butts*, print media reigned supreme as the premiere sources for sports news.[121] These same print sources are now virtually obsolete as news sources.[122] A communications commentator summarized the current demand for news in the following way:

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legacy.

113. Jack Curry, *Clemens Reasserts His Innocence*, N.Y. TIMES, May 13, 2009, at B14, *available at* http://query.nytimes.com/gst/fullpage.html?res=9900EFDA123EF930A25756C0A96F9C8B63.

114. Juliet Macur, *Clemens Found Not Guilty of Lying About Drug Use*, N.Y. TIMES, Jun. 18, 2012, at A1, *available at* http://www.nytimes.com/2012/06/19/sports/baseball/roger-clemens-is-found-not-guilty-in-perjury-trial.html?pagewanted=all&_r=1&.

115. *See* Tom Verducci, *Despite Verdict, Clemens Still on Trial in Court of Public Opinion*, SPORTS ILLUSTRATED, June 19, 2012, http://sportsillustrated.cnn.com/2012/writers/tom_verducci/06/19/roger.clemens.verdict/index.html ("The acquittal for Clemens changes almost nothing about his baseball legacy other than to keep the taint from worsening.").

116. Clemens v. McNamee, 608 F.Supp. 2d 811, 824 (S.D. Tex. 2009), aff'd, 615 F.3d 374 (5th Cir. 2010).

117. Andrew K. Craig, *The Rise in Press Criticism of the Athlete and the Future of Libel Litigation Involving Athletes and the Press*, 4 SETON HALL J. SPORT L. 527, 546 (1994).

118. Tyler Kepner, *Bonds (and Everyone) Strikes Out*, N.Y. TIMES, Jan. 10, 2013, at A1 (concerning players, including Roger Clemens, who were not elected into Hall of Fame because of steroid accusations).

119. Sada Reed, *Sports Journalists' Use of Social Media and Its Effects on Professionalism*, 6 J. OF SPORTS MEDIA 43, 49 (2011).

120. Ronnie Ramos, *Four Ways Social Media has Deteriorated Traditional Journalism*, NAT'L SPORTS JOURNALISM CENTER. (Feb 29, 2012, 3:09 PM), http://sportsjournalism.org/sports-media-news/four-ways-social-media-has-deteriorated-traditional-journalism/.

121. Drew Hancherik, *Tweet Talking: How Modern Technology and Social Media are Changing Sports Communication*, 2 ELON J. OF UNDERGRADUATE RESEARCH IN COMM. 15, 16-18 (2011).

122. *Id.* at 18.

> With the demand for up-to-the-minute news and information increasing daily, reporters are under pressure to break news quickly or risk having their story published first by another media outlet. Often, this rush leaves reporters with an ethical dilemma: in the name of breaking news, should a story be published before it can be verified by multiple credible sources?[123]

Unfortunately, most reporters have answered this ethical dilemma by publishing stories before they could verify the story with a credible source.[124]

The treatment of social media postings, such as "tweets," is an area of the law still being analyzed by courts.[125] Clearly, though, the current defamation standards seem ill-equipped to handle the potential claims that come from the lower standards developing in modern journalism.[126] "As communication has evolved, the defamation standard has remained stagnant. In the context of professional sports, the dated approach to defamation of a public figure has, and will continue to, pose problems when the alleged defamation takes place on social media sites like Twitter."[127] The ultimate question becomes: how should defamation law be reformed to properly and fairly handle the *new age* of defamation lawsuits?

V. PROPOSAL: ELIMINATE OR REFORM THE PUBLIC FIGURE ACTUAL MALICE STANDARD

The first reform the Court needs to adopt is overturning the *Butts* public figure doctrine.[128] In 1967 when *Butts* was decided, the Court may not have foreseen that such a large portion of the population would qualify as public figures. Today, especially in the world of sports, virtually anyone can become a public figure without any voluntary act of their own. With some high school sports now being televised on cable television, should the courts classify these high school athletes as public figures, who can be defamed without a remedy absent proof of actual malice?[129] If *yes*, does the trend continue if middle school sports become televised? How about youth sports leagues? Would a ten-year-old football player be considered a public figure if her parents posted a clip on YouTube of her game that was then viewed by more than one million people?[130] Based on precedent, there is a strong case that the child would qualify as a "limited public purpose figure."[131] The difficulty of determining who is a public figure in an age where anyone can become a star in the blink of an eye is an impossible task.

In addition to the difficulty of determining who is a public figure, the reasons the Court laid out in *Gertz* for distinguishing a public figure from a private citizen are

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123. *Id.*

124. *See id.* at 15, 18-19 (providing examples of incidents where a sports reporter used social media to quickly transmit an unverified report that proved to be false).

125. Joe Trevino, *From Tweets to Twibel: Why the Current Defamation Law Does Not Provide for Jay Cutler's Feelings*, 19 SPORTS L. J. 49, 69 (2012).

126. *Id.*

127. *Id.*

128. Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967).

129. *See* Deem, *supra* note 27, at 815.

130. *See 9 Year Old Girl Football Star – Sam Gordon – Football Player Highlights & Footage*, YOUTUBE, http://www.youtube.com/watch?v=cdIOOY43HWs.

131. Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 (1974).

flawed.[132] The *Gertz* Court held that public figures have a better chance of defending themselves because they have access to the media to do so, and thus private citizens need more protection than public figures.[133] This essay has already laid out examples showing that public figures, particularly athletes, are not able to adequately defend themselves by proclaiming innocence through the media, or even winning in a court of law.[134] Moreover, the *Gertz* Court reasoning is clearly no longer applicable in modern society:

> Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.[135]

Through social media and websites such as YouTube, anyone has the ability to attain "prominence" and popularity today,[136] even with no intent to do so. Given the difficulty of classifying people as public figures, combined with the flawed reasons for a need to conduct such an inquiry, the Supreme Court must drop the public figure classification in defamation lawsuits.

In connection with the need to dispose of the public figure doctrine is the need to drop the *actual malice* standard as well. The actual malice standard, as already demonstrated, is virtually impossible to meet, with modern news sources that obtain information from less than reliable sources.[137] The actual malice standard, requiring a subjective analysis of the publisher's state of mind, unnecessarily lengthens and complicates defamation lawsuits. The simple solution to this problem is to require a defamation plaintiff to prove that a false statement was made about her that resulted in quantifiable damage.

Supreme Court Justice Byron White advocated this position in his concurring opinion for *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[138] Justice White was a member of the majority opinion in *Sullivan*.[139] However, he publicly voiced his doubts with the *Sullivan* holding in his *Greenmoss* opinion, stating that *Sullivan* was the "first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander."[140] White acknowledged that criticism of public officials is an essential part of the freedoms that have been established in this country.[141] However, he reasoned

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132. *Id.* at 344-52.

133. *Id.* at 344.

134. Verducci, *supra* note 111.

135. Gertz, *supra* note 126, at 345.

136. *Id.*; *see* Zachary Pincus-Roth, *New Media: YouTube Creative Artists Pride Themselves on Being a Separate Breed*, L.A. TIMES, Sep. 19, 2010, *available at* http://articles.latimes.com/2010/sep/19/entertainment/la-ca-video-stars19-20100919.

137. Drew Hancherik, *Tweet Talking: How Modern Technology and Social Media are Changing Sports Communication*, 2 ELON J. OF UNDERGRADUATE RESEARCH IN COMM. 15, 16-18 (2011).

138. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 765 (1985) (White, J., concurring).

139. New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).

140. *Greenmoss*, 472 U.S. at 766. Justice Burger, in a separate concurring opinion, also agreed that the holding in *Sullivan* needed to be re-examined by the Court. *Id.* at 764.

141. *Id.* at 767.

that these "freedoms" were not prevented in any way by prohibiting the publishing of false statements.[142] "On the contrary, erroneous information frustrates these values."[143]

The Supreme Court, even in opinions that are problematic for defamation plaintiffs, has held that citizens have a basic right to protect their name and reputation.[144] By requiring a showing of actual malice, the Court has essentially told the public that some false statements are acceptable.[145] The *Gertz* court provides a confusing and seemingly contradictory rationale: "Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."[146]

This reasoning does not hold true in today's society. The harm that one false statement can have on a person's reputation is much greater now than it was in the past; any news can turn into thousands of social media posts within a matter of minutes.[147] In 1974, when *Gertz* was decided, most people received their news by reading the morning newspaper, but people today get the news off the Internet, or even have it delivered straight to their smartphone the minute the news breaks,[148] leaving no time for a *public figure* to have a chance to defend herself against a false statement. Thus, the modern day plaintiff forced to prove actual malice is left with no legitimate way to defend her reputation unless she can achieve the near impossible task of proving that the publisher of the defamatory statement had *actual malice*.

Justice White, even in 1985, recognized the near impossible task facing defamation plaintiffs trying to protect their reputations in the media.[149] Speaking to the contention that a public figure could deny or clarify the statements in the media, Justice White stated: "[t]hat is a decidedly weak reed to depend on for the vindication of First Amendment interests - it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."[150] As the example of Roger Clemens illustrates, this statement is even more true today than it was at the time of *Greenmoss*.[151] Athletes are often considered guilty within minutes of a defamatory statement hitting the newsfeed, sometimes before they themselves are even aware of the statement.

For instance in 2006, three Duke Lacrosse players were arrested on rape charges.[152] Assuming their guilt, despite their repeated public statements of innocence[153], the media

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142. *Id.*

143. *Id.*

144. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

145. *Id.*

146. *Id.* at 340.

147. *See, e.g.*, Samantha Murphy Kelly, *Twitter Breaks News of Whitney Houston Death 27 Minutes Before Press*, MASHABLE (Feb. 12, 2012), *http://mashable.com/2012/02/12/whitney-houston-twitter/* (describing how one published twitter statement announcing Whitney Houston's death turned into 10,000 "re-tweets" in a matter of 27 minutes).

148. *See* Jefferson Graham, *Enter a Whole New World Through Your Phone*, USA TODAY, May 13, 2005, at B1.

149. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 768-69 (1985) (White, J., concurring).

150. *Id.*

151. *See supra* Part III.C.

152. DON YAEGAR, IT'S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED 182 (2007).

published reports destroying their reputations, and the community turned against the players.[154] University faculty, assuming their guilt, failed them out of classes, kicked them off the lacrosse team, and ultimately expelled them from school.[155] The charges, carried out by a dishonest prosecutor with the help of a corrupt law enforcement officer, were found to be without merit and dropped completely.[156] While this was not a defamation case, it provides yet another example of how athletes are unable to defend their reputations from being destroyed through the media, which is why the actual malice requirement needs to be dropped and replaced with the simple solution of allowing a plaintiff to prove that a harmful statement is false.

There are legitimate concerns for those opposed to dropping the public figure and actual malice doctrines. There may be situations, in certain circumstances, where a publisher has to self-censor a story that might be completely true. However, to ensure that citizens have a remedy to protect their reputations from false attacks, particularly in a time where news reporting has become unreliable, publishers need to have some pressure to confirm their stories. There also may be concerns that the courts will be flooded with excessive lawsuits from athletes and other *public figures* who no longer have to prove actual malice. This fear is unfounded, however, as there are still many burdens for these potential plaintiffs to overcome when considering whether to file a lawsuit. An athlete will still need to prove that what was published is false.[157] Athletes will also need to find a way to show that they suffered quantifiable damages.[158] These burdens, combined with the fact that most athletes would rather not deal with the media attention that comes with filing a lawsuit, support the conclusion that eliminating the actual malice requirement will not result in a significant increase in defamation lawsuits.

The press, the courts, and the public need a clear rule for defamation cases. The solution is to establish a simple rule: any statement that harms someone and is proven to be false is defamation. This rule would not infringe on the freedom of the press, because the press is still is equipped with near absolute immunity to comment on and criticize public officials and figures in the form of opinions.[159] That is, the press will only be liable for factually false statements. Additionally, the courts will be relieved from ruling on the complicated question whether someone classifies as a public figure, and if so, trying to determine a publisher's state of mind at the time the statement was published. Instead, the courts will rule on the much simpler questions of whether a statement was true or false, and if false, whether the statement caused any quantifiable harm.

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153. *Id.* at 177.

154. *Id.* at 83-85.

155. *Id.* at 120-30.

156. *Id.* at 277 (highlighting that the prosecution even went as far as announcing that the players were innocent, which analysts later described as "absolutely rare.")

157. Philadelphia Newspapers v. Hepps, 475 U.S. 1134 (1986).

158. Earl L. Kellett, *Proof of Injury to Reputation as a Prerequisite to Recovery of Damages in Defamation Action – Post-Gertz Cases*, 36 A.L.R .4th 807 (1985). The Supreme Court has left it up to the states to decide whether a showing of injury to one's reputation is a prerequisite to recovering for defamation. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). I would support making this a requirement in all states in order to prevent frivolous defamation lawsuits.

159. The distinction between fact and opinion in defamation actions is somewhat unclear after the Supreme Court holding in *Milkovich v. Lorain Journal Co.*. 497 U.S. 1 (1990). Unfortunately, it is unlikely that any bright-line rule can be established to determine what is fact and what is opinion, leaving lower courts with the responsibility of ruling on the question in defamation cases. *See* 1 LAW OF DEFAMATION § 6:27 (2d ed.) (discussing examples of state court decisions when a question of fact or opinion was presented in a defamation case).

CONCLUSION

The case of NFL linebacker Jonathan Vilma involves many nuances and complications beyond defamation law.[160] Because Vilma is part of the NFL players union, there are issues in the case involving antitrust law and complicated civil procedure questions.[161] However, Vilma's case is a recent example of how an athlete can be left without protection or a remedy when his reputation is tarnished under current defamation law. The facts of the case are still unclear,[162] but if Vilma could prove that he was falsely accused of running a "bounty program," then he should not be prevented from receiving compensatory damages simply because the NFL believed its own accusations to be true.[163]

The Court in *Sullivan* was protecting "the press," which, in the 1960s, primarily consisted of reputable newspaper companies.[164] The concern over these newspapers regularly publishing false and harmful statements about public figures was not as substantial as it is today. Anyone in the modern age of the Internet and social media can technically be *the press*. Everyone has the ability to post up to the minute news with the click of a button. News sources are no longer limited to highly reputable companies that can be relied upon for factual statements. It is time for the law to catch up with modern times and protect future victims of defamatory comments. The solution is simple: if a publisher makes a false statement of fact that harms another person, the publisher is guilty of defamation.

"Hiding hatred makes you a liar; slandering others makes you a fool."[165] We are taught at a young age that lying is bad and can be hurtful. It is time for our legal system to recognize this fundamental teaching in regards to all of our citizens, by modernizing defamation law with the removal of the archaic public figure and actual malice standard.

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160. Vilma v. Goodell, 917 F.Supp.2d 591 (2013).

161. *Id.*

162. *See* CNN Staff, *Tagliabue Rescinds penalties in NFL bounty case* (Dec. 12, 2012), *available at* http://edition.cnn.com/2012/12/11/sport/football/nfl-bounty-tagliabue. While there are still some questions over the facts and evidence in the case, the punishments Vilma received from the league over the "bounty program" were later rescinded after the case was reviewed by arbitrators and the NFL's former commissioner Paul Tagliabue.

163. *Vilma*, *supra* note 154. The court in *Vilma* even expressed their "disturbance" with the NFL's investigation into Vilma's charges, and the fact they denied Vilma the right to face his accusers. Because of the actual malice requirement however, the court held "the statements were ultimately found to have enough support to defeat the defamation claims."

164. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (identifying "persons who do not themselves have access to publishing facilities" as "not members of the press").

165. *Proverbs* 10:18 (New Living Translation).

TRESL Symposium 2013 Panel Discussion: "Asking the Audience for Help: Crowdfunding as a Means of Control"

SEPTEMBER 13, 2013 – THE UNIVERSITY OF TEXAS AT AUSTIN*

Benette Zively: What we are going to do today is talk about crowdfunding. Hopefully, if you don't know, there are a number of different types of crowdfunding and we are going to talk about those and even talk some about [how], if folks aren't careful when they are doing crowdfunding, they can run into to some pretty serious laws. Securities law, in particular I would say are probably the most significant from purposes in doing crowdfunding, because not only are there civil penalties potentially involved with raising capital via securities offerings, but there are criminal provisions that do apply also. Now I don't foresee that happening just on a regular [basis] – if someone doesn't register, I don't see those individuals going to jail – but I see other people that are involved in crowdfunding, raising capital, that are committing fraud. I can definitely see them potentially having criminal implications with their activity. But what we are going to do first is talk about some of the different types of crowdfunding structures out there, models, and I was going to ask David if you could kind of talk a little about that and, if you don't mind, I know everyone didn't read the bios, give a two-second [talk about] what your background is and why you are even here, other than you love Austin and want to be on a panel.

David Marlett: I make up those bios every time so I always have to read them to see what I said. No, I'm the head of the National Crowdfunding Association. I'm a graduate from here in '91. Way back when. And I spent a lot of my years after leaving here in the film business writing and practicing law some – well actually quite a bit – but predominantly I have been writing, and working in the film industry helping filmmakers raise money. That led to, in 2011, helping some filmmakers with Kickstarter and, when the JOBS Act was coming down, starting the National Crowdfunding Association. I also chair the World Crowdfunding Federation, which is a collection of all the crowdfunding associations in the world.

Zively: So this is international; crowdfunding is international?

Marlett: Oh very much. A lot of other countries actually have lapsed us since we have started. They have already come up with their own rules, moved on, found their own way and are already doing equity crowdfunding.

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* The following is an edited transcript of a panel from the 2013 TRESL Symposium "Fighting for Control in Entertainment and Sports." This panel, "Asking the Audience for Help: Crowdfunding as a Means of Control" was held in the Eidman Courtroom in the University of Texas School of Law on September 13, 2013.

Zively: Now what types of models are out there in terms of different crowdfunding websites that you see?

Marlett: People break it down in different ways. Generally it's reward or equity, but then you get subdivisions of that. And then there's the debt side, the Kivas, and a lot of this . . . you go back to the history of crowdfunding and earlier forms of micro loans and some of those peer-to-peer loan programs are still successful. I think we will continue to see elements of loans as forms of security move forward. But anyways, you have the loan element, which I don't deal with a lot. I know those guys some, but I don't deal with it a lot.

And then you've got, of course, crowdfunding—reward-based crowdfunding, which we are all familiar with, which is . . . Kickstarter and Indiegogo, there's Rocket Hub and those guys. And then, of course, you are going to have equity crowdfunding, which already has a version out there with Angel List and some of those, which is purely on the accredited side right now. But the form of equity that's coming, where you get a piece of the action, we are going to talk about that.

But in reward-based crowdfunding I divide it down. You've got philanthropic, where's it either for a non-profit which can't be on Kickstarter—it's got to be on Indiegogo for that. Like somebody needs a heart transplant, . . . its philanthropic; it's for a good cause.

Zively: For a heart transplant?

Marlett: Oh there's people . . . for whatever. They get on there and they raise money for all kinds of things. There's a huge category over there for that. It's more personal. And then you get to more of an enterprise. And then I would divide enterprise down into art generally of some sort. Film, music, something that an artist is going to go do that you want to support. And then you've got presales. Oftentimes just most of those things it's . . . no matter how you slice and dice them they don't want to call it that but it's really a presale. Actually, a film is in essence a presale. But where it's an actual device, app, or software where they're going to go out and create it with your money . . . . generally in that case what you are getting is that product once it gets made, which has got some tax issues and things.

. . .

Zively: Gotcha. Okay, so what do you think right now is the most common type of crowdfunding?

Marlett: Well, gaming or innovative devices, often times they have something to do with mobile devices or they are technological. There's a lot of camera add-ons and stuff like that. So you've got that whole category, which is still the largest category as far as dollars. No, excuse me I don't know that anymore. Probably still would be, yeah.

And then of course you've got film. I would guess that is number two, but I don't have that on my fingertips as far as actual numbers. But generally that's what it's been, and I don't think that's different even with the big *Veronica Mars* movie and the other larger films.

Zively: Now I want to make sure the audience... everybody understands this concept of equity? Right? I want to see everybody. Yes? Okay, good. Do you... okay good. What we are going to do...

Steven Bradford: Is this a Corporations test or something?

[*Laughter*]

Zively: I just wanted to make sure. I know I'm asking law school students, but I just wanted to make sure. What we want to talk about now is... we have talked about the different business models. David's gone into that. I don't know if you notice what David said, "after the JOBS Act." Everybody familiar with the JOBS Act by chance? Kind of? Okay. We have a very esteemed professor from the University of Nebraska. It is quite interesting, before the JOBS Act actually came out, he published an article about crowdfunding, and I think you actually participated with the SEC and some advisory committees also?

Bradford: Yes, I testified. Well, the SEC has an annual small business conference where they invite people to come in and speak, and the commissioners are there, and I testified about crowdfunding at that, which would have been a few months before the House actually introduced, or passed a crowdfunding statute. I was involved in discussions with staff on the House and Senate sides before the crowdfunding bill passed. I take no responsibility whatsoever. And then after the crowdfunding bill passed, I testified before a House subcommittee and then also wrote an article criticizing the crowdfunding statute. And I just want to point out, I am a native Texan for what it's worth, but I am also an Oklahoma Sooners fan, so I guess I lose all around.

Zively: Okay, we are going to have to ask you to leave.

[*Laughter*]

Marlett: Nebraska was one thing, but Oklahoma? . He went one step too far.

Zively: Now, real quickly, Professor Bradford, please explain for the audience here kind of some of its implications and why this JOBS Act and crowdfunding kind of came into play.

Bradford: Well, if you go back to most of the stuff that David was talking about in terms of the existing crowdfunding, what you are getting is not a financial return. What you're getting is a t-shirt, a copy of a CD, something like that. And the reasons it's that way is because if, in the fundraising the people would offer you a financial return, whether it would be a percentage of their profits, or stock in their company, or even probably, if they borrow the money and offer you interest on a loan, all of that would be a security under federal securities laws, and that would trigger registration requirements for securities offerings.

And the problem with those registration requirements is they're incredibly expensive. I'm talking about hundreds of thousands of dollars for a registered securities offering. So for the amounts of money that we are talking about being raised through crowdfunding, it simply doesn't make financial sense to register. And so that kind of crowdfunding doesn't happen.

What the JOBS ACT did is to make a couple of changes, create a couple of exemptions in federal securities law, from that registration requirement, so that now you can offer securities, offer financial return in connection with fundraising, without having to go through that process. One of them is kind of an extension of an existing exemption, but would basically allow companies to raise money, publicly offer, on an internet crowdfunding site as long as they only actually sold their securities to what is known as accredited investors. And in terms of individuals, that's basically wealthy individuals that meet either an income or net worth test.

The other thing that the JOBS Act did was to create a new crowdfunding exemption where you can sell to anybody, but it's got various requirements that you've got to comply with, and I think we will talk about those requirements in a little bit. One of those changes has been made—the one about selling to accredited investors. The other one is kind of hung up at the SEC and will be for the conceivable future. But as a result of those, it will now be possible to do crowdfunding where you're actually promising people a financial return. In other words, not a t-shirt or something like that, but "Hey, if you invest in my film I'll give you a percent of the profits," or something like that. So it's basically moved securities into the crowdfunding world.

Zively: And now I want to ask you, based off of that, do those investors have control of the company then?

Bradford: They theoretically could be given control over the company. You could make them just like ordinary stockholders with voting rights and all of that. You wouldn't necessarily have to. You could give them a percentage of the film or something like that without giving them any sort of control at all over how the film is made or distributed or anything of that sort.

Zively: So in essence, the issue or the film or whatever could still retain control but yet raise capital to help fund your projects or whatever?

Bradford: It's just purely a matter of how it's structured contractually.

Zively: Can you give us just a couple of the highlights, in terms of how much a company can raise under this JOBS Act?

Bradford: Well, under the one where you sell to accredited investors, as much as you want. There is no limit. Under the other crowdfunding exemption where you can sell to anybody, the most the company can raise is a million dollars in any 12-month period. And there are also restrictions on how much you can raise from each investor. The amount that an individual investor can invest is limited based on that investor's net income or net worth.

Zively: Now, I've got Ms. Jolie Goodnight. She is a fledgling, budding artist here in Austin. She is actually the second person I have ever met that's had a successful Kickstarter campaign. But she did have a successful Kickstarter campaign, and I kind of wanted to know how you did it [and] why you came up with going the Kickstarter route. Give us some ideas on what the thought process was, and then we'd kind of like to hear things that worked well along that process and things that didn't work so well. I would imagine probably the worst thing is that you would have to deal with lawyers all day.

Jolie Goodnight: No.

Marlett: That wasn't the worst or you didn't have to deal with it?

Goodnight: Neither. Yeah. I'll be honest. What started the whole thing was I had saved up some money and recorded what was supposed to be my debut album. Within the course of the time that it was recorded and then being mixed and mastered I took a listen and during that time... I'm a pretty ambitious human being and I had gone farther than my record sounded, if that makes any sense. Career-wise, I was more developed then my record was.

So when we listened to it, I was really sad about the product because I realized I had come much further than my record. And so I realized that it was something that I didn't want to release; it was not something that I was happy or proud of. As an artist you don't want to have a product that you don't even want to put out. And so I...

Zively: Were you working on a shoestring budget at this point?

Goodnight: Yeah . . . I had $300. And I had a piano player who was a genius. He's a Grammy-award-winning piano player. I had a lot of people working on my side, but in terms of having other players the whole thing just wasn't fleshed out. It wasn't full and rich. It was pretty basic. And so my brother, [who actually] is my producer, Gabriel Rhodes, who is a genius, basically said if you're really upset about it why don't you do a Kickstarter. It was his idea.

Zively: So you had heard of Kickstarter?

Goodnight: I had heard, and, actually, I had funded some Kickstarters before.

Zively: Oh, okay.

Goodnight: But at that time, I think I needed somebody... I needed someone to tell me, "Well look at what you've done in the past year. You could probably do the same thing on Kickstarter." So, I don't get a lot of sleep; I'm not a big sleeper.

Zively: You said you'd been doing this for a year, so you had been raising some...

Goodnight: No, I had been working towards goals, different career goals...

Zively: Oh, gotcha, gotcha.

Goodnight: And so, he said, if I spent the same amount of time and energy on a Kickstarter, he felt like I could raise the money I needed, as I had towards whatever gigs. I would pick a venue and go, "I want to perform in that venue, I'm at Point A, how do I get to Point B?" So, I did the Kickstarter.

Zively: Was that a hard process getting set up with Kickstarter?

Goodnight: Yes. Yeah, just when you think you're done you get an email from them or from Amazon saying "Now send us this form, and fill out this, and go do this," and it's really hard, especially if you're on tour, to be able to go fill in everything and find a Kinkos and fax it in and whatever, but it's...

Marlett: Do you mind if I ask...

Zively: Please, ask.

Marlett: Do you know [. . .] anybody that's used Indiegogo?

Goodnight: Yes.

Marlett: It's a lot easier, did they tell you?

Goodnight: Yeah, but I know that Indiegogo takes. . .

Marlett: ...But you might be less successful there...

Goodnight: A higher, yeah, and they take a higher percentage in the end.

Marlett: There are differences, yeah.

Zively: So, the portals that seem to be friendlier, easier for raising capital are charging probably a little higher fee? Is that what you were saying?

Marlett: Yeah, Indiegogo has a little higher fee. I didn't mean to interrupt her story.

Goodnight: Oh, no. It's fine.

Zively: Okay so now we're...

Goodnight: So I...

Zively: Faxing stuff [to] Kickstarter.

Goodnight: Yeah.

Zively: What kind of information did you have to give?

Marlett: He just dated himself.

Zively: I did.

[Laughter]

Goodnight: I did have to fax stuff; I did. I went to Kinkos, and I faxed things. I scanned things; I faxed things. I made phone calls . . . I had several panicky moments, but it was fine in the end.

Zively: What kind of information were they wanting?

Goodnight: I don't remember. They wanted bank information; they wanted, oh I don't remember.

Zively: Did they want to hear some of your music already?

Goodnight: No, absolutely not.

Zively: No?

Goodnight: No.

Zively: Did they ask for your history, how long you...

Goodnight: They asked for... they asked for bio info like . . . who you are as an artist. But the biggest parts of it, other than little strange financial details – and I don't know if they asked for my social security and all that; they may have – but they also wanted to have you tell your story so that you can convince people that you're worth investing in.

Zively: So they wanted you to have a story?

Goodnight: They wanted you to have a story, yeah . . . because it's people giving you their hard-earned money, so you have to convince them that you're worth giving their hard-earned money to. So, it kind of surprised me how successful it was because I knew that $10,000 was a really giant amount to work toward. And so I knew that there'd be family and friends that were going to be willing to help. But it was amazing to me to see how many people just go on Kickstarter, search for projects they believe in, and then donate to them. So some of them weren't even my fans yet until they went on Kickstarter and found me somehow. I don't know if they searched Austin or searched jazz or searched... whatever, but a lot of them were people that actually hadn't been to my shows, or obviously hadn't heard my music because it didn't exist yet.

Marlett: May I ask a question? Of that $10,000, what percentage would you say came from somebody that you either knew or their next connection out?

Goodnight: Mmmm...

Marlett: Rough guess.

Goodnight: Probably... 80... between 80 and 90% was people that I knew or people that they knew.

Bradford: You mentioned your shows. When you did your shows, were you making a pitch there?

Goodnight: Absolutely.

Bradford: Go to my Kickstarter site?

Goodnight: Yeah, any time. Because I'm a jazz performer, but a burlesque performer as well, so whenever I would do my jazz shows, I would let people know that that's what I was doing and also the emcee of the show was kind enough, thankfully, everywhere I went – because I did festivals around the US – and each one of the emcees announced it as well.

. . .

Zively: These... they don't call them investors, do they?

Marlett: Backers, generally.

Zively: Backers.

Goodnight: Backers.

Zively: Now what do these backers get for putting money into your album?

Goodnight: Well there are reward tiers, so it depends on how much they donated. Some people donated without asking for anything. Some people just wanted to give, which was amazing. But for the cost of a CD, if they gave, [for example], 12 bucks, they got a CD . . . [and there were] things like posters, signed 8x10s.

Also, I put together kind of a scrapbook of the whole process. So, I took pictures – lots and lots of pictures – during the recording time in the studio and put together a PDF sort of scrapbook for them to download so that they can see what the process looks like, [for example], what the musicians are doing, stuff that producers are doing, so, kind of a fun thing for fans to get to see.

Zively: Now, the backers... Did you have, like, a list? Like a scale: if you give $13 you get a disk, if you give $25 you get a disk and a picture?

Goodnight: Mmhmm.

Zively: Alright... so the backers wouldn't get this thing saying I want to give $100 and go on a date with you or something like that, would they?

Goodnight: No; there's tiers that you set, and one of them was a fifteen minute Q&A with me over Skype, so I guess that's sort of like a date, but not really.

Zively: So, any real highlights that stick out in your mind from that process?

Goodnight: One of the things that was amazing to see was how many friends and how many of their friends would share it on social media without me even asking. It would just say "I just donated to Jolie's Kickstarter. I really believe in her. Please check this out." You know, if I did a search for "Goodnight" on Facebook, my stuff would come up, of course, but there'd be all these people. The support was really, really, really wonderful just to see, people who didn't even donate, knew they couldn't, but still spread the word about it. That was also really special.

But also one of the other things was, I was doing these little promotions where I would say, the next five folks who promote the Kickstarter will get something, like a Halloween poem I think was one of them, like silly, silly, silly stuff, and they'd jump right on it. So that

was a highlight to see what funny things, fun, goofy things I could come up with that people would get excited about to help me out.

Zively: It's interesting that you brought up the social media. Is it, this crowdfunding thing, kind of a phenomenon? Social media investing. Steven and David... isn't that true?

Bradford: Yeah, it's not just social media, but the whole idea of the Internet tying us all together. Crowdfunding wouldn't really... well, crowdfunding in one form has existed for a long time. You think about what politicians do in fundraising; that's essentially crowdfunding. You go to a whole bunch of people; you get money from all of them; you fund your campaign. But, what really makes it work is this whole interconnected, Internet, social media world that we now live in where it's so easy to reach people.

Zively: David, I guess you've been around for a while, so . . . you've been dealing with...

Marlett: How old am I?

Zively: Well, but I mean you...

Bradford: He graduated from law school after I did.

[*Laughter*]

Zively: But I mean, David, you've been dealing with film—the film industry for quite a while.

Marlett: Yeah, I've been around a long time.

Zively: And you, you have the luxury, or whatever, of kind of seeing this phenomenon come about where all of a sudden funding for films, for instance, can . . .

Marlett: Yeah I mean it's...

Zively: Would it be fair to say it's easier to fund them now?

Marlett: No, no not at all. Well, it depends on the dollar amount. It's an interesting technological time. We were talking about this earlier; someone picks up their iPhone and thinks they're a filmmaker. But the fact that you can go make a decent [film] for what, before would be considered "no way"—half a million dollars, a hundred thousand dollars, something like that. The fact that that technology is coming along at the same time you have this technological ability . . . for those kind of films, absolutely it's a lot easier. [N]ow... it's

not just hitting up your uncle and whatever and the old things that we all did. With regard to the higher-level films though, it's still very actor-dependent.

[Now] what's interesting... how many – I want to ask, if you don't mind me asking a question – how many of you guys are students? And is it fair to say that you have an interest in entertainment law; that's why you're in here somewhat? Is that fair? Okay. You know one of the things that's changing is that, if I was in law school and I was interested in entertainment law, crowdfunding would be a big part of my focus, because your clients are all about "how do I get money?" Money, money, money. [T]hey don't want you to tell them anything about their art. It's about money. "How do I get the money, and how do I hang on to it?"

Zively: That's a good point, lawyers aren't supposed to be telling them about their art.

Marlett: "No, no, alright stay out of my art." Just help them get the money and help them stay clean with the law. And so crowdfunding is just the thing; we're just barely seeing the tip of it. This is the future, and it's going to start changing. We've been doing different models, or starting to, of [for example], matching funds, and I don't know how many of you guys are familiar with how films are financed and some of the details of that.

I know entertainment's got a lot of other aspects to it, but one of the things about why I think crowdfunding is so ideal for entertainment is because there's an obvious match. A crowd and an audience—there's a real match there. And the dollar amounts that people are oftentimes giving – now we're talking about reward-based crowdfunding.

But as a consultant, when you get out there and you're trying to practice law in the area, and you're trying to make money . . . the problem is . . . having a big enough transaction that you can actually get a piece, and it makes sense. So I'll just share with you guys a little practical example. I don't know if I'm getting off our topic . . .

Zively: No, not at all.

Marlett: Is this okay? I decided this year, in 2013, to focus on a revenue stream from film crowdfunding, charging for my services with filmmakers."

The problem is, I found that they needed to be asking for about $400,000 or $500,000 for my percentage to really make a difference—for me to be able to make enough money for all the time I was going to have to go in and help them put on their campaign. Well, when you get to that level of film . . . then there's sort of a tipping point. And oftentimes what I was looking at were eight-million-dollar movies. Still have several of them right now that we're working on, where the gap that they're looking for – they already have got around five figured out – they're looking for around $3,000,000.

So what we're designing . . . this is where this is going and you can be leaders in this if you want to be – we're saying, alright, let's go out and crowdfund—reward-based crowdfund—a million dollars on this film. But let's go find somebody, a distributor, or, again I don't know how much you guys know about film, but somebody who might've otherwise financed that three-million-dollar gap, and let's go to them and say, "You know what, instead of taking the $3,000,000 and getting, let's say whatever that might be, 30% of

the equity or, whatever, I'm not trying to—math doesn't quite always work out evenly, so I'm just saying—let's just say they were going to get 30%, right?"

Now what I'm asking you to do is give me $2,000,000, and you still get 30% of the equity. Right? Because the reward-based guys can't get any by definition. So, now, as an investor, your rate of return just went up. Same amount of money, and I get a lot more equity out of it—potential equity. Now also, because . . . I'm going to do reward-based, we're saying I don't even want your money right now. All I want you to do is pledge.

And I'm not going to tell you how great this film is. I'm not going to tell you all the comparisons from this movie to [others], and [how] we think it's going to do. We don't do any of that. Just pledge the two million dollars, and if I'm successful in getting a million dollars from a crowd, then you have to come in. Alright?

Now that's changed your risk position as well, right? Now I've gone out and I've proven up this film at least to a fairly large percentage of people. And now we can go out and advertise – and we haven't seen this yet for you guys who have actually backed films, – but what you'll start seeing is "Hey, put some money into this thing, and every twenty dollars you put in turns into sixty, because we've got a deal with Relativity, or we've got a deal with whomever, where they'll kick in, if you put in money."

So, there're some interesting things you can do in the entertainment space to ratchet up the total amount of money that you're looking [at] for your clients—of doing it in some innovative ways. [But] I don't want to hog all of our time.

Zively: We've got lots of time.

Marlett: Okay, so, here's a practical example too when you start talking about talent, representing talent. We got into this deal with a Kristen Stewart film and, well she was the biggest lead, but Kristen Stewart's agents said, basically, "She's not going to do this."

Well, everybody knows who she is. So I guarantee you, everybody in this room, if Kristen Stewart was crowdfunding . . . you'd all know about it. It would immediately get a lot of attention.

But, Kristen Stewart has practically zero Facebook or Twitter; she doesn't have any social media to speak of. So we're just going off her name. But we go down the cast list, and Elizabeth Banks is in it, and Elizabeth Banks has one and a half million Twitter followers.[1] So when we start thinking, "Okay, well, I want to go book a film; now who has... who can open"—generally it's always about who opens, who has the power to open on the weekends, if you guys know what that is; so every talent has a quotient relative to their power to open a film.

Well, then you start saying, "Well, wait a minute, who's more important in this film? Elizabeth Banks or Kristen Stewart?" Elizabeth Banks can reach out to millions of people. Right? Kristen Stewart . . . there's a value, because I have a name I can throw out there that she's crowdfunding, but she brings no social media, as far as direct. So, there's a real ticket—how do we tie into her, what do you call it, vampire... Twilight fans—and yet, and do that? So there's the . . . social media issue on that.

The problem is, after all this work, Kristen said no. [A]nd, so you know, we had done a whole lot of work – we designed it, we got the matching dollars, we got finally every

1. *ElizabethBanks*, TWITTER, https://twitter.com/ElizabethBanks (last visited Mar. 4, 2014) (1.43 million followers).

piece in – and then the talent says no. I can kind of understand . . . I spend a lot of time with agents in these processes because, what you end up doing, you end up going in there and negotiating [because], at the very end, no matter all the law, all the deals, everything else, it comes down to handholding the talent. It's a sport. You're going to end up doing that in entertainment law.

But, I think crowdfunding—I'm hoping that, certainly by the time you guys graduate—we start seeing higher-level talent getting involved in crowdfunding projects and continue to escalate it. So, you guys are familiar with Zach Braff's thing, and some of the others that have come along. But as long as it's still hanging in the Sylvester Stallone zone, it's not going to get very far. So we've got to get that higher talent in, so the talent get more comfortable with it.

Zively: Really quickly – because, I heard a lot of stuff more from my point – can you give us a better idea on how films are financed, because I understand there's obviously a financing component, but it seems like that would be done way, way, way early on in the process, before anything ever gets on the ground. I mean, is that kind of the concept?

Marlett: Well that's a whole subject . . . but – I mean, real fast, high, 30,000-foot – how a film gets financed . . . typically it's a producer and a writer. That's how it starts. The producer and the writer get together. They're going to go out, try to convince a distributor—used to be the bank for this—I don't know how [much] you guys know this stuff—you banked the foreign sales, you'd go out and sell foreign rights. And a lot of that has gone away. And the digitization . . . again that pushes us towards crowdfunding, moving towards digitization. Well, that's where your crowd is.

I might be getting off my point, but the point is, the old traditional way was, you go sell your foreign market, and then you bank those. So Spain says, "We'll give you this much money for the rights to Spain"; somebody else says, "We'll give you this much for the rights to China," [etc.]. And the banks out there say, "Okay, we'll discount that; we'll factor it." Are you following me on that? So they'll say – it's a promise; it's a promise that they'll give you the money – so the bank says, "Oh, okay, Spain's going to give you $80,000 for this film, for the rights to sell it in Spain. Okay, well then, we'll turn around and loan you $50,000. And we'll take that $80,000 as security—the pledge for $80,000 as security. Okay?" So you go out, and you bank your foreign, typically.

But that's changing a lot nowadays. And that's only good for, generally, half the budget. So most of the rest of it is going to be—and I'm talking, like, a, let's say a twenty... anything under forty, fifty million dollars. Now, these big ones, the bank rolls them different ways from studio films, but anything that is a little, a micro studio or independent, this is typically how it's done. So a lot of time is spent. You've got to go get your major talent involved to get that distributor, because they know what that talent's worth in Spain.

Zively: Okay.

Marlett: They know what that talent... everyone's got a number. Let's say Sylvester Stallone sells well in China. Okay, great. Well, that's worth this much money. I don't know; I'm pulling this out. So there're all these algorithms that are put into place. So anyway, point is,

that's typically how it's done, and then you have equity that will make up—again, 30,000-foot generalization here—but equity is going to make up that other 50%.

Zively: Okay.

Marlett: For example, in the eight-million-dollar film, which is really low for a Kristen Stewart film, that $5,000,000 was all through discount tax incentives, through states . . . and their foreign—banking their foreign. So they were at a three-million-dollar gap.

Zively: Why does crowdfunding seem like such a great, viable vehicle for films in particular? Because I know you've said that before?

Marlett: Well, because films are moving to digital; this is where the audience is. The audience is going to consume the film in a digital space. Quite often they're downloading it on Netflix, or you're watching it on your computer, or it's coming to your television screen; it's all done digitally. This is where the funding is happening. The audience is digital, and the funding is happening digitally, and they're there. They're already there. So I can go out and, as I tell people all the time, the producers who are more scared about this, I say, "Listen; this is nothing new." Crowdfunding is nothing new in this entertainment industry. It's called ten bucks at the box office. You just crowdfunded. That's what it is.

Zively: But you're doing it on the back end.

Marlett: You're just doing it after you've taken the risk. Here, we're pulling it back beforehand. So the biggest risk—I'm going to try to tie this back to you guys—the biggest thing for your client is to say, "Why?" And that's where the filmmakers—you—have to get creative and say—because I could just wait and watch your CD, why am I supporting you now? Why am I supporting your film now when all I've got to do is just wait until it comes out?

Goodnight: Because you couldn't have gotten the CD without supporting me first.

Marlett: Right, well right, at that level...

Goodnight: ...is the answer for musicians.

Marlett: A film like this one—like the Kristen Stewart one we're talking about—we're trying to go out and get a crowd. Why? Why do I care? Why don't I just wait until the movie comes out and I'll just pay ten bucks if I hear it's good? Right? So you've got to give me something; I need to be incentivized. What am I going to get? Is it going to be cool? I want something cool. And so there's a whole art coming in—how do I incentivize audiences?

Now I'm talking about going up to higher dollar values and specifically why I am doing that is because, if you remember the first part of this, you guys want to make some

money. If you're going to go out, if you're legal counsel for these people, these have got to be higher dollar value transactions. Because we could spend all day talking about—[*to* Goodnight] no offense to you at all—but there's no money in her; you didn't hire a lawyer to do that. You see what I'm saying? So, those transactions, as they get higher, is where it has to get more and more sophisticated and more and more interesting for you guys to come out and have clients that need your services. Clients that need your services to help them.

Zively: Well, I'm going to switch over so that Steven can answer this as well. What is more appealable for an issuer—that's a company that's out there trying to raise capital—to do? Reward-based or equity? Or does it matter, depending on what industry we're talking about?

Bradford: I think it very much depends on the industry. You were thinking about what you have to hook the investor, and one thing you have to hook the investor—you work in the industry, so you probably don't think in these terms—film is sexy, film is exciting. If you have a company that's trying to raise money to build a widget machine or something like that, nobody's going to care. It's not exciting. But if I can say, "Oh, hey, I was in the" – I love this – "Sly Stallone Zone." I wish films had to be labeled like that, so I wouldn't go to them. But if I can help fund this next film, I can tell all my friends. And I notice that in some of those fundraisings, if you give enough, you even get your name in the credits. Now you're in the movie industry.

And so I think it's very much industry-dependent. The other industry that you see really doing well in crowdfunding is gaming. And that's because all of those people who are on their computer twenty-four hours a day are gamers, and they're very comfortable with the medium and they like games, so they're willing to do it.

Zively: That would make a little bit more sense I would imagine, only from a rewards basis because I'm assuming the gamer is going to get access to the new game.

Bradford: That's often one of the rewards. And in music, often one of the rewards is you get a copy of the CD or the digital music or whatever it is that's being produced. I assume in the movies, you give a certain amount, and, if it's coming directly to DVD, you get a copy of the DVD. None of that works as well for more traditional kinds of companies doing things, and so, for them, they haven't really done much successfully in their rewards-based crowdfunding. For them, it's going to have to be offering people some kind of financial return. Because just the opportunity to get a t-shirt that says *Acme Corporation*, or something like that, isn't going to be a big draw.

Marlett: And speaking of what you get, just from a legal... another legal thought to stick in your head is the interesting thing that came up with Zach [Braff] – was it Zach when this one came up? I don't think this was *Veronica Mars*, I think it was Zach – where if you gave enough money—or was this another one—this might have been James Franco's; I can't remember. Anyway, if you gave enough money, you got to be in the film. Well, under California law, you can't buy your way into a film, right? I can't—if I give you $10,000, you let me be in the movie. Obviously that would feed all kinds of corruption and could hurt

the industry, so they have a state law that says you can't do that. It was an interesting legal argument. I was telling somebody this would be on an entertainment final law exam; argue both sides of this. . . . [I]f I've put $10,000 in and you let me be in the background, have you just... have I paid my way, have I bought that role, or is it [that] I bought an experience? I gave you so much money, and now you're letting me have an experience. It's not like I've been a hired employee. So there're two different legal arguments, but you start getting into that when you starting talking about...

Bradford: There's one that's even worse than that in terms of legal problems. Anybody know the name of the drummer for Nine Inch Nails? He did a crowdfunding solicitation to create an album and had several interesting rewards. One of them if you gave enough money, was to go to Mexico with him and sample the mushrooms, which I think is a euphemism. And it was on Indiegogo, which I couldn't believe that got past their legal counsel, but yeah, there are issues like that.

Goodnight: But doesn't some of the legal stuff happen after it's been funded, too? Like they don't initially catch it, but then they may catch it after it looks like the whole thing's funded and everyone's excited for you and you've popped open the champagne, you'll get an email or a letter saying by the way, we saw this; you don't get any of that money.

Marlett: Right, that's happened.

Zively: Now, and I don't know if in a reward-based... if it's very similar to what we're talking about with equity... but Steven, if you don't mind, talk about the JOBS Act and how they're allowing a contributor all the way up, even though they've made the commitment—all the way up until the funds are being released to change their minds, because I think that's pretty significant. And do you know—let me ask Jolie first—do you know, with your Kickstarter campaign, investor makes the commitment . . . can they pull that commitment back out?

. . .

Goodnight: I didn't. Oh, no, no. It was only things that didn't go through. Actually, I don't think I had anybody back out during the process.

Marlett: The industry average is about 5%. So if you're looking for *X* number of dollars, at least right now, then you need to add at least five for shrinkage in that sense.

Zively: Well, and one thing that's kind of critical with investments typically—under the securities laws, once an investor makes a commitment to put their money into . . . stock or in the issuer, typically that commitment is made. It's just a matter of closing, and the funds get dispersed. Crowdfunding is a little different, isn't it Professor Bradford?

Bradford: Maybe. Actually, the provision you're talking about is a really good example. If students want to learn something about drafting and where to put commas and clauses and

things like that, this provision is a good example . . . you could not do any worse. Well, I know the person that drafted it. I shouldn't say that.

Marlett: I don't know him; I'll say it—it's one of the worst written statutes.

Bradford: Well I've said it in print, so I'll say it again—it's poorly written. But in their defense, it was put together in about a week. But there's a provision in there that says that in at least some circumstances, investors will have a reasonable opportunity to rescind the commitment to purchase securities. Now what's not clear is whether that's all investors, or there's also a provision about if you don't tell people what the price is, you just give a formula for calculating the price . . . something based on whatever the market looks like on the day that we close. It may just apply to that, where you don't give a definite price up front and it's subject to change. Or it might be read to apply to everybody, that you've got a right to rescind. And I hope that's one of many ambiguities the SEC will try to clean up.

Zively: But here's the scary part with having that ability. Kickstarter, correct me if I'm wrong, you've got a certain time period that you've got to raise the funds by, a drop-dead date, correct?

Goodnight: Mmhmm.

Zively: Okay so let's say you're rocking and rolling—no pun intended there—but you're doing really well with your capital raised. Three days before your close, you've got twenty-five contributors who back out. Aren't you kind of being put in a difficult spot at that point?

Goodnight: Absolutely.

Marlett: This doesn't happen though.

Zively: It doesn't? Okay. So nothing bad. Well, let's just say that scenario, it does happen, because the potential for fraud is there.

Bradford: Wel,l you might get new information between the time you commit and when you have the right to withdraw.

Marlett: [T]here've been a few [times] where it's been open to the public, to Kickstarter and Indiegogo's embarrassment, where they've had to shut down a deal that did get funded, but they said they realized it wasn't correct, or it looked fraudulent or whatever else.

Bradford: Kickstarter recently shut one down right before the closing date because they found some fraud, and it was a fairly large offering. . . . So it happens.

Zively: So [for] contributors then... this sounds like a pretty good deal to me if I'm a contributor because now I know Kickstarter's looking out for my contribution. They're going to vet out the issuers.

Marlett: They vet a lot. They run algorithms. I know the guys at Indiegogo, and they spend so much time—that's one of the reasons . . . they have less fraud rate than the credit card companies; it's around two percent right now. So I think that's one of the things we have to consider when we get into the equity world.

We can so over-regulate where we already have algorithms. For example, I know on Indiegogo, they have a problem with a lot of... one comes to mind—a Russian group; they try to come on there and what they'll do is set up a crowdfunding program: "We want to crowdfund *blank*." You may think they're trying to get people's money, and it's fraudulent [but] no, they don't want your money. They then take all their stolen credit cards and fund the project. Now they have just laundered all that money. It's a way of pulling it off all the credit cards and laundering money by cash back out to them. And so that's one of the programs they have—they'll look for—one of the reasons they do go through some processes is that they're running you through these algorithms to see . . . if you pop on anything. And they're looking for opportunities there for those kinds of frauds—people misusing their own systems.

Bradford: You've got to remember, one big fraud and Kickstarter's dead. There are a lot of competitors out there. If Kickstarter has one or two major instances of fraud, people go to Indiegogo. They hear about it, they don't go to Kickstarter. So they have all kinds of business incentives to try and keep clean.

Marlett: I wouldn't be surprised if Kickstarter was bought by Amazon. I think we're going to see more of that. It's going to get more streamlined probably. And that'll continue. It's good for Indiegogo in certain ways to kind of keep the independent spirit, but I don't know.

Zively: Jolie, you want to make a second album; you going to go back to Kickstarter again, you think?

Goodnight: I don't know. I've thought about that. The thing about doing a Kickstarter is that it's an emotional rollercoaster because when you first put it out, a lot of money comes in and you're really excited and thinking, "Okay, I'll get there in no time."

And then it's really dead. And then maybe some stuff trickles in, and then you're biting your nails by the end of it. And it's—when a dream is on the line, it's a little bit nerve-racking.

Marlett: Did you do 30 days?

Goodnight: I did 30 days, yeah. And then also on top of that, it's a whole job in itself, and I already work a lot. And so it's much harder work if you want to raise that money than people think it's going to be. And I put a lot of research into it as well, looking at blogs and looking at advice from other people who had done it, looking at other people's and seeing

what worked for them. It's constant, absolutely constant. You have to bring it up in conversations a lot, which feels a little bit "ew" for me. It's an emotional tug of war with yourself.

Marlett: I tell clients it's hand-to-hand combat from the moment you start.

Zively: You know, as I was sitting there, Jolie, . . . hearing you talk, it would seem—it's just me thinking—it would seem that would be a much more appealable way – if I was in your position – to raise the capital than to have to go directly to each individual and make my pitch to them, because you kind of break that wall down.

Goodnight: It is a buffer. It functions as a buffer for sure.

Zively: And did you find that to be very helpful? Because it sounded like you had raised capital before by directly going to some of your family and the like, right?

Goodnight: Well, I had raised capital before by saving my own money.

Zively: Okay, okay.

Goodnight: And then getting the help, the physical help from people, like the musicians . . . ; they were just willing to donate their time.

Marlett: Artists who save money? How does that work?

Goodnight: It's really difficult.

[*Laughter*]

Goodnight: But also the positive side of it that makes me want to do it again was that what's really cool about it is that it gives the chance for your fans and your mega fans—the people who really believe in you—to be a part of it. That's why I actually titled mine *Be a Part of the Album*, and that's why I took all the photos of the process, and it adds this really cool kind of pressure—that you want to create something magnificent not just for yourself, but for those people. And it gives them a chance to be part of that magic with you, and I thought about that when I was recording. So there're positives, but it's hard.

Zively: Can you envision an artist that does crowdfunding because they want to do a North American tour? And then they want to do another one for an album? Can you see an artist doing that?

Goodnight: Yeah, I've seen people doing that actually, who just kind of do a thing after a thing . . . Kickstarter after Kickstarter after Kickstarter. And at some point, it kind of seems like you maybe should be...

Marlett: There's a fine balance there.

Goodnight: Yeah, it almost seems like you should learn how to save some of that money from the last tour. Or maybe you should be booking better-paying gigs. Or you should—if you're having to get that many crowdfunds—fundraisers over and over again—maybe there's not something you're doing right. So at some point, for me, I want to be on my own a little bit at some point.

Marlett: It's really changed in the film industry in the last two years. It used to be—way back in 2011—yeah, two years ago [*Laughter*]. But two years ago, it was just unheard of that you would be raising partial funds. Now, it's no big deal. We need to do our post or whatever else it is. I even saw recently where they said "Help us get enough money so we can make an offer to this particular actor." I'm thinking...

Goodnight: What?

Marlett: Yeah, I didn't know if that would work. I didn't dig far enough to go, "Well, do you already have the deal?" How do you know that? That just seemed really flimsy. But anyway...

Goodnight: Or just have strong enough work that that particular actor wants to be involved.

Marlett: Well, unfortunately, their agents still may require them to have – or their lawyers say – "No, no. We need money up front. We don't care that you want to do it."

Zively: That's interesting you mentioned that. If you remember, Steven, or Professor Bradford, when we were sitting outside talking to David, you said you've got to have a pitch—you've got to have a story. You actually, Jolie, even said that's what Kickstarter [said] to you. Give me an idea—why do I have to have a story? Couldn't I just sell my talent? Isn't that good enough?

Goodnight: Well, because you're trying to reach people that can't—maybe haven't seen your talent yet. They can't come see your show. They don't know. They haven't seen you in person, or they haven't heard a record, so they don't know why they're supposed to care. But, if you write something that's beyond your elevator pitch, if you write something deep from within, that says why you should care—here's why I care; I hope you do, too—then . . . I think the success of crowdfunding comes more just from the fact that they want that product because, like I said earlier, because they won't have my CD if I don't raise it. But I think it's more than that, too.

Marlett: It's personal. It's not just the product; it's personal to you. So I think there's a connection.

Goodnight: Yeah, there's a connection. There you go.

Zively: David, could you kind of talk about how you always have to have a pitch?

Marlett: Yeah, you always have to know, if you're talking to a client or somebody, and you're trying to help them—again, I'm trying to make this more about you guys—but the whole thing is their "NBO": what's their next best option? You've always got—I think it's smart—always be thinking [about] their next best option. Because you can go into these things sort of cocky and say, "Oh well, they're just going." Well, what's their next best option? Wait until your movie comes out. What's the reason they're doing it now? What's the connection? Why do they feel connected with you?

Zach [Braff], . . . the *Veronica Mars* deal, there was a connection—people wanted to see [those]. Yeah, they could have just waited until it came out, but there was a connection. I backed that one, too. But there was a connection there. But it's just sort of an excitement.

Sometimes, the connection is in the social element—my connection is that my friends are doing it. Now that's one of those catch-fire things you hope happens. . . . Maybe it's that I don't even know who these guys are, but all my friends on Facebook are backing it, okay, so that's a different kind of connection. But . . . somehow, there is this relatability.

Or the subject matter itself is important; you want to see this happen. I've talked on and off with the city of Chicago – I'll tell you this really quick story – [and] the city of Chicago wants to be a leader in environmental with the new – what's his name; help me – the mayor...

Zively: Rahm Emmanuel.

Marlett: Yeah, that's it. Well, one of the things they discussed was to have the first electric garbage truck in the United States. There's one in Japan and two in Europe, and they cost about a million dollars each. Well, how are you going to go to the taxpayers and say, "We want a million dollars for one garbage truck?"

But there is something kind of cool about that. So that's why we've gone to them and said, "Listen; that wouldn't be that hard to raise crowdfunding." You go to the rest of the United States—there're a lot of people out there who say, "Hey, that's a cool thing; we'd like to see that because that would be healthy," – that's the thought process – [that] there ought to be one in the United States . . . if there's going to be one. So we've been talking about that.

My point is the connection. It's knowing your audience, knowing that connection. Why would they want to support it?

I'll give you two quick statistics, which you mentioned. One is that about 80% of the money you raise is in the first week and the last week. So there's been some discussion about some of our projects; we've been saying, "Let's just do two-week campaigns because

let's just get out there . . . just all of the thrust in and then you're out." So there's been some interesting arguments about how to do...

Zively: So Jolie's shaking her head no.

Goodnight: The reason for me – because I thought about doing that after doing that research – that the problem with it is that that time where it's really, really dead and down is a really great time to figure out what your next step is to get that last amount of money, and you can get more in the end if you take that time to retweet—there're all these different people on Twitter who are just there to tweet about your Kickstarter. So if you find that list of those folks . . . that time where it's really dead is a great motivational time to go, "Okay, this might not work."

Marlett: It depends on the project.

Goodnight: Yeah.

Marlett: The other statistic which I threw out which I think is interesting is... I think everyone is familiar with the golden mean?

Zively: Is that something they used in the old days?

[*Laughter*]

Marlett: It's an empirical number the Greeks used—it's pi. So anyway, point is, what we're seeing coincidently is around 36%. Huge rounding, huge generalization, around 36% – different for her [*pointing at Goodnight*] – comes from friends, family, the next circle out. The balance will be people you've never heard of before. It's going to be different depending on what the genre is: if it's more personal, stylistic music like yours, a lot of differences. But that's just when I try and tell clients about how much to crowdfund: at a minimum you need to know where 36% is going to come from.

If you can tell me that, then we can start working with your social media numbers that are going to push it on out. How can you get past that to people who've never heard of you—[that] sort of thing?

. . .

Zively: I have a question actually for Professor Bradford—we get to a point where we can do equity crowdfunding—you envision those companies that are raising capital sit down and make a story like a Jolie over here? Or are you going to see a little more involvement with lawyers because we've got a securities transaction?

Bradford: Well, you've got to have some involvement with lawyers because... well, there are pretty strict fraud rules in the securities law and the new crowdfunding exemption adds one that's even stricter. Fraud in a securities law sense is open-ended enough that you really don't have to be deliberately trying to mislead people in order to stumble into it. You have to be "reckless"—whatever that means; leaving information out can be fraud. So it's not that you have to outright lie to these people.

I suspect that a lot of these small companies doing crowdfunding, unless they have legal assistance, are going to make some mistakes that are going to come back to haunt them. . . . The new crowdfunding exemption is much too complicated, much more complicated than it should have been. And they're going to need legal help just to . . . navigate it and make sure they do things right. Either they or the sites they are doing it through—somebody is going to have to have lawyers providing that advice. The remedy if you don't is you could raise a million dollars and find that you have to give every penny of that back, because people have the right to rescind their purchases if you didn't qualify for the exemption or if you defrauded them.

Zively: That has devastating effects, obviously.

Bradford: Yeah, but in terms of telling your story I think if you talk to venture capital financiers, that's what they look for. It's not a numbers business. It's "Do you have a story? Can you convince me that you're doing something that if I fund it, it's going to succeed, is going to draw people?"

And . . . obviously they do their homework. They look at the financial statements, they look at the numbers. But what distinguishes two identical sets of numbers is the entrepreneur that has the story, that has the plan, that can convince them it's going somewhere.

Marlett: And I'd argue that only [applies to] equity crowdfunding when its smaller dollars that someone is putting in—it may be only $100—I may not be going to do nearly the due diligence that I might otherwise.

Bradford: It's going to be the story.

Marlett: Now that doesn't mean that behind the scenes the legal has got to be in there, but that's between you and the state regulators for the SEC. But when it comes to your forward facing—to your investors—it's still the hearbeat, the story.

Bradford: Yeah.

Marlett: If I'm putting in $100, I'm not really expecting much of a return, you know.

Bradford: People say they're rational, but when push comes to shove, people are emotional, and it's emotions that drive them.

Zively: So in essence . . . with what everyone knows from securities law, if I'm out there trying to raise money for my company, if I have material information that a reasonable investor would want in trying to make an investment decision, I'm trying to provide that information too, okay. But if you've got a company that's out there doing crowdfunding, and let's just say they don't go hire securities counsel, and they do this pitch we're talking about here—their story. And, oh, by the way, the VP of the company was convicted of securities fraud eight years ago because he worked at Bernie Madoff security; that's not disclosed in the material that the crowdfunded investors get. Subsequently, they find out; they're probably not going to be real happy, especially if they haven't made any money.

Bradford: Nobody ever sues to get their money back if the company is making 400% profits.

Zively: Okay, so you know what the result is, and here again trying to focus [on] what David is focusing on, even in the realm of if you've got a client out there, when we start to get into this equity—yeah, you're going to want them to put a story together, but you're going to want to go in and find out who all has been convicted of felonies, has anybody filed for bankruptcy that's in management here. Not that it's necessarily material, but . . . you guys, as lawyers, are going to have to help out the issuer—that company—figure out what materially we need to get out legally so we don't end up having to give that whole million dollars back because we forgot to disclose some material fact.

Bradford: Well, and the other thing is, people don't like to disclose things about themselves.

Zively: No.

Bradford: And you've got a fight with the filmmaker—whoever's trying to raise money—to tell them, "[You have] got to disclose things about your past whether you want to or not."

Marlett: And I want to come in just to make sure we [remember] when we're talking about all this disclosure stuff, we're talking about when equity crowdfunding comes. We're not talking about everything else we've been talking about—the reward-based. And as you can see, you may already be asking the question of yourself, "Why would I even do equity?" In some industries like film . . . I don't even know that I even want to move towards equity. They've got all this regulation.

Let's just do some more interesting things with the audience, for the crowdfund. Let's do matching dollars maybe, or more sophisticated, more standardized, for the rest of the money. But let's use the audience in different ways, and let's keep them; now, I don't have to deal with any regulation.

Bradford: But you're in one of the industries where that's possible.

Marlett: Right, right, and to the extent that they're in the entertainment zone.

Bradford: It works for entertainment.

Zively: What's the coolest reward tied to a film, that you got to have dinner with Sylvester Stallone?

Marlett: I don't know if that's cool, [*laughter*] but, yeah, most of the talent won't have anything to do with the people that put the money.

Goodnight: That's sad.

Zively: Wouldn't that make the most sense in terms of people wanting to put the money in?

Marlett: But, wait a minute. Let's go back. Suddenly you're counsel for the talent...

Zively: Okay.

Marlett: Okay, I've got 2,000 people that you've never heard of now wanting to pull a piece of your client. Really, you can sort of understand when they're going, a lot of these clients, these actors—it's a little different when you have a singer whose dealing with a direct audience [*gesturing to Goodnight*]. . . . [For example] this whole film Kristen Stewart is about – it's a very erotic film about shoe fetish –, but anyway...

Bradford: Is that one in the Stallone Zone?

[*Laughter*]

Marlett: So anyway, let's [say] if you gave $5 or $6,000, you could go to Rodeo Ave. and go shoe shopping with Kristen Stewart.

Goodnight: No kidding!

Marlett: Well, we tried. Course, she – through her agent – said no frickin' way. But, but, but Elizabeth Banks was very open to some creative ideas. It's real interesting how you'll see different talent who are just like "Hey I'd love to." They just love the connection with their audience.

Zively: Yeah.

Marlett: And some of them go "No way, I don't want anything to do with this," so it's so talent personality driven.

Zively: I can see it being dependent on the person, that person who is putting the money in.

Marlett: Right.

Zively: I guarantee you if that was a reward, you'd get a hell of a lot more money. If I knew that I got the opportunity to sit down with...

Marlett: And that's the thing. You can limit those. You can say we're only going to offer five of those and it's $10,000 each or whatever. So you can do that. You're going to start seeing those things. It's so talent driven.

Bradford: But it's funny if you look at the places like Kickstarter. People will see those kinds of rewards and they'll try to translate it to something else. I saw uh, it was a couple of people developing software and one of the rewards if you contributed to $ 2,000, $2,500, something like that, was lunch with the software developers. And I'm thinking I might pay $2,000 not to have lunch with the software developers. I'm sure they're very interesting guys, but . . .

Marlett: But the point being made is that—I've had plenty of these conversations—you sit down and start going, "What am I going to offer because everybody is already offering a copy of the film, or a copy of the soundtrack. We know we've got to do a t-shirt. Okay, alright; what else can we offer?"

Goodnight: Be creative.

Marlett: And it gets [creative], yeah.

Audience Member: Isn't that also hard because couldn't Kristen Stewart just take another movie deal where she doesn't have to have a bunch of fetishists follow her?

[*Laughter*]

Marlett: Oh, sure. And, right, NBO. Next best option. But in this particular case she really wants to do this movie.

Zively: So, what happens in the scenario where the contributor doesn't get the reward?

Marlett: Well, that's happened.

Zively: Okay, so what happens? Is there a breach of contract claim?

Marlett: If it's reward-based, it's a whole open area. Especially if I was a law student now, I think that's going to be an area of litigation that's coming. It's a brand new – if you want to walk out into a law firm and have something that's unique that that law firm didn't already have; you want to make yourself marketable – I think there's a whole market there to come. There's going to be litigation in crowdfunding, there're going to be all these niches that are coming in crowdfunding that...

Zively: But then Professor Bradford will tell you something that will be the demise of that.

Bradford: What am I going to tell? I don't think I'm going to say what I was supposed to say.

Marlett: Well, if you're only investing $100...

Bradford: Oh yeah, who's going to run you, chase you down for a $10 t-shirt and sue you? Now I think the more interesting question is whether we can bring a class action against Kickstarter if they don't come through with $10,000 worth of rewards. I think not, but I'm not sure anyone has litigated that yet.

Zively: So now, Professor, you had said out there it only takes one, and we get fraud in this area, in crowdfunding.

Bradford: Yeah.

Zively: And then the next thing you know, the SEC is coming in, and they said they're basically going to cut this off.

Bradford: Well that's one thing you need to keep in mind about the JOBS Act provisions, especially the crowdfunding provisions, is that the SEC was not in favor of it. It was kind of shoved down their throats by Congress. The state securities administrators were not in favor of it.

Zively: Who was in favor of it?

Bradford: Actually, President Obama supported it early on; the White House supported it, but it was more of a groundswell. It actually originated with your people [*pointing at Marlett*]. It was originally on the Internet.

Marlett: It was a political ploy . . . absolutely. The idea was . . . ,"Why can't I go on Facebook and tell people that I'm trying to raise money and invite people on Facebook." That was the original concept.

Zively: Okay.

Marlett: And even the original bill draft—early, early draft—involved Facebook, in literally saying that. So it got shifted. But the large part – this was April 2012 – who was going to vote against it? They're all up for reelection; it's an election year.

Zively: It's called the "JOBS Act" [*air quotes*].

Marlett: There's this whole thing.

Bradford: Well, it was deregulatory, and the Republicans were in control of the House. They were supporting it. Obama was behind it, which meant the people in the Senate were unlikely to oppose it, particularly in an election year. And so it was just kind of this perfect storm of things coming together. I think if you were to try to do it again this month, it probably wouldn't get through the Senate.

Zively: Professor Bradford and I were talking, it might be one of the last bipartisan bills that will be passed with overwhelming support.

Marlett: I don't even think half of them read it even though it's really short. "JOBS Act? Okay." [*Marlett makes a motion like he's signing a document*].

Bradford: The miracle was actually that it got to the floor in the Senate, because this was a time where nothing was getting to the floor in the Senate, and the majority leader finally said, "Yeah, I'll bring it to the floor."

Zively: I didn't even get a chance to tell you, the JOBS Act, it was literally "Jumpstart . . . "

Bradford: ". . . Our Business Startups."

Zively: Okay, and the thought was this was going to create jobs. Okay, now you're a politician. This is right after '08, right? How are you going to vote against the bill that's going to create jobs? Okay, now I challenge anybody to go out there and troll the Internet and find out how many projected jobs have been projected to be created because of this bill. Can anybody just give me a guess? Just one guess?

Audience Member: 20,000?

Zively: 20,000. How about you? This is Congress now. Okay? They do big stuff, right?

Marlett: I don't even know the answer to this.

Bradford: Have you seen a number?

Audience Member: How many particular jobs has Congress created?

Zively: . . . You know the economists and all this; they go in and they start trying to crunch numbers and get a better idea: "Okay; we can raise this much more capital," "We can have this many more jobs," etc. Any idea? The number that was – and the only reason I know this is a journalist wrote a whole article on it – a representative's office that holds that 186,000 jobs over seven years.

Marlett: See, I don't think that's wrong.

Bradford: Is that based on CBO Projections?

Zively: No, no.

Bradford: Because I haven't seen those numbers.

Zively: That's a high number.

Marlett: Not a high number. I'd say over seven years it would've created a lot more than that.

Zively: You think?

Marlett: Oh yeah. If equity comes in and, what this does...

Bradford: Yeah, I think there are other provisions of that Act that we haven't talked about that are relatively ineffective and actually kind of silly, but I think—I would be surprised—if this works. There's a question whether this crowdfunding exemption is too expensive for it to do anything. But if it were to work, I think it would create a lot of jobs. I'm just not sure it will work.

Marlett: Should we jump to questions, I'm not trying to...

Zively: Yeah, we've got seven minutes left. I know every one of y'all has a question.

Bradford: If you don't have questions, we'll just have to talk more, and you'll have to listen to us.

Zively: Perfect.

Audience Member: Jolie, I'm wondering if you think that being in Austin helps with Kickstarter also, because we have such a community that is invested in the arts?

Goodnight: Maybe, though a lot of my contributors are people from all over, just because I did a tour, so it's hard for me to say, because if I had just stayed in Austin I'd have a little bit better idea. But I also used to live in San Diego, so I had people from there, so maybe. But also maybe not because there's kind of an eye-rolling thing in Austin about how everyone is a musician, and then now it's, "Everyone is doing a Kickstarter," so I don't really know. But I know that especially within the music community it's like, "Oh yeah right, live music capital of the world, okay [*said sarcastically*]," so . . . I'm not really sure.

Audience Member: Say someone gets their project successfully funded and they're not able to deliver the product. Does it say on Kickstarter that you've got the money and not let you back on, or is there any way for them to control that?

Marlett: Yeah, you're not going to be able to get back on. . . . And there are certain examples of that out there. My eight-year-old son backed this thing called *Castle Story*, which was a game last summer that was going crazy, it is supposed to be sort of like *Minecraft*, and I was trying to show him what I was doing with crowdfunding. But they have still not created the game! And now he's nine and he's [saying], "Those people just took our money," and they did. I went on there and they were trying to raise $30,000 dollars and they raised $800,000 dollars. And now it's a year later, and they've done very little from what I can see.

Audience Member: And so there's no way for Kickstarter to require sort of...

Marlett: The moment you do that, you're putting Kickstarter in the liability chain.

Zively: But isn't Kickstarter doing that anyway by even vetting these things to begin with and tracking the amount of fraud?

Marlett: Like I said to begin with, these things haven't been litigated, but I think...

Bradford: They're certainly on their site disclaiming that in about five different ways.

Marlett: I think right now they're more worried about PR than anything else. I'm sure they're worried about litigation.

Bradford: They're well-lawyered. My guess is they've thought about this.

Zively: Another question? I've got one, how about a graduate student wants to do a Kickstarter campaign to pay for graduate school?

Bradford: Happened.

Marlett: It's happened.

Bradford: All kinds of things like that. If you've got a good enough story, you can do it. Look at the peer-to-peer lending sites; there are all kinds of personal funding requests like that.

Zively: Now that's peer-to-peer lending.

Bradford: Well, but that's crowdfunding too—debt crowdfunding.

Audience Member: What limits do you see crowdfunding reaching? I have a friend the other day on Facebook saying she goes to the University of San Diego, a private school—$50,000 a year. She said she only had $36,000, and she needed the difference. And she was asking everybody and anybody on social media to make up that difference for her last year. So, . . . what are the limits of crowdfunding?

Bradford: Crowdfunding right now, outside of equity, which has got regulatory issues, is being used for everything. It is being used by scientists to fund projects; it's being used by students to fund school, it's being used by people to fund operations. It goes back to the story. I don't hear a story from what you are telling me from her situation. But if she were to go on a crowdfunding and say "You know, I . . . grew up poor. My family was homeless. I managed to make my way up to be admitted to this school. I've got really good grades." If she's got a story, that's the issue.

Zively: One thing that just came to mind—we've got twenty states right now that have changed their position on marijuana rules. You've got marijuana. Could it be, and maybe this is going way past where we need to be...

[*Laughter*]

Marlett: I've already been thinking on this.

Zively: Okay so, help me out then.

Marlett: I know where you're going with this.

Zively: Can I here in Texas put money into...

Marlett: But Colorado won't let you.

Zively: Colorado.

Marlett: I've already looked into this.

Bradford: Looking for an investment?

[*Laughter*]

Marlett: For a client. For a client. For a client.

Zively: But you know, you can see.

Marlett: Oh sure.

Bradford: But anytime you are going interstate like that, you've got...

Zively: Where you have an illegal in one state...

Bradford: Yeah, and you've also got an illegal at the federal level, so...

Zively: Oh, I didn't think about that.

Marlett: Yeah, you just put that right out there.

Zively: So, could they do an intrastate offering, say in Colorado?

Marlett: I don't know what the Colorado rules are—I know they are very strict relative to ownership of those production facilities and everything else.

Zively: Okay. Well no, I wasn't talking about equity; now, I'm talking about reward-based.

[*Laughter*]

Zively: What?

Marlett: Okay, let's go there. But, you've still got that interstate rule relative to how much you can buy and that sort of thing.

Zively: Sure. Sure.

Marlett: Yeah.

Zively: Got a couple more minutes. Any other questions? I've got one more question for each of the panelists. I want to hear a prediction of where you see crowdfunding in five years.

Bradford: I think that reward-based crowdfunding will continue to grow. I think it's been growing exponentially. I think it will continue to grow exponentially. I think the crowdfunding to accredited investors will grow tremendously. I don't see the crowdfunding – the million-dollar crowdfunding exemption – really taking off. I think it's too expensive.

Zively: Dave?

Marlett: Yeah, I'd say. I'd say it's going to continue to grow but I think you're going to get saturation. And people are going to start getting tired of it a little bit. I think the more corporatization . . . the cool factor is going to start shifting.

Zively: Hm...

Marlett: People are going to start feeling like they are being used to kind of pre-market a movie. . . . You can have a blow back. Now, that said, I still think there're going to be tremendous opportunities out there. There's going to be more sophisticated kinds of deals. Let me just turn real quick to one more quick story, for example.

The gaming laws in Maryland—you have to give so much back to the community. This is the same way in Nevada, probably . . . or other states. But the casinos have to give so much money back to the community. Okay? Well, right now that's a good ol' boy system where that money goes. They have to peel off so much of the percentage and reinvest it in the community. Well, if you're a community leader, and you know those guys, you can really help steer in money. So the point was, "Why don't we go use crowdfunding? Even if it's a poor community, but we do it based on every dollar that this community raises."

It's like putting in a vote, but they're actually putting in their money. So they go out and raise their own money. And so they say, "Let's go out and do a matching dollar program . . . let's use crowdfunding to help direct that."

Now other countries are actually starting to do it. And they can do it like almost tax-dollar allocations. So they're using crowdfunding as a crowd-sourcing in a way for applications—for where to spend large amounts of money. So there're some interesting ways of doing that, that I can see some modifications in the next five years of some creative uses. There's tremendous open field for creativity coming out and thinking outside the box of how to use that connectivity.

Zively: So could we have public financing projects done through crowdfunding?

Marlett: Well, it's an interesting concept. And one might say, "Well, that's more equitable and I'm voting with my dollar . . . it's targeted; it's saying, listen, this is where the money ought to go because we've raised this much money from the community. Enough people put in a buck each saying that was important to them or whatever else." It's just a concept.

My overriding point here is that I just think in the next five years—of course you guys graduate and start looking—I think there's going to be some interesting things that we haven't thought of yet, of uses of that, and we are probably going to learn a lot from other countries that are already ahead of us and doing some of these things.

Zively: Jolie?

Goodnight: Well, for me, what I love about it now . . . is that I'm able to have all of the creative control of everything that I do pertaining to my record. People backed it, believed in it; it's up to me. But, what worries me . . . as it transitions in the future [is that] every other part of the music industry and entertainment industry . . . starts off very DIY; it starts off very personal, and the story's important and all these things. And eventually…

For example, [my mom] used to work for a publishing company in Nashville. She's a singer-songwriter, and it went from this very personal, very wonderful, community of songwriters working under one company, and it was bought . . . and suddenly any writer that didn't basically want to write a Hallmark card for country records was out. And so what worries me future-wise – and I want to be an optimist about it, and hopefully it just grows and is incredible and stays very personal and stays this way – but what worries me [is] – because as a showbiz kid I've watched how every time something starts that way, it ends up not that way anymore – it ends up being a homogenized, Hallmark card.

And so hopefully that doesn't happen with crowdfunding because for people like me it makes dreams come true. And I get to have the creative control, and I hope that it's able to stay that way or at least have part heart. I hope it doesn't leave musicians fighting for some other creative way to be able to create their art.

Marlett: I think the good news about Indiegogo and people trying to start up [is] then maybe we're going to start seeing some more localized crowdfunding portals. The Austin crowdfunding portal...

Goodnight: Yeah.

Marlett: ...where you could come and just see Austin people. And there're some other ideas like that. The University of Texas crowdfunding portal where you can fund student projects or whatever else, I think we're going to start to see.

Goodnight: Yeah, and hopefully that's the direction it's heading.

Zively: So, the real key is, "Keep being cool, crowdfunding, because once you're not, no one's going to want to come."

Goodnight: Or, well, people will do it and buy into it because maybe they don't know any better. For me, I have a poor frame of reference because I grew up in the country music world and I watched it go from great songs, great musicians, great everything, to suit and tie gentlemen saying, "This is how the song is going to go." They're gonna write it. This is the formula.

Marlett: One of the cool things though about crowdfunding is that it is international and it's one of the concerns that people have is that they'll say "well listen if I can go to Brazil I can just be a Brazilian company and get . . . I'm still on the Internet right?"

Goodnight: Yeah.

Marlett: Alright, so there's this whole issue—and that's why the Canadians were so quick to jump on this saying, "Wait a minute." We had the Canadians come in and using Kickstarter, and they're [saying], "Well, wait a minute, . . . we need to be doing this ourselves," and they wanted to jump on equity first, and they already had it going. So, [if] there's some element of this that's refreshing to me, [it is] that, yes, there's going to be corporatization but it's still . . . the Internet. It's a global community, and I think you're going to find all kinds of pockets and interesting uses for it.

Zively: Steven, David, Jolie, thank you very much for your time. We appreciate it very much. Thank you.

[*Applause*]