

ROUGH AROUND THE EDGES: PROFESSIONALISM, ELIGIBILITY, AND THE FUTURE OF FIGURE SKATING

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I. INTRODUCTION

On the evenings of December 2 and 3, 1994, three new figure skating champions were crowned in Hamilton, Ontario. The women's champion, Josée Chouinard, skated a four minute technical program held over from the 1994 Lillehammer Olympics. The men's champion, Scott Hamilton, ten years removed from his Olympic victory in the 1984 Sarajevo games, defeated recent four-time World Champion Kurt Browning, as well as former World Champion Brian Orser, U.S. medalist Mark Mitchell, and 1980 Olympic Champion Robin Cousins.

The pairs champions, Ekaterina Gordeeva and Sergei Grinkov, performed a perfect performance to complement their 1988 and 1994 Olympic Golds. Chouinard, Hamilton, Gordeeva and Grinkov all stood proudly at center ice as they received their medals, and their checks, proclaiming them to be the 1994 Toyota Canadian Professional Figure Skating Champions. Their thrill of victory was short-lived, as there were figure skating championships held in Providence, Cleveland, Sun Valley, Long Island, Amherst, Worcester, Tokyo, Edmonton, Landover, Hamilton, and Nashville within a fifteen week period surrounding the Canadian championship. All of these competitions featured World champions, Olympic medalists, and National champions; however, none of these competitions, under the current rules of the International Skating Union and national governing bodies, would feature *future* World, Olympic, or National champions. All skaters who competed in these "professional competitions" were deemed to have lost their eligibility to compete in future ISU-sanctioned events. Of course, these skaters could have had a second chance at "eligible" glory, provided they hung up their professional skates by April 1, 1995, and filed for reinstatement as "amateurs," as they used to be called. Therefore, although the consensus is that the greatest skaters in the world today are professionals, (many of whom were given one-shot eligibility to compete in the 1994 Olympics), the ISU continues to cling to a system of "amateurism". In so doing, it prevents figure skating from achieving its full potential, forgoing both the opportunity to control the goings-on at the professional competitions and the opportunity to display up-and-coming young skaters at events featuring a Scott Hamilton or a Katarina Witt as the marquee performer.

Similarly, all is not well on the professional front. Although skating had more exposure on television during the 1994-95 year than ever before, the twin threats of overexposure and the diminishing of an athletic and artistic event are very real. The "Rock and Roll Skating Championships" were just one example of a commercial extravaganza which may have won television ratings but will surely begin to erode the credibility of the skaters and the judging process.¹ Furthermore, most of these

1. The judges at the Rock-and-Roll Championships included such figure skating

professional championships relied on a cast of "the usual suspects," and week after week the same former Olympian would appear on the same network to do the same routine in a different arena. When only one new suspect, one new Olympic champion, is added to each event every four years, boredom on the part of viewers and overexposure of certain skaters will become the norm.

This Article will discuss the confused state of the sport of figure skating today and will discuss ways to restructure skating so as to best achieve a stable mixture of commercial popularity, athletic competition, and artistic elegance. Part II will discuss the historical structure of figure skating and the rules which governed the sport prior to the current confusion. Part III will focus on the popularity of figure skating today, discussing skater eligibility, and will provide insight on the future of the sport if it maintains its current direction. Part IV will analyze the regulatory frameworks of other individual sports, with particular focus on the regulations of the Women's Tennis Association, the ATP tour, and the Professional Golfer's Association. Part V will discuss several of the most important areas of legal challenge to individual sports, and Part VI will propose the restructuring of the governance of figure skating, drawing on the legal issues faced by other individual sports as they have grown and the realities of the market for figure skating.

II. THE TRADITIONAL RULES AND GOVERNANCE OF FIGURE SKATING

The International Skating Union is the governing body over all national figure skating associations today. Founded in 1892 for the purpose of standardizing international speedskating competitions,² the ISU quickly acted to "ban anyone who was not strictly an amateur skater from ISU events" once it gained control over the figureskating arena.³ Today, the ISU acts as the worldwide representative of figure skating, sanctioning all non-professional competitions and selected pro-ams,

notables and highly qualified skating judges like MTV's Downtown Julie Brown, former NHL star Bryan Trottier, and Bruce Jenner.

2. BEVERLY SMITH, *FIGURE SKATING: A CELEBRATION* 17 (1994).

3. *Id.* For this reason, Axel Paulsen, creator of the now ubiquitous Axel jump, was banned from ISU figure skating competitions because he had competed professionally as a speedskater. *Id.*

certifying national associations, and creating the rules for World and Olympic figure skating championships.⁴

Figure skating was first included in the 1908 *Summer* Olympic games in London, and was the first winter event to be considered an Olympic Sport.⁵ By the time the winter games began,⁶ national associations for figure skating had already been established around the world. In 1921, the United States Figure Skating Association was founded by seven figure skating clubs around the country.⁷ It became a member of the ISU in the same year.⁸

Throughout the following decades, competitive figure skating continued as a purely amateur sport. Although skaters such as Sonja Henie achieved worldwide fame through movies and entertainment spectacles on ice, the large majority of high-level skaters did not achieve such renown with the public at large, and became coaches or left the sport altogether after their competitive careers came to a close.

In the 1960's, television began to exert its influence on the sport. Network broadcasts of the National, World, and Olympic Championships made skaters well-known performers. Peggy Fleming, after winning the 1968 Olympic Gold Medal in Grenoble, became the first skater to have her own television special, earning about \$500,000 in her first year as a professional skater.⁹ Janet Lynn, a popular skater who never won a World or Olympic title due to her difficulties with compulsory figures, signed a three-year contract worth \$1,455,000 with the now-defunct Ice Follies in the early 1970's.¹⁰

In 1973, the ISU added the short program, a two-and-a-half minute program featuring several required technical moves, to the competitive requirements to bolster the television-friendliness of the sport and to lessen the importance of the almost unwatchable compulsory (school) figures.¹¹ Throughout all of these changes, however, several aspects of figure skating remained constant: the judging was a constant source of com-

4. *Id.* at 17-18. The ISU currently has fifty member nations.

5. *Id.* at 19.

6. The Winter games were first held in 1924.

7. USFSA, THE 1995 OFFICIAL USFSA RULEBOOK iv (1994) [hereinafter USFSA].

8. *Id.*

9. CELEBRATION, *supra* note 3, at 51.

10. *Id.*

11. *Id.*

plaint; the skaters were amateurs; and the fastest way to professional success, which at this time was based on touring and entertainment spectacles such as Ice Follies and Ice Capades, was an Olympic Gold Medal.

A. Changes in the Governing Structure

In 1978, the U.S. Congress passed the Amateur Sports Act.¹² Although it was not of major import to the development of figure skating at the time, it did become a factor in the development of figure skating once the amateurism rules were altered in the early 1990's.¹³ Until the late 1980's, figure skating was, on the books at least, an amateur sport. Under ISU rules, skaters were not permitted to receive money from sanctioned competitions, sign contracts, or control the money they received from endorsements or exhibitions.¹⁴ Therefore, a trust fund was established and administered by the national skating association to control any money the skater in fact did earn.¹⁵

12. AMATEUR SPORTS ACT OF 1978, Pub. L. No. 95-606 (Nov. 8, 1978), 92 Stat. 3045-3058 (1978).

13. The Amateur Sports Act defined an amateur athlete as "any athlete who meets the eligibility standards established by the national governing body in which the athlete competes." *Id.* at § 103(1). Under the United States Olympic Committee bylaws, the United States Figure Skating Association is the National Governing Body for the sport of figure skating. See USOC BYLAWS (1992), App. I. As such, the USFSA is required to abide by the Amateur Sports Act and the USOC Constitution and Bylaws. *Id.*

Under the ISU Constitution, the USFSA is called a "national association," and is therefore a member who is bound to follow the ISU rules. ISU CONST., Art. 6. This also raises a question as to whether the USFSA is in compliance with the national governing bodies provision of the Amateur Sports Act, in which the National Governing Body must:

demonstrate that it is autonomous in the governance of its sport, in that it independently determines and controls all matters central to such governance, does not delegate such determination and control, and is free from outside restraint, and demonstrates that it is a member of no more than one international sports federation which governs a sport included on the program of the Olympic Games or the Pan-American Games.

Id.

14. KURT BROWNING, FORCING THE EDGE 110 (1991) (statement of Kevin Albrecht) [hereinafter FORCING].

15. For example, the USFSA promulgated eligibility rules in 1990 which provided:

3. A skater is permitted to perform for money in non-sanctioned ice-shows and exhibitions, and to use his or her name, picture or personal appearance to advertise commercial products, services, or enterprises for money, and remain as an eligible person, if he or she complies with the following requirements:

(a) Obtains contract approval from the USFSA.

(b) Establishes a USFSA trust fund.

Canadian agent Kevin Albrecht, along with his client, World Champion Kurt Browning, developed a system which would bypass the trust fund system and insure that the skater remained "eligible."¹⁶ In order to give Browning and his advisors some control over the investment of the trust fund money, Albrecht created a corporation, Kurt Browning Enterprises, Inc.,¹⁷ with the goal of transferring Browning's money from the Canadian Figure Skating Association trust fund to the corporation.¹⁸ As a result, there is now a standard agreement available to Canadian skaters who wish to control their own trust funds. However, the episode illustrates the growing rift between the skating purists, who feel that money should be a secondary concern for up-and-coming skaters, and between those who feel that skaters should have control over their own business affairs even while competing as eligibles.¹⁹

In 1990, another technical change in figure skating made the sport more television-friendly. The Halifax World Championships were the last world championships to include compul-

(c) Ensures that all proceeds are deposited in the skater's trust fund.

(d) If a skater is 15 years old or younger, presents evidence of attendance at school in compliance with the state laws of his or her residence.

(e) Agrees to restrict commercial activities, both two weeks before and during USFSA and International Championships and through the World Championships and the Olympic Winter Games.

This provision is unlimited as to age or skating level.

USFSA, THE OFFICIAL 1991 USFSA RULEBOOK (1991), Interim Eligibility Rules.

16. FORCING, *supra* note 15, at 109.

17. *Id.*

18. *Id.* Acknowledging from the outset that eligibility rules would prevent Browning from spending the money, Albrecht entered into negotiations with the CFSA and the ISU. Ultimately, the corporation was given permission to remove the money from the CFSA trust fund. *Id.* at 110. Two CFSA Board members were placed on the Board of Kurt Browning Enterprises, and, after Albrecht's CorpSport Agency merged with IMG, corporations looking for sponsorship opportunities with Kurt Browning were also shown sponsorship opportunities with the CFSA. *Id.*

19. *Id.* Kevin Albrecht related the following story:

The CFSA kept trying to block it. They'd had unhappy experiences in the past with agents and felt that it was premature. Kurt hadn't won anything yet. He wasn't even Canadian champion at that time, let alone world champion. The CFSA felt that thinking about business would be a distraction, that he would do better to concentrate on skating. I remember attending the world championships, where the wife of a CFSA board member accosted me. She kept poking a finger in my chest, saying, "Don't-you-take-our-boy-away-from-us." With each word, she'd give me another poke. This was immediately after Paris [1989 World Championships]. These people genuinely believed that outside agitators were going to come in and destroy Kurt. The whole thing was very, very rocky.

Id.

sory figures in the competition. Although compulsory figures once counted for fifty percent of the total score, their value declined to twenty percent of the total score in Halifax. Because of their lack of crowd-appeal, their lack of television-readiness, and their effects on the outcomes of the televised portions of the competitions, compulsory figures were eliminated in the higher level events.²⁰

Also in 1990, the ISU overhauled its eligibility rules at its Congressional meeting.²¹ Under these 1990 Amendments, participation in professional competitions still caused ineligibility.²² Although both the ISU and the national governing

20. See CELEBRATION, *supra* note 3, at 151. It is interesting to note that although we consider Scott Hamilton to be one of our greatest Olympic champions, Brian Orser won three out of four free skates between the two at the 1984 Olympics and the 1984 Worlds. *Id.* Hamilton's higher rankings in the compulsory figures allowed him to win both competitions. *Id.*

21. I.S.U. Rule 102(2). Prior to 1990, the ISU eligibility rule stated:

A person is not eligible in skating if he or she has:

- a) practiced or taught skating for gain . . . ;
- b) participated in any capacity in a skating competition or exhibition in violation of the rules of the I.S.U. or of the I.S.U. member concerned . . . ;
- c) signed a contract providing for remuneration as an athlete or coach in skating prior to the completion of an I.S.U. Championship or an International Competition;
- d) accepted direct or indirect financial benefit without the authorization of the I.S.U. member concerned in connection with their preparation or participation in competition . . . ;
- e) permitted their name, picture, personal appearance or performance to be used to advertise any commercial product, service or enterprise, except in accordance with contracts entered into either by the I.S.U. or the Member concerned.

All payments to be made under such contracts shall be to the I.S.U. or to the Member and not directly to the athlete concerned.

Id.

22. I.S.U. Regs., 1190, Rule 102(2), at 4. These rules stated:

A person is not eligible in skating if he or she:

- a) is a person who has accepted direct or indirect financial benefit without the authorization of the Member concerned in connection with the preparation for or participation in competition and without such benefit being made available through the Member concerned;
- b) participated in any capacity in a skating competition in violation of the Rules of the I.S.U. or of the Member concerned;
- c) performed in an ice show, exhibition or instructed in skating, permitted the use of his or her name, picture or personal appearance to advertise any commercial product, service or enterprise, unless approved by the Member concerned.

d) in the performance of the sport, manifestly contravened the Rules of the I.S.U. and the spirit of fair play and good sportsmanship.

bodies allowed for reinstatement, "a person who has been ineligible, in accordance with the provisions of Rule 102, may not thereafter compete in I.S.U. Championships, the Olympic Winter Games, or International Competitions, even though reinstated as an eligible person."²³ As a result of these new rules, the USFSA did promulgate new interim rules allowing skaters to profit from their skating,²⁴ and skaters were allowed to use their trust fund money to cover their training and living expenses. However, prominent skaters militating for reinstatement to compete in I.S.U. events, such as Brian Boitano, were still considered ineligible.²⁵ Within two years, that too would change.

By the early 1990's, certain sanctioned competitions around the world, the NHK in Japan and the Trophy Lalique in France, for example, began awarding monetary prizes to the eligible competitors. However, "ineligible skaters" were not allowed to compete at these events because they were ISU-sanctioned. In June 1992, the ISU decided to change its tune once again, announcing that "ineligible" skaters would be allowed a

Id.; see also Fishbein, Note, *When Sovereigns Collide*, 9 CARDOZO ARTS AND ENT. L.J., 231, 246 (1990).

23. I.S.U. Regs., 1990, Rule 103 at 5-6.

24. See *supra* note 24 and accompanying text.

25. Fishbein, *supra* note 23, at 244-45. According to Fishbein, the 1990 I.S.U. rule changes put the U.S.F.S.A. between a rock and a hard place:

Prior to the 1990 ISU Congress, [the] definition of "eligible person" was fully in accord with ISU rules. More importantly, the USFSA definition conformed with the Amateur Act's requirement that eligibility-to-compete regulations could not be more restrictive than the rules of the appropriate international sports federation.

The new ISU regulations change all this. The new eligibility rules give to each ISU Member the responsibility to establish the basis, including any financial arrangement, in which its skaters are permitted to participate in I.S.U. Championships and/or International Competitions. As a result, the 1990 ISU eligibility rules, which leave the determination of eligibility to compete criteria largely to the discretion of the individual Member, directly conflict with section 391(b) of the Amateur Act. Although ISU rule 102(9)(a) requires Members to adhere to all restrictions of the ISU eligibility rules, it allows Members to "include additional restrictions." Because section 391(b) of the Amateur Act forbids the USFSA from setting *any* eligibility requirements that would be *more* restrictive than the eligibility criteria of the ISU, setting *any* such criteria-more restrictive than the ISU minimums-would be inconsistent with section 391 of the Act and could be grounds for revocation by the U.S. Olympic Committee of the USFSA's franchise as the NGB for figure skating. To comply with the Amateur Act, the USFSA could not specify any rules of eligibility that are more stringent than the ISU minimum standards.

Id. (emphasis added).

one-time only reinstatement through their national associations to compete in the 1994 Nationals, Worlds, and, if they chose and if they placed well in Nationals or Europeans, the 1994 Winter Olympics in Lillehammer.²⁶ Many prominent skaters jumped at the opportunity to compete in the Olympics once again: 1984 and 1988 Gold Medalist Katarina Witt, 1988 Gold Medalist Brian Boitano, 1984 Gold Medalist Scott Hamilton, 1992 Gold Medalist Kristi Yamaguchi, 1982 World Champion Elaine Zayak, 1992 Gold Medalist Victor Petrenko, 1992 Gold Medalists Mishkuteniok and Dmitriev, 1988 Gold Medalists Gordeeva and Grinkov, and 1984 Gold Medalists Torvill and Dean.²⁷

The new reinstatement rules dismayed many skaters who had chosen to remain "eligible" to take advantage of the unusual two-year gap between Olympic Games.²⁸ Lloyd Eisler, Canadian pairs skater, stated, "Our sport is political, everybody knows that. The judges are not going to put people with world and Olympic titles 15th."²⁹ Mark Mitchell, then considered a United States prospect, voiced the fears of many of the younger skaters when he spoke about the upcoming Olympics, "There are only two spots open, and to take one of them away from other people . . . I don't think that's right. Brian [Boitano] has had his two Olympics."³⁰ The decision displeased even the reinstated pros: "This is not what I lobbied for. What I lobbied for was to let professionals back in, to open up the sport completely, to take the next step," said Brian Boitano.³¹

Several more developments occurred in 1993, before the highly-anticipated "Pro-Am" Olympic Games in 1994. In May 1993, the USFSA abolished the association-supervised trust funds, allowing skaters to keep their earnings.³² Second, the USFSA sanctioned its first pro-am competition, held in Los An-

26. *Pros and Cons of A Comeback*, McLEAN's, Mar. 15 1993, at 45.

27. Neither Scott Hamilton nor Kristi Yamaguchi, however, pursued competition after reinstatement.

28. The Winter Olympics were held in both 1992 and 1994 in order to stagger the schedule between the Summer and Winter Games.

29. John Jeansonne, *Amateur Skaters Icy on Pros*, NEWSDAY, May 1, 1993, at 98.

30. Randy Harvey, *Cases of Pros, Ams, and Pro-Ams*, LA TIMES, April 6, 1993, at C3.

31. Jeansonne, *supra* note 30, at 98.

32. Harry Berkowitz, *Well-Heeled Sport: Figure Skating Changes Rules for the Money*, NEWSDAY, Feb. 9, 1994, at 15. The USFSA also eliminated the use of five percent of a skater's earnings for skater development programs. *Id.*

geles in April.³³ The competition featured \$330,000 in prize money, with the winners awarded \$40,000 and the last-place finisher receiving \$20,000.³⁴ Finally, the Canadian Figure Skating Association began to award monetary prizes at the respected Skate Canada competition.³⁵

The much-vaunted Lillehammer Olympics, although best remembered for the battles between skaters off the ice, did provide an interesting look at the former professionals competing against the younger eligibles. Overall, the politics and the star power which were expected to mesmerize the judges did not materialize. In the men's competition, Alexei Urmanov won the Gold, Elvis Stojko the Silver, and Philippe Candoloro the Bronze; the well-known reinstated men, Victor Petrenko and Brian Boitano, finished off the podium. In the women's event, Katarina Witt, the only competing reinstated woman, finished sixth. Only in the pairs and ice dance events did reinstated skaters win medals: Gordeeva and Grinkov won the Gold, and Mishkuteniok and Dmitriev won the silver. Torvill and Dean finished third in ice dancing.

III. THE CURRENT STATE OF FIGURE SKATING

The quantum leap taken by figure skating in 1994-95 cannot be traced to any specific actions taken by the figure skating associations but by two unforeseen events: the clubbing of Nancy Kerrigan's knee by Tonya Harding's cronies and CBS Sports' loss of NFL football to Fox.³⁶ Several other reasons have been cited for skating's popularity: the two-year break between Olympics instead of the usual four; the pro-am nature of the Olympic games; the increasing athleticism of skating; the popularity of ice dancing; the creation of new tours based more on skating than on spectacle; and the attempts of television to capture a female audience.³⁷

The Tonya Harding scandal brought legions of viewers to the women's event at the Olympics. From January 6, the date

33. Harvey, *supra* note 31, at C3.

34. *Id.*

35. Martin Cleary, *SunLife Skaters Can Figure on Winning Cash*, THE OTTAWA CITIZEN, Oct. 5, 1993, at C6.

36. *Watch Out, Super Bowl-Here Come the Ice Skaters*, CHRISTIAN SCI. MONITOR, Feb. 10, 1995, at Sports 1.

37. *Id.*

of the attack, until Nancy Kerrigan told Mickey Mouse that this was "the most corniest thing" she had ever done, the saga was in the papers, on television, and on the tabloid covers next to the cash registers at the supermarket. The affair resulted in a low finish at the Olympics for Harding, (who eventually pleaded guilty to criminal charges, resigned from the USFSA, and was stripped of her 1994 National Title), a silver medal and short-lived stint as America's Sweetheart for Nancy Kerrigan, and ratings through the roof for CBS, as the women's short program became the fourth most watched program in sports broadcasting history.³⁸

As the Harding potboiler stumbled to closure, CBS, after losing its football contract to Fox, looked for a sport to fill its then-empty weekend lineup. Figure skating, with its tendency to attract a largely female audience and its new-found popularity among American viewers, fit the bill. Therefore, CBS focused its "Eye on Sports" and broadcast eleven figure skating events between November 9 and December 24, 1994.³⁹

CBS was not the only network capitalizing on the booming popularity of figure skating. During the skating season, ABC also presented eleven skating events, and its ratings jumped thirty percent from 1993-94, when it had broadcasted only seven events.⁴⁰ In addition, several Disney skating specials were shown during the holiday season, IMG Television Group began producing skating events, and multiple television stations, including ESPN and Fox, also broadcast professional competitions and exhibitions.

The quality and format of the non-sanctioned professional competitions varied wildly.⁴¹ No standardized judging formula had been developed. The required elements for a superior technical program were undetermined. Several competitions had no time requirements for the programs, while others relied

38. An estimated 126.6 million viewers watched the short program, fourth only to three Super Bowls. Allen Lessels, *Gold Blades: Pro Figure Skating a Hot Commodity*, BOSTON GLOBE, Dec. 8, 1994, at 69.

39. Most of these events were slotted into Saturday and Sunday afternoons, but the two-part "Ice Wars" was a prime-time special. See Robert Trussel, *Cutting a Sharp Figure*, KANSAS CITY STAR.

40. Libby Slate, *Skating Comes In From the Cold*, L.A. TIMES, Jan. 20, 1995, at F30.

41. However, the cast of characters did not. Almost every competition featured some permutation of the following skater line-ups: Kristi Yamaguchi, Katarina Witt, Oksana Baiul, Denise Biellmann, Nancy Kerrigan, Rosalyn Summers, Victor Petrenko, Scott Hamilton, Paul Wylie, Kurt Browning, and Bryan Boitano.

on cumulative team marking. Almost all of these competitions were promoted by IMG, Jefferson Pilot Sports, or Candid Productions. Although some, like the Toyota Canadian Professional Figure Skating Championships (produced by IMG Canada) and the Complete World Professional Figure Skating Championships (produced by Candid Productions) were presented as true figure skating championships, others were exhibitions in competition's clothing.⁴² Fortunately for the image of figure skating, the above-mentioned professional competitions were the aberration, not the rule. Most professional championships were presented with the dignity of a true competition, with a panel of judges knowledgeable about skating, a technical and artistic program, and complex performances by the participating athletes.

Predictably, the response of the ISU and the National skating associations to these professional competitions was loud and unhappy. Claire Ferguson, the USFSA President, stated that all of the television-driven events are "phony shows set up by promoters," and that the skaters "could run around naked and it might be acceptable. Any sport has to have uniform rules."⁴³ Despite the venomous responses of the national associations to the professional competitions, the ISU had unwittingly played a part in their creation and popularity, as after the 1994 Olympics, those skaters who turned professional or became "ineligible" were given until April 1, 1995 to reinstate through their national association. Once reinstated, they

42. Some of the most questionable events included: *The Gold Championship*, a showdown between six Olympic Champions. Judged by coaches of eligible and former skaters, the Gold Championship proved to be little more than a moneymaker for IMG clients; *The Ice Wars - USA v. The World*. The two two-hour telecasts featured approximately thirty-two minutes of skating each and drew double-digit ratings. None of the skaters were individually scored; scores were handed down after the men had finished skating and then again after the women had finished skating. The winning team received \$100,000 each on top of individually-negotiated appearance guarantees; *The Rock and Roll Figure Skating Championships*. This competition featured skaters skating to rock music, from Enigma to Aerosmith to the Village People to George Gershwin. Commentators Pat O'Brien and Kurt Browning reminded the audience that once again, Nancy Kerrigan lost to Oksana Baiul by one-tenth of a point, the same margin of defeat as at the Olympics.

There has been some controversy over the using of eligible coaches as judges in competition, as was done in *The Gold Championship*, as commentators believe that there is a conflict of interest. See Lisa Luciano, *Skating's Brave New Whirl: But What If It Ends Up With The Same Old Judging?* N.Y. TIMES, Nov. 6, 1994, § 8, at 13.

43. Jay Weiner, *Real Ice War Is Among Skating Officials, Promoters*, PLAIN DEALER CLEV., Nov. 9, 1994, at 5E.

could compete only in ISU-sanctioned competitions, but they would regain eligibility for the 1998 Olympics.

This year-long lapse allowed skaters such as Oksana Baiul, who was presumed to be considering the 1998 Olympics, to sign lucrative professional contracts for the 1994-95 professional season and forego the 1995 World Championships. Other national skating associations were not as accepting of skaters' use of the year-long professional window. For example, World Medalist Surya Bonaly, a French skater, signed contracts with both Jefferson Pilot Sports and Candid Productions for seven professional competitions in the 1994-95 season.⁴⁴ After the contracts were signed, the French Federation told Bonaly that they would not process her reinstatement application should she compete in these events.⁴⁵ That threat, combined with the promise of a million franc a year sponsorship until the 1998 Olympics, was enough to convince Bonaly to back out of her contracts.⁴⁶

The ISU held fast to its reinstatement deadline.⁴⁷ Despite this supposed hard line, the ISU announced at the 1995 World Championship that it was going to introduce prize money for all ISU-sanctioned competitions in the 1996 season⁴⁸ and would sanction other events in order to mold them into a Grand Prix circuit.⁴⁹ The ISU hoped that by these changes,

44. Sonja Springs, *Skating: Cracks in the Ice World*, THE GUARDIAN, Oct. 9, 1994, at 8.

45. *Id.*

46. *Id.* There were two reasons Bonaly faced such pressure from the French Federation. First, the Federation believed that Bonaly had a chance to become World Champion in 1995. *Id.* Second, the French Federation had a contract with a French television network, a rival of which was to broadcast two of the events in which Bonaly contracted to skate. *Figure Skating Melt-Down: Made-For-TV Events Lose Stars*, THE RECORD, Oct. 5, 1994, at S7.

47. See Brian Creighton, *Figure-Skating Baiul Given April 1 Deadline by ISU*, REUTERS WORLD SERVICE, Jan. 30, 1995. Lawrence Demmy, the Vice President of ISU, confirmed the ending of open competition as of April 1, 1995, stating "We opened the door slightly, then opened it wider, then Congress decided to close it. Congress took the measure to protect our sport. The vote was decisive." *Id.* Demmy further stated that the ISU was concerned by the promoter-driven competitions, particularly those in the US, and that the ISU was taking a stand to "say to the skaters make your choice, either compete in events not in the interest of the ISU or skate and represent your country in the ISU championships. The restriction is that we will not allow skaters to take part in any competition which is not an ISU-sanctioned event." *Id.*

48. *Japan's Ito Applies for Reinstatement*, N.Y. TIMES, Apr. 4, 1995, at B14.

49. Digest, *Gordon Paves Ability on Short Tracks*, S.F. EXAMINER, Apr. 3, 1995, at B10.

many of the sport's big names would be lured back to ISU-sanctioned competition.⁵⁰ However, the ISU failed in its bid to lure back the skaters; in a surprise move, Oksana Baiul did not apply for reinstatement, choosing instead to remain a professional skater under contract with the William Morris Agency.⁵¹ Several skaters, including Josée Chouinard of Canada, Midori Ito, a former World Champion of Japan, and Maia Usova and Alexander Zhulin, did apply for reinstatement, but it is fair to say that these skaters are not the big fish that the ISU hoped to catch. According to the rules in effect today, every other "ineligible" skater is now ineligible forever.

But in skating, tomorrow is always another day. The ISU Congress will be held in Jerusalem next year, and already it has been reported that a new deadline for reinstatement will be imposed.⁵² Until then, skating will continue to wander uncertainly, with its non-sensical caste system preventing the best skaters in the world from competing against one another.

IV. REGULATION OF INDIVIDUAL SPORTS

As figure skating takes uncertain steps towards its future, other individual sports, such as tennis and golf, have existing professional or open circuits which allow general competition. Therefore, it is instructive to look at the regulatory systems designed by these sports and to analyze whether the framework would be applicable to figure skating.

A. *The ATP Tour*

1. Player Commitment⁵³

The ATP Tour controls the rankings for men's tennis and runs many tennis tournaments held around the world.⁵⁴ The tour is based on competition open to "all male tennis players based on merit and without discrimination" as long as they agree to the Player Commitment.⁵⁵ This commitment requires

50. *Japan's Ito, supra* note 49, at 14.

51. *Baiul Remains A Professional; Ito Regains Amateur Status*, SUN-SENTINEL, FT. LAUDERDALE, FL., Apr. 4, 1995, at 2C.

52. *Ito Aims for 1998 Games*, MONTREAL GAZETTE, Apr. 4, 1995, at C1.

53. 1994 OFFICIAL RULEBOOK OF THE IBM/ATP TOUR, Art. II.

54. The Grand Slams, both for men and for women, are under the purview of the International Tennis Federation (ITF).

55. 1994 OFFICIAL RULEBOOK OF THE IBM/ATP TOUR. Art. I(D).

the top ten players to participate in the IBM/ATP World Championship and eleven other championship tournaments,⁵⁶ while players ranked between eleven and twenty-five must participate in eleven tournaments, with ten coming from the Championship Series and one coming from the World Series Tournaments.⁵⁷

2. Guarantees and Exhibitions

The ATP does not permit its competitors to receive guarantees for their appearances.⁵⁸ Should a tournament violate this rule, it is subject to “. . . a fine up to \$50,000 plus the amount or value of any such compensation, disqualification and loss of membership, and/or forfeiture of all sums, if any, previously paid to the Tour.”⁵⁹ Acceptance of such a fee by a player is considered to be a major offense under Article VIII. Should a player be found in violation of this rule, the player is “. . . subject . . . to a fine up to \$20,000 plus the amount or value of any such payment, and/or to suspension from play in Tour sanctioned tournaments or tennis events for a period up to three (3) years.”⁶⁰

The ATP also has special rules for “Special Events,” which are basically exhibitions.⁶¹ An ATP player agrees not to play in special events which are held during any Championship Series Events or the ATP World Championship, within thirty days of a Championship Series Event if the special event is

56. Art. II(B)(5)(c)(1).

57. *Id.* at II(B)(5)(c)(2). Those ranked from twenty-six to fifty must play in ten Championship Series Tournaments and Two World Series Tournaments. *Id.* at II(B)(5)(c)(3).

58. Art. IV (A)(8) provides, in pertinent part:

the owner(s), operator(s), sponsor(s) or agent(s) of a Tour sanctioned tournament shall not offer, give or pay money or anything of value, nor shall such tournament permit any other person or entity to offer, give, or pay money or anything of value to a player, directly or indirectly, to influence or assure a player's competing in a tournament, other than prize money and permitted amateur expenses, unless authorized to do so by the Tour.

Id. The World (Free) Series, Challenger Series, and Satellite Series are permitted to pay these appearance fees. The Challenger and Satellite Series are lower-level tours, allowing players to work their way up the tour rankings, gaining points through competing in the Challenge or Satellite Tours. *Id.*

59. Art. VII(B)(1).

60. *Id.* at (D).

61. Special Events are defined as “a professional tennis tournament or other professional tennis event that is not a part of the IBM/ATP Tour or that is not an event sanctioned and recognized by the Tour.” Art. II §(8)(e).

within the same market of the Championship Event or within one hundred miles thereof, or within one hundred miles of an ongoing World Series event.⁶²

Those players who are amateurs⁶³ and wish to join the tour must turn professional before joining the tour.⁶⁴ An amateur is eligible to compete in individual tournaments, and is reimbursed by the tour for the actual and reasonable expenses pursuant to his tournament participation.⁶⁵ However, an amateur who has entered a tournament as an amateur must stay amateur through the completion of that tournament, and he may gain no prize money through his participation in that tournament.⁶⁶

3. Ranking

The ranking system provided by the ATP Tour is somewhat complex. Its stated purpose is to "provide an objective merit-based method of determining player qualification for entry and seeding in tournaments."⁶⁷ In each fifty-two week period, the player is ranked according to his top fourteen finishes in the ATP Tour approved events.⁶⁸ When new results are added, the results from fifty-two weeks earlier are dropped from the determination of top fourteen finishes.⁶⁹ Each type of tournament carries with it a different amount of points based on the prestige of the tournament and the total financial contribution it makes in player prize money.⁷⁰

B. The WTA Tour

1. Tournament Categories

The WTA Tour is the largest women's sports tour in the

62. *Id.* at Art. II (D)(8)(a)-(c).

63. In tennis, amateurism is largely limited to those players who are playing in college, under the purview of NCAA rules regarding amateurism. All of the major tennis circuits are considered "open," but all of the circuits grant prize money, thus making the players on all tours professionals.

64. *See* Art. II (B)(3).

65. *See* Art. VII (D).

66. *Id.* at (B)(4).

67. *Id.* at Art. I (B)(1).

68. *Id.* at Art. III(A).

69. *Id.* at Art. III(B).

70. *Id.* at Art. (5)(Table). Therefore, if the Australian Open, a Grand Slam, grants \$2,250,000 in prize money, the winner receives 450 points toward his ranking, the finalist receives 338, and the remaining players receive scaled points down to one. *Id.*

world, sponsoring over sixty tournaments with prize money of over \$35 million dollars.⁷¹ The tournaments are split into categories, including Grand Slam Events, the WTA Tour Championship, and several tournaments classified by specific tiers.⁷²

2. Player Commitment⁷³

The WTA considers the top twenty players in the tour rankings to be "exempt" players. These exempt players must sign up for thirteen Tournaments, none of which may be Tier IV Tournaments.⁷⁴ The four highest ranked players must play in twelve tournaments, excluding Grand Slams and the WTA Championship. Five of the tournaments must be Tier I, and seven must be Tier II.⁷⁵ Players ranked numbers five through twenty must likewise play in a specified combination of tournaments, with more Tier II and III tournaments included as the ranking drops.⁷⁶

In 1995, the WTA instituted an "Age Eligibility Rule."⁷⁷ Furthermore, the WTA instituted a gradual increase in the number of tournaments a player may play between the ages of fourteen and seventeen.⁷⁸ Also, no player under the age of fifteen may be ranked on the WTA Tour,⁷⁹ and once a player under eighteen becomes a participant in the WTA Tour, the parent must attend a two day parent orientation and the child

71. WTA, 1995 WTA TOUR RULES, Chap. I, p.7 (1995).

72. *Id.* The Grand Slam events consist of the Ford Australian Open, the French Open, Wimbledon, and the United States Open. *Id.* at 9. The WTA Tour Championship is held every November at Madison Square Garden in New York City. *Id.* The tier tournaments each have minimum purses: Tier I tournaments have a minimum purse of \$806,250; Tier II tournaments have a minimum purse of \$430,000; Tier III tournaments have a minimum purse of \$161,250; and Tier IV tournaments have a minimum purse of \$107,500.

73. *Id.* at 13-26.

74. *Id.* at 15.

75. 1995 WTA TOUR RULES, 13-15.

76. *Id.* Those players ranked from twenty-one to fifty must play in twelve tournaments as well, with the combination of ten tournaments chosen from Tiers I, II, and III, and two tournaments from Tier IV. *Id.* at 16. All other players on the WTA Tour must commit to playing in twelve WTA Tournaments per year. *Id.* at 17.

77. *Id.* at 18. Under this rule, "A player who has not yet reached the date of her fourteenth (14th) birthday will not be accepted into any professional tennis tournament on the WTA Tour or ITF Futures Circuit." *Id.*

78. *Id.* at 18-19. No player may play in a full complement of WTA Tour tournaments before she reaches her seventeenth birthday, nor may a player be "exempt" or a "top 21-50 Group player" before reaching the age of seventeen. *Id.*

79. *Id.* at (K)(6).

must attend a professional orientation.⁸⁰

3. WTA Tour Prize Money and the Ranking System⁸¹

a. Prize Money and Amateur Players

Should an amateur player place high enough in a WTA event to win prize money, the money remaining after the amateur's expenses have been paid is divided between the WTA Players Association and the sponsoring Tournament.⁸² Amateurs are entitled to payment of "actual and reasonable expenses," including transportation, room, board, and applicable chaperone expenses.⁸³

b. Improper Guarantees

Guarantees are forbidden at all WTA approved Tournaments.⁸⁴ Violating the rule against guarantees can result in sanctions, fines of up to \$50,000, removal from the WTA Calendar, and loss of WTA Committed Players.⁸⁵ Improper payments, such as traveling expenses for professionals and indirect payments for player participation, are also prohibited and result in a letter of admonition and an investigation by the Chief Executive Officer of the WTA.⁸⁶

c. Rankings

The WTA Rankings for singles players are based on both the players' tournament successes and their results against ranked players.⁸⁷ Points are awarded to competitors on the WTA Tour in two categories: round points, which reward play-

80. *Id.* at (K)(7)(b). Two further requirements demand that a player under the age of eighteen meet the minimum educational requirements of the country of legal residence and complete an annual medical examination. *Id.* at (K)(7)(c)-(d).

81. See 1995 WTA TOUR RULES, Sec. XIV.

82. *Id.* at (B).

83. *Id.* at (C).

84. Sec. XIV (F)(1), paragraph 1, reads:

The owner(s), operator(s), or agent(s) of a WTA Tour approved Tournament shall not offer, give or pay money or anything of value to a player, directly or indirectly, to influence or guarantee a player's appearance at a Tournament other than prize money and permitted amateur expenses, unless authorized by the WTA Tour.

Id.

85. *Id.*

86. *Id.* at (F)(2) and (3).

87. Art. XIV, WTA Tour Rankings.

ers for the highest round they reach, and quality points, which reward players who defeat ranked players.⁸⁸ The points are subsequently utilized to rank the players.⁸⁹

4. Exhibitions

The WTA Code of Conduct permits its players to compete in "open week" exhibitions offering guarantees.⁹⁰ The Code restricts participation in these exhibitions with several rules: the exhibition may not be within 125 miles of an ongoing tournament, or for sixty days before or thirty days after, the exhibition may not be televised to a city which has an ongoing tournament, and a player may not play in an exhibition in the same week in which she has defaulted from a WTA Tournament.⁹¹

C. The PGA Tour

1. Types of Events

The PGA Tour consist of two types of events: "open events," in which all players eligible under PGA Regulations are eligible to apply for the Tournament, and "invitation events," in which the PGA's co-sponsor invites certain participants to play in the Tournament.⁹²

2. Eligibility and Guarantees

The PGA permits both PGA members and qualified amateurs to compete in their Tournaments, although each tournament on the PGA tour has different standards of admission.⁹³

88. For example, if the number one player is defeated in the finals of a Tier I tournament, the winner gains 260 round points for winning the tournament, plus 75 extra quality points for defeating the number one ranked player.

89. *Id.* at 112. The points are added, (Quality + Round), and then divided by at least twelve, (indicating the minimum number of tournaments in which one can compete in one year), to give an average and determine the player's rank. *Id.* The points are cumulated over a fifty-two week period. *Id.*

90. *Id.* at Rule 4.7.1. The WTC defines open week as "a week in which there are no Tournaments scheduled in the following categories: Grand Slams, WTA Tour Championship, Tier I or II." *Id.*

91. *Id.* at Rule 4.7.1.

92. PGA TOUR, PGA TOUR PLAYER HANDBOOK AND TOURNAMENT REGS. 51 (1994).

93. For example, the following players were eligible for the 1995 Players Championship:

Winners of all PGA Tour tournaments within the 12-month period since the 1993 Players Championship which awarded official victor status. The top 125

Tour eligible players include those with special exemptions, the top 125 PGA Tour members on the previous year's money list, those members returning from a special medical exemption, the top ten finishers from the previous tournament, the top five from the previous year's NIKE Tour, special members, and team championship winners.⁹⁴ Other players must gain entry into Tournaments and the PGA Tour through a special Qualifying Tournament. The top forty finishers in the tournament qualify to compete on the PGA Tour for the next year.⁹⁵

The PGA prohibits guarantees.⁹⁶

PGA Tour members from the 1993 Official PGA Tour Money List. Designated players. Any foreign player who meets the requirements of a designated player even though not a member of the PGA Tour. Winners of the PLAYERS Championship, the Masters Tournament, the U.S. Open, the PGA Championship, and the NEC World Series of Golf the last 10 years. Winners of the British Open. Six players not otherwise eligible, selected by the PLAYERS Championship Committee: the Commissioner; the PGA Tour Tournament Chairman and the PLAYERS Championship Tournament Director. To complete a field of 144 players, PGA Tour members, in order, from the 1994 Official PGA Tour Money List through the Nestle Invitational.

Id. at 20-21. *But c.f.*, the Players eligible for the PGA Championship:

Former PGA Champions. Winners of the Masters Tournament the last five years. Winners of the U.S. Open the last five years. Winner of the 1993 British Open. Winner of the 1994 PGA Seniors Championship. The 15 lowest scorers, and any tied for 15th place, in the 1993 PGA Championship. The 40 lowest scorers in the 1993 PGA Club Professional Championship. The 70 leaders in official PGA Tour money standings, from the 1993 Buick Open through the 1994 Federal Express St. Jude Classic. Members of the last-named U.S. Ryder Cup Team. Winners of PGA Tour tournaments designated as major events, from the 1993 PGA Championship to the 1994 PGA Championship.

Id. at 28-29.

94. *Id.* at Sec. III(A)(1). Special exemptions include the PGA and US Open Champions in the last ten years; the last ten winners of the Players Championship; the last ten NEC World Series of Golf winners; the last ten Masters winners; last ten British Open Champs; last five leaders of the PGA Tour Money list; winners of PGA Tour co-sponsored events for the last five years; the last named Ryder Cup team; those players on the Official PGA Tour Career Money List; eight players, including amateurs, on tournament sponsor invitation; two foreign players; the current PGA Club Professional Champion; the PGA sectional champion of the section where the tournament is played; four qualifiers from that section; four low scorers at a qualifier; and life members. *Id.*

95. *Id.* at (A)(2). Some players, such as those who ranked 11 to 25 on the NIKE Tour, may immediately jump to the final qualifying round of this tournament. *Id.*

96. Sec. VI (A) of the PGA HANDBOOK states:

Neither players nor other individuals acting on such players' behalf shall solicit or accept any compensation, gratuity, or other thing of value offered for the purpose of guaranteeing their appearance in any PGA TOUR cosponsored, coordinated or approved golf event, including any pro-am event played in connection therewith, except as may be specifically authorized by the Tournament Policy Board prior to the event.

D. Common Trends

There are several comparisons to be made between the rules governing figure skating and the rules discussed above. The most striking trend appearing from a comparison of the ATP, WTA, and PGA rules is the uniform prohibition on the payment of appearance fees at the highest levels of athletic competition. This is in marked contrast to modern professional skating, where appearance fees for "competitions" are accepted.

Second, all three of the above professional tours sponsor lower-level professional tours, such as the Tier IV Tournaments, the Challenger and Satellite Series, and the NIKE Tour. The lower-level tournaments allow the up-and-coming professionals to compete against more experienced professionals, gaining both recognition from the powers-that-be in the sport and increasing their rankings through repeated competition at the professional level. Currently, figure skating has no such system. Although figure skaters gain name recognition as amateurs, the amateur ranks, with infrequent competitions and emphasis on technical jumping ability, leave skaters unprepared for the transition to the professional ranks.

The third common feature amongst the tours analyzed above is a player ranking format based upon results from more than one event. Tennis, both through the WTA and the ATP, provides a cumulative point system combining results from many events throughout the year. All golf tournaments, although differing in invitation or eligibility requirements, include a cross-section of champions and high-ranking golfers from various other tournaments or ranking lists. Conversely, figure skating provides neither cumulative ranking nor equities between championships. For figure skating, the Olympics are both the beginning and the end of public recognition and career opportunities.

Fourth, the ATP, WTA, and PGA permit and encourage amateurs to compete with professionals by reimbursing them for expenses and sanctioning pro-ams. These tournaments, an intermingling between professionals and amateurs, serve to enhance the maturation process of the younger athletes and limit the financial and marketing damage suffered by a sport when

its older, established stars begin to fade. Currently, the United States Figure Skating Association hesitates over sponsoring such pro-ams, and with both the ISU's closing of the reinstatement window and the current paranoia about professionals, widespread pro-ams do not seem likely.

A final area in which the ATP and the WTA could lead the way to figure skating is in the area of judging, or officiating, as called in tennis. Both the ATP and the WTA prescribe strict standards for the refereeing of their tour events.⁹⁷ Eligible figure skating has standards for judges; however, the impartiality of these judges has repeatedly been called into question. Professional skating has no such guidelines, and in some cases, the judges do not even have a figure skating background upon which to base their decisions.⁹⁸

V. LEGAL IMPLICATIONS OF SPORTS TOURS

Tennis and golf have not been immune from legal challenges to their tour structure. Players bring suit when excluded from certain events or from the tour altogether. Sex testing and drug testing raise additional issues. Further, when the tour players are independent contractors, issues arise over the authority of the tour to discipline them. The organization of tours themselves and the involvement of agencies such as IMG and Proserv have also come under antitrust scrutiny.

Many of the above issues revolve around application of the antitrust laws. Therefore, it is necessary to consider the current application of antitrust laws in the sports context.

A. *Sports and Antitrust: A Brief Overview*

The antitrust atmosphere surrounding the area of sports is confusing. Through judicial extrapolation of the 1922 *Federal Baseball*⁹⁹ decision, courts have found that baseball is exempt

97. See 1994 OFFICIAL RULEBOOK OF THE IBM/ATP TOUR, Art. IV; 1995 WTA TOUR RULES, Art. IX, describing the rules of judging and officiating, respectively.

98. See *supra* note 2.

99. *Federal Baseball Club v. National League*, 259 U.S. 200 (1922); see also *Toolson v. New York Yankees, Inc.* 346 U.S. 356; *Flood v. Kuhn*, 407 U.S. 258. Although the decisions began as an exemption for the baseball reserve system, *Kuhn* stated that the rulings on baseball antitrust stood for an exemption for the entire business of baseball. As long as Congress continues to acquiesce, we should adhere to - but not extend - the interpretation of the Act made in those cases. *Id.*

from many aspects of the antitrust laws. However, other sports do not enjoy such an exemption.¹⁰⁰

The Sherman Act holds unreasonable trade restraints to be violative of the Act's provisions. Unreasonableness is determined by using either the per se approach or a rule of reason analysis. A court will find a per se restraint of trade when there has been price fixing,¹⁰¹ market allocation,¹⁰² resale price maintenance,¹⁰³ and vertical territorial restrictions.¹⁰⁴ In recent years, however, the Supreme Court has narrowed these per se categories.¹⁰⁵

The most important non-sports antitrust case with an impact on sports in recent years is *National Society of Professional Engineers v. United States*.¹⁰⁶ In *Society of Professional Engineers*, the Supreme Court set forth a test to be used in rule of reason cases, stating that an agreement is unlawful if the anti-competitive results of the agreement outweigh the pro-competitive benefits caused by the agreement.¹⁰⁷ Because of the unique nature of sports as an industry, courts almost always apply a rule of reason analysis to antitrust issues in the field of sports.¹⁰⁸

100. See *International Boxing Club of New York v. United States*, 358 U.S. 242 (1959) (holding that boxing is interstate commerce); *Radovich v. NFL*, 352 U.S. 445 (1957) (holding that antitrust laws are applicable to football).

101. *United States v. Socony Vacuum*, 310 U.S. 150 (1940).

102. *United States v. Topco Ass'n*, 405 U.S. 596 (1972).

103. *Dr. Miles Medical Co. v. John D. Parks and Sons Co.*, 220 U.S. 373 (1911).

104. *United States v. Arnold, Schwinn and Co.*, 388 U.S. 365 (1967).

105. *Broadcast Music Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), holding that price fixing in all contexts does not automatically violate Section 1 of the Sherman Act. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1958), the Court held that competition against a cooperative by one of its members could be prohibited by the cooperative, thus limiting the per se theory of group boycotts. Finally, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), a per se rule against territorial restrictions on distributors was overturned.

106. 435 U.S. 689 (1978).

107. *National Society of Prof. Engin. v. United States*, 435 US 679 (1978). Under this test, the courts

[B]alance only an agreement's effects on economic competition. Courts must weigh the injury to the consumer stemming from any increase in defendants' market power due to the arrangement (allocative inefficiency) against any benefits to the consumer that occur because defendants can make and sell their product(s) at a lower price or make more and higher quality products at the same price (productive efficiency).

Id.

108. See *Mackey v. NFL*, 543 F.2d 606 (1976) (using a rule of reason analysis to invalidate the Rozelle Rule); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381,

More specifically, Section 2 of the Sherman Act also plays a role in decisions regarding sports. In order to find a violation of Section 2 of the Sherman Act, which prohibits the exercise of monopoly power, courts must apply a two-step test. As a threshold matter, the court must determine if the alleged violator possessed enough market power to fall under the regulation of Section 2.¹⁰⁹ If such power exists, the court then determines if there was willful acquisition and maintenance of that power separate from achievement due to a superior product, business acumen, or historic accident.¹¹⁰ The court finds a violation if it determines that the purpose and intent of the monopolist was to engage in exclusionary conduct.¹¹¹

With this brief background in antitrust, it is now necessary to look at specific areas of individual sports and analyze these and other important legal issues.

B. *Eligibility to Compete on a Tour*

One of the first issues which must be determined when a sport forms a tour is who will be permitted to participate. All major tours today have eligibility requirements which focus largely on the skill of the players seeking to compete. These determinations, especially those made by the PGA, have seen extensive litigation in the antitrust area.

In the late 1950's, professional golf was growing in popularity to the point where prize money exceeded \$1 million and qualifying events could not accommodate the demand for play in PGA tournaments.¹¹² In 1958, in order to accommodate this growing demand, the PGA terminated the approved player status of fifty-seven professional golfers, including Herbert Deesen.¹¹³ The PGA terminated Deesen for insufficient playing ability and failure to compete in the required tournaments.¹¹⁴ After twice being denied reinstatement, Deesen brought suit alleging violations of Sections 1 and 2 of the Sherman Act. First, Deesen argued that "PGA rules and regula-

rev'd on other grounds, (finding that the competitive harms to the Raiders in prohibiting their move outweighed the interest of the League in making them stay in Los Angeles).

109. U.S. v. Grinnell Corp., 384 U.S. 563 (1966).

110. *Id.*

111. *Id.*

112. SPORTS AND THE LAW, *supra* note 143, at 658.

113. Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966).

114. *Id.*

tions are so indefinite as to be incapable of non-discriminatory enforcement and are thus unreasonable."¹¹⁵ The court disagreed, finding that the basis for the PGA requirements was to assure that there were certain standards of competition on the tour; therefore, the purpose of the rules was "not to destroy competition but to foster it by maintaining a high quality of competition."¹¹⁶ In so holding, the court found that the means used by the PGA to assure this high-quality competition, including sectional requirements and tournament requirements, were reasonable.

Second, Deesen argued that the PGA rules were not applied uniformly to both PGA members and non-members and therefore were facially unreasonable.¹¹⁷ The court again disagreed with Deesen, holding that any professional player was permitted to join the PGA and that the PGA's purpose was to protect the welfare of professional players in order to maintain public interest in the game.¹¹⁸ Therefore, the court found no Section 1 violation.¹¹⁹

Finally, Deesen raised a Section 2 claim, arguing that the PGA was an illegal monopoly.¹²⁰ Deesen based this argument on three facts:

- (1) PGA sponsors and co-sponsors substantially all professional golf tournaments in the United States;
- (2) to compete in these tournaments a player must be a member of PGA or a PGA approved tournament player; and
- (3) PGA has the power to exclude any applicant for [sic] participation in these tournaments for any reason whatsoever.¹²¹

The court determined that the PGA did not attempt to use its power to destroy or suppress competition, stating that the Tournament player category was designed to promote participation by newer players, that the PGA granted recognition to other tournaments which it did not sponsor, and that the PGA scheduled events so as not to conflict with non-PGA events.¹²²

115. *Id.* at 169. Deesen contended that the rules allowed too much room for subjectivity in sectional determinations. *Id.*

116. *Id.* at 160.

117. *Id.*

118. *Deesen*, 358 F.2d at 160.

119. *Id.*

120. *Id.*

121. *Id.* at 171.

122. *Id.* at 171. The PGA formed the Tour Players Division (TPD) in the late 1960's to accommodate the rising stars on the tour. *Id.* The TPD today has a commissioner who is

Therefore, the court found no Section 2 violation.¹²³

A subsequent challenge to the Tournament player category was brought in *Weser v. PGA*.¹²⁴ In 1976, Weser, a former tournament-approved player, sought to enter the Western Open.¹²⁵ However, he did not meet the eligibility requirements for the Open.¹²⁶ Weser sued the PGA, TPD and the Western Open under Sections 1 and 2 of the Sherman Act. The district court analyzed the claim under rule of reason scrutiny, stating that there was no reason to question that the purpose of the eligibility requirements was to assure that the golfers in the tournament are high caliber.¹²⁷

In its analysis, the court stated that the appropriate inquiry in such a case is "whether there is a legitimate business purpose for limiting the players of the PGA and the TPD."¹²⁸ Finding that there were natural restrictions inherent in a golf tournament (including the number of players able to complete the course in one day, the resources available to the sponsor of the tournament, and the availability of volunteers to run the tournament), the court held that there were legitimate business reasons to limit the number of participants.¹²⁹ However, the court further determined that the qualifying schools run by the PGA looked like a group boycott restricting the admission of new players in favor of the old, unrelated to player competence, since the number of players successfully completing

accountable to the tour players for his actions. *Id.* In order to make room for new players on the tour, the TPD restricted access to tournaments by club pros, requiring competition and qualifying school from would-be Tour members. *Id.* The system was the subject of an antitrust challenge by Emil Weser. See *Weser, infra* note 126 and accompanying text.

123. *Deesen*, 358 F.2d at 171.

124. *Weser v. PGA*, 1979-2 Trade Cases (CCH) ¶ 78,180 (1979).

125. *Id.*

126. *Id.* The eligibility requirements required players to be members of the TPD, members of recognized pro golf associations, the Illinois PGA champion, the course head pro, nineteen members of the Illinois section, or the PGA National club champion. *Id.*

127. *Id.*

128. *Id.*

129. *Weser*, 1979-2 Trade Cases at 78,180. However, the court found that there could be an antitrust violation in this case if the player selection method for the tournament did

permit entry to some golfers who have not proven their competitive ability, while denying it to others, or if the regulations are so restrictive that those persons who have proven their competitive ability are refused entry into the tournaments in order to favor less qualified members, the regulation may not be reasonable.

Id.

qualifying school was determined by existing openings on the tour.¹³⁰ Despite this finding, a subsequent settlement precluded a determination of this issue.¹³¹

C. Gender Testing

The issue of gender testing in individual sports gained notoriety with the 1977 case of *Richards v. United States Tennis Association*.¹³² Richards, a former professional tennis player who had undergone a sex change operation to become a female, failed the Barr body test implemented by the United States Tennis Association for determining gender.¹³³ Richards brought suit against the USTA, the US Open Committee, and the WTA claiming a violation of the New York State Human Rights Law and the 14th Amendment of the U.S. Constitution.¹³⁴ Richards sought a preliminary injunction allowing her to qualify for the women's draw of the U.S. Open.¹³⁵

The USTA argued that they instituted the Barr test in order to insure fairness due to the competitive advantage of a male who underwent a sex change.¹³⁶ However, doctors who had worked with Richards testified that she had no unfair advantage when competing as a female tennis player.¹³⁷ The

130. *Id.*

131. *Id.* The *Weser* case was decided under a rule of reason analysis, which would not be applicable today. Since the Supreme Court adopted a balancing test, this case may have been decided differently. Although the PGA did prove that there were "legitimate business reasons" for its restrictions on competition, there is no extensive analysis about how these reasons compare with the anti-competitive effects of the restrictions.

132. *Richards v. United States Tennis Ass'n*, 93 Misc. 2d 713, 400 N.Y.S.2d 267 (1977).

133. *Id.*

134. *Id.*

135. The USTA enacted the Barr body test in response to Richards' application to play in the US Open. *Id.* at 715. This test had been used by the International Olympic Committee since 1968, but all of the evidence in the *Richards* case showed that the institution of the test was nothing more than a reaction to Richards. *Id.* The USTA had previously employed the phenotype test, consisting only of observation of primary and secondary sexual characteristics, and each tournament had made its own decision as to whether or not to employ the chromatin test. *Id.*

136. *Id.* The USTA submitted an affidavit attesting to the usefulness of the Barr body test, which in the opinion of the writing doctor could reliably detect a second "x" chromosome in a female. *Id.* Further, the affidavit stated that the "y" chromosome carried by a male would alter the muscle mass, height, and strength of a man during childhood and adolescence, and that sex reassignment would not alter the height or skeletal structure of a born male. *Id.*

137. *Richards*, 93 Misc. 2d at 719. These doctors uniformly thought that Richards should be considered a female, that she was the equivalent of a woman who had under-

court found in favor of Richards, stating that the requirement that she pass the Barr body test to participate in the US open "is grossly unfair, discriminatory, and inequitable, and violative of her rights under the Human Rights Law of this state."¹³⁸ The court found that the only valid reason to use a sex determination test is to prevent "men masquerading against women, competing against women."¹³⁹ Richards was, in the court's opinion, a female. Furthermore, the court determined that the Barr test should not be used as the sole criterion for eligibility when there are other factors which militate toward the finding that the person failing the Barr test is a woman.¹⁴⁰

The *Richards* case is the only court opinion on the gender status of athletes participating in gender-divided sports. Ultimately, the determination of whether a competitor is female or male still remains a regulated issue. The WTA today requires a Femininity test should there be a question as to the Tour applicant's sex. Should the applicant fail or refuse to take the test, such applicant is not permitted to compete on the Tour.¹⁴¹

D. Disciplinary Authority over Individual Athletes

Once athletes are allowed to participate on a tour, they are then bound by provisions which regulate their activities and actions while on the tour. Tour disciplinary authority is an area which by its very nature creates litigation, as players who have been suspended or expelled from the tour attempt to regain their tour status.

The case of *Blalock v. LPGA* is one of the early cases in this area.¹⁴² Jane Blalock, a professional golfer, was suspended for one year by her peers on the board of the Ladies' Professional Golf Association because of her habit of moving the ball. She brought an antitrust suit, and the Court found in her favor, finding that both "the purpose and effect of the arrangement in this case . . . was to exclude plaintiff from the market, and is

gone a complete hysterectomy, and that the Barr test was "inadequate to determine sex and it is unfair to use that test as the sole criterion for determining one's sex for purposes of participating in a sports event." *Id.*

138. *Id.* at 721.

139. *Id.*

140. *Id.*

141. WTA HANDBOOK, PLAYER ENTRY AND ACCEPTANCE PROCEDURES, (A)(4), p.84.

142. *Blalock v. LPGA*, 359 F. Supp. 1260 (N.D. Ga. 1973).

therefore a 'naked restraint of trade'.¹⁴³ Since the LPGA was the Tour handling all of women's golf, removing her from the tour was removing her from the entire market because LPGA members could not compete in other tournaments.¹⁴⁴ Thus, the court found this behavior by the LPGA Executive Board to be illegal per se, especially because the members of the board making the decision were her competitors, and her removal would have a direct positive result for them.¹⁴⁵

Today, a court would likely analyze the case under a rule of reason approach, considering the strong judicial preference developed for this line of reasoning in sports-related cases. However, if a sports organization enacted a disciplinary system which allowed the alleged violator's competitors to be the sole decisionmakers as to whether a violation has occurred, the anti-competitive effects would still outweigh the pro-competitive effects of such a procedure.

Another antitrust case in the golf arena focused on the issue of the disciplinary authority of the Tour Commissioner.¹⁴⁶ In *O'Grady v. PGA*, the PGA Commissioner, Deane Beman, suspended Philip O'Grady for six tournaments and fined him for making statements and behaving in a manner unbecoming of a professional golfer.¹⁴⁷ The court, in denying a preliminary injunction, found that *Blalock* was inapposite to the case at hand because the determiners of the suspension were not solely players who were competitors of O'Grady's, but were a cross-section of PGA members.

Using a rule of reason analysis, the court held that the PGA's action was pro-competitive.¹⁴⁸ The plaintiff made no

143. *Id.*

144. *Id.*

145. *Id.*

146. See *O'Grady v. PGA*, 1986-2 Trade Cases (CCH) ¶67, 361 (S.D. Cal. 1986).

147. *Id.* O'Grady allegedly made statements that certain golf courses were better suited as runways for LAX than as PGA tour stops, and that the Commissioner was a Nazi, a Communist, a Russian, a dictator, a Hitler, a Mussolini, and a Richard Nixon. *Id.*

148. *Id.* The court held:

[W]ith regard to the regulations involved in this case, I think it's apparent that these are self-imposed regulations that have been arrived at through the action of players themselves. They are not regulations that are somehow imposed by a group of owners. I think the obvious is that the regulation is for the purpose of insuring a healthy and continuing series of tournaments for the players to compete in and make money in, and I think that the regulation to some extent might be deemed, rather than anti-competitive, might be deemed pro-competitive.

showing of anti-competitive effect, and the judge stated that the actions taken by the Committee to suspend O'Grady were routine disciplinary actions in response to comments that can be construed in no other way than as damaging to the PGA.¹⁴⁹

E. Tour Organization

The major decisions in cases focusing on the validity of tour organization have come from the sport of tennis. Unfortunately, most of the cases in this area have been settled before a final judgment on the merits. Nevertheless, the cases which have come to the preliminary stages of trial shed some light on the appropriateness of the involvement of agencies such as IMG and ProServ in every aspect of the tennis industry, and on different constructions of applicable antitrust law.

1. *Heldman v. USLTA*

The case of *Heldman v. United States Lawn Tennis Ass'n*¹⁵⁰ arose after Heldman left the USLTA (now the USTA) and began her own professional tennis tour.¹⁵¹ Heldman claimed that the USLTA threatened to bar players under contract to the USLTA from participation in her tour because the tournaments on her tour were not sanctioned by the USLTA.¹⁵² She charged that the actions of the USLTA violated the antitrust laws as a boycott and that the actions by USLTA interfered with her business under state law.¹⁵³

Id.

149. *Id.*

150. *Heldman v. United States Lawn Tennis Ass'n*, 354 F. Supp. 1241 (S.D.N.Y. 1973).

151. *Id.* at 1247. Heldman herself was no longer a player, but a promotor of women's tennis who created the USLTA-sanctioned Virginia Slims tournament. *Id.* She joined the USLTA as "Director of the Women's Professional Tennis Tour and Chairman of the Women's Open Circuit Committee of the USLTA" in February 1972, but resigned in August of the same year after the USLTA released her from her contract on the understanding that she was leaving to focus on "Tennis World" Magazine. *Id.* Instead, Heldman began a tour circuit of her own, about which players and sponsors knew before Heldman left USLTA. *Id.* Heldman began rounding up players for her tour, making it clear that the players who signed with her would be suspended from USLTA events. *Id.* The USLTA, learning about the Heldman tour, attempted to convince her to apply for sanctions, but she refused. *Id.* The USLTA then notified all players who were considering jumping leagues that they had the right to leave the USLTA, as the men had done, but they may be reduced in status to "contract professionals," which would in turn reduce their opportunities to play for prize money on the USLTA-sponsored tour. *Id.*

152. *Id.*

153. *Id.* Billie Jean King entered the case as an intervenor, claiming that the USTA

The court found that none of the actions taken by the USLTA were carried out with an illegal purpose or effect, but were attempts to "fairly . . . achieve a sensible accommodation between competing interests."¹⁵⁴ Ultimately, the court held that they could not grant the injunction because the court was not at all sure that Heldman had a good chance of success on the merits, as the USLTA sanctioning rules were intended to foster integrity in the tournaments and the evidence on the motion did not show the provision to be outside the rule of reason.¹⁵⁵ The court gave a tantalizing hint of what was to come had the case gone to trial when it stated, "there are close and complex issues raised - particularly with regard to the anti-trust allegations - which should only be resolved upon a full trial of the facts."¹⁵⁶ However, this case did not proceed to trial, as the International Tennis Federation agreed to create the WIPTC to govern women's tennis.¹⁵⁷

Looking at the *Heldman* decision from a 1990's perspective, there is a possibility that had the case gone to trial, the case would have been a victory for the players. Although the court speaks of the valid reasons for the restraint, there are many significant reasons why the anti-competitive nature of the restraint could outweigh the pro-competitive benefits. First, the existence of only one tennis tour gives that tour complete control over all women's tennis in the world and complete domina-

interfered with her right to play as a professional in any tournament she so chooses. *Id.* The case was heard on a motion for a preliminary injunction. *Id.*

At the time, the USLTA was divided into two divisions: amateur competition and professional competition. *Id.* With regard to amateur competition, the court found that there were adequate, pro-competitive reasons for the USLTA to sanction: uniformity of rules of play to allow for uniform ranking, orderly tournament scheduling, and providing the public with high-caliber tennis competition. *Id.* at 1244. The USLTA had the right to remove these players from USLTA tournaments had they competed in unsanctioned events charging admission, paying player expenses, or paying prize money. *Id.*

Professional players were allowed to win prize money in USLTA sanctioned events, particularly "open" tournaments. *Id.* However, the USLTA continued to regulate the player's ability to perform in non-sanctioned events. *Id.* If a professional participated in such a tournament, the player could be made a "contract pro," allowing her to compete only in those tournaments considered open for all categories of players. *Id.* at 1245. The contract player could regain eligibility after a reinstatement procedure. *Id.*

154. *Id.* at 1248. With regard to Billie Jean King, the court found that when she decided to play on Heldman's tour, she knew that she would be eliminating herself from USLTA play. *Id.*

155. *Heldman*, 354 F. Supp. at 1252.

156. *Id.* at 1250.

157. SPORTS AND THE LAW, *supra* note 143, at 672.

tion over the tours' prices, creating the possibility of inflated prices for consumers and for sponsorship opportunities. Second, the tour can also limit the prize money to be won by the players, creating an artificial restraint on the players' earning power. Finally, the tour can prevent non-Tour enterprises from running tournaments, as they may exercise authority over player competition.

2. *Volvo North Am. Corp v. Men's International Professional Tennis Council*¹⁵⁸

The pervasive involvement of ProServ and IMG in men's tennis created litigation over MIPTC regulations. Both ProServ and IMG initially restricted their activities to player representation, but they began managing and staging tournaments on their own.¹⁵⁹ MIPTC then passed a regulation prohibiting player agencies from managing tournaments.¹⁶⁰ When Volvo sued the MIPTC over the scheduling of their own tournament, ProServ and IMG joined the litigation to attempt to strike down the MIPTC regulations.¹⁶¹ Volvo settled with MIPTC once their tournament was given better scheduling; however, ProServ and IMG continued the litigation.¹⁶²

First, IMG and ProServ contended that MIPTC was part of a cartel which monopolized men's tennis, and that the cartel caused elevated prices and limited competition from producers of Special Events.¹⁶³ MIPTC responded to these allegations by stating that if the tournament owners and producers are a cartel, then IMG, ProServ and Volvo are part of this cartel.¹⁶⁴ Therefore, MIPTC contended that there was no standing to assert antitrust claims against the rest of the cartel.¹⁶⁵ The Court refused to deny standing to IMG, ProServ, and Volvo even if they were cartel members, finding that a restraint of

158. 857 F.2d 55 (2d Cir. 1988).

159. SPORTS AND THE LAW, *supra* note 143, at 673.

160. *Id.*

161. *Id.*

162. 857 F.2d at 55. The case was heard by the Second Circuit on an appeal from the district court's summary dismissal. *Id.*

163. *Id.* IMG and ProServ alleged that the cartel injured them through: (1) restriction on the ability to gain enough players for events; (2) forcing them to produce fewer events than they would have without the cartel; (3) and making the Special Events less profitable than they otherwise would have been. *Id.*

164. *Id.*

165. *Id.*

trade enacted by the cartel may be negative to a particular member, and in that event, the member can raise the claim that it should have been free to compete.¹⁶⁶

Next, the court analyzed the antitrust claim, holding that the MIPTC was a joint venture and could commit antitrust conspiracy.¹⁶⁷ Before remanding the case for further consideration, the court made several pronouncements to be used by the district court. First, the Second Circuit warned the district court to be careful in determining whether to apply the rule of reason or the per se analysis to the issue because the horizontal price fixing alleged by IMG and ProServ may have been essential to the structure of the Tour.¹⁶⁸ Second, the court found that the Commitment Agreements signed by the players were not unreasonable in length due to the fact that they only ran for thirty-six weeks per year. Finally, the court reinstated the claims by IMG and ProServ under Section 2 of the Sherman Act to be considered by the court below.¹⁶⁹

Finally, IMG and ProServ were sued under Section 2 of the Sherman Act.¹⁷⁰ Since IMG and ProServ together represent eighty percent of the top men's tennis players, they almost certainly have market power.¹⁷¹ The court noted that once market power is determined, it must be proven that this power was

166. *Id.* Under this reasoning, the court upheld the appellants' rights to challenge the scheduling of the Grand Prix Circuit, the Commitment Agreements signed by players, the Tournament contribution to the Bonus Pool, and the limiting of Special Events. *Id.*

167. 857 F.2d at 55.

168. *Id.*

169. *Id.* Once again, these issues were not heard at trial. After remand, the litigants settled, with ProServ and IMG agreeing not to be tournament owners and the MITPC agreeing to allow agencies to sell television time and to be sponsors.

The MIPTC brought counterclaims against IMG and ProServ in this suit which were dropped, claiming, among other things, that IMG and ProServ were violating the antitrust laws in their roles as both agents and tournament owners. *Id.* The analysis of these claims by commentators is useful due to the overwhelming power that IMG and ProServ wield in tennis. See George Andrew Metanias, et al., *A Critical Look at Professional Tennis Under Antitrust Law*, 4 ENT. AND SPORTS L.J. 57 (1987). The commentators find that both ProServ's and IMG's actions were either a division of markets in which the parties refrained from scheduling against one another or a group boycott in which they would prevent their players from participating in tournaments in which they had no financial interest. *Id.* at 90. Since these are traditionally considered per se violations, Metanias, Cryan, and Johnson believe that even if the court was to apply the rule of reason analysis, IMG and ProServ would be held liable for antitrust violations under section one of the Sherman Act. *Id.* at 91.

170. 857 F.2d at 91.

171. *Id.*

exercised with the intent of maintaining a monopoly and not because of better business, history, or a better product.¹⁷² Consistent with the other issues before the court, the issue was remanded for further consideration.

VI. THE BRAVE NEW WORLD: WHERE DOES FIGURE SKATING GO FROM HERE?

A. *The Realities of Figure Skating*

Before determining what steps figure skating can take to organize itself into a coherent structure, certain realities which face, and will continue to face, the world of figure skating, must be confronted. If the forces attempting to turn figure skating into an immediate, big-bucks extravaganza do not recognize these realities, figure skating in its current incarnation will be a thing of the past.

First, figure skating is a tremendously expensive sport for talented young skaters, and there is almost no financial reward until skaters reach the very top. It is not uncommon for the family of a thirteen-year-old skater who has shown promise to spend upwards of forty thousand dollars a year on that

172. *Id.* at 92. The commentators list nine areas in which ProServ and IMG impermissibly exercised monopoly power:

- (1) offering guarantees and wildcards to induce young players to sign with the agency;
- (2) threatening blacklisting of young players who do not sign;
- (3) making loans or financial deals with coaches to 'encourage' their players to sign;
- (4) control in related markets pressuring players to sign;
- (5) "leveraging their star clients to obtain financial concessions from tournament owners";
- (6) "coercing financial concessions" from other tournaments through threat to hold a competing tournament;
- (7) acting in concert;
- (8) pressuring players to play in tournaments which earn money for ProServ or IMG; and
- (9) scheduling events at times favorable to their players.

Id. The commentators find that these actions in the market of professional tennis make IMG and ProServ likely guilty, and state that the biggest Section 2 violation of these two agencies is the tying arrangement in which "ProServ and IMG use tennis players they represent (the tying product) to gain control of tennis tournaments (the tied product) . . . to parlay their control of the component markets of player services, tennis tournaments, and broadcasting to monopolize the entire market of men's professional tennis." *Id.* at 93. Therefore, if the commentators can be believed, all parties were correct to settle the litigation before it reached a trial on the merits.

child's skating.¹⁷³ In America, good coaches charge at least sixty dollars per hour. Talented skaters require at least five lessons per week, usually more, bringing the cost for lessons to \$1200 per month or, since skaters skate forty-eight weeks per year, to \$14,400 for the year. These costs do not include ice time, which is an additional cost not included in coaching time, tutors, ballet and other dance classes, strength training, costume costs,¹⁷⁴ travel costs, and competition costs. Because of these extremely burdensome expenditures, it is imperative that National Governing Bodies such as the United States Figure Skating Association continue to have the funding to subsidize the costs encountered by young skaters.

Second, young skaters need a structured organization through which they can progress from amateur to professional status. It takes years of practice for a skater to become good enough to compete at the senior level. Constant testing, competition, and monitoring are necessary for a skater to develop his or her skills.

The National Championships held at the novice and junior levels and the World Championships held at the junior level should not be sacrificed in order to cater to the skaters who have made it to the big-money senior level. If those competitions are limited due to the lack of interest on the part of television networks or potential competition sponsors, the entire sport will suffer four years down the road from that decision. Skaters will reach the senior level with no experience performing in front of large crowds and with a general lack of experience with the strains of competition. Therefore, any alterations which are made to figure skating's competitive structure should only be made at the senior level, when skaters have attained the highest level of achievement.

Third, skaters do not have the luxury enjoyed by athletes in other individual sports: they cannot put on a costume and continue to skate competitively week after week. If Pete Sampras

173. This \$40,000 estimate may be, in fact, conservative, as in many cases the skater will move away from home to train, incurring additional costs. PRIMETIME LIVE, Mar. 1995. The family of skater Tara Lopinski spent \$59,000 on Tara's skating in one year. *Id.*

174. CELEBRATION, *supra* note 3, at 70. Nancy Kerrigan's Olympic costumes, which were donated to her by designer Vera Wang, cost "\$9,600 for the black-and-white creation and \$13,000 for the flesh-colored attire. Priced at \$9,600, the costume for the technical program (at two minutes, forty seconds or so) would have cost Kerrigan \$60 a second to wear." *Id.*

chose to wear the same whites each tournament, use the same racquet and following a similar game plan, no one would notice. In fact, were he successful, people would applaud his superior tactics. The reverse is true in figure skating. The more a skater does the same thing, the more the public tunes out. And when the public tunes out, the money dries up. Therefore, skaters who compete and perform exhibitions in the current professional ranks must come into the competitive season with a number of programs. It takes a substantial amount of time to create these programs and keep them fresh for repeated performances. Since no skater can enter into the professional season with enough routines, competitions should be spread out and there should be a large enough rotating pool of skaters to prevent the feeling on the part of the public that they are watching the same, repetitive routines.

Fourth, figure skating is a worldwide sport, and any changes must take into account universal conditions and opinions. Most of the made-for-television, big-prize competitions which were held in the 1994-95 season took place in North America and were designed to play to a North American television audience. The results, although a marketing bonanza for American promoters, simply scared the European-dominated International Skating Union into once again shutting the eligibility door. Champion skaters come from all over the world, and should skating choose to organize itself into a worldwide organization of skaters, competitions should be allocated into different parts of the world to prevent a sharp demarcation between North American skaters and international skaters.

Fifth, skating is still best known for its popularity in the Olympics. However, this limits the current profitability of the sport. As stated above, there are only four categories of Olympic champions added to the ranks once every four years. Considering these skaters as the only major-league skaters will hurt figure skating's ability to market itself in the future as the "been there, seen that" boredom sets into the possible viewing audience.¹⁷⁵

Finally, judging in figure skating will always involve some level of subjectivity. Since figure skating without artistry

175. John Powers, *Free Skate Urged; Eligibility Rules Seem Hypocritical*. BOSTON GLOBE, Nov. 27, 1994, at 57. The *Boston Globe* quoted Paul Wylie as stating, "If you are going to be on the 'A' list, you have to win an Olympic medal." *Id.*

would simply be a jumping match, the artistic impression mark is needed to give the sport its soul. In the artistic impression comes the subjectivity; some judges will simply like the flow and style of one skater better than that of another. Some skaters are naturally more musical than others. Some skaters will always be avant-garde, receiving low marks for being odd or daring while setting a trend that will garner high marks for other skaters who follow. What must be controlled more than subjectivity in the artistic impression mark is the backstage politics that go on in figure skating; personal and national prejudices must be left at the door. However, judges should be closely monitored by the International governing bodies, and any nationalistic or questionable trends in marking should be strongly discouraged.

B. How Should Figure Skating Change?

1. Reinvent the International Skating Union

The International Skating Union, as an International Federation for both figure skating and speed skating, is a governing body whose time has passed. Considered slow and reactionary even by its members, the International Skating Union cannot adequately represent sports on such divergent tracks as figure skating, with one of the largest viewing audiences in the world, and speed skating, which rarely makes it onto the television screen.

Figure skating needs an International Federation which will control figure skating exclusively and attempt to unite the rival factions of eligibles and non-eligibles. Clearly, the International Federation should exhibit more concern for the future of the sport. Instead of blanketly negating the validity of all professional competitions, an International Federation should attempt to use these competitions for the good of figure skating. Most of all, the International Federation should not be signing contracts with IMG to allow them to exercise more control over figure skating.

Acting in the best interests of figure skating as a whole is sure to upset some of those involved with figure skating today, especially certain show promoters. Therefore, any new International Federation must ensure that it does not enact restrictions for the sport as a whole that run afoul of the antitrust laws, such as excluding IMG completely from the show promo-

tion business. Nor should the new Federation limit what skaters can and cannot do as far as skating appearances are concerned. If a skater chooses not to compete in the Nationals in favor of participating in an exhibition in Los Angeles, that is the skater's prerogative. The goal for the Federation should be to create as large a talent pool as possible to allow for skaters to appear in different competitions and exhibitions, and to create a system where several competitions would be highly respected, not just the Worlds and Olympics.

Finally, the Olympic Charter grants the right to determine who should compete in the Olympics to the International Federations.¹⁷⁶ Therefore, the International Federation can and should adopt an open eligibility policy, wherein skaters would not be classified by status but by skill and former results to determine which competitions the skater may compete.

2. Maintain the National Governing Bodies

National governing bodies play an important role in the development of figure skaters and in the production of a national championship and nationally-sanctioned competitions. Therefore, if figure skating is restructured, National Governing Bodies should remain a part of this structure by: developing sponsors for competitions that take place in their country; producing and financially benefitting from competitions they present; creating a system for young skaters to progress through the ranks; and helping to fund the careers of these young skaters.

Furthermore, national governing bodies have a role to play in the eligibility determination of skaters for the Olympics.¹⁷⁷ Therefore, the national governing bodies could help in expanding the sport of figure skating. Unfortunately, since all

176. OLYMPIC CHARTER, Part II, Rule 45. To be eligible for participation in the Olympic Games, a competitor must comply with the Olympic Charter as well as with the rules of the IF concerned as approved by the IOC, and must be entered by his NOC.

1. Each IF establishes its sport's own eligibility criteria in accordance with the Olympic Charter. Such criteria must be submitted to the INC Executive Board for approval.

2. The application fo [sic] the eligibility criteria lies with the IF's, their affiliated national federations, and the NOC's in the fields of their respective responsibilities.

Id.

177. See OLYMPIC CHARTER, Sec. II, Rule 45, By-law (2).

parties are being so provincial in figure skating today, it is unlikely that a figure skating association such as the USFSA would act to open up its ranks to professional skaters. This type of inaction demonstrates short-sightedness and a lack of thought. Everyone is afraid that figure skating is going to turn into tennis, with players scouting the world for the most lucrative exhibitions and refusing to compete in certain locales because of the location's climate. However, figure skating is as much like tennis now as it ever will be, since promoters and agents are running the shows, providing guarantees, and lucrative payoffs are permitted.

The National Governing Body also plays an important role in maintaining funds to disburse to younger figure skaters to defray the costs of training. The USTA makes a substantial amount of money from the US Open; similarly, the USFSA could use the money it makes from the Nationals and other competitions it chooses to defray training costs and to institute additional skater programs.

3. Limit IMG Control Over the Sport

IMG is so interconnected with skating today that it looks as if there is a *Volvo v. MIPTC* situation in figure skating's future. IMG represents the ISU and many of the professional, ineligible skaters. IMG schedules competitions, books its skaters into those competitions, and handles the broadcast rights to those competitions. Analogizing to the *Volvo* case, the counterclaims brought by the MIPTC can be seen in the context of IMG and figure skating. IMG clearly has market power and acts as both an agent and a competition producer in figure skating, and these actions could be either a market division or a group boycott. If this is so, IMG will certainly be found to have violated the Sherman Act, either on per se grounds or on rule of reason grounds. And although IMG is right now overreaching in the field of figure skating, it is IMG that figure skating does not want to be without. Therefore, a preemptive agreement with IMG, on the order of that made between MIPTC and IMG and ProServ, would be useful in figure skating.

4. Create a World Cup Circuit Under the Auspices of the New International Federation Controlling Figure Skating¹⁷⁸

Since figure skaters make a substantial amount of their yearly earnings from tours, because figure skating is linked with winter in the minds of much of its audience, and because most North American arenas already have ice down, figure skating should restrict itself to an October through March competitive schedule. An ideal schedule would be one of ten to twelve events, scheduled in different nations and with different combinations of skaters. Included in these events could be competitions such as Japan's NHK, France's Trophy Lalique, Skate Canada, Skate America, several competitions arranged by outside promoters, and the National and World Championships.

a. Point System

The Circuit should use a point system, in which the winner of each competition gains a certain number of points, as does the second place finisher, and so on. The skater who has com-

178. Skaters and their agents have proposed various types of World Tour-type circuits. The term World Cup Skating Circuit comes from an idea voiced by Kurt Browning in his book, *Forcing Edge*. *FORCING*, *supra* note 15, at 214. Browning states:

I'd also like to see a World Cup skating circuit. It would be far more interesting for the fans if they could watch a whole series of competitions, with points awarded and prize money distributed, to determine who will be the world's best skater in any given year.

The skaters would be forced to live out of a suitcase, it's true. But how long are we at our competitive peak? Not very many years. If the circuit paid enough money - and it would, given TV rights and sponsorships of every kind - I think we'd be willing to attempt it. I could see skaters seizing the agenda here, getting this off the ground by means of a consensus among ourselves. After all, it would simply be an extension of what we're already doing. We're constantly going to competitions. If the season were extended, we'd simply have to stay in shape a little longer. The World Cup and the Worlds wouldn't conflict. Rather, they'd coexist. There's room for both of them.

Id. Paul Wylie, 1992 Olympic Silver Medalist, has also advocated a change in the competitive structure of the sport:

This was inexorable, like professional basketball or tennis, where you develop as a professional and the people know your name and start to follow you Eventually, the Olympics may not be the only game in town in terms of bringing people a certain level of notoriety. In tennis, you don't have to wait four years to try to win Wimbledon or a Grand Slam. How unrealistic is that for skating?

Paul Wylie, quoted in Jere Longman, *All of Those Triple Axels are Leaving the Skating World Dizzy*, N.Y. TIMES, Nov. 27, 1994, at B10.

peted in the requisite number of competitions and earns the most points would be the winner of that year's World Cup. This way, the Tour would reward both excellence and consistency. With a point system, skaters would be able to recoup from a bad performance instead of having an off-night and watching twenty years of training lead to a minor-league career, as happens currently when skaters fail to medal at the Olympics.

b. Open Competition

One of the bases for this Circuit would be open competition. Once a skater reaches a certain level, that skater should be considered potential Circuit material. There are two ways a skater could become a competitor on the Circuit. First, a skater could gain entry through the traditional ladder: placing at regionals, placing at sectionals, and then finishing high at Nationals. Each of the top five finishers in each nation's National competition would become eligible to compete in all World Cup events the next year. A second method of determination could be granting points to skaters who compete in smaller competitions throughout the year, gaining points in a manner similar to the accumulation of points which currently occurs on the satellite tours in tennis. Once a skater gains enough points to be in the top fifty, that skater would be eligible to compete on the World Circuit.

c. Elimination Rounds

Currently, figure skating competitions use qualifiers when the field is too big to perform on the night of the competition. This qualifying method could become more prominent, a precursor to all World Cup Competitions, and could provide each skater with an opportunity to compete in the final draw. Some skaters should be automatic entries, such as the reigning champion of the event, the current Nationals champions, and the World Champion. The qualifiers, therefore, would be designed for the up-and-coming skaters who are trying to reach the level of the veterans.

d. No Minimum Number of Competitions Required

The skaters would not be bound to compete in a minimum number of competitions each year and would be free to perform

in exhibitions instead of competitions if they so choose. The only real repercussion would be that a skater who did not compete in enough competitions or accumulate enough points could not become the World Cup champion. However, if Brian Boitano decides that he really wants to skate in Lalique and only Lalique, and he qualifies under one of the provisions above, he would be free to do so. In this way, veteran skaters who are making the career change to exhibition and show skating can still test their competitive skills and bring added publicity to any younger skaters who are competing at that competition.

e. Standardize the Judging

The judging on all World Cup Circuit events should be standardized through the International Federation. Figure skaters have voiced a preference for former figure skaters instead of non-skating volunteer judges, currently the norm in eligible competition. There is some merit to that preference. Former skaters are less likely to be swayed by political blocs, as they have had the experience of being at the mercy of political blocs themselves. However, former skaters are also very opinionated as to their preferred style of skating, and may come with a bias towards a skater who has a similar style. Coaches are also a worthy choice for judges. They have most often dealt with skaters of many different abilities and styles and have learned to adapt themselves to those differences. However, it is difficult to enlist enough qualified judges who do not have conflicts because of their professional relationships with skaters who are their current or former students.

The best method of standardizing the judging is to create a panel featuring all three types of judges: the NGB trained judges, former skaters, and coaches. Therefore, any judicial prejudices will be personal and not as a result of the entire group. In addition, judges from each class will have different ways of looking at a performance, making for exciting, controversial, and complete judging.

f. Prohibit Guarantees

The ATP, WTA and PGA all prohibit guarantees in their tournaments, and any new figure skating circuit should follow suit. By their very nature, guarantees hinder the validity of

athletic competition, as the athlete will be collecting money no matter what the outcome of the contest. This has the potential side effect of limiting athlete motivation and undermining public confidence in the integrity of the competition. Guarantees should be reserved for exhibitions and tours and stricken from all competition.

5. Limit the Competitive Season to Encourage Agency-Sponsored Exhibitions

A benefit of the proposed World Cup Circuit is that more skaters will gain prominence through the expanded number of competitions, and more skaters will qualify to compete on the world stage. Therefore, figure skating tours and exhibitions will not be as repetitive as the current crop. The more skaters that participate, the less demand for each particular skater and boredom among the viewers.

In addition, many professional skaters today state that they are no longer interested in competing and only want to skate for audiences and for fun. There is no reason to believe that those feelings will change simply because the organization of the sport changes. Therefore, the exhibitions would create opportunities for those skaters who have already made their name but no longer wish to prove themselves competitively. These skaters should have enough marquee value to make exhibitions worthwhile and to continue interest in their careers after their competitive days are over.

6. Regulations of the World Cup Circuit

a. Eligibility

Under the system described above, eligibility should not become a major issue in the Circuit, as the Circuit really does not limit eligibility but makes more skaters eligible for high-level competition. An analysis of the pro-competitive and anti-competitive effects of the circuit should prove beyond a doubt that such a system is not anti-competitive. The following aspects of the system could be considered anti-competitive: removal from the circuit of players who do not place high at the Nationals or meet the point system requirement; and, skaters must be a member of the national governing body to skate in these competitions. However, the Circuit does have significant pro-competitive effects in that it creates a completely open structure in

which skaters can compete, does not restrict other competing entities from creating their own competitions which do not grant points for the Circuit, promotes development of new skaters, and acts to maintain a high level of competition in the sport of figure skating. Under the balancing analysis, the pro-competitive benefits clearly outweigh the anti-competitive effects.

b. Gender Testing

Gender testing is not a real issue in figure skating, as it is a sport in which size and muscle mass do not play as important a role as timing and agility. Strength is needed, but the difference in strength is usually apparent in the jumps, and it is not such a tremendous strength differential that a male who had undergone a sex change operation would have an advantage over females against whom she then competes. Differences between men's and women's figure skating are more prevalent in the movements they make, not in the strength they display.¹⁷⁹

c. Drug Testing

The cleanest legal way to permit drug testing at all events is to have the skaters, when contracting to skate in a certain competition, agree that they may be subject to random drug testing. This is already done in Olympic competition. Failing those provisions in the contract, the Circuit could write into its regulations a clause permitting the implementation of a drug testing program, as is done by the Tennis Tours.

Drug testing and the use of drugs has twice become an issue in figure skating. In 1991, Russian Ice Dancer Marina Klimova tested positive for banned substances at the European championships. Although a second analysis of the sample exonerated her of any drug-taking, she and her partner failed to win the Gold medal which was expected of them, and the ISU was forced to re-examine its testing policies, which until that point had been to use a lab in the locality of the compe-

179. There is a difference in jumping ability. Men must land a triple axel in order to be in the running for a medal in the men's division, while very few women have been able to successfully land the triple axel, (although both Tonya Harding and Midori Ito landed it successfully several times). In addition, female skaters such as Surya Bonaly have come very close to completing quadruple jumps, which very few men have been able to complete.

tion to read the test results.¹⁸⁰ Another episode of drugs in figure skating was one which remained hidden throughout the skater's career. Christopher Bowman, who would have been unbeatable had he concentrated on the sport, spent his career underachieving and earned himself the nickname "Hans Brinker from Hell". In March 1995, he admitted in an interview with ABC Sports that he had also spent his career using speedballs - a combination of cocaine and heroin.¹⁸¹

Skating is no more immune to drug problems than is society at large. Therefore, drug testing should be carried out in order to assure that athletes are not competing in dangerous physical condition and are not using drugs to enhance their performance.

d. Disciplinary Authority

In order to prevent the occurrence of situations such as that portrayed in *Blalock*, any discipline carried out on a tour should be vested in either a Commissioner or a Commission made up of individuals from various areas of skating, such as the Professional Skaters' Guild members, members of the National Governing Bodies, International Federation members, and coaches. There should also be an appeals process for this form of discipline. If these procedural safeguards are followed, the courts would likely hold, as was held in *O'Grady*, that regulations providing for discipline of skaters on the Circuit are effective in maintaining the respect of the tour for the skaters, organizers, and consumers, and therefore are pro-competitive.

e. Elect a Commissioner

In order for a World Cup Circuit to survive, a Commissioner must be elected and vested with disciplinary powers to broker disputes between member nations. If National Governing Bodies are to be preserved, these disputes will certainly arise. The Commissioner could be a member of any of the National Governing Bodies, or, preferably, an outsider with the

180. See Michael Janofsky, *Soviet Dance Champions Seek to Overcome Ordeal*, N.Y. TIMES, Mar. 13, 1991, at B11. According to Janofsky, in ten years of drug testing of figure skaters, only one test ever came up positive. *Id.*

181. Interview with Christopher Bowman, *ABC Wide World of Sports*, Mar. 1995. Prior to this interview, Bowman had steadfastly denied that he had ever used drugs, and denied that the severe beatings he received while training in Toronto and Pittsburgh were drug-related. *Id.*

business acumen and marketing smarts to keep the sport headed in the right direction, funnelling marketing money into each of the National Governing Bodies in order to keep the programs for young skaters viable.

VII. CONCLUSION

Figure skating as a sport and as a business will be faced with many major decisions over the next several years. Will skating become an open sport? Will it remain divided between competing eligibles and competing non-eligibles? How long will the public remain interested in made-for-tv competitions when the same performances occur every week? When will the cash cow dry up? In order to preserve the integrity that figure skating has left after the past year, the powers-that-be should act to unite all the skaters, whether eligible or ineligible, and create a legitimate tour structure instead of relying on made-for-tv events with no uniform standards and no guarantees of quality. The National Governing Bodies have been overseeing figure skating for over sixty years, and the International Skating Union for even longer. If they do not take some open-minded action to corral the sport now, it will continue to travel in many harmful directions, and the skaters of the future will be the ultimate losers.