

PROFESSIONAL AND COLLEGIATE SPORTS GOVERNANCE:
EMERGING LEGAL TRENDS AND ISSUES

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I. EMERGING LEGAL TRENDS AND ISSUES

A. NCAA

1. *O'Bannon v. NCAA*:¹ *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

- In July 2009, Ed O'Bannon, former UCLA basketball starter, filed a lawsuit against the NCAA and the Collegiate Licensing Company. The central focus of O'Bannon's argument was that the two defendants' actions consisted of violations of the Sherman Antitrust Act, which deprived him of his right of publicity.
- O'Bannon brought this suit after seeing his likeness from the 1995 UCLA championship team used in a video game without his permission or consent. O'Bannon argued that the character in the video game player played the same position as O'Bannon, power forward, and his height, weight, bald head, skin tone, jersey number and left-handed shot matched that of O'Bannon.
- In January 2011, Oscar Robertson joined in the class action suit, which also includes Bill Russell and 20 other former college athletes.
- Electronic Arts and the Collegiate Licensing Company both withdrew from the case after finalizing a \$40 million settlement.
- On August 8, 2014, Judge Wilken held that the NCAA's practice of not allowing student-athletes to be paid violated antitrust laws, and ordered that the members schools be allowed to offer full cost-of-attendance scholarships to student-athletes, which would cover cost-of-living expenses that were not currently included in collegiate athletic scholarships (as much as \$5,000 per athlete per year of eligibility).
- While Judge Wilken's August 8, 2014 ruling in *O'Bannon v. NCAA* opened up the door for college athletes to potentially enjoy trust funds of up to \$5,000 per year. The case's ruling is likely just the beginning to change in college-athlete labor markets.

¹ [http://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling;](http://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling)
[http://www.usatoday.com/story/sports/college/2016/03/31/federal-judge-ncaa-must-pay-423-million-obannon-anti-trust-case/82493298/;](http://www.usatoday.com/story/sports/college/2016/03/31/federal-judge-ncaa-must-pay-423-million-obannon-anti-trust-case/82493298/) and <http://michiganlawreview.org/the-obannon-case/>

- The U.S. Court of Appeals for the 9th Circuit affirmed Ed O’Bannon’s central argument that certain NCAA amateurism rules are violations of federal antitrust law.
 - The court limited the win by stating that the maximum that member schools had to provide to student athletes was the cost of attendance. This decision invalidated Judge Wilken’s earlier finding that would have required member schools to pay Division I football and men’s basketball players up to \$5,000 a year for name, image and likeness rights.
 - Writing for the panel, Judge Bybee stated that “offering [student-athletes] cash sums untethered to education expenses” would transform collegiate sports into a kind of minor league arena.
 - Right behind *O’Bannon* on the docket is *Jenkins v. NCAA*, a case being litigated for the plaintiffs by acclaimed sports-law expert Jeffrey Kessler.
 - Shawne Alston, Martin Jenkins and several other current and former players have sued the NCAA contending that the cap on athletic scholarships to tuition, room, board, books and fees is a violation of antitrust law. These plaintiffs contend that without such caps, universities would feel pressured to compensate student-athletes with market value scholarships.
 - Unlike the limited remedy sought by the lawyers in *O’Bannon*, the *Jenkins* case argues for a true free market for college athletes’ labor services – a result likely justified by traditional interpretation of antitrust laws. With the right expert testimony (something plaintiffs lawyers were lacking in the *O’Bannon* case), the athletes in *Jenkins* just might win and overturn the NCAA’s whole shebang.
2. *Arrington v. NCAA*:² *Arrington v. NCAA (In re NCAA Student-Athlete Concussion Injury Litig.)*, 988 F. Supp. 2d 1373 (J.P.M.L. 2013).
- In 2011, Adrian Arrington, a former safety at Eastern Illinois, sued the NCAA over its lack of concussion policies. Arrington had sustained five concussions during his career, some severe enough that he was unable to immediately recognize his parents afterward. By the time he was 27, Arrington was on welfare and was unable to remain employed because he suffered from violent seizures (during one seizure, he tore his rotator cuff.)
 - In December 2013, the NCAA would make a shocking legal argument in filings on a wrongful-death suit brought by the family of Derek Sheely, a former Division III football player at Frostburg State. Sheely collapsed after repeated

² <http://www.cnn.com/interactive/2014/10/us/ncaa-concussions/>

blows to the head during a preseason drill in 2011. He died six days later. (“The NCAA denies that it has a legal duty to protect student-athletes.”)³

3. *Northwestern Football Players’ Union Case*:⁴ **Northwestern University and College Athletes Players Association (CAPA), Petitioner.** Case 13–RC–121359

- In March 2014, Peter Sung Ohr, National Labor Relations Board Region 13 director, issued a ruling granting Northwestern football players the right to unionize.
- In order for the NLRB to find that Northwestern players could form a union, I had to find that players were University employees. Employee is defined as “a person who [1] is under the contract of hire to [2] perform services for another, [3] subject to the employer’s control and [4] in return for payment.”⁵
- Ohr concluded, “[1] the letter of intent and scholarship offer is the employment contract, [2] the hours of practice and play that generates millions of dollars of revenue for the school are the employer’s benefits, [3] the coach’s rules are the control, and [4] the scholarship itself is the pay. Players are employees, and it didn’t take any stretch in logic to get there.”⁶
- On August 17, 2015, the National Labor Relations Board (“NLRB”) unanimously declined jurisdiction. The NLRB evaded dealing with a key element in an earlier ruling, which held that college football players are close enough the definition of “employee” in the National Labor Relations Act making them eligible to seek union representation under the law. The NLRB stated that football players “bear little resemblance to graduate student assistants or student janitors and cafeteria workers whose employee status the board has considered in other cases.”

B. NFL

1. *Tom Brady v. NFL*:⁷ **NFL Mgmt. Council v. NFL Players Ass’n, 2015 U.S. Dist. LEXIS 119283 (S.D.N.Y. Sep. 3, 2015)**

- The National Football League (“NFL”) suspended one of the League’s most popular players, Tom Brady, for being “generally aware” of a scheme to deflate footballs during the 2015 AFC championship game.

³ <http://www.cbssports.com/general/news/ncaa-denies-legal-duty-to-protect-student-athletes-court-filing-says/>

⁴ <http://www.si.com/college-football/2016/02/24/northwestern-union-case-book-indentured> and http://www.nytimes.com/2015/08/18/sports/ncaafotball/nlrbsays-northwestern-football-players-cannot-unionize.html?_r=0 and <http://www.forbes.com/sites/georgeleef/2015/08/21/the-nlrbsays-northwestern-football-players-from-unionizing/3/#127b6ce34261>

⁵ <http://www.sbnation.com/college-football/2014/3/27/5551014/college-football-players-union-northwestern-nlr>

⁶ *Id.*

⁷ <http://www.sbnation.com/nfl/2015/9/3/8804543/tom-brady-suspension-appeal-nfl-roger-goodell-deflategate>; and <http://www.nytimes.com/2016/04/26/sports/tom-brady-deflategate-new-england-patriots-suspension-reinstated.html>

- “The saga raised fundamental questions about fairness on the field; how teams look for an edge; and whether the commissioner, who views himself as a stern taskmaster, had overstepped his bounds.”⁸
 - In September 2015, U.S. District Judge Richard M. Berman overturned the NFL’s four game suspension of Tom Brady. Judge Berman wrote, “The Award is premised upon several significant legal deficiencies, including (a) inadequate notice to Brady of both his potential discipline (four-game suspension) and his alleged misconduct; (b) denial of the opportunity for Brady to examine one of two lead investigators, namely NFL Executive Vice President and General Counsel Jeff Pas; and (c) denial of equal access to investigative files, including witness interview notes.”
 - The 2nd Circuit essentially ruled that Goodell and his team had the ability to do what they did, in relation to the Brady suspension, under the “conduct Detrimental” clause of the CBA. The 2nd Circuit reinstated Tom Brady’s original four-game suspension.
 - Chief Judge Robert A. Katzman, in his dissent, held that Goodell had overstepped his authority in his role as arbitrator in this process by changing his reason for punishing Brady once he had heard the player’s appeal. Judge Katzman explained that Goodell initially suspended Brady for his role in the deflategate scheme, but then argued that Brady had obstructed the investigation by destroying his cellphone that could potentially have contained messages about the scheme.
2. *Adrian Peterson v. NFL*:⁹ ***National Football League Players Association v. National Football League et al.*, 88 F. Supp. 3d 1084 (D. Minn. 2015).**
- In September 2014, Adrian Peterson was indicted on charges of reckless or negligent injury to a child.
 - On September 17, 2014, the Minnesota Vikings placed Peterson on the exempt/Commissioner’s list, which banned him from all team activities.
 - In November 2014, Peterson accepted a plea deal with the hope of reinstatement.
 - However, on November 18, 2014, the NFL fined and suspended Peterson for the rest of the regular season, citing a personal-conduct policy that was hardened and

⁸ <http://www.nytimes.com/2016/04/26/sports/tom-brady-deflategate-new-england-patriots-suspension-reinstated.html>

⁹ <https://www.washingtonpost.com/news/early-lead/wp/2016/08/04/federal-appeals-court-sides-with-nfl-in-adrian-peterson-case/>; and <http://www.dailynorseman.com/2016/4/25/11504216/adrian-peterson-can-potentially-affect-tom-bradys-court-case>

made more strict after a Baltimore Ravens player, Ray Rice, assaulted his future wife in an Atlantic City casino elevator.¹⁰

- Peterson’s defense team argued that the player’s conduct happened before the new personal conduct policy had been revised and that Peterson should be punished within the confines of the previous guidelines.
- Adrian Peterson appealed his indefinite suspension. Much like the Brady case, the Peterson action questions whether the NFL has the power to do certain things under the “Conduct Detrimental” clause of the CBA.
- U.S. District Judge David Doty overturned arbitrator Harold Henderson’s ruling.
- On Aug 4, 2016, a three-judge panel of the 8th U.S. Circuit Court of Appeals held that the arbitrator acted appropriately upholding Commissioner Roger Goodell’s suspension of Peterson for six games.

3. *NFL Concussion Case:*¹¹ ***In re: National Football League Players’ Concussion Injury Litigation, 821 F.3d 410 (3d Cir. 2016).***

- In 2012, more than 4,500 players, spouses, and representatives brought an action against the NFL, referred to as the concussion lawsuit. Plaintiffs sued the NFL for compensation for neurological deterioration and recognition resulting from playing football in the NFL.
- The two central allegations were that the NFL (1) knew about the long-term health risks associated with concussions and repeated blows to the head and (2) deliberately ignored and actively concealed this information in order to protect the economic value of the game.¹²
- In 2013, the NFL concussion lawsuit was tentatively settled for \$765 million. In May 2014, however, the judge presiding over the case rejected the settlement and ordered both sides to present evidence that the settlement amount is fair and adequate.
- In April 2016, the United States Court of Appeals for the Third Circuit unambiguously upheld a district court’s approval of the deal, over the objections of some players who had argued that the terms were too restrictive and would not take care of many players who developed serious neurological problems over time.¹³

¹⁰ <https://www.washingtonpost.com/news/early-lead/wp/2016/08/04/federal-appeals-court-sides-with-nfl-in-adrian-peterson-case/>

¹¹ <http://injury.findlaw.com/car-accidents/nfl-concussion-lawsuit-information.html>

¹² *Id.*

¹³ <http://www.nytimes.com/2016/04/19/sports/football/nfl-concussion-lawsuit.html>

- “They risk making the perfect the enemy of the good,” the court said of the players who objected that the settlement was too restrictive. “This settlement will provide nearly \$1 billion in value to the class of retired players. It is a testament to the players, researchers and advocates who have worked to expose the true human costs of a sport so many love. Though not perfect, it is fair.”¹⁴
- The appellants can still ask a larger panel of judges at the Third Circuit to hear their appeal, or they can solicit the Supreme Court.

C. MLB

1. *Alex Rodriguez v. MLB*:¹⁵ ***Alexander Rodriguez v. Major League Baseball et al., Case No. 1:13-cv-07097 (S.D.N.Y.)***

- In an attempt to have his 2014 suspension overturned, Alex Rodriguez, 3rd baseman for the New York Yankees, sued MLB and the MLB Players Association. The two lawsuits came down after an independent arbitrator handed down his decision in the matter relating to Rodriguez’s alleged use of performance enhancing substances. The arbitrator, Fredric Horowitz, reduced what was originally a 211-game suspension to 162 games suspension, which was to include the 2014 postseason as well. The arbitrator found that Rodriguez had not only used three banned substances, but attempted on at least two occasions to hinder MLB investigations relating to the Biogenesis scandal. The arbitrator stated, “While this length of suspension may be unprecedented for a MLB player, so is the misconduct he committed.”
- By February 2014, Rodriguez dropped his lawsuits against MLB and the MLB Players’ Association.

2. *Senne v. MLB*:¹⁶ ***Senne v. Kan. City Royals Baseball Corp., No. 14-cv-00608-JCS, 2015 U.S. Dist. LEXIS 1119 (N.D. Cal. Jan. 6, 2015)***

- Minor League baseball players brought suit against MLB and all of the Major Baseball League teams.
- The plaintiffs contended that MLB has been engaging in a practice of failing to pay players in order to reap higher profits.

¹⁴ *Id.*

¹⁵ <http://m.mlb.com/news/article/66540960/alex-rodriquez-sues-mlb-mlbpa-to-overturn-suspension/>; <http://www.nytimes.com/2016/04/26/sports/tom-brady-deflategate-new-england-patriots-suspension-reinstated.html> <http://www.cnn.com/2014/01/13/us/alex-rodriquez-lawsuit/>; and <http://sports.yahoo.com/blogs/mlb-big-league-stew/rod-drops-lawsuits-against-mlb-signaling-may-accept-222730411--mlb.html>

¹⁶ [http://www.law360.com/articles/708792/minor-leaguers-face-uphill-battle-in-mlb-pay-suits/](http://www.law360.com/articles/708792/minor-leaguers-face-uphill-battle-in-mlb-pay-suits;); <http://www.baseballamerica.com/minors/mlb-states-its-defense-in-minor-league-players-lawsuit/>; and <http://blogs.orrick.com/employment/2015/06/09/swinging-for-the-fences-minor-leaguers-continue-suit-alleging-they-were-paid-peanuts-by-the-mlb/#more-1052>

- The plaintiffs also argued that there is a “long, infamous history of labor exploitation dating to its inception.”
- The teams had requested that the trial be transferred to the Middle District of Florida because it is a more relevant geographic area as 15 clubs maintain spring training sites in the states (including 12 in the Middle District).
- In July 2016, U.S. Magistrate Judge Joseph Spero of the U.S. District Court for the Northern District of California, in San Francisco, denied the class certification of the minor league players involved in the *Senne* case.
- “Class members can demonstrate minimum wage and overtime violations only by demonstrating that their rate of pay fell below the minimum wage rate and that they worked the requisite hours to be entitled to overtime pay, both of which will turn on the number of hours of compensable work they performed and the amount of compensation they received for that work,” Spero said.¹⁷
- “The court concludes that the individualized issues that will arise in connection with adjudicating these questions will be extensive and will make class-wide treatment of plaintiffs’ claims virtually impossible.”¹⁸
- The next step, as outlined in the document’s conclusion, is for each side to meet and submit a joint case management statement by August 5. A case management conference will then be held on August 19.

D. NHL

1. *Concussion Cases:*¹⁹ ***In re NHL Players’ Concussion Injury Litigation, No. 14-2551 (SRN/JSM), 2015 U.S. Dist. LEXIS 33230 (D. Minn. Mar. 16, 2015).***

- On November 25, 2013, over two dozen former National Hockey League (“NHL”) players brought the first of five proposed class action lawsuits regarding traumatic brain injuries.
- The plaintiffs allege that the NHL failed to warn its players of the short and long-term effects of repeated concussions and head trauma, as well as failed to adequately care for its players after they received such injuries, and promoted and glorified unreasonable and unnecessary violence leading head trauma.
- As result of these shortcomings, plaintiffs contend that players are at a heightened and increased risk of contracting serious brain diseases such as Alzheimer’s, dementia, and Parkinson’s.

¹⁷ <http://www.baseballamerica.com/news/major-league-baseball-scores-win-minor-league-litigation/>

¹⁸ *Id.*

¹⁹ <http://www.nhlconcussionlitigation.com/information.html>

- On August 19, 2014, the Judicial Panel on Multidistrict Litigation determined that the NHL players' concussion injury cases involved common questions of fact and that centralization of the cases in the District of Minnesota was appropriate.²⁰
- All similar cases by former NHL players against the NHL were transferred to the District of Minnesota and assigned to the Honorable Susan Richard Nelson for coordinated or consolidated pretrial proceedings.²¹
- On October 20, 2014, Plaintiffs' Co-Lead Counsel filed a Master Administrative Long-Form and Class Action Complaint against the NHL.
- On March 25, 2015, District Judge Susan Richard Nelson denied the NHL's motion to dismiss the Master Complaint based on the sufficiency of the allegations.
- On May 18, 2016, District Judge Susan Richard Nelson denied the NHL's motion to dismiss the First Amended Complaint based on labor law preemption.

II. ECONOMIC IMPACT OF PROFESSIONAL AND COLLEGIATE SPORTS

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3. Darren Heitner, *Sports Industry to Reach \$73.5 Billion by 2019*, Forbes, Oct. 19, 2015, <http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/darrenheitner/2015/10/19/sports-industry-to-reach-73-5-billion-by-2019/&refURL=https://www.google.com/&referrer=https://www.google.com/>.
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5. Bill Syken, *Here's Why Companies Spend Millions On Super Bowl Ads*, Sports Illustrated, Feb. 7, 2016, <http://fortune.com/2016/02/07/super-bowl-ads-spend-millions/>.

²⁰ *Id.*

²¹ *Id.*

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9. Scott Morgan, *How Much Money Do College Sports Generate*, Zacks, finance.zacks.com/much-money-college-sports-generate-10346.html.
10. Wayne Friedman, *March Madness = Billion-Dollar Ad Haul, Loss In Business Productivity*, MediaDailyNews, Mar. 15, 2016, <http://www.mediapost.com/publications/article/271302/march-madness-billion-dollar-ad-haul-loss-in-bu.html>.
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13. Jesse Stephen, "Letting Teams Walk: Exploring the Economic Impact of Professional Sports Franchises Leaving Cities" (2014). *MPA/MPP Capstone Project*. Paper 25. http://uknowledge.uky.edu/mpampp_etds/25

III. RELATED JOURNALS, LAW REVIEWS AND PRESS ARTICLES OF INTEREST

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2. Michael Telis, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 6 (2014).
3. Jeremy P. Grove, *Three and Out: The NFL's Concussion Liability and How Players Can Tackle the Problem*, 14 VAND. J. ENT. & TECH. L. 649 (2012).

4. Clark Belote, "Football and Torts: Two American Traditions and the NFL Concussion Litigation." *NFLconcussionlitigation.com*. Ed. Paul D. Anderson. T.C. Williams School of Law, University of Richmond, 2013. Web. 30 Sept. 2013.
<http://nflconcussionlitigation.com/wp-content/uploads/2012/08/FOOTBALL_AND_TORTS_2013-copy.pdf>.
5. Spencer Anderson, *NCAA Institutions and a Duty to Warn Football Student-Athletes: A Look into the Arrington v. NCAA Case*, NFL CONCUSSION LITIG., available at <http://nflconcussionlitigation.com/wp-content/uploads/2012/08/NCAA-Institutions-and-a-Duty-to-Warn-copy1.pdf>.
6. Sheldon D. Pollack and Daniel V. Johns, *Northwestern Football Players Throw a "Hail Mary" But the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 1 (Fall 2015).
7. Christie Cho, *Protecting Johnny Football: Trademark Registration for Collegiate Athletes*, 13 NW. J. TECH. & INTELL. PROP. 65 (2015).
8. Ryan Rezel, *GUILTY UNTIL PROVEN INNOCENT, AND THEN, STILL GUILTY: WHAT THE WORLD ANTI-DOPING AGENCY CAN LEARN FROM THE NATIONAL FOOTBALL LEAGUE ABOUT FIRST-TIME ANTI-DOPING VIOLATIONS*, 29 WIS. INT'L L.J. 4 (2012).
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10. Bradley V. Murphy, *PROTECTING AMERICA'S PASTIME: THE NECESSITY OF MAJOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION FOR THE SURVIVAL OF MINOR LEAGUE BASEBALL*, 49 IND. L. REV. 793 (2016).
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18. Christopher Gates, *Adrian Peterson Can Potentially Affect Tom Brady's Court Case*, SB Nation, April 25, 2016, <http://www.dailynorseman.com/2016/4/25/11504216/adrian-peterson-can-potentially-affect-tom-bradys-court-case>.
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