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SPORTS AND THE LAW

EXAMINING THE LEGAL
EVOLUTION OF AMERICA'S
THREE "MAJOR LEAGUES"



Peter A. Carfagna

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By
Peter A. Carfagna

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610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-90758-5

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PREFACE

“Sports and the Law: Examining the Legal Evolution of America’s Three ‘Major Leagues’ ” represents the culmination of my many years of “sports law” legal practice (as a partner at Jones Day; Chief Legal Officer at IMG; and now as Senior Counsel at the Calfee Law Firm) and of law school teaching (first at Case Law School and now at my alma mater, Harvard Law School.)

The book synthesizes the major legal precedents that have shaped the evolution of America’s three “major leagues”—Major League Baseball (MLB); the National Football League (NFL); and the National Basketball Association (NBA). In so doing, it traces the impact of MLB’s “antitrust exemption,” in juxtaposition to the “non-statutory labor exemption” that applies to the NFL and NBA. In particular, the legal history of each league’s Constitution/By Laws; Collective Bargaining Agreements (and related work stoppages); and its “Uniform Player Contracts” are examined through illustrative “hypothetical” group negotiation and drafting exercises. Initial legal challenges to each of the (now familiar concepts) including “the amateur draft,” “free agency,” “age eligibility,” and the leagues’/players’ “intellectual property rights” demonstrate the unpredictable outcomes created by the intrusion of external legal authorities (e.g., courts, arbitrators, etc.) upon the current structure of each league and its related Commissioner’s “authority.”

The book concludes by recounting the tortured history of “franchise relocation” law, as well as the importance of first obtaining, and then carefully drafting, a “naming rights agreement” for any newly constructed “major league” venue.

PETER A. CARFAGNA

September 2009

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ACKNOWLEDGMENT

In publishing this second “sports law” book with West since I began teaching at Harvard Law School after leaving my position as Chief Legal Officer at IMG, I would first like to thank Staci Herr of West who has been unceasingly supportive of my efforts to reduce my Harvard Law School courses to a textbook form that would be useful to other “sports law” instructors and practitioners. Also, as I did in the Acknowledgments in my first West Law textbook, “Representing the Professional Athlete,” I would to thank Harvard Law School Professor Emeritus Paul Weiler (under whom I studied at Harvard in 1979, and with whom I have stayed in close touch since then) for his lifetime contributions to the field. To follow in Paul’s footsteps at Harvard is humbling indeed, because his teaching “Sports and the Law” from his “magnum opus” textbook at Harvard for nearly 30 years created the “level playing field” from which all sports law professors are now fortunate enough to operate.

Further, I would like to acknowledge and give thanks for the unflagging support provided for my teaching and scholarship by the administration at Harvard Law School, including Deans Elena Kagan and Martha Minow, Interim Dean Howell Jackson, and Vice Dean for Academic Programming, Professor Andrew Kaufman. Without their support, and the indefatigable efforts of my 2008–09 Teaching Assistant, Megha Parekh, who helped me transform my HLS course into this text, the publication of this second book would not have been possible.

Finally, as I did in the Acknowledgments in my first book, I would like to thank my wife Rita, and the rest of my family, for providing me with the never-ending support “back home,” that enabled me to travel to Harvard each week to teach the most wonderful students in the world—a luxury that is truly “priceless” in the world of academia to which I am proud to contribute once again with this publication.

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CHAPTER 1

THE MORAL INTEGRITY OF THE SPORT: THE ROLE OF THE COMMISSIONER AND THE LAW

■ ■ ■

Introduction

Though the building blocks of professional sports are the athletic skills of the players, the mortar holding these blocks together is a nexus of contracts between the players, clubs, and league. In each of the three “major leagues,” the constitution and collective bargaining agreement provide foundational support for the structure and governance of the league. These foundational documents state the scope of and the limitations on the authority of the Commissioner, who is entrusted with overseeing the league. Today, Major League Baseball (MLB), the National Football League (NFL), and the National Basketball Association (NBA) each have a Commissioner entrusted with protecting the “best interests” of the game, though the contours of the position vary by league.

Chapter 1 begins with an overview of the Commissioner’s current powers in each league, and then examines the exercise of Commissioner’s powers—at various points during league history—as applied to gambling, misconduct on the field, drug use, and diversity in sports. As you read the cases below, consider whether or not in a particular situation the case was resolved within the league’s internal procedures or in a court of law. When do you think that internal resolution, under the auspices of the Commissioner, is best? What issues ought to be reserved for a court of law? When answering these questions, does it make a difference to you if the Commissioner’s decision affects a player or a third party? A contractual or a constitutional right?

I. THE COMMISSIONER’S POWERS

The oldest of the leagues, MLB, was the first to create a Commissioner. The position was created in response to the “Black Sox Scandal” of 1919.¹ Commissioner Kennesaw Mountain Landis was appointed to over-

1. For more information on the Black Sox Scandal, you may want to read ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (2000).

see the league. While Commissioner Landis may have had the powers of a “benevolent but absolute despot [with] all the disciplinary powers of a proverbial *pater familias*,”² subsequent MLB Commissioners have seen the office’s authority erode as the Major League Baseball Players Association (MLBPA) emerged and gained strength. The current MLB Collective Bargaining Agreement (MLB CBA), which runs from 2007 until 2011, provides the most important limitations on the Commissioner’s once plenary powers. Once the Commissioner actually assesses a disciplinary penalty, the standard of review for punishment imposed upon a player for misconduct is “just cause.” Players who are disciplined may appeal to an impartial arbitrator or a three-arbitrator panel chaired by an impartial arbitrator. Discipline for on-field conduct may only be appealed if it results in a fine greater than \$5,000 or a suspension of more than ten games. Commissioner actions “involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball” are exempt from the ordinary grievance procedure, if the Commissioner so desires. Furthermore, the “best interests” power includes not only financial but also moral issues. However, if the Commissioner invokes this power, the MLBPA can reopen the CBA if it finds his decision “unsatisfactory.”

By contrast, in the NFL, the Commissioner maintains nearly complete control over the area of player discipline. Under the NFL CBA, if the Commissioner decides to punish a player with a fine, suspension, or both, for “conduct on the playing field” or “conduct detrimental to the integrity of, or public confidence in, the game of professional football,” the player’s only recourse is an appeal to the Commissioner himself.³ As for disputes pertaining to terms and conditions of player employment, involving the interpretation of the NFL CBA, the NFL Player Contract, or the NFL Constitution and Bylaws, are resolved under a different procedure before neutral arbitrators.

Finally, in the NBA, the two most significant contractual provisions currently governing the Commissioner’s authority are Article 35 of the NBA constitution and Article XXXI of the NBA CBA. Article 35, which lists various offenses and their maximum penalties, is the starting point for the Commissioner’s power to address misconduct. Article 35 requires that each team include a clause in its player contracts binding the players

2. *Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

3. NFL Collective Bargaining Agreement Art. XI, § 1(a) (2006). The “conduct on the playing field” clause contains an exception for penalties “imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players [which] shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFLPA. Within ten (10) days following such notification, the player, or the NFLPA with his approval, may appeal in writing to the Commissioner.” *Id.* at Art. XI, § 1(b).