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# Surveying Colorado Sports Law

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by

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## Introduction

The purpose of this article is to provide an overview and explore some of the major sports law cases that have emanated from within the four corners of the state of Colorado or maneuvered through Denver's Tenth Circuit Court of Appeals.[1] With a population of just over five million people, the twenty-second most populous in the United States, it is apparent that Colorado has had an impact on the discussion of sports law at the national level rivaling more populous states.[2] Also known as the *Centennial State*, having been admitted to the Union in 1876, Coloradans have the luxury of volumes of ski slopes, vivid and mountainous landscapes, and the state boasts numerous nationally prominent colleges and universities, including those with premier sports teams in the National Collegiate Athletic Association's (NCAA) Division I, such as the University of Colorado (Boulder), Colorado State University (Fort Collins), the United States Air Force Academy (Colorado Springs), the University of Denver, and most recently the University of Northern Colorado (Greeley).[3]

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[1] The United States Court of Appeals for the Tenth Circuit is comprised of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. It is based in Denver. *See* The United States Court of Appeals for the Tenth Circuit, http://www.ca10.uscourts.gov/ (last visited July 11, 2012).

[2] *See* Wikipedia, *Colorado*, http://en.wikipedia.org/wiki/Missouri (last visited July 11, 2012).

[3] *Id*. The University of Northern Colorado moved to the Division I level beginning in 2006.There are numerous other colleges and universities including Adams State College (Alamosa), Colorado College (Colorado Springs), Colorado Mesa University (Grand Junction), Colorado School of Mines (Golden), and Metropolitan State University of Denver.

Colorado also boasts professional teams found in all the Big Four sports including the Denver Broncos (NFL), Colorado Rockies (MLB), Denver Nuggets (NBA), and the Colorado Avalanche (NHL). In fact, Colorado is the state that has the smallest population while at the same time having a team franchise in each of the Big Four sports leagues.[4] Meanwhile, the United States Olympic Committee (USOC) is the National Olympic Committee (NOC) for the United States and is based in Colorado Springs. All of this enables Colorado to be a prime location for a wide range of cutting edge cases, decisions, discussions and events which have an impact on the relationship between sports and the law among the professional, amateur and recreational environments. Legal issues at Colorado-based educational institutions appear to have an affinity for exposing and challenging the authority of NCAA policies as this article will demonstrate.

The Olympic Environment

The Colorado Springs-based USOC is a federally chartered organization though it operates as a private entity.[5] The USOC oversees the organizations responsible for the administration of individual and team sports known as national governing bodies (NGBs).[6] The authority of the USOC is established in the Amateur Sports Act of 1978 later amended by the

[4] *Id*. The Colorado Springs Sky Sox minor league baseball (AAA), the Colorado Mammoth of the National Lacrosse League (NLL) which play in Denver at the Pepsi Center, the home arena for the Denver Nuggets, and the Colorado Rapids of Major League Soccer (MLS) which play in Commerce City, represent other professional Colorado-based sports teams as well.

[5] *See* Adam Epstein, *Go for the Gold by Utilizing the Olympics*, 29 J. LEGAL STUD. EDUC. 313 (2012) (discussing the history of the USOC and relevant litigation and how to incorporate the information into a traditional business law course). Colorado Springs is also home to the United States Olympic Training Center and the headquarters of the United States Olympic Committee.

[6] *Id*.; *see also* Official Web site of the U.S. Olympic Committee, *The United States Olympic Committee History*, http://www.teamusa.org/about-usoc/usoc-general-information/history (last visited July 11, 2012). It is worth noting that Colorado Springs is also the home to the United States Bobsled and Skeleton Federation, United States Fencing Association, United States Figure Skating Association, USA Basketball, USA Boxing, USA Cycling, USA Judo, USA Hockey, USA Swimming, USA Shooting, USA Table Tennis, USA Triathlon, USA Volleyball, and USA Wrestling. *See* Wikipedia, *Colorado Springs, Colorado*, http://en.wikipedia.org/wiki/Colorado_Springs,_Colorado (last visited July 11, 2012).

Ted Stevens Olympic and Amateur Sports Act of 1998.[7] The USOC has exclusive jurisdiction over U.S. participation in the Olympics, Paralympic Games, and Pan American Games.[8] Interestingly, and according to federal law, the USOC also has exclusive use of the word *Olympic* for commercial purposes.[9] Indeed, those who use the word *Olympic* for commercial purposes without prior permission from the USOC are likely to receive a cease and desist letter from USOC lawyers.[10]

Although it was federally chartered by Congress, it is not a federal agency.[11] Thus, the USOC appears not to be a governmental (state) actor, thereby establishing that Constitutional claims against the USOC itself are most likely erroneous.[12] Still, legal battles involving the USOC have extended far beyond Colorado and covered a wide range of subjects including those related to amateurism, use of use of performance-enhancing drugs (PEDs) or illegal substances, and team selection.[13] In fact, when President Jimmy Carter decided not to send a team to the 1980 Moscow Olympic Games, the USOC became involved in litigation related to the failure to send the team.[14]

Oddly, though the USOC is headquartered in Colorado Springs, almost no relevant cases have been decided in state or federal courts in Colorado.[15] Instead, cases have emanated from

[7] Epstein, *supra* note 5, at 315 (note 7).
[8] *Id*. at 315.
[9] *Id*. at 329-333. This also includes word simulations such *Olympik*.
[10] *Id*. at 330.
[11] *Id*. at 316.
[12] *Id*.
[13] *Id*. at 317-18.
[14] *Id*. at 318.
[15] *See generally* Epstein, *supra* note 5; The published decisions include Martinez v. United States Olympic Comm., 802 F.2d 1275 (10th Cir. 1986) (rejecting the wrongful death claim brought by the estate of New Mexico amateur boxer due to lack of subject matter jurisdiction); U.S. Olympic Comm. v. Am. Media, Inc., 156 F. Supp. 2d 1200 (D. Colo. 2001) (dismissing claim by USOC that magazine's publication of an Olympic preview issue titled *OLYMPICS USA* on the grounds that the publication did not rise to the level of commercial speech; Hollonbeck v. United States Olympic Comm., 513 F.3d 1191 (10th Cir. 2008) (determining that the ADA § 504 of the Rehabilitation Act does

state and federal courts around the country.[16] Decisions involving the USOC that have gained worthy attention in sports law circles have included issues involving premier athletes such as rower Anita DeFrantz, sprinter Harry *Butch* Reynolds, runner Mary (formerly Decker) Slaney, and wrestler Matt Lindland, none who actually hail from Colorado or even litigated there.[17] It is now settled, after years of curious and circuitous litigation, that arbitration (rather than litigation) is now the mandatory method to resolve coach, athlete, drug testing and team selection disputes related to the USOC under federal law.[18] Thus, while the USOC's presence in Colorado provides much legal work for the organization, the impact of pure Colorado-based precedent is extremely lacking with regard to the USOC.[19]

Intercollegiate Environment

Colorado has had a major impact on the discussion and relationship between college sports and NCAA rules, formally known as bylaws.[20] Colorado, in fact, has a rich history of litigants who have expressed discontent with intercollegiate policies in general, as this section demonstrates. One might say that Colorado is a leader in terms of challenging the authority of the NCAA.

*Nemeth*

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not require the USOC to afford Paralympic athletes equal access to certain athlete support programs that are available to Olympic and Pan American athletes).

[16] *See generally* Epstein, supra note 5.

[17] Id. at 319-325. Mary Slaney did attend the University of Colorado (Boulder) for two years on a track scholarship, however. *See* Jamie MacDonald, *31. Mary Decker Slaney, Track and Field*, S.I. FOR WOMEN (Nov. 29, 1999), *available at* http://sportsillustrated.cnn.com/siforwomen/top_100/31/.

[18] *See generally* Epstein, *supra* note 5, at 319-325.

[19] The United States Anti-Doping Agency is also located in Colorado Springs. *See* Official Web site of the United States Anti-Doping Agency, *Contact Us*, http://www.usantidoping.org/contact/ (last visited July 11, 2012).

[20] *See* Adam Epstein & Paul Anderson, *Utilization of the NCAA Manual as a Teaching Tool*, 26 J. LEGAL STUD. EDUC. 109 (2009).

The University of Denver (also known as DU or sometimes interchangeably at one time known as *Colorado Seminary*), presented one of the first opportunities for a court to hear a case involving an injured scholarship athlete who then filed a workers' compensation claim.[21] In the 1953 decision *Univ. of Denver v. Nemeth*, DU football player Ernest Nemeth played for the college and also worked for the college, receiving fifty dollars a month from the university, meal deductions, and housing accommodations in exchange for cleaning sidewalks, caring for the campus tennis court, and maintaining the campus furnace.[22] However, these jobs were contingent upon his participation on the school football team, clearly a violation of NCAA rules today.[23] In sum, if Nemeth had failed to produce on the football field, then his compensation at DU would have ended.[24]

Nemeth sustained various neck and back injuries while engaged in spring football practice.[25] He brought a claim for workers' compensation, alleging that he was employed by the university to play football and that the injury arose out of and in the course of employment, the important language for workers' compensation claims.[26] DU maintained that it was engaged

[21] Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953); *see also* Univ. of Denver v. Indus. Comm'n. of Colorado, 335 P.2d 292, 294 (Colo. 1959) (holding that even though Nemeth accepted a lump sum payment for his 15% permanent disability, when he subsequently asked for more compensation due to a change in his condition, the Supreme Court of Colorado declared that private agreements may neither violate public policy nor abrogate statutory requirements such as under the through private agreements under the workers' compensation system established at that time, and the decision to reopen Nemeth's case was affirmed).
[22] *Id*. at 424.
[23] One might characterize this arrangement in today's intercollegiate environment as an extra-benefit, defined by the NCAA Division I Manual, Bylaw 16.02.3 (Extra Benefit) (2011-12), "An extra benefit is any special arrangement by an institutional employee or a representative of the institution's athletics interests to provide a student-athlete (or a student-athlete's relative or friend) a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body (e.g., foreign students, minority students) determined on a basis unrelated to athletics ability.").
[24] *Univ. of Denver*, 257 P.2d at 425-26. The court also noted "Higher education this day is a business, and a big one... A student employed by the University to discharge certain duties, not a part of his education program, is no different than the employee who is taking no course of instruction so far as the Workmen's Compensation Act is concerned." *Id*. at 426.
[25] *Id*. at 424.
[26] *Id*. at 425.

solely in the field of education, the injury did not arise out of or in the course of employment, and that the award would contravene public policy.[27] The Supreme Court of Colorado ruled that the mere fact that a student may "augment the funds necessary for [his] maintenance while attending the University" does not alter the fact that he may be an employee for workers' compensation purposes.[28] Therefore, the court allowed Nemeth to recover for his injuries under workers' compensation, a decision that had a huge impact on the perception of student-athletes and their relationship to their schools.[29]

*Dennison*

Then in 1957, the Supreme Court of Colorado again addressed the issue of whether a scholarship football player could be entitled to workers' compensation in *State Compensation Insurance Fund v. Industrial Accident Commission*.[30] The court was presented with a scenario similar to that in *Nemeth*, but remarkably different was that the student-athlete, Ray Dennison, actually died two days after suffering a head injury he sustained on the opening play of the game in Trinidad, Colorado.[31] In denying recovery to Dennison's widow, the court reasoned that the "college did not receive a direct benefit from the activities, since the college was not in the

[27] *Id*.
[28] *Id*.
[29] *Id*. at 430; *see also* Ellen J. Staurowsky, *"A Radical Proposal": Title IX has No Role in College Sport Pay-for-Play Discussions*, 22 MARQ. SPORTS L. REV. 575 (2012) (quoting from the memoirs of Walter Byers, the first full-time executive director of the NCAA, that after the *Nemeth* decision that the NCAA intentionally crafted the term "student-athlete" to differentiate college athletes from those in the professional ranks and made a concerted effort to include the expression in all NCAA rules and interpretations); *see also* Matt Emeterio, *Why Cam Newton Proves College Players Should Be Paid*, PBH NETWORK (Jan. 10, 2011), http://www.prosebeforehos.com/sports-editor/01/10/why-cam-newton-proves-college-players-should-be-paid/ (offering that after losing the *Nemeth* case, the NCAA created the "student-athlete" designation specifically to ensure that college athletes would not be deemed, at least linguistically, as employees of NCAA members universities and therefore not covered by state workers compensation laws).
[30] State Comp. Ins. Fund v. Industrial Accident Comm'n., 314 P.2d 288 (Colo. 1957).
[31] *Id*. at 289.

football business and received no benefit from this field of recreation."[32] The court then stated that since there was no contract between Dennison and the college for his football participation, the injury was therefore not an incident of or caused by his employment by the college.[33]

Thus, the *Dennison* court emphasized that without a contractual obligation to play football, there is no employer-employee relationship to which workers' compensation is applicable.[34] The decision did not overturn *Nemeth*, however. The court distinguished *Nemeth* by finding that Nemeth's employment "depended wholly on his playing football and it is clear that if he failed to perform as a football player he would lose the job provided for him by the University."[35]

Subsequent to the *Nemeth* and *Dennison* decisions, many other states dealt with similar workers compensation claims, but these decisions have generally upheld the principle that student-athletes are not considered employees of their universities in this regard.[36] Still, views and perceptions change over time. There has been much more attention drawn to the issue of whether or not student-athletes are (or should) be considered employees particularly with regard

[32] *Id*. at 290 (referring to Fort Lewis A&M College, now known just as Fort Lewis College (in Durango), and the game against Trinidad State Junior College).
[33] *Id*. at 289.
[34] *Id*. at 290. The court also stated that it did not believe that the legislature intended the workers' compensation fund to be a "pension fund for all student athletes attending our state educational institutions."
[35] *Id*. (quoting *Nemeth* at 426-27, "The football coach testified that meals and the job ceased when the student was 'cut from the football squad.'" Further, "* * * the employment at the University * * * was dependent on his playing football, and he could not retain his job without playing football.").
[36] *See, e.g.,* Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170 (Ind. 1983) (reversing and holding that the resulting disability to the scholarship athlete nevertheless did not establish that either party had the intent to enter into an employer-employee relationship); Coleman v. W. Mich. Univ., 336 N.W.2d 224 (Mich. Ct. App. 1983) (holding that WMU had little control over Coleman and even if it did, Coleman's football skills were not an integral part of WMU's school business); Waldrep v. Texas Emp'rs Ins. Ass'n, S.W.3d 692 (Tex. Ct. App. 2000) (holding that TCU did not direct or control all of Waldrep's activities as a football player before suffering his spinal cord injury which led to paralysis); *but see* Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169 (Dist. Ct. App. 1963) (holding in favor of the wife of California State Polytechnic football team who successfully brought a workers' compensation claim to recover for the death of her husband as a result of a plane crash while returning from a game).

to increased control over their lives each year and with a rules book that has exploded in terms of size.[37]

*Derdeyn*

In the 1993 decision in *Univ. of Colorado v. Derdeyn*, the Supreme Court of Colorado held that the CU's drug-testing program was an unreasonable search under the Fourth Amendment after David Derdeyn, a long distance runner, did not want to submit to random drug testing.[38] In 1984, the University of Colorado began a drug testing program for its student athletes.[39] The original testing program required a urine test for certain drugs at each annual physical and random testing throughout the year.[40] The university amended and revised its program several times.[41] In 1988, the third amendment to CU's drug testing policy included several changes in the program including one major change in which random urinalysis was replaced with random "rapid eye examination" (REE) testing.[42] Urinalysis would be performed only after finding a reasonable suspicion that an athlete had used drugs.[43] Under the new program, a failure to perform well on an REE provided the school with a reasonable suspicion of drug use.[44]

In 1991, the Colorado Court of Appeals affirmed the trial court's holding that the drug-testing program violated both the Fourth Amendment and the Colorado Constitution finding that CU did not establish a *compelling* need for the program nor was there a compelling safety

[37] *See* Epstein & Anderson, *supra* note 20, at 117.
[38] Univ. of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993).
[39] *Id*. at 930.
[40] *Id*. at 930-31.
[41] *Id*. at 931-33.
[42] *Id*. at 931-32.
[43] *Id*. at 932.
[44] *Id*.

interest because there was no evidence of drug use by the student-athletes.[45] The court went further and stated that it felt that CU essentially coerced student-athletes to sign the drug testing consent forms because participation in intercollegiate athletics was conditioned on signing the consent form.[46] A divided Supreme Court affirmed the appellate court in a lengthy decision and held that CU's drug testing program was unconstitutional. [47]

The national discussion of drug use by students and athletes was a hot-topic in the 1980s and 1990s, and what happened at CU certainly maintained that momentum.[48] Subsequent to the *Derdeyn* decision, in June of 1995, the United States Supreme Court held random, suspicionless drug testing of high school and elementary school athletes to be constitutional, the Court's first ruling on the constitutionality of random testing of athletes in college, high school, or elementary school.[49] Case law continued to evolve at virtually every level across the United States, and more often than not the testing programs were found legitimate in an ever expansive way.[50] As a result of the *Derdeyn* decision, today CU only conducts drug tests on athletes only when it has

[45] Derdeyn v. Univ. of Colorado, 832 P.2d 1031, 1034-35 (Colo. Ct. App. 1991).
[46] *Id*. at 1035.
[47] *Univ. of Colorado*, 863 P.2d at 930.
[48] *See, e.g.*, Hill v. NCAA, 865 P.2d 633 (Cal. 1994) (upholding constitutionality of drug testing policy under California constitution); *see also* Dante Marrazzo, *Athletes and Drug Testing: Why do We Care if Athletes Inhale*?, 8 MARQ. SPORTS L.J. 75 (1997) (referencing the Presidential declaration of "war on drugs" and Nancy Reagan's "Just Say No" campaign); *see also* Gordon A. Martin, Jr., *How it All Began: The Move to Drug Testing*, 40 NEW ENG. L. REV. 705 (2006) (referencing the various cases involved in the evolution of the legality of drug testing including non-sport related Supreme Court cases including Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (involving a Federal Railway Administration regulation mandating blood and urine tests of employees involved in certain train accidents) and Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (upholding Customs Service drug testing for employees).
[49] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); *see also generally* Eric N. Miller, *Suspicionless Drug Testing of High School and College Athletes after Acton: Similarities and Differences* 45 U. KAN. L. REV. 301 (1996).
[50] *E.g.* Todd v. Rush Cnty. Schs., 983 F. Supp. 799 (S.D. Ind. 1997),133 F.3d 984 (7th Cir. 1998) (upholding Indiana's policy of random and suspicionless drug tests of students in extracurricular activities, not just student-athletes, because these are privileges rather than rights under the Fourth Amendment); Bd. of Educ. Indep. Sch. Dist. #92 of Pottawatomie v. Earls, 536 U.S. 822 (2002) (holding that the Future Farmers of America, Future Homemakers of America, the band, choir and even the pom-pom squad was subject to mandatory drug testing) .

information that satisfies the constitutional standard of reasonable, individualized, suspicion that banned or illegal substances are being abused by a student-athlete.[51]

*Bloom*

CU All-American football player Jeremy Bloom, a native of Loveland, Colorado and also a world-class skier, contended that financial endorsements were required in order to afford to stay competitive in freestyle moguls skiing at international level.[52] Unfortunately for Bloom, an NCAA bylaw stated that a student-athlete cannot promote any commercial product or service.[53] The NCAA declared Bloom ineligible after he sued the organization in Colorado state court to obtain an injunction on this NCAA bylaw.[54] Bloom quit football at CU, kept his endorsements and pursued the Olympics instead.[55] Bloom competed for United States in the 2006 Turin Olympics in the moguls, and later became a 5th round pick for the Philadelphia Eagles in the 2006 NFL draft.[56]

Many had criticized the NCAA's position on this no endorsements rule, particularly since it seemed inconsistent with the fact that according to NCAA rules one could be a professional athlete in one sport (but not endorse a product or service) and remain an amateur in another

[51] University of Colorado at Boulder Intercollegiate Athletic Department Substance Abuse Education and Testing Program Policy (rev. 2010), CUBUFFS.COM, http://www.cubuffs.com/ViewArticle.dbml?DB_OEM_ID=600&ATCLID=204968078 (last visited July 7, 2012).
[52] Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621 (Colo. App. 2004) (affirming trial court's decision not to allow request for waivers of NCAA rules restricting student athlete endorsement and media activities and refusing to enjoin the NCAA from enforcing its bylaws).
[53] *Id*. at 625. NCAA Bylaw 12.5.2.1, Advertising and Promotions after Becoming a Student-Athlete states: Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.
[54] *See* ADAM EPSTEIN, SPORTS LAW 36 (2013).
[55] *Id*.
[56] *Id*.

sport.[57] The NCAA's position seemed arbitrary in light of the fact that around the same time, University of Notre Dame football player Tom Zbikowski, who was also a competitive boxer, was allowed to earn prize money for a boxing tournament in held in Madison Square Garden (MSG).[58] The NCAA's position was that Zbikowski's participation in the MSG event did not constitute the sale or promotion of a commercial product or service.[59] This appeared to send a mixed message on whether there was, in fact, an unambiguous NCAA policy which supported the clear line of demarcation between amateurism and professionalism.[60]

*Colorado Seminary*

The persistent spirit of Bloom's challenge to the NCAA amateurism rules was reminiscent to a case involving the University of Denver Pioneers thirty years earlier in the 1976 decision *Colorado Seminary v. NCAA*.[61] Much do the dismay of DU fans, DU's participation in the tournament was later vacated by the NCAA Committee on Infractions (COI).[62] A lawsuit was brought by DU (and by several of its student-athletes) to enjoin the NCAA from imposing sanctions against the hockey team (and other DU athletic teams) because DU used several

[57] *Bloom*, 93 P.3d at 625. Bloom relied on NCAA Bylaw 12.1.2, "[a] professional athlete in one sport may represent a member institution in a different sport." This is a somewhat common phenomenon in which a professional minor league baseball player ends his pursuit of making MLB and yet then pursues a shot at NCAA football, coming to campus as a much older student-athlete in their mid to late twenties.
[58] EPSTEIN, *supra* note 54, at 36.
[59] *Id.*; *Bloom*, 93 P.3d at 626 (noting that Bloom could not promote a commercial product (such as being featured in a Tommy Hilfiger advertisement) since that would violate the philosophical purpose behind the NCAA's Const. art. 2.9. (Principle of Amateurism), which states "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises).
[60] *Bloom*, 93 P.3d at 626 (noting that the NCAA no endorsement rules were rationally to the NCAA's purposes NCAA Const. art. 1, § 1.3.1., "to maintain intercollegiate athletics as an integral part of the educational program," and to "retain a clear line of demarcation between intercollegiate athletics and professional sports."
[61] Colorado Seminary (Univ. of Denver) v. Nat' Collegiate Athletic Ass'n., 417 F. Supp. 885 (D. Colo. 1976), *aff'd*, 570 F.2d 320 (10th Cir. Colo. 1978).
[62] *Colorado Seminary (Univ. of Denver)*, 417 F. Supp. at 892. The University of Wisconsin Badgers hockey team defeated DU in the National Collegiate Ice Hockey Championship game in Boston, Massachusetts in 1973. *See* Inside College Hockey, *1973 NCAA Tournament*, http://www.insidecollegehockey.com/6History/ncaa_73.htm (last visited July 12, 2012).

hockey players who were ineligible to play.[63] DU's players had received compensation for playing hockey. The players, however, were extraordinary: they were Canadian Junior A hockey players and DU, and other schools, had not only used such players for years, but such players often received room and board from the Canadian teams which would have caused them to be ineligible.[64]

However, the NCAA attempted to clarify its position related to these amateur Canadian hockey players by then sending out a questionnaire to NCAA member institutions who received room and board in Canada.[65] The NCAA attempted to gain more information on the use of these players so as to preserve its amateurism rules without having a discriminatory effect based upon alienage.[66] However, U.D. Chancellor Maurice Mitchell and head coach Murray Armstrong refused to comply with the NCAA.[67] DU refused to declare these students ineligible and a

[63] *Id*. at 889. Originally some baseball players were also part of the lawsuit, but because the season was over and the team was not selected for postseason competition these plaintiffs voluntarily dismissed the suit.
[64] *Id*. at 890-891 (noting that prior to October 25, 1974, the "Official Interpretations" related to the hockey rules provided two very important and relevant provisions: 0.i.5. A student-athlete may have played ice hockey on a team in a foreign country prior to his matriculation at a member institution, provided that any student-athlete who has been a member of any ice hockey team in a foreign country shall be ineligible if he has received, directly or indirectly, from a hockey team any salary division or split of surplus, educational expenses, or has received payment for any expenses in excess of actual and necessary travel expenses on team trips, a reasonable allowance for one meal for each practice and home game and actual and necessary travel expenses to practice and home games. . . . (emphasis added); 0.i.6. Any student-athlete who has participated as a member of the Canadian Amateur Hockey Association's major junior A hockey classification shall not be eligible for intercollegiate hockey).
[65] *Id*.
[66] *Id*. at 890 (citing Buckton v. Nat'l Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D.Mass.1973). The NCAA, in fact, then outright rescinded official interpretations 5 and 6 effective October 26, 1974, and new interpretations were adopted including0.i.1. . . . (b) The term "pay" specifically includes, but is not limited to, receipt directly or indirectly of any salary, gratuity or comparable compensation, division or split of surplus, educational expenses not permitted by governing legislation of this Association, and excessive or improper expenses, awards and benefits. Expenses received from an outside amateur sports team or organization in excess of actual and necessary travel and meal expenses for practice and game competition shall be considered pay. (emphasis added)).
[67] *Id*. at 891-94 (noting that indeed the various schools, including D.U., would be forced to declare many players ineligible possibly due to the lack of clarity in the rules, but that the NCAA also declared that the eligibility of student-athletes meeting certain conditions would be immediately restored. Apparently all other member institutions complied, but D.U. still refused to comply with the NCAA plan to grandfather the players in. Instead, the court noted that DU "unequivocably" stated that each student-athlete was eligible.).

lawsuit ensued, though it did not end well for DU.[68] The court held that the student-athletes had no protected interest in procedural due process (or substantive due process), and that the NCAA rules did not unconstitutionally discriminate against them,[69] and that DU's equal protection rights were not violated by the NCAA when the NCAA sanctioned DU for using the ineligible players.[70]

*Law*

In one of the most devastating defeats in the history of NCAA related litigation, in *Law v. NCAA*, the NCAA membership institutions voted to establish the restricted earnings coach (R.E.C.) position, which capped the amount of money certain coaches could earn during any given year.[71] This applied during the 1992-93 season to the salaries of entry-level, assistant basketball coaches and limited them to $12,000 during the academic year and $4,000 during the summer months.[72] The rule was enacted as a cost-cutting measure and to provide more competitive balance among member institutions.[73]

A federal jury found that the R.E.C. rule violated antitrust laws and awarded $22.3 million, which was automatically tripled to $66.9 million.[74] Eventually the case settled with

[68] *Id*.; *see also Colorado Seminary (Univ. of Denver)*, 570 F.2d at 321 (offering that the dispute "culminated with the NCAA placing the hockey team on a two-year probation with no post season participation in NCAA events, and also the probation of all other University athletic teams for a one-year period with similar consequences.").
[69] *Id*. at 895 (opining that the interest in participating in college sports is "too speculative to establish a constitutionally protected right.").
[70] *Id*. at 897-99 (characterizing DU's refusal to comply as an act of defiance by the highest level of executive official at DU).
[71] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998). The case emerged from the United States District Court in the District of Kansas.
[72] *Id*. at 1014-15.
[73] *Id*. at 1022-24.
[74] *See* EPSTEIN, *supra* note 54, at 361.

1,900 coaches out of court for $54.5 million in 2000.[75] The NCAA appealed to the Tenth Circuit Court of Appeals, but the court affirmed the district court's order which had granted a permanent injunction which barred the R.E.C. rule and upheld the order granting summary judgment to the plaintiffs related to antitrust liability.[76]

As demonstrated, wars were waged against the NCAA by Coloradans and others in state and federal cases, often against the NCAA and its private rules and policies. However, the 1990s also represented challenges involving federal laws such as Title IX, the federal gender equity statute.[77] Title IX, the continuously evolving 1972 law that bans sex discrimination at schools receiving federal funds, is best known in its sports context for a three-part formula or "test" that determines if schools are in compliance with the law.[78] However, what the law actually means, how it has transformed, and the extent of its reach is subject to vigorous opinion, debate and academic discourse.[79] As the nation watched the legal battle between Brown University and its women's gymnastics team during the 1990s, the state of Colorado became part of the national discussion with two very different cases involving CSU and CU during the same time period.[80]

*Roberts*

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[75] *Id*.; *see also* Lauren Streib, *Just In Time For March Madness: The 10 Best NCAA Lawsuits*, BUSINESS INSIDER (Mar. 17, 2010), http://www.businessinsider.com/just-in-time-for-march-madness-the-10-best-ncaa-lawsuits?op=1#ixzz20QLitzSE.

[76] *Law*, 134 F.3d at 1024.

[77] Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.S. §§ 1681-88 (2012).

[78] *See, e.g.*, J. Brad Reich, *All the [Athletes] Are Equal, but Some Are More Equal than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for Its Future*, 108 PENN ST. L. REV. 525 (2003*); see also* Megan Ryther, *Swimming Upstream: Men's Olympic Swimming Sinks While Title IX Swims*, 17 MARQ. SPORTS L. REV. 679 (2007).

[79] *See generally*, Erin E. Buzuvis, *Survey Says…A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821 (2006); Erin E. Buzuvis, *Reading the Pink Locker Room: On Football Culture and Title IX*, 14 WM. & MARY J. WOMEN & L. 1 (2007); Erin E. Buzuvis, *Sidelinded: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL'Y 1 (2010); Erin E. Buzuvis, *The Feminist Case for the NCAA's Recognition of Competitive Cheer as an Emerging Sport for Women*, 52 B.C.L. REV. 439 (2011); Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. (2011).

[80] Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) [Cohen I]; Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 [Cohen II].

In *Roberts v. Colorado State Board of Agriculture*, CSU was found in violation of Title IX because the proportion between female students at CSU as compared to the number of student-athletes was 10.5%, thereby not satisfying the *substantial proportionality* prong of one of the three-part test for Title IX compliance.[81] The claim was brought by students and former women's softball players after CSU announced it was cutting the team.[82] The United States District Court for the District of Colorado held in favor of these plaintiffs and ordered the team reinstated particularly since the elimination of the team resulted in the statistical disparity.[83] The appellate court affirmed and agreed that there was neither a full and effective accommodation of women's interests nor a history and continuing practice of expansion in women's athletics, the other two of the three prongs.[84] The *Roberts* decision became one of the more cited Title IX decisions at the time and was considered a major victory for Title IX advocates as Title IX interpretation continued.[85]

*Simpson*

[81] Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev' in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993). The three-part test refers to the Department of Education, through its Office of Civil Rights (OCR), 1979 Policy Interpretation that, at least in theory, an educational institution can demonstrate compliance with Title IX by showing 1) *Substantial Proportionality* (Is an institution providing participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment as full-time undergraduate students?); 2) *A History of Expansion of Women's Programs* (Has an institution demonstrated a history and continuing practice of program expansion for the underrepresented sex?); and 3) Full and Effective Accommodation of Interests (Has an institution fully and effectively accommodated the interests and abilities of the under- represented sex?). *See* EPSTEIN, *supra* note 54, at 204-07 (exploring Title IX and how its interpretation often depends upon the political party that occupies the White House and Congress).

[82] *Roberts*, 998 F.2d at 826.

[83] *Id*. at 829-30.

[84] *Id*. at 830-34 (recognizing that although CSU created a women's sports program out of nothing in the 1970s and even added eleven sports for women, it noted that he district court also found that women's participation opportunities declined steadily during the 1980s).

[85] *See* Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U.L. REV. 553 (1994) (noting that the *Roberts* decision, including the *Cohen* decision (and another, Favia v. Indiana Univ. of Penn., 812 F. Supp. 578 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d Cir. 1993), all played a role in establishing a model for judicial enforcement of Title IX that is rooted in the three-part test).

The next decade, the University of Colorado faced a gender-related issue which became enshrined in a Title IX legal debate, though far outside the scope of the original perception of the law's reach based upon an ordinary reading of the language used in the federal statute alone. However, as Title IX litigation evolved over the recent decades, it is now well-established that monetary damages may be pursed under a Title IX claim for knowingly allowing sexual harassment to take place in certain settings.[86] In *Simpson v. Colorado*, one of the important legal issues was whether the risk of sexual assault during CU recruiting visits was obvious.[87]

Two young women who were students at CU alleged that they had been sexually assaulted at an off-campus party for football recruits on December 7, 2001.[88] After six years of legal maneuvering, including an outright dismissal of the case by a U.S. district judge in 2005 who claimed that there was no evidence of *deliberate indifference* to the law, the Tenth Circuit Court of Appeals revived the lawsuit since it believed that there was evidence to demonstrate a policy of showing high school recruits a "good time."[89] This court concluded that a school such as CU can be said to have intentionally acted in clear violation of Title IX when the violation is caused by official policy, which may be one of deliberate indifference to providing adequate training or guidance that is obviously necessary for the implementation of the program or policy.[90]

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[86] *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (ruling under Title IX's implied right of action that a female high school student could seek monetary damages from her coach-teacher for sexual harassment); *see also* Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS OF SPORT 127 (2008); Anita M. Moorman & Lisa P. Masteralexis, *An Examination of the Legal Framework between Title VII and Title IX Sexual Harassment Claims in Athletics and Sport Settings: Emerging Challenges for Athletics Personnel and Sport Managers*, 18 J. LEGAL ASPECTS OF SPORT 1 (2008);
[87] Simpson v. Univ. of Colorado, 372 F. Supp. 2d 1229 (D. Colo. 2005), 500 F.3d 1170, 1172 (10th Cir. 2007).
[88] *Simpson*, 500 F.3d at 1172.
[89] *Id*.
[90] *Id*. at 1178-79.

This court reversed the lower court which had granted summary judgment to CU and held that there was sufficient evidence that by the time of the incident, (1) the coach had general knowledge of the serious risk of sexual harassment and assault during recruiting efforts; (2) the coach knew such assaults had occurred during previous visits; (3) the coach continued to maintain an unsupervised player-host program within the recruiting program to show high school recruits a "good time"; and (4) the coach's own unsupportive attitude resulted in no change in the atmosphere surrounding the recruiting program that would have made the misconduct less likely.[91]

Finally, in December 2007, the University of Colorado settled the lawsuit by paying $2.85 million to the two women.[92] Lisa Simpson received $2.5 million, and the other woman, Anne Gilmore, received $350,000.[93] The school also agreed to hire an adviser to monitor compliance with Title IX and add a position in the office of Victim Assistance.[94] The football team's head coach Gary Barnett survived the scandal, but later accepted a buyout after the 2005 season after losing 70-3 in the Big 12 Conference championship game.[95] Athletic Director Dick Tharp resigned in November, 2004.[96] Betsy Hoffman, CU's president, survived only until she

[91] *Id*. at 1184-85.
[92] *See* Larry DiTore, *University of Colorado in $2.85 Million Sex-Assault Settlement*, BLOOMBERG (Dec. 5, 2007), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=adDAPsNWyMd4&refer=home.
[93] *Id*.; *see also generally* Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95 (2010).
[94] DiTore, *supra* note 92.
[95] ESPN.com News Services, *Barnett Forced Out; Receives $3 Million Settlement*, ESPN (Dec. 9, 2005), http://sports.espn.go.com/ncf/news/story?id=2252252. It did not help matters that in February 2004, Gary Barnett was suspended with pay after making disparaging comments about Katie Hnida, a former placekicker for CU, who reported being raped in 1999 by a Colorado player. She later transferred to the University of New Mexico. *See* Bill Pennington, Colorado Puts Football Coach on Leave, N.Y. Times (Feb. 19, 2004), *available at* http://www.nytimes.com/2004/02/19/sports/college-football-colorado-puts-football-coach-on-leave.html.
[96] Eddie Pells, *CU Athletic Director Dick Tharp Resigns*, ASSOCIATED PRESS ARCHIVE (Nov. 22, 2004), *available at* http://www.apnewsarchive.com/2004/CU-Athletic-Director-Dick-Tharp-Resigns/id-3000b17cb83688eeef3f2076b0199499.

resigned as well in March, 2005.[97] The *Simpson* case stands as an example of lack of institutional control in addition to the continuing evolution of Title IX claims from equal participation to sexual assault.[98] It demonstrated an unsupervised culture which exposed CU to extreme legal risk as recruits took official visits sponsored by CU's athletic department.

Professional Sports

*Hackbart*

One of the landmark professional sports torts cases in the United States emerged from the state of Colorado.[99] In *Hackbart v. Cincinnati Bengals, Inc*., running back Charles "Boobie" Clark (Cincinnati Bengals) hit defensive back Dale Hackbart (Denver Broncos) on the back of the head out of frustration after an interception during a game in 1973 in Denver.[100] The play was over, and Hackbart was not looking when he was hit from behind. The hit fractured Hackbart's neck as a result.[101] The Tenth Circuit Court of Appeals reversed the trial court by holding that a football player may be held responsible for injuring an opponent if he acts with the *reckless disregard* for the opponent's safety, and remanded for a new trial.[102] The *Hackbart* case eventually settled out of court.[103] However, it represented a relatively new era in

[97] Tom Kenworthy, *Univ. of Colorado President Resigns Amid Controversy*, USA TODAY (Mar. 7, 2005), *available at* http://www.usatoday.com/sports/college/2005-03-07-colorado-hoffman_x.htm.
[98] *See* Jennie E. Spies, *Winning at All Costs: An Analysis of a University's Potential Liability for Sexual Assaults Committed by Its Student Athletes*, 16 MARQ. SPORTS L. REV. 429, 446-460 (2006).
[99] See Steven I. Rubin, *The Vicarious Liability of Professional Sports Teams for On-The-Field Assaults Committed by Their Players*, 1 VA. J. SPORTS & L. 266, 271-76 (1999) (discussing the *Hackbart* case which arose out of an incident in a September 8, 1973 game between the Cincinnati Bengals and Denver Broncos).
[100] Hackbart v. Cincinnati Bengals, Inc. [Hackbart I], 435 F. Supp. 352 (D. Colo. 1977), *rev'd by* Hackbart v. Cincinnati Bengals, Inc. [Hackbart II], 601 F. 2d 516 (10th Cir. 1979).
[101] *Hackbart*, 601 F.2d at 519.
[102] *Id*. at 525.
[103] Rubin, *supra* note 99, at 274 (note 47); *see also* Robert Janis, *Whatever Happened to…Dale Hackbart*, SPORTS COLUMN (Nov. 29, 2004), http://www.sportscolumn.com/2004/11/29/what-ever-happened-to-dale-hackbart/.

torts law in which co-participants in which a standard of care is owed to others, even if they are professional athletes in a violent sport such as football.[104]

*Haywood*

One of the most prominent decisions in sports law history involved a Denver-based professional athlete and team, though Colorado really had nothing to do with the decision jurisprudentially. In the early 1970s, the NBA had a rule that required a graduating high school player to wait four years before he could become eligible to be drafted or play in the NBA.[105] Spencer Haywood was drafted by the NBA's Seattle SuperSonics even though four years had not passed since his high school graduation.[106] At the time, Haywood was already playing for the Denver Rockets of the American Basketball Association (ABA), which was competing with the NBA for talent.[107] The ABA pursued players, other than those already on NBA rosters such as Spencer Haywood, a sophomore at the University of Detroit who left after only one season when he signed a $1.6 million contract with the Denver Rockets.[108]

After the NBA initially refused to allow Seattle to sign Haywood, he and his legal team sued, arguing that the rule constituted a group boycott in violation §1 of the Sherman Antitrust Act.[109] A federal district court ruled in favor of Haywood and granted an injunction which

[104] Rubin, *supra* note 99, at 273-74.
[105] Similarly, in Clarett v. Nat'l Football Leauge, 369 F.3d 124 (2d Cir. 2004), football player Maurice Clarett sued in order to be eligiblefor the NFL draft even though it apparently had a rule that required him to be three full seasons removed from his high school graduation. Clarett argued on similar antitrust grounds, won at the district court level, but the Second Circuit Court of vacated the district court's order that he be declared eligible for the 2004 NFL draft. Clarett was ultimately drafted in the third round by the Denver Broncos in the 2005 draft, but he did not make the team.
[106] EPSTEIN, *supra* note 54, at 355.
[107] *Id*.
[108] *Id*.
[109] Denver Rockets v. All-Pro Mgmt., 325 F. Supp. 1049, 1059 (C.D. Cal. 1971).

allowed him to play in the NBA.[110] The court believed that Haywood would suffer irreparable injury to his skills and playing career if he was prevented from playing.[111] The case quickly made its way up to the Supreme Court, via the Ninth Circuit, in which the highest court sustained the district court's decision to issue an injunction.[112] In sum, Haywood could play. Thereafter, the NBA altered its draft eligibility rules, and the NBA draft-eligibility rule essentially dissolved until 2005.[113]

*Dreith*

Ben Dreith, a Colorado resident and former AFL and NFL referee from 1960 to 1990, sued the NFL alleging violations of the Age Discrimination in Employment Act (ADEA) and outrageous conduct under Colorado state law in 1991.[114] Dreith had been a three sport athlete at the University of Colorado in his younger years.[115] After being demoted to line judge in 1990, he filed a complaint that was transferred to the Equal Employment Opportunity Commission (EEOC) alleging that he had been demoted because of his age.[116] Thereafter, the NFL informed Dreith that it was not renewing his contract.[117] The EEOC determined that the NFL's policy to scrutinize its officials' on-field performance after they reached age 60 violated the ADEA.[118] Dreith then filed a second EEOC complaint alleging retaliation, and the District Court for the District of Colorado allowed Dreith's several claims of age discrimination and outrageous

[110] *Id*. at 1067.
[111] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971) (noting that the Ninth Circuit stayed the injunction in the case, but it reinstituted the judgment of the district court decision).
[112] *Id*. at 1204.
[113] EPSTEIN, *supra* note 54, at 356.
[114] Dreith v. Nat'l Football League, 777 F. Supp. 832 (D. Colo. 1991).
[115] *See* University of Northern Colorado Athletic Hall of Fame, UNC BEARS, http://uncbears.com/trads/hall/index (last visited July 12, 2012).
[116] *Dreith*, 777 F. Supp at 834; *see also* Adam Epstein, *The ADEA and Sports Law*, 16 J. LEGAL ASPECTS OF SPORT 177, 188-89 (2006).
[117] *Dreith*, 777 F. Supp at 834.
[118] *Id*.

conduct under the ADEA to continue.[119] The parties and their counsel were ordered to meet in a good faith attempt to settle the case.[120] Apparently a settlement was reached in January 1993, for $165,000 plus court costs and attorney fees.[121]

*Beerman*

In *Donchez v. Coors Brewing Co*., Robert Donchez, a beer vendor at Coors Field in Denver and who created the character *Bob the Beerman* lost a trademark lawsuit against the Colorado Rockies.[122] Donchez had registered *Bob the Beerman* as a service mark pursuant to Colorado law.[123] After the Colorado Rockies ran a series of advertisements without Donchez, but using the terms *beerman*, he sued for trademark infringement.[124] The United States District Court for the District of Colorado granted summary judgment for the corporations (Coors Brewing Co. and an advertising agency), and the Tenth Circuit affirmed.[125] The appellate court ruled that Donchez failed to present sufficient evidence to allow a reasonable jury to find that the term *beerman* had acquired a secondary meaning, thereby failing to present sufficient evidence to allow a jury to find he had a protectable interest in the mark *beerman*.[126] It supported this through evidence that more than 75 percent of those surveyed in the Denver area thought the

[119] *Id*.
[120] *Id*. at 839.
[121] Staff and Wire Reports, *Jurisprudence*, LOS ANGELES TIMES (Jan. 6, 1993), *available at* http://articles.latimes.com/keyword/ben-dreith.
[122] Donchez v. Coors Brewing Co., 392 F.3d 1211 (10th Cir. 2004) (offering that in fact in January 1993, the Colorado Rockies hired Donchez and assigned him badge number "0001," identifying him as the first licensed beer vendor in Rockies' history).
[123] *Id*. at 1214 (noting that Donchez' mark, "Bob the Beerman," was registered by the State of Colorado under the class of "Education and Entertainment Services," on October 7, 1993) .
[124] *Id*. at 1214-15 (explaining that in April, 1997, Coors began a national television advertising campaign for its Coors Light product utilizing advertisements featuring vendors were referred to by customers as *beerman*, or *the beerman*, or *Hey, beerman*, or *Hey, beerstud*).
[125] *Id*. at 1223.
[126] *Id*. at 1219.

term *beerman* was a common or generic name.[127] The court also denied claims for violation of right of publicity.[128]

*Others*

In a case affecting a Colorado university though not litigated at all in Colorado, in *New England Patriots Football Club, Inc. v. University of Colorado,* CU's regents, the president, an athletic director, and a football fan, appealed a decision from the United States District Court of the District of Massachusetts, which entered a preliminary injunction enjoining defendants from causing the university to employ the coach of the NFL's New England Patriots, Charles "Chuck" Fairbanks.[129] CU had persuaded him to become head football coach at their Boulder-based school.[130] The NFL team sued CU and obtained an injunction, based upon principles related to inducement for breach of contract, characterized in this case as contract jumping.[131] CU attempted to defend itself by claiming that because it is a state institution, that it was immune from suit under the state's Eleventh Amendment.[132] The injunction was upheld.[133]

Finally, in *Brooks v. Paige,* a Adrian Brooks, a professional soccer player with the Major Indoor Soccer League (MISL) team the Denver Avalanche, brought a defamation claim against Woodrow Paige, Jr., a television sports commentator with WGN of Colorado, Inc., who called him a quitter and drew a mustache on his photograph before spitting and jumping on it during the broadcast of its weekly sports show, *Sports Connection*.[134] The Colorado Court of Appeals found

[127] *Id*. at 1218.
[128] *Id*. at 1221.
[129] New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196 (1st Cir. Mass. 1979).
[130] *Id*. at 1198.
[131] *Id*.
[132] *Id*. at 1202 (holding that CU may be enjoined from making a contract by unlawful or tortious means even if the university was regarded as the state itself).
[133] *Id*.
[134] Brooks v. Paige, 773 P.2d 1098, 1100 (Colo. Ct. App. 1988).

that as a professional player, he was a public figure, and that the statements were not deliberate or reckless falsehoods.[135] Rather, the statements amounted to mere opinions worthy of constitutional protection.[136]

Interscholastic Sports

The state of Colorado does not appear to have interscholastic decisions that have had nearly as much impact in sports law as the challenges manifest in the intercollegiate and professional contexts. Nevertheless, it is worth noting that Colorado instituted the first legislative enactment specifically authorizing participation by homeschool students, in 1988.[137] However, in the 1977 decision in *Beeson v. Kiowa County School District*, a high school student sued and alleged that the policy of prohibiting married students from participating in any extracurricular activities was discriminatory.[138] The girl was a star player on the varsity basketball team, married with her parents' consent, and had a child.[139] When she tried to rejoin the team during her senior year, she was prevented from doing so under this policy.[140]

A Colorado trial court ruled in favor of the school district and on appeal, the appellate court held that the issue was now moot seeing that she had already graduated.[141] However, the court also held, pursuant to a state statute, enacted in 1973, that the creation of a *marriage relationship* was a fundamental right and the no-married student rule discriminated against those who exercised that right in violation of the Fourteenth Amendment's Equal Protection Clause

[135] *Id*. at 1101 (noting that the statements were merely rhetorical hyperbole, opinions meriting constitutional protection).
[136] *Id*.
[137] *See* Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. LEGAL ASPECTS OF SPORT 213, 224 (2005).
[138] Beeson v. Kiowa Cnty. Sch. Dist., 567 P.2d 801 (Colo. Ct. App. 1977).
[139] *Id*. at 804.
[140] *Id*.
[141] *Id*.

unless there existed a compelling state interest that justified the discrimination.[142] The appellate court reversed the trial court's decision.[143]

Recreational Sports

The state of Colorado is naturally concerned about liability issues given the volume of recreational activities both indoors and outdoors and has several statutes which limit liability in various contexts.[144] For example, Colorado has a baseball specific statute, known as the *Colorado Baseball Spectator Safety Act of 1993*, which limits liability for a flying ball or bat at a professional baseball game.[145] In sum, Colorado's act states that a spectator of professional baseball assumes the risk of any injury to person or property resulting from any of the inherent dangers and risks of such activity.[146] In fact, in Colorado a spectator is presumed to have knowledge that there are inherent risks in watching professional baseball and may not recover from an owner of a baseball team or an owner of a stadium where professional baseball is played

[142] *Id*. at 805; *see also* Thomas A. Schweitzer, *"A" Students Go to Court: Is Membership in the National Honor Society a Cognizable Legal Right?*, 50 SYRACUSE L. REV. 63, 78-80 (2000) (offering that married students in Colorado and elsewhere did not forfeit their right to attend school but did lose their eligibility to participate in sports and other extracurricular activities, which were deemed "privileges" rather than rights, but that has changed remarkably in recent decades and now considered unconstitutional in many jurisdictions).

[143] *Id*. at 804.

[144] *See* Daniel P. Connaughton & John O. Spengler, *Automated External Defibrillators in Sport and Recreation Settings: An Analysis of Immunity Provisions in State Legislation*, 11 J. LEGAL ASPECTS OF SPORT 51 (2001) (summarizing the various state immunity statutes, including COLO. REV. STAT. §13-21-108.1 (2011), which provides limited immunity to persons rendering emergency assistance through the use of automated external defibrillators (AEDs)).

[145] COLO. REV. STAT. §13-21-120 (2011). The statute also requires the following notice to be posted in conspicuous places at the entrances outside the stadium and at stadium facilities where tickets to professional baseball games are sold, in black letters, with each letter to be a minimum of one inch in height: "UNDER COLORADO LAW, A SPECTATOR OF PROFESSIONAL BASEBALL ASSUMES THE RISK OF ANY INJURY TO PERSON OR PROPERTY RESULTING FROM ANY OF THE INHERENT DANGERS AND RISKS OF SUCH ACTIVITY AND MAY NOT RECOVER FROM AN OWNER OF A BASEBALL TEAM OR AN OWNER OF A STADIUM WHERE PROFESSIONAL BASEBALL IS PLAYED FOR INJURY RESULTING FROM THE INHERENT DANGERS AND RISKS OF OBSERVING PROFESSIONAL BASEBALL, INCLUDING BUT NOT LIMITED TO, BEING STRUCK BY A BASEBALL OR A BASEBALL BAT."

[146] *Id*.; The statute does not provide complete immunity, but it is pretty close. For example, the statute states, "(5) Nothing in subsection (4) of this section shall prevent or limit the liability of an owner who: (a) Fails to make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition relative to the nature of the game of baseball; (b) Intentionally injures a spectator; or (c) Fails to post and maintain the warning signs required pursuant to subsection (6) of this section."

for injury resulting from the inherent dangers and risks of observing professional baseball, including but not limited to, being struck by a baseball or a baseball bat.[147]

Similarly, under the *Colorado Ski Safety Act of 1979*, a somewhat controversial statute, each skier assumes the risks inherent in the sport of snow skiing.[148] This act does allow skiers to sue each other for injuries stemming from crashes.[149] It also limits ski area operators' liability by capping damages at one million dollars.[150]

In *Cooper v. Aspen Skiing Company* (2002), the issue involved the legitimacy of parental waivers.[151] There was debate as to whether Colorado's public policy actually afforded minors protection which precluded parents or guardians from releasing a minor's own prospective claim for negligence.[152] The Supreme Court of Colorado resolved the issue and held that a parent cannot waive a child's future cause of action for negligence, thereby reversing the court of

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[147] *Id*.; *see also* Leigh Augustine, *Who is Responsible When Spectators are Injured While Attending Professional Sporting Events?*, 5 U. DENV. SPORTS & ENT. LAW J. 2 (2008) (noting that the statute also states, "Limiting the civil liability of those who own professional baseball teams and those who own stadiums where professional baseball games are played will help contain costs, keeping ticket prices more affordable.").

[148] COLO. REV. STAT. §33-44-101 et seq. (2011); *see* Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259, 286-292 (2010); *see also* Thomas Loegering, *Darkness Falls: Should Night Skiers be Given a Free Pass?*, U. DENV. SPORTS & ENT. LAW J. 89, 89-90 (2008) (noting that following 1990 amendments to the act, "no skier can make any claim or recover against any ski area operator for an injury that was sustained due to the "inherent dangers and risks of skiing."). Loegering also points out that under the 1990 amendments, Ski area operators are not required to post warning signs regarding the inherent dangers and risks of skiing, and, inter alia, inherent dangers and risks of skiing are defined as "dangers and conditions which are an integral part of skiing" which include changing weather, snow and surface conditions, collisions with natural and artificial objects and other skiers, variations in steepness and terrain, and failure to ski within one's ability. *Id*.

[149] COLO. REV. STAT. §33-44-109(1) (2011); *see also* Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641 (2003) (citing Ulissey v. Shvartsman, 61 F.3d 805, 809 (10th Cir. 1995) (noting that Colorado Ski Safety Act creates presumption that "the uphill skier ... had the better opportunity to avoid the collision").

[150] COLO. REV. STAT. §33-44-113 (2011) ("The total amount of damages which may be recovered from a ski area operator by a skier who uses a ski area for the purpose of skiing or for the purpose of sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, a snowboard, or any other device and who is injured, excluding those associated with an injury occurring to a passenger while riding on a passenger tramway, shall not exceed one million dollars, present value, including any derivative claim by any other claimant, which shall not exceed two hundred fifty thousand dollars, present value, and including any claim attributable to noneconomic loss or injury, as defined in sections 13-21-102.5 (2), C.R.S., whether past damages, future damages, or a combination of both, which shall not exceed two hundred fifty thousand dollars."…)

[151] Cooper v. Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002).

[152] *Id*. at 1231.

appeals.[153] In 1995, the plaintiff (David Cooper) suffered injuries, including blindness, at the age of seventeen while training for a competitive, high speed alpine race, when he lost control and crashed into a tree.[154] Cooper was participating in the Aspen Valley Ski Club when the accident occurred, and he and his mother had signed a form titled *Aspen Valley Ski Club, Inc. Acknowledgement and Assumption of Risk and Release* for which both the trial court and court of appeals held released the ski club from liability.[155] The release was written to release the Ski Club from:

> Any liability, whether known or unknown, even though that liability may arise out of negligence or carelessness on the part of persons or entities mentioned above. The undersigned Participant and Parent or Guardian agree to accept all responsibility for the risks, conditions and hazards which may occur whether or not they are now known.[156]

The court held that "a parent or guardian may not release a minor's prospective claim for negligence and may not indemnify a tortfeasor for negligence committed against his minor child."[157] It also stated that it is a well-settled principle that "[a] minor during his minority, and acting timely on reaching his majority, may disaffirm any contract that he may have entered into during his minority."[158] Thus, Colorado's Supreme Court held that parents cannot sign a waiver on behalf of his or her minor child.[159] However, the story did not end there. Just over a year later, the Colorado General Assembly in 2003 enacted legislation which superseded the *Cooper*

[153] *Id*.
[154] *Id*. at 1230.
[155] *Id*.
[156] *Id*. at 1231.
[157] *Id*. at 1237.
[158] *Id*. at 1232.
[159] *Id*. at 1237 (holding that "parental indemnity provisions, liability waivers that parents sign on behalf of their minor children, violate Colorado's public policy to protect minors and create an unacceptable conflict of interest between a minor and his parent or guardian.").

decision.[160] In fact, it specifically referenced the *Cooper* decision in the statute.[161] This state statute re-affirmed that a parent of a child may, on behalf of the child, release or waive the child's prospective claim for ordinary negligence.

## Conclusion

The state of Colorado is rich with history in cases, controversies, decisions and policies involving sports and the law. This article addressed many of the prominent sports law decisions that have a relationship to Colorado. One might characterize Colorado's relationship to sports law as both dynamic and defiant particularly with the legal battles waged with the NCAA. Colorado sports law jurisprudence measures up to other states and provides a nice perspective on changing times and the evolution of law to keep up with those changes across a wide range of areas: Olympic, interscholastic, intercollegiate, professional and recreational sports law environments. This article also demonstrated the checks and balances found in the American legal system in which judicial decisions might be overruled by subsequent legislative statutes. There is no reason to believe that this will change given the presence and influence of its Big Four sports franchises, the home of the USOC, its training center, headquarters of various NGBs, the various prominent public and private institutions including the United States Air Force Academy, and the Tenth Circuit Court of Appeals. Indeed, the metes and bounds survey of sports law in Colorado is significant and quite appealing.

[160] COLO. REV. STAT. § 13-22-107 (2011).
[161] *Id*. ("The general assembly further declares that the Colorado supreme court's holding in case number 00SC885, 48 P.3d 1229 (Colo. 2002), has not been adopted by the general assembly and does not reflect the intent of the general assembly or the public policy of this state.").