Introduction

What is sports law? A defined area of law? A course of study that encompasses various academic subsets? A loose term to describe the panoply of professions that encompass both sports and the law?

The answer to the somewhat existential question, "what is sports law?" is too complex to be distilled into a dictionary definition. If anything, "sports law" is akin a unicorn: a mythical and mysterious concept with which many are enamored and would like to witness, but never will, because, in reality, it does not exist in the simplistic sense that many would like to believe.

The substance of sports law aside, the very definition has been debated for years by scholars. In fact, Timothy Davis dedicated an entire 35 page article to it in the Marquette University Sports Law Review, one of the most prestigious sports-related legal publications in the world. In his view, this existential debate regarding the field of "sports law" can be summarized as follows:

> Those engaged in the debate concerning whether sports law constitutes a substantive area of law tend to adopt one of three positions: 1) no separately identifiable body of law exists that can be designated as sports law and the possibility that such a corpus of law will ever develop is extremely remote; 2) although sports law does not presently represent a separately identifiable substantive area of law, recent developments suggest that in the near future it will warrant such recognition; or 3) a body of law presently exists that can appropriately be designated as sports law. (Davis, 2011, https://goo.gl/8yMo9d).

We'll analyze of each Davis' three theories individually. The first, considered the "traditional view," posits that "that sports law represents nothing more than an amalgamation of various substantive areas of the law that are relevant in the sports context. According to this perspective, the term sports law is a misnomer given that sport represents a form of activity and entertainment that is governed by the legal system in its entirety." (Davis, 2011, https://goo.gl/8yMo9d).

In other words, an introductory sports law course would not focus on one area of the law (e.g., intellectual property transactions), but rather, a multitude of substantive legal principles that often intersect with sports. The sports law professor's job, according to this theory, would be to identify the legal principles that are the most germane to those in the sports industry, explain their underpinnings, and demonstrate their applicability. Without question, no single survey course could cover the entire universe of

legal principles potentially applicable to sports, and thus, the professor's job is to cull, simplify, and present only the most salient concepts to the student, understanding that higher-level courses provide an avenue for a more in-depth look of specific subject areas.

The second position is considered the "moderate position," and argues that a body of law relevant only to sports (i.e., "sports-only law") is developing, but "has not reached a point of maturation such that a 'unique substantive corpus' exists that can be categorized as 'sports law.' (Davis, 2011, https://goo.gl/8yMo9d).

While the "moderate position" described above is more closely related to the traditionalist view, the third prevailing theory stands alone in that it views sports law as an entirely separate and stand-alone area of the law. This view is favored by scholars that believe the study of sports and the law has evolved into a complex and unique field that must be considered independent of – rather than as a subset of – the various legal principles drawn upon with respect to the study of sports law. As Timothy Davis points out, one of the leading proponents of this view is the British scholar, Professor Simon Gardiner, who:

> "argues that it is true to say that [sports law] is largely an amalgam of interrelated legal disciplines involving such areas as contract, taxation, employment, competition and criminal law but dedicated legislation and case law has developed and will continue to do so. As an area of academic study and extensive practitioner involvement, the time is right to accept that a new legal area has been born - sports law." (Davis, 2011, https://goo.gl/8yMo9d).

The debate referenced above is an important one for contextual and scholarly purposes, however, it will not materially impact the substance of this introductory level course. However, as we work through the basic elements of sports law, consider your position, if you have one, and assess whether it evolves as your understanding of the field deepens throughout the course. Also query the areas of the law with which a well-rounded sports lawyer should have a general understanding. Consider the view of Matthew J. Mitten, a widely respected sports law professor at Marquette University:

> Counsel for professional leagues and clubs need a general understanding of contract, labor, private association, antitrust, tort, tax, and intellectual property law. Those representing professional athletes must be familiar with

labor and employment, contract, federal and state tax, and worker's compensation law, as well as athlete-agent regulation. A sports lawyer must have strong contract negotiation and drafting skills to represent professional sports industry clients. An understanding of the arbitration process is also important because most employment-related disputes between professional athletes and leagues or their respective clubs are resolved by mandatory arbitration. Representation of individuals, educational institutions, and governing bodies that are part of the youth, high school, college, or Olympic sports industries also requires broad knowledge of contract, private association, tort, and constitutional law (if the requisite "state action" exists) and of arbitration (for Olympic sports). (Mitten, s.d., https://goo.gl/vZ2aMo).

1.1 Consideration and Enforceability of Contracts

1.1.1 Consideration

Consideration can be described as the value underlying a contract. It is something provided by one party to another as part of an agreement. It is the reason that a party assents to a contract. For example, if you were to sell an apple for $5, the consideration for the apple would be the $5. Conversely, the consideration for the $5 would be the apple. Consideration, in other words, is what one provides or receives in connection with an agreement. The concept of consideration exists in the majority of Western legal systems, including, for example, the United States and Britain, where the concept is enshrined in common law, and in Spain, where it is known as "causa" and is codified in Articles 1274-77 of the Spanish civil code. When consideration is lacking, courts will not enforce an agreement.

The famous case of Schnell vs. Nell illustrates this point:

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay $600:

1) A promise, on the part of the plaintiffs, to pay him one cent.
2) The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of property.
3) The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in, itself, indeterminate value, for money, or, perhaps, for some other thing of indeterminate value. In this case, had the one cent mentioned, been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush, upon its face, if it be regarded as an earnest one … A moral consideration, only, will not support a promise … The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for …

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. (Schnell, 1861).

Always remember the importance of consideration if you want to craft an enforceable agreement. If you are not giving – or giving up something – then the agreement may lack consideration and be unenforceable.

Let's look at a common form of consideration: promises.

1.1.2 Promises

We know that consideration – or value – is an essential element of a contract. Without it, the contract may be unenforceable. What about when the value of the contract is not an object (e.g., money), an action (e.g., moving out of an apartment), or an omission or failure to act (e.g., not disclosing a secret receipt)?

Can a promise, or series of promises, constitute the consideration that underlies a contract?

Yes. A promise is defined as "a manifestation of intention to act or refrain from acting in a specified way, so as to justify a promisee in understanding that a commitment has been made." (Various, 1979).

Here's an example of a promise that is made up of two promises: if you promise to disclose certain proprietary information to me next week, and I promise to pay $10 upon receipt of that information, we have created consideration by making promises to each other, even though no action needs to be taken at the time of the agreement.

While a series of promises amongst persons or businesses can constitute an agreement, a unilateral promise, is generally not binding. For example, if Frank promises to give Jose $1,000 in one week because he's feeling generous at the time, there is no "agreement," in the legal sense, because Jose has not provided any value or consideration to support the promise.

This comes up regularly in the world of professional sports, especially with restricted signing periods during which players can negotiate with multiple teams, but not sign. (See, 2016, https://goo.gl/t67cSU)

Exceptions can be made, however, when a person reasonably relies on a promise. For example, if our friend Jose had made a $1,000 donation to a charity that he couldn't otherwise afford after hearing Frank's promise, he might be able to sue Frank for damages in certain jurisdictions.

Such reliance, however, is unlikely to be deemed "reasonable" in the world of free agent athlete negotiations and changes of heart.

Reading Assignment 1.2.2 – Article IV, Section 5, NFL Collective Bargaining Agmt.

Query the following while reading:

1) Is an oral promise to play for a team enforceable under this collective bargaining agreement? Does the answer change if the promise is made in writing, but not in the form of a player contract?
2) What sort of "nonfootball-related services" might a player provide to his/her club?
3) Should "nonfootball-related services" be subject to the salary cap?
4) What sort of "individually-negotiated terms" do you think subsection (e) is referring to, and why would the player want to protect these intellectual property rights?

Section 5. Notices, Prohibitions, etc.:

(a) Any agreement between any player and any Club concerning terms and conditions of employment shall be set forth in writing in a Player Contract as soon as practicable. Each Club shall provide to the NFL a copy of each such Player Contract within two days of the execution of such contract by the player and the Club. The NFL shall provide to the NFLPA a copy of each executed Player Contract it receives from a Club within two business days of its receipt of such Player Contract. It is anticipated that each Club will send a copy of each such Player Contract to the NFL by overnight mail the day it is so executed, and the NFL will send a copy of such copy to the NFLPA by overnight mail the day it is so received. The NFL shall provide to the NFLPA any salary information received from a Club which is relevant to whether such Player Contract complies with Article 7 and/or Article 13, within two business days following the NFL's receipt of such information. Promptly upon but no later than two business days after the signing of any Veteran with less than three Accrued Seasons to a Player Contract, the signing Club shall notify the NFL, which shall notify the NFLPA of such signing.

(b) Any agreement between any player or Player Affiliate and any Club or Club Affiliate providing for the player to be compensated by the Club or Club Affiliate for nonfootball-related services shall be set forth in writing as a separate addendum to the player's Player Contract, which addendum shall state the amount of or otherwise describe such consideration. If such an agreement is executed subsequent to the execution of the player's NFL Player Contract, it must be submitted to the NFL as an addendum to that Player Contract within two days of the execution or making of the agreement. The NFL shall provide a copy of such addendum to the NFLPA within two business days of receipt.

(c) No Club shall pay or be obligated to pay any money or anything else of value to any player or Player Affiliate (not including retired players) other than pursuant to the terms of a signed NFL Player Contract (or any

addendum thereto for nonfootball-related services as described in Subsection 5(b) above). Nothing contained in the immediately preceding sentence shall interfere with a Club's obligation to pay a player deferred compensation earned under a prior Player Contract.

(d) In addition to any rights a Club may presently have under the NFL Player Contract, any Player Contract may be terminated if, in the Club's opinion, the player being terminated is anticipated to make less of a contribution to the Club's ability to compete on the playing field than another player or players whom the Club intends to sign or attempt to sign, or another player or players who is or are already on the roster of such Club, and for whom the Club needs Room. This Subsection shall not affect any Club or Club Affiliate's obligation to pay a player any guaranteed consideration.

(e) No Player Contract may contain any individually-negotiated term transferring any player intellectual property rights to any Club or Club Affiliate or any Club sponsor.

(f) No Club or player may agree upon any Player Contract provision concerning the termination of the contract that is inconsistent with the terms of this Agreement (including but not limited to the NFL Player Contract, Appendix A hereto), or the provisions of the NFL Constitution and Bylaws as set forth in the attachment to the letter dated August 4, 2011.

1.1.3 Meeting of the Minds and Mistakes

We've already covered one essential element of an enforceable agreement in consideration. A second essential element is a "meeting of the minds." This concept is implicit in the concept of an agreement, in that two parties are "agreeing" on a matter, however, it should not be taken for granted. For example, words written on a page may have different meanings to different people, even both are reasonable in their interpretations. Translations, language and cultural barriers can lead to confusion, and mistakes can be made, even though signatures are affixed to documents.

These are the concepts that must be considered when determining whether parties have had a "meeting of the minds" that is sufficient to enforce their mutual intentions.

Mistakes happen. Some mistakes can strike at the heart of a contract, and render enforceable, while others will not be excused, costing clients substantial sums and attorneys their jobs. Let's consider some examples.

In the famous English case of Griffith v. Brymer (King's Bench 1903), Griffith rented a room overlooking the planned route for a coronation procession from Brymer. Brymer knew that Griffith's purpose in renting the room was only to view the procession. However, unbeknownst to both parties at the time the contract was entered into, the King had been taken ill, and the procession was called off. When Griffith learned of the cancellation, he demanded from Brymer the return of his money.

The question the court had to answer was the following: will a mutual mistake which relates to the underlying and material facts of a contract void the agreement?

The court found that it was. It concluded that where both parties to a contract are mistaken as to the existence of those facts upon which the contract is based, and the misconception goes to the heart of the agreement, the contract is void. Since Brymer knew of Griffith's purpose in renting the room, which was thwarted by the cancellation of the procession, Griffith was entitled to the return of his money.

In other cases, mistakes will not be excused and become very expensive. For example, in a famous case involving baseball cards, a twelve year old card collector saw a rare card for sale for $12.00. The card was, in fact, worth $1,200, but a new sales clerk did not pick up on the mistake and sold the card for $12.00. When the purchaser refused to return the card, the store sued.

Was there a meeting of the minds? Should the agreement be enforced? In this case, we'll never know. The parties decided to sell the card to charity and settle the case.[1]

What is certain is that a unilateral mistake can be so fundamental so as to eliminate the "meeting of the minds" that is required for there to be a binding agreement. Where a mistake of one party at the time of the agreement was made as to a basic assumption and has material effect on agreed exchange of performances that is adverse to him, the contract can often be challenged, especially if the effect of mistake is such that enforcement of the contract would be unconscionable, or the other party had reason to know of the mistake or his fault caused the mistake. (Various, 1979).

Reading Assignment 1.2.3 – The Famous English Case of Raffles vs. Wichelhaus

Query the following while reading:

1) Clearly there was a mistake; do you agree with the result reached by the court? Do you think it is a fair result?
2) Would your opinion change if the goods were perishable and could not be re-sold to another merchant?
3) Can you think of a sports-related example during which two parties could make a mutual mistake that would render an agreement unenforceable?
4) If a player believes he's healthy, and a team that believes he's healthy signs that player to a contract, and both later find out that the player has a heart condition that renders him unable to play, should his contract be honored? Rescinded?

[1] For a detailed and excellent academic analysis of this case, *see* Kull, A. (1992). *Unilateral Mistake: The Baseball Card Case*, 70 Wash. U. L. Q. 57 (1992).

5) If you were running a professional sports league, what sort of procedures would you implement to address and remedy such situations in a fair and just manner?

Raffles v. Wichelhaus – In the Court of Exchequer

[1864] EWHC Exch J19 (1864) 2 H & C 906; 159 ER

To a declaration for not accepting Surat cotton which the defendant bought of the plaintiff " to arrive ex Peerless from Bomb-y," the defendant pleaded that he meant a ship called the "Peerless" which sailed from Bombay, in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the " Peerless," which sailed from Bombay in December. -Held, on demurrer, that the plea was a good answer.

DECLARATION. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhollorah, to arrive ex "Peerless" from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of 17-d. per pound, within a certain time then agreed upon after the arrival of the said goods in England.

Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready, and willing and offered to deliver the said goods to the defendants.

Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea: That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the "Peerless," which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing and did not offer to deliver to the defendants any bales of cotton which arrived by the last mentioned ship, but instead thereof was only ready and willing and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the "Peerless," and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. - The contract was 1864 for the sale of a number of bales of cotton of a particular RAFFLES description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the "Peerless." The words "to arrive ex ' Peerless,' " only mean that if the vessel is lost on the voyage, the contract is to be at an end. [Pollock, C. B. - It would be a question for the jury whether both parties meant the same ship called the "Peerless."] That would be so if

the contract was for the sale of a ship called the "Peerless;" but it is for the sale of cotton on board a ship of that name. [Pollock, C. B. - The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A, that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other "Peerless." [Martin, B.- It is imposing on the defendant a contract different from that which he entered into. Pollock, C. B. - It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [Pollock, C. B.-One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. - There is nothing on the face of the contract to shew that any particular ship called the "Peerless" was meant; but the moment it appears that two ships called the "Peerless" were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose shewing that the defendant meant one "Peerless" and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract.-He was then stopped by the Court.

Per CURIAM.-There must be judgment for the defendants.

1.1.4 Writing: Better to Remove All Doubt

When someone refers to a “contract,” we are likely to conjure up images of lengthy, written documents, detailing a series of rights and obligations among parties.

However, oral agreements are “contracts,” and thus, are generally enforceable even if oral (with some exceptions that are laid out in various statutes, such as contracts for the purchase and sale of real estate; mortgages; long-term leases; agreements for personal services; securities transactions; etc.).

The primary definition of “contract” in Black’s Law Dictionary is: An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. (Von Bar Drobnig, 2004).

Of course, the mere enforceability of an oral agreement does not necessarily make it a sound approach to doing business. Attorneys use written agreements to preserve the record of rights and obligations, provide

predictability, and memorialize the bargain and allocation of risks and rewards. This ultimately minimizes the probability of disputes during execution of the contract, and, in the event such disputes arise, provides agreed-upon mechanisms for resolving them.