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References to Football in Judicial Opinions and Written Advocacy

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In 2015, the U.S. Supreme Court decided Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund. The investors’ class action sought damages arising from the registration statement that Omnicare filed with the Securities and Exchange Commission before its public common stock offering.
The Court held, 9-0, that the issuer's sincere expression of pure opinion did not constitute an "untrue statement of a material fact," or an omission of "a material fact . . . necessary to make the statements therein not misleading."

Writing for the Court, Justice Elena Kagan explained that these dual bases of liability, recited in Section 11 of the Securities Act of 1933, are not "an invitation to Monday morning quarterback an issuer's opinions" if the opinions later prove incorrect. The Court thus spurned second-guessing from the relative comfort of hindsight.

With her nod to football, Justice Kagan employed a rhetorical technique that justices and lower federal and state judges have employed with increased frequency since the early 1970s. In cases with no claims or defenses concerning sports, written opinions help decide or explain issues of law or fact with references to the rules, strategies, or terminology of a wide array of sports.

Special Cultural Significance

The courts' frequent references acknowledge that sports holds (as the U.S. Court of Appeals for the 4th Circuit observes) "a special significance in our culture." Professional sports engage the attention of broad segments of the American people, including judges who adjudicate and lawyers and litigants who comb reporters for today's opinions and tomorrow's precedents. The courts' own careful use of sports references invites advocates to carefully use sports references to illuminate law or fact in their briefs and other court filings.

Indeed, careful use of sports references provides an ideal way for advocates to heed advice from the Supreme Court itself. "Think of the poor judge who is reading . . . hundreds and hundreds of these briefs," says Chief Justice John G. Roberts, Jr. "Liven up their life just a little bit . . . with something interesting."

Years earlier, Justice Wiley B. Rutledge struck the same chord: "It helps to break the monotony of the printed legal page to add a bit of life now and then. . . . A dull brief may be good law. An interesting one will make the judge aware of this."

Justice Antonin Scalia similarly advised brief writers to "[m]ake it interesting." "I don't think the law has to be dull," he continued. "Legal briefs are necessarily filled with abstract concepts that are difficult to explain," he continued. "Nothing clarifies their meaning as well as examples," which "cause the serious legal points you're making to be more vivid, more lively, and hence more memorable."

Brief writers can "liven up" their court filings, "break the monotony," and make their submissions "more vivid" with references to high-visibility sports that Americans follow. With the Major League Baseball playoffs and the World Series holding public attention, I wrote in the Journal's September-October issue about how the courts' use of baseball references can help advocates energize their own writing.

As the National Football League playoffs, climaxing by the Super Bowl, dominate the sports pages in January and early February, this article discusses the courts' frequent use of football references in their written opinions. The discussion seems especially instructive for advocates as they hone their written submissions that seek to explain and persuade. In early 2016, a Harris Interactive survey provided solid reason why the New York Times has called the Super Bowl "a de facto national holiday celebrating the nation's most popular sport." In the Harris survey, 33 percent of Americans who follow one or more sport ranked pro football as their favorite, with baseball coming in second, at 15 percent.

Football References in the Supreme Court

Even before Omnicare, the justices' frequent use of football references set an example for advocates. In Morse v. Frederick in 2007, for example, the Court rejected a First Amendment free speech challenge to a high school principal's suspension of a student who had unfurled a banner at a school-sponsored and school-supervised event on a public street near the Juneau, Alaska campus. The majority found that the principal had reasonably concluded that the banner advocated illicit drug use.

Dissenting in Morse, Justice John Paul Stevens argued that the Court's First Amendment precedents also required proof that the student's expression interfered with the school's educational mission. "[I]nstead of demanding that the school make such a showing," wrote Justice Stevens for himself and Justices Souter and Ginsburg, "the Court punts."

Other justices have also used "punting" to describe argumentation or decision making that assertedly avoids confronting a difficult issue, similar to the way a football team avoids a difficult field position by kicking the ball downfield and yielding possession. Justices have also called out efforts to do "end runs" around a rule or obligation, thus imitating a ball carrier who seeks to evade football tacklers by cutting a wide path around his own end.

Like football teams, parties may maintain "playbooks" that help determine strategy. But justices have also often challenged arguments, conduct, or postures that step "out of bounds," and thus thwart momentum in law as in football and various other sports. In one recent decision, dissenting Chief Justice John G. Roberts, Jr. -- the captain of his high school football team years earlier -- likened a party's late entry into the underlying suit to "piling on," similar to a late tackle on an opposing ball carrier who has already been brought down.

In Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council in 1978, the Court held that the Administrative Procedure Act's notice-and-comment formula generally established the
maximum procedure that Congress permitted courts to impose on agencies in rulemaking proceedings. Writing for the Court, Justice William H. Rehnquist noted that the court of appeals had imposed greater procedure only after reviewing the record of the Vermont Yankee rulemaking proceeding itself. The Court said that the review encouraged Monday morning quarterbacking,23 the sort of second-guessing that the Court rejected in Omnicare more than a generation later.

Football References in the Lower Courts

Lower federal and state court opinions regularly invoke a wide range of football references. Some of these references have also appeared in the Supreme Court, but the lower courts’ significantly larger caseloads also permit opportunity for football references that have not appeared in the United States Reports.

The Nature of Football

In DeBruce v. Commissioner in 2014, the U.S. Court of Appeals for the 11th Circuit granted the capital defendant habeas relief based on his ineffective-assistance-of-counsel claim.24 The court focused on the lead defense counsel’s trial performance because the majority determined that co-counsel had played only a minor role. The dissenter found the majority’s focus unduly narrow because “a placekicker plays ‘only a minor role’ in the grand scheme of a football game, but his efforts nonetheless matter a great deal.”25

In Cabell Huntington Hospital, Inc. v. Shalala in 1996, the 4th Circuit held that the U.S. Secretary of Health and Human Services had improperly calculated disproportionate-share payments under the Medicare statute.26 The key section distinguished between patients who were “eligible” for medical assistance and patients who were “entitled,” terms that the Secretary contended were interchangeable. The court of appeals rejected the contention. “In a football game,” the panel explained, “wide receivers are eligible to receive the ball from the quarterback, but none of them is entitled to receive it.”27

Other lower court opinions describe counsel’s litigation strategy like a football coach’s offensive and defensive strategies as a “game plan,”28 which may be found in a “playbook.”29 Parties may engage in pretrial or other preliminary “scrimmages,” a term referring to games, often in youth leagues or interscholastic play, that may showcase weaknesses and strengths but do not count in the league standings in football and various other sports.30 The U.S. Court of Appeals for the 11th Circuit says that in a criminal case, “much like a timeout in a football game momentarily halts the game clock, some pretrial events temporarily stop the running of the Speedy Trial Act clock.”31

When opposing litigants stake out their respective positions in anticipation of trial, they (like the offensive and defensive units of opposing football teams) assume positions at the “line of scrimmage.”32 Similar to a running back or pass receiver when the quarterback turns to him, a party or agency that takes the initiative “carries the ball,”33 even while other participants remain “on the sideline.”34 Arguments and conduct must remain “in bounds,”35 and not step “out of bounds” with sharp practice.36 “Punting” describes avoidance of factual or legal issues.37

Courts caution against “end runs” that permit evasion.38 Where a party or lawyer engages in the tactic, the offender should be “thrown for a loss”39 because (as the U.S. Court of Appeals for the 3rd Circuit put it) “end-run tactics might be suitable on a football field, but they are not persuasive in a court of law.”40

The U.S. Court of Appeals for the 5th Circuit explains that appellate courts grant deference to trial court fact finding because “absent an evidential vacuum or clear error, the final judgment . . . must come from the judicial gridiron, and not from armchair quarterbacks’ reading of the game in Sunday’s paper.”41 When the trial court rules on whether to admit assertedly cumulative evidence, the court must decide whether the evidence would aid the jury, or whether “in the parlance of the gridiron, [it] will just be piling on.”42

A desperate but hopeful quarterback may seek a seemingly miraculous victory by throwing a long “Hail Mary” pass to a receiver who is heavily covered near or beyond the goal line in the waning seconds. A party facing impending defeat at or near the end of a legal proceeding may throw a “Hail Mary” with a contention or argument whose success appears unlikely but not impossible.43

The facts and law developed at trial may indicate either a clear winner or a close decision. One way or the other, when the court enters final judgment in a party’s favor, “[a] win, whether by four touchdowns or a last second field goal, is a win.”44 In a criminal case, however, “the State’s evidence must be persuasive enough to almost make a touchdown; reaching the midfield is never enough to meet the ‘beyond a reasonable doubt’ standard.”45

In a 2016 capital punishment case, the Connecticut Supreme Court left undisturbed a precedent that was decided by a bench that included a judge who had retired from the court and been replaced. In the 2016 case, a concurrence reasoned that because the precedent had been argued well before the judge’s retirement and replacement, excluding the judge “would have raised the unsavory specter of running out a football game clock” on him.46

Judges as Quarterbacks or Referees

The U.S. Court of Appeals for the 3rd Circuit says that “trial judges are somewhat like quarterbacks in that they have a broad range of options for their game plan, and the losing party is not entitled to a new trial even when the trial judge’s ruling approaches the maximum latitude of the rules.”47

Courts also frequently liken judges to referees, who are expected to remain impartial while monitoring the adversaries’ conduct and approaches in football and other sports. In 2015, for example, the California Court of Appeal reversed a judgment for the defendant, whose trial counsel committed so many acts of misconduct that the trial judge’s failure to impose sanctions had the effect of favoring the defendant over the plaintiff. The panel turned to football: “Imagine a football game in which the referee continually flagged one team for rule violations, but never actually imposed any yardage penalties on it.”48

In Hunkins v. Bradley in 1979, the Wisconsin Court of Appeals called the trial judge “more than a referee.”49 Hunkins held that the trial court did not abuse its discretion by questioning witnesses and anticipating objections in an effort to accelerate
the six-day trial that arose from an automobile collision on a suburban street. "The referee in a . . . football . . . game does not have to concern himself with the length of time the contest takes. That is the job of the timekeeper," the panel began. "However in a trial, civil or criminal, it is the judge who has the duty, while affording each side a fair opportunity to present its case, to seek a reasonably unprotracted conclusion to the proceedings.”

Electronic and Telephone Communications

It has been held that an electronic communication may be “intercepted” only after the sender’s release but before the communication reaches its destination. A federal district court explained: “In American football, a ball can only be intercepted when it is 'in flight.' Once a pass receiver on the offensive team has caught the ball, the window for interception has closed, and defenders can only hope to force a fumble.”

In a state proceeding, however, the Maryland Court of Special Appeals explained that football analogies can come up short in close wiretapping cases: “In football, a quarterback, standing on his own ten-yard line, may direct a pass to his wide receiver on the forty-yard line. An intervening defensive back, however, with probable cause to anticipate the pass, may leap up and pull the ball out of the air at the thirty-yard line. In the binary 'either-or' world of football, the interception precludes the reception. In the multi-layered world of electronic surveillance, by contrast, the message may be received at its destination even as it is simultaneously intercepted in mid-flight.”

In another state proceeding, one Nevada Supreme Court justice concluded that a participant in a telephone communication cannot also intercept the communication: “[N]o one would consider it possible for either a football passer or receiver to be a pass interceptor; obviously, it takes a third person to capture or seize the football from its intended, two-person, passer-receiver course.”

An “Ardent Fan” in the Supreme Court

In the Supreme Court and lower federal and state courts alike, sports references can help judges and advocates reach one another through the written word. One jurist who likely would have welcomed brief writers’ carefully drawn football references was Chief Justice Earl Warren, who proudly called himself an “ardent fan of most sports” because he respected athletic competition as “an important phase of American life.” To demonstrate key points and to make writing more readable, his opinions sometimes featured sports references.

Chief Justice Warren held a particular passion for football and baseball. For several years, he brought the other justices and their wives to Philadelphia each autumn for the Army-Navy football game. He rarely missed a Washington Redskins home football game, attended as many Washington Senators baseball games as his schedule permitted (often with his clerks), and attended at least one World Series game whenever the autumn classic was played in a city near Washington.

Chief Justice Warren readily explained his unorthodox practice of reading the daily newspaper from back to front: “I always turn to the sports section first,” he said. “The sports section records people’s accomplishments; the front page, nothing but man’s failures.”


Endnotes

2 Id. at 1327.

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