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## NOTES

# The Latest NFL Fumble: Using its Commissioner as the Sole Arbitrator

*State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015).

TERESA MULLINEAUX\*

### I. INTRODUCTION

Professional football is the most popular sport within the United States.<sup>1</sup> Dominating television, the last Super Bowl XLVIII, the annual championship game, was the most watched television show in U.S. history.<sup>2</sup> The National Football League (NFL) is the governing body of professional football in America and is led by Commissioner Roger Goodell who acts as the chief executive of the NFL overseeing all 32 NFL teams. Amongst his vast powers includes resolving disputes with “full, complete, and final jurisdiction to arbitrate any dispute between any player, coach, and/or other employee of any member of the League (or any combination thereof) and any member club or clubs.”<sup>3</sup> The Commissioner’s ability to make binding decisions in these disputes is diminished by a clear conflict of interest. This must be changed.

In 2013, Todd Hewitt, a former employee of the St. Louis Rams, sought a writ of mandamus requesting the Twenty-First Judicial Circuit in St. Louis County, Missouri, vacate an order compelling arbitration of his age discrimination claim against the St. Louis Rams and three of its affiliates. The trial court granted the Rams’ motion to compel arbitration, and ordered the court action be stayed pending the arbitration. After an unsuccessful attempt at an appeal, Hewitt received a preliminary order in mandamus from the Eastern District of the Missouri Court of Appeals. On transfer from the court of appeals, the Missouri Supreme Court issued a writ of mandamus and reviewed Hewitt’s case for error.

The Missouri Supreme Court found that having the NFL Commissioner serve as the mandatory arbitrator for any claim against the NFL was unconscionable, as

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1. Darren Rovell, *NFL Most Popular for 30th year in row*, ESPN (Jan. 26, 2014), [http://espn.go.com/nfl/story/\\_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd](http://espn.go.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd).

2. John Breech, *Super Bowl 49 watched by 114.4M, sets U.S. TV viewership record*, CBS SPORTS, (Feb. 2, 2015 5:26pm ET), <http://www.cbssports.com/nfl/eye-on-football/25019076/super-bowl-49-watched-by-1144m-sets-us-tv-viewership-record>.

3. NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BYLAWS, NAT’L FOOTBALL LEAGUE 28 (2006), [http://www.nfl.com/static/content/public/static/html/careers/pdf/co\\_.pdf](http://www.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf) [hereinafter NFL CONSTITUTION AND BYLAWS].

the Commissioner is inherently biased. The NFL Commissioner is inherently biased as he receives his salary from team owners, and the team owners also adopt the rules and regulations under which he operates. Furthermore, these same owners will eventually consider renewing or terminating the Commissioner's contract. The court inferred the specific terms of arbitration from applicable statutes in Missouri's Uniform Arbitration Act and directed the parties to proceed with a neutral arbitrator.<sup>4</sup>

The Missouri Supreme Court was correct to determine the Commissioner should not act as an arbitrator for these claims. This Note will analyze the Commissioner's bias, explore how other professional sport leagues handle arbitration claims, and provide future recommendations for NFL players and employees.

## II. FACTS AND HOLDING

The St. Louis Rams is a NFL team located in St. Louis, Missouri.<sup>5</sup> Todd Hewitt started with the team during college as a summer equipment department employee.<sup>6</sup> He joined the organization as a full-time employee in 1978 and became the equipment manager in 1985.<sup>7</sup> He held the position until early 2011.<sup>8</sup>

During his tenure with the St. Louis Rams, Hewitt signed a number of employment contracts with the organization.<sup>9</sup> In November 2008, Hewitt signed his final contract with the Rams covering both the 2009 to 2010 and 2010 to 2011 football seasons.<sup>10</sup> The contract contained an arbitration clause binding Hewitt to the Constitution and By-Laws and Rules and Regulations of the NFL and by the decisions of the NFL Commissioner if a dispute arose as the Commissioner is granted "full, complete, and final jurisdiction and authority to arbitrate" through the Constitution and By-Laws.<sup>11</sup>

In January 2011, head coach Steve Spagnuolo informed 54-year-old Hewitt that the organization would not renew his employment contract.<sup>12</sup> In May 2012, Hewitt filed suit in the Twenty-First Judicial Circuit in St. Louis County, Missouri, against the St. Louis Rams Partnership and three affiliated companies — The Rams Football Company, Inc., ITB Football Company, L.L.C., and The St. Louis Rams, L.L.C. (collectively the Rams) — asserting age discrimination claims in violation of the Missouri Human Rights Act (MHRA), section 213.010 et seq.<sup>13</sup>

The defendants moved to compel arbitration and dismiss or stay the court proceedings, citing the arbitration provision in Hewitt's employment contract.<sup>14</sup> Hewitt opposed arbitration for five reasons.<sup>15</sup> First, three of the four defendants did not sign the agreement.<sup>16</sup> Second, the parties came to no meeting of the minds as

4. State *ex rel.* Hewitt v. Kerr, 461 S.W.3d 798, 803 (Mo. 2015) (en banc).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Hewitt*, 461 S.W.3d at 803.

10. *Id.*

11. *Id.* at 803- 804.

12. *Id.* at 804.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Hewitt*, 461 S.W.3d at 804.

to the essential terms of the arbitration agreement.<sup>17</sup> Third, the arbitration agreement lacked consideration.<sup>18</sup> Fourth, the agreement did not contain a clear and unmistakable waiver of Hewitt's right to bring a statutory violation claim in court.<sup>19</sup> Fifth, Hewitt claimed several provisions of the arbitration agreement were unconscionable, including the provision naming the NFL Commissioner as the arbitrator.<sup>20</sup>

The Rams' motion to compel arbitration was granted by the trial court with the action to be stayed pending the arbitration.<sup>21</sup> Upon the rejection of an appeal, Hewitt petitioned the Missouri Court of Appeals for a writ of mandamus or prohibition which issued a preliminary order in mandamus.<sup>22</sup> Both parties sought and were granted transfer to the Missouri Supreme Court, and Hewitt asked the Missouri Supreme Court to issue a writ of mandamus preventing the trial court from compelling arbitration of the dispute.<sup>23</sup>

The Missouri Supreme Court recognized that a writ of mandamus was the appropriate mechanism to review whether a motion to compel arbitration was improperly sustained.<sup>24</sup> In order to qualify for a writ of mandamus, a litigant "must allege and prove that he has a clear, unequivocal, specific right to a thing claimed."<sup>25</sup> The court found the arbitration provisions within Hewitt's contractual agreement were unconscionable as the NFL Commissioner controls every part of the process and there is no third party, independent review of his decisions.<sup>26</sup> The Missouri Supreme Court, implying the specific terms of arbitration from applicable statutes in Missouri's Uniform Arbitration Act (MUAA) then issued an order compelling arbitration wherein the trial court appoints a neutral arbitrator.<sup>27</sup>

### III. LEGAL BACKGROUND

#### *A. Standard of Review*

The Missouri Supreme Court can issue and determine original remedial writs, including writs of mandamus.<sup>28</sup> A writ of mandamus is the proper way to review whether a motion to compel arbitration was improperly sustained.<sup>29</sup> The Missouri Supreme Court will issue a writ of mandamus only when the party requesting the writ has a clear and unequivocal right to the relief requested.<sup>30</sup>

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17. *Id.*

18. *Id.*

19. *Id.* Several provisions of the arbitration agreement Hewitt argued interfered with his rights under the MHRA, barring arbitration under the "denial of statutory rights" doctrine. *Id.*

20. *Id.*

21. *Id.*

22. *Hewitt*, 461 S.W. 3d at 804-05.

23. *Id.* at 805.

24. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 855 (Mo. 2006) (en banc).

25. *Furlong Companies Inc. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo. 2006) (en banc).

26. *Hewitt*, 461 S.W.3d at 813; *Vincent*, 194 S.W.3d 853 at 855-56.

27. *Hewitt*, 461 S.W.3d at 803.

28. *Id.* at 805 (Mo. 2015) (en banc); see MO. CONST. art. V, § 4.1.

29. *Hewitt*, 461 S.W.3d at 805; see *Vincent*, 194 S.W.3d at 856.

30. *State ex rel. Jay Bee Stores, Inc. v. Edwards*, 636 S.W.2d 61, 62 (Mo. 1982) (en banc).

*B. Arbitration Agreement*

The Federal Arbitration Act (FAA) governs the applicability and enforceability of arbitration agreements in all contracts involving interstate commerce.<sup>31</sup> The United States Supreme Court has held the FAA applies where an arbitration agreement is executed in a single state by residents of that state as long as one of the parties in the agreement engages in business in multiple states.<sup>32</sup> The FAA provides the four exclusive ways an arbitration award can be vacated, which has been upheld by the United States Supreme Court.<sup>33</sup> Of these four ways, the one most applicable in Hewitt's case involves evident partiality or corruption of the arbitrators.<sup>34</sup>

The Court noted that while it is impractical to think that arbitrators cannot have any ties with the business world, arbitrators should face more scrutiny than judges when it comes to bias because arbitrators have complete freedom to decide the law and facts of the case without appellate review.<sup>35</sup> Congress, which passed the FAA, did not intend to have litigants submit their cases to arbitrators that are biased toward one party and favorable to the other.<sup>36</sup> Thus, arbitrators should disclose any potential bias and should avoid the appearance of bias.<sup>37</sup>

Evident partiality as a means for vacatur has been interpreted in different ways and no clear consensus exists at the federal level as to what evident partiality is and what information an arbitrator must disclose to the parties.<sup>38</sup> Depending on the jurisdiction, each circuit has a different definition of evident impartiality that parties must be aware of when seeking to vacate arbitration.

The Fifth Circuit adopted the rule that an award can be vacated only if there is more than a "trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding."<sup>39</sup> The court did not want to provide motivation for parties to conduct rigorous, after-the-fact investigations to uncover very trivial relationships, most of which would not have been objected to if the disclosure had been made.<sup>40</sup>

The First, Second, Fourth, Sixth, and Eleventh Circuits have adopted a form of the "reasonable person" standard to determine evident partiality.<sup>41</sup> The First Circuit defined evident partiality as a situation where a reasonable person would conclude that an arbitrator was partial to one party of the arbitration.<sup>42</sup> Mere participation by the arbitrators and one of the parties in the same industry is not enough for a facial

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31. *Hewitt*, 461 S.W. 3d at 805; see 9 U.S.C. §1-15 (2012).

32. *Hewitt*, 461 S.W.3d at 805 (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003)).

33. 9 U.S.C. § 10 (2012); see *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); see also MO. REV. STAT. §435.405 (2000).

34. 9 U.S.C. § 10.

35. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 148-49 (1968).

36. *Id.* at 150.

37. *Id.* at 149-150.

38. *Hall St.*, 552 U.S. at 578 (holding that the statutory grounds are exclusive and cannot be supplemented by a contract).

39. *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283 (2007).

40. *Id.* at 285.

41. See e.g., *JCI Comm. Inc. v. Int'l Bhd of Elec. Workers, Local 103*, 324 F.3d 42 (1st Cir. 2003); *Morelite Const. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79 (2nd Cir. 1984); *Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125 (4th Cir. 1995); *Nationwide Mutual Ins. Co. v. Home Ins. Co.*, 429 F.3d 640 (6th Cir. 2005); *Gianelli Money Purchase Plan & Trust v. ADM Inv. Sers., Inc.*, 146 F.3d 1309 (11th Cir. 1998).

42. *JCI Comm.*, 324 F.3d at 51.

claim of evident partiality.<sup>43</sup> Rather, there must be specific facts showing improper motives of the arbitrator.<sup>44</sup> The Eleventh Circuit held that an arbitrator can not be guilty of evident partiality unless (1) the arbitrator has actual knowledge of an existing conflict or (2) the arbitrator knew information that would lead a reasonable person to believe a conflict could exist and failed to disclose it.<sup>45</sup>

The Fourth Circuit devised a four-part test to define evident partiality.<sup>46</sup> The first factor a court should consider is any personal interest, pecuniary or otherwise, the arbitrator has in the arbitration.<sup>47</sup> Next, the court considers whether the directness of the relationship between the arbitrator and the party the arbitrator is alleged to favor.<sup>48</sup> The third factor is the connection of the relationship to the arbitration.<sup>49</sup> Lastly, the court looks at the proximity in time between the relationship and the arbitration proceeding.<sup>50</sup> These factors should be examined to determine whether the asserted bias is “direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.”<sup>51</sup>

Furthermore, the Fourth Circuit considers facts that indicate “improper motives on the part of the arbitrator,” but the party need not prove the arbitrator did indeed have improper motives, as this would make the standard for evident partiality the same as proving actual bias.<sup>52</sup> The party seeking vacatur must put forward objective facts to demonstrate such a degree of partiality that a reasonable person would conclude the arbitrator had improper motives.<sup>53</sup>

The Eighth Circuit, the jurisdiction in which Missouri is under, has yet to define evident partiality. The Eighth Circuit has shown that a business relationship between one party and the arbitrator would constitute evident partiality.<sup>54</sup> Therefore, arbitrators should avoid the appearance of bias and must disclose to the parties any dealings that might create bias or an impression of it.<sup>55</sup> Additionally, Missouri state courts have adopted their own standard for evident partiality; when the interest or bias of the arbitrator is direct, definite, and capable of demonstration<sup>56</sup> and is not remote, uncertain, or speculative.<sup>57</sup>

Missouri state courts can evaluate unconscionability claims, including arbitrator bias claims, under state law in the context of contract formation.<sup>58</sup> Courts look at the contract or arbitration agreement as a whole to see whether the agreement to arbitrate is valid.<sup>59</sup> The doctrine of unconscionability gives courts the power to

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43. *Id.* at 52.

44. *Id.* at 51.

45. *Gianelli Money*, 146 F.3d at 1312.

46. *Consolidated Coal*, 48 F.3d at 130.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 129.

52. *Consolidated Coal*, 48 F.3d at 129.

53. *ANR Coal Co., Inc. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 494, 501 (4th Cir. 1999).

54. *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159-60 (8th Cir. 1995).

55. *See Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 982 (8th Cir. 2001).

56. *See Sheffield Assembly of God Church, Inc. v. Am. Ins. Co.*, 870 S.W.2d 926, 930 (Mo. Ct. App. W.D. 1994); *Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 343 (Mo. Ct. App. S.D. 1995).

57. *Sheffield Assembly of God Church, Inc. v. Am. Ins. Co.*, 870 S.W.2d 926, 930 (Mo. Ct. App. W.D. 1994).

58. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 812-813 (Mo. 2015) (en banc); *see Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 492 n.3 (Mo. 2012) (en banc).

59. *State ex rel. Hewitt v. Kerr*, 461 S.W. 3d 798, 812 (Mo. 2015) (en banc).

invalidate contracts if a party in the contract is subject to an absence of meaningful choice and unfairly oppressive terms.<sup>60</sup> Under the NFL constitution and bylaws, the league or the team owners “shall select and employ” the Commissioner and set the Commissioner’s term of employment and compensation, thus the Missouri Supreme Court concluded that the Commissioner is employed by the team owners.<sup>61</sup>

In a similar case to *Hewitt* involving a writ of mandamus and the compelling of arbitration, the Missouri Supreme Court found a clause in an arbitration contract between a home-builder and home purchasers that designated the president of a home-builders association as the sole selector of the arbitrator unconscionable because the president was “an individual in a position of bias.”<sup>62</sup> Requiring an individual in a position of bias to be the sole arbitrator or to be the sole selector of an unbiased arbitrator is unconscionable.<sup>63</sup> Missouri Revised Statute § 435.360 remedies this unconscionable portion of the arbitration provision by allowing the court to appoint one or more unbiased arbitrators.<sup>64</sup>

### C. Terms of Arbitration

A valid arbitration clause in an employment contract requires mutuality of agreement and assent by the parties to the terms of the contract.<sup>65</sup> To incorporate terms from another document, the contract must make clear reference to the other document and describe it so that the document’s identity can be ascertained beyond a doubt.<sup>66</sup> A state determines the validity of an arbitration agreement by applying state contract law principles.<sup>67</sup> This means a Missouri court can declare an arbitration agreement unenforceable if a generally applicable contract defense pertains to concerns raised about the agreement.<sup>68</sup> The terms of a contract are read by the court holistically with terms interpreted under their plain meaning.<sup>69</sup>

In many states, there are statutory provisions for enforcing arbitration agreements by state courts.<sup>70</sup> The Missouri General Assembly adopted the MUAA in 1980.<sup>71</sup> Prior to 1980, arbitration agreements, either written or oral, did not bar the filing of a lawsuit in Missouri.<sup>72</sup> Today, when an arbitration agreement is valid but the arbitration provisions are silent or unconscionable as to certain essential matters regarding the arbitration, the failure or nonexistence of the terms is remedied by

60. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006) (en banc).

61. *Hewitt*, 461 S.W. 3d at 813.

62. *Id.*; *Vincent*, 194 S.W.3d at 859.

63. *Vincent*, 194 S.W.3d at 859.

64. MO. REV. STAT. §435.360 (2000). “If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed... the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.” *Id.*

65. *Hewitt*, 461 S.W.3d at 810 (Mo. 2015) (en banc); see *Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 925 S.W.2d 932, 938 (Mo. Ct. App. S.D. 1996).

66. *Hewitt*, 461 S.W.3d at 810-811 (Mo. 2015) (en banc); see *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 196 (Mo. Ct. App. E.D. 2006).

67. *Vincent*, 194 S.W. 3d at 805; see *Hewitt*, 461 S.W.3d at 807.

68. *Hewitt*, 461 S.W.3d at 807; see also *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515 (Mo. 2012) (en banc) (listing examples of contract defenses include fraud, duress, or unconscionability).

69. *Hewitt*, 461 S.W.3d at 808; see *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. 2003) (en banc).

70. *Med. Shoppe Int’l, Inc. v. J-Pral Corp.*, 662 S.W.2d 263, 273-74 (Mo. Ct. App. 1984).

71. *Id.* at 274.

72. *Id.*

implied terms from statutes within the MUAA.<sup>73</sup> The most significant change after the MUAA was enacted was the increased enforceability of agreements to arbitrate.<sup>74</sup> The MUAA applies only to written agreements and gives guidelines for enforcing arbitration agreements by providing terms that can be read into arbitration agreements.<sup>75</sup> For example, the MUAA allows for a substitution of a new arbitrator when the designated arbitrator is disqualified.<sup>76</sup>

In *Hojnowski v. Buffalo Bills, Inc.*, another former equipment manager of an NFL team challenged the arbitration clause of his employment contract when he filed a lawsuit in federal district court for age discrimination.<sup>77</sup> Hojnowski's employment contract contained a similarly worded arbitration clause to Hewitt's and Hojnowski was not provided with the NFL procedural guidelines that govern arbitration proceedings.<sup>78</sup> Hewitt's main argument for vacating the arbitration provision was that the agreement did not include the rules governing arbitration and did not explicitly reference these rules.<sup>79</sup> Hojnowski was unaware he would be required to arbitrate employment related disputes with the NFL Commissioner serving as the arbitrator.<sup>80</sup> The United States District Court for the Western District of New York rejected Hojnowski's argument that the validity of an arbitration agreement required transparently stated arbitration guidelines.<sup>81</sup> The court cautioned that the practice of not including arbitration guidelines in the arbitration provision of an employment contract was not advisable.<sup>82</sup> However, the court still found the employment contract was a valid, enforceable contract, and that it "clearly and unmistakably" compelled Hojnowski to arbitrate all employment-related disputes.<sup>83</sup>

#### IV. INSTANT DECISION

##### *A. Majority Opinion*

On transfer from the Missouri Court of Appeals, five of the seven Missouri Supreme Court judges found no adequate remedy on appeal for the present claims.<sup>84</sup> Because Hewitt could not be compelled to arbitrate his claims using the NFL guideline terms with the Commissioner as the sole arbitrator, the court found that Hewitt

73. *Hewitt*, 461 S.W.3d at 811; *see also* *Triarch Indus v. Crabtree*, 158 S.W.3d 772, 775 (Mo. 2005) (en banc); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859-61 (Mo. 2006) (en banc).

74. MO. REV. STAT. §435.350 (2000).

75. *Forest Hills Country Club v. Fred Weber, Inc.*, 691 S.W.2d 361, 363 (Mo. Ct. App. E.D. 1985).

76. *Hewitt*, 461 S.W.3d at 813; *see* MO. REV. STAT. § 435.360 (2000).

77. *Hojnowski v. Buffalo Bills, Inc.*, 995 F.Supp. 2d 232, 236-38 (W.D.N.Y. 2014).

78. *Id.* at 235. The arbitration clause provided:

Employee agrees that all matters in dispute between Employee and Employer, including without limitation any dispute arising from the terms of this Agreement, shall be referred to the NFL Commissioner for binding arbitration, and his decision shall be accepted as final, complete, conclusive, binding, and unappealable by the Employee and Employer.

*Id.*

79. *Id.* at 236.

80. *Id.* at 237.

81. *Id.* at 239-40.

82. *Id.* at 238.

83. *Hojnowski*, 995 F.Supp at 237.

84. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 806 (Mo. 2015) (en banc) (Breckenridge, Draper III, Stith, Russell, and Teitelman, JJ.). These judges found that "if Hewitt is not bound to arbitrate under the terms of his contract, this Court can readily avoid this duplicative and unnecessary additional litigation through a writ of mandamus." *Id.*



had no adequate remedy on appeal and that a permanent writ of mandamus should be issued.<sup>85</sup>

The court also found that the FAA governed Hewitt's employment contract since the Rams operate in interstate commerce.<sup>86</sup> Additionally, the court held that the arbitration agreement was supported by adequate consideration.<sup>87</sup>

The majority found that Hewitt's employment contract had a valid and enforceable arbitration clause compelling him to arbitrate disputes against the Rams.<sup>88</sup> The arbitration provision in Hewitt's employment contract provided that the Constitution and By-Laws and Rules and Regulations of the NFL would lead to final decisions of the NFL Commissioner that would legally bind Hewitt.<sup>89</sup>

Through the plain text of the agreement, the court found that Hewitt knew he was bound by the Constitution and By-Laws and Rules and Regulations of the NFL but that he was not aware of the full provisions of his employment contract because the contract neither mentioned the NFL procedural guidelines nor attached them.<sup>90</sup> Hewitt conceded his employment contract had an arbitration provision, and the trial court found an arbitration provision had been included in many of the previous employment contracts Hewitt had signed.<sup>91</sup> The language in Hewitt's contract provided that:

The Rams and Hewitt . . . agree that in any dispute which may arise between them, the matter in dispute shall be referred to the Commissioner of the National Football League for decision and after due notice and hearing, at which both parties may appear, the decision of said Commissioner shall be final, binding, conclusive and unappealable. . . .<sup>92</sup>

Thus, the majority found that the essential terms of the arbitration were not referenced in Hewitt's employment contract and therefore were not incorporated.<sup>93</sup>

Hewitt argued that the Commissioner could not be neutral or unbiased in a dispute between an employee and team management because team owners select and determine the salary of the Commissioner.<sup>94</sup> Within Hewitt's contract, the plain language showed he intended to be legally bound by the constitution and bylaws of

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85. *Id.* at 815.

86. *Id.* at 805. ("[T]he team—its players and employees—participate in away games and take in revenue in other states, and several of the defendant corporations named in this suit are incorporated in Delaware.")

87. *Id.* at 809.

88. *Id.* at 803 (Breckenridge, Draper III, Stith, and Russell, JJ.). Justice Teitelman wrote a dissenting opinion stating that Hewitt should not be compelled to arbitrate the underlying dispute, as there was no mutual agreement to the essential terms in this case. *Id.* at 822.

89. *Id.* at 810 (quoting the Constitution and Bylaws of the NFL) ("The [NFL] Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate [...] . . . The Commissioner shall interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and Bylaws and any enforcement thereof.")

90. *Hewitt*, 461 S.W. 3d at 811.

91. *Id.* at 808.

92. *Id.* at 812.

93. *Id.* at 803 (Breckenridge, Draper III, Russell, and Teitelman, JJ.). In dissent, Justice Stith, noted that no case had been cited requiring that the parties be given a copy of the relevant rules when they were otherwise accessible. *Id.* at 821 (citing *Hojnowski v. Buffalo Bills, Inc.*, 995 F.Supp.2d 232, 236-38 (W.D. N.Y. 2014)).

94. *Id.* at 812.

the NFL, which stated the NFL Commissioner is the sole arbitrator.<sup>95</sup> Hewitt neither presented a question of fact as to the content of these provisions nor demonstrated whether the provisions said that NFL teams must comply with their terms.<sup>96</sup> The agreement was supported by consideration and obligated both parties to arbitrate.<sup>97</sup> The court further determined that Hewitt did not show that the circumstances under which the contract was entered into were so unconscionable as to render the agreement invalid.<sup>98</sup> The court concluded that there was a valid and enforceable agreement to arbitrate.<sup>99</sup> The agreement governed arbitration of any dispute which may arise between Hewitt and the Rams, including statutory claims.<sup>100</sup> Therefore, even Hewitt's claims under the Missouri Human Rights Act (MHRA) could be arbitrated.<sup>101</sup>

The majority also found that the NFL's dispute resolution procedural guidelines setting out the essential terms of arbitration were not included in Hewitt's employment contract and thus were not incorporated into his contract.<sup>102</sup> Hewitt's employment contract made no reference to the NFL guidelines, and the Constitution and By-Laws did not clearly reference the guidelines either.<sup>103</sup> The contract only referred to the "Rules and Regulations of the National Football League,"<sup>104</sup> and did not identify the guidelines so Hewitt could "ascertain beyond a doubt" what guidelines were incorporated into the agreement.<sup>105</sup> Furthermore, the court held that Hewitt did not bear the responsibility of seeking out an unknown document not clearly identified in his employment contract or the constitution and bylaws.<sup>106</sup> As such, Hewitt could not manifest his consent and did not assent to the essential terms of arbitration found in the guidelines.<sup>107</sup>

However, the court found the agreement to arbitrate was valid because the plain language in the employment contract proved that Hewitt knew he was legally bound by the constitution and bylaws of the NFL, which provided that his disputes would be arbitrated.<sup>108</sup> The court found Hewitt was unable to show the circumstances under which the contract was made were so unconscionable that the entire contract was invalid.<sup>109</sup> Hewitt argued that the contract was presented without any discussion about the contractual terms.<sup>110</sup> The court found this was undermined by the fact that Hewitt had been an employee of the team for over 30 years, during which time the trial court found Hewitt had signed many employment contracts containing arbitration provisions substantially similar to the one in this case.<sup>111</sup> The court

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95. *Id.* at 808.

96. *Hewitt*, 461 S.W.3d at 808.

97. *Id.* at 810.

98. *Id.*

99. *Id.*

100. *Id.* at 814.

101. *Id.*

102. *Hewitt*, 461 S.W.3d at 803 (Breckenridge, Draper III, Russell, and Teitelman, JJ.).

103. *Id.* at 811.

104. *Id.*

105. *Id.* at 810; see *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 196 (Mo. Ct. App. E.D. 2006).

106. *Hewitt*, 461 S.W.3d at 811.

107. *Id.* at 810.

108. *Id.*

109. *Id.* at 809.

110. *Id.*

111. *Id.*

agreed with the trial court that if Hewitt did not read his contract, ask about the terms within it, or obtain supporting documents during his tenure with the Rams, the court could not turn back time and protect him against his contractual promises.<sup>112</sup> Therefore, the court found the arbitration agreement was not procedurally unconscionable.<sup>113</sup>

The majority found that the terms of the contract designating the NFL Commissioner, an employee of the team owners, as the sole arbitrator with autonomous discretion to create arbitration rules was unconscionable and therefore unenforceable.<sup>114</sup> Like the president of the home-builders association in *Vincent*, the Missouri Supreme Court found the NFL Commissioner was “an individual in a position of bias as the arbitrator,” because NFL Commissioner has an implicit bias due to his employment by the NFL and its affiliates.<sup>115</sup> Furthermore, the Commissioner is not only the arbitrator but also the person controlling almost every aspect of the arbitration from the rules and procedures to the final decision.<sup>116</sup> The court found these provisions within the arbitration agreement were unconscionable as there was no independent third party review of his decisions.<sup>117</sup>

The majority further found that the MUAA provides a mechanism to infer missing terms from the arbitration agreement and gives guidelines for appointing an arbitrator to replace the NFL Commissioner.<sup>118</sup> As such, four judges issued a permanent writ of mandamus, directing the trial court to vacate its order granting the motion to compel arbitration and to issue an order compelling arbitration with a neutral arbitrator, inferring the specific terms of the arbitration from applicable statutes in the MUAA.<sup>119</sup>

### *B. Judge Stith’s Dissenting Opinion*

Judge Stith concurred with the majority in part and dissented in part. Judge Stith concurred with the majority’s holding that a writ of mandamus was the appropriate way to review a trial court decision for error in sustaining a motion to compel arbitration and that the arbitration agreement in this case was valid.<sup>120</sup> Judge Stith did not agree with the majority’s belief that the NFL Commissioner was presumptively biased.<sup>121</sup> The majority opinion in this case was the first decision in the United States that held the NFL Commissioner, as an employee of the various NFL teams, could not be unbiased in a dispute between an employee and an NFL team.<sup>122</sup>

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112. *Hewitt*, 461 S.W.3d at 809.

113. *Id.* at 810. Justice Wilson dissented on these grounds pointing out that the Court ordered Hewitt to participate in the very thing he asked the Court to stop, specifically, his arbitration. *Id.* at 829.

114. *Id.* at 803 (Breckenridge, Draper III, Russell, and Teitelman, JJ.).

115. *Id.* at 813.

116. *Id.* at 813; see NFL CONSTITUTION AND BYLAWS, *supra* note 3, at 28.

117. *Hewitt*, 461 S.W.3d at 813; State *ex rel.* *Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) (en banc).

118. *Hewitt*, 461 S.W.3d at 803 (Breckenridge, Draper III, Russell, and Stith, JJ.).

119. *Id.* Because there was not mutual agreement to the essential terms, Justice Teitelman dissented and held there was not an enforceable contract and therefore Hewitt was not compelled to arbitrate. *Id.* at 822.

120. *Id.* at 816.

121. *Id.*

122. *Id.* at 817.

The Missouri Supreme Court held this, “simply on the fact that the NFL Commissioner is, well, the NFL Commissioner.”<sup>123</sup> In each case where a party has sought disqualification of the NFL Commissioner because of his position, the disqualification request was denied—until now.<sup>124</sup> Actual bias or a conflict of interest had always been required.<sup>125</sup>

Furthermore, Judge Stith believed the NFL Commissioner did not exclusively represent the interests of the team owners.<sup>126</sup> The NFL requires the NFL Commissioner to have “unquestioned integrity” and no financial interest, direct or indirect, in any professional sport.<sup>127</sup> Furthermore, Judge Stith noted that Hewitt offered only speculation and cited no evidence of bias against employees or legal authority for his claim that the NFL Commissioner was inherently biased or had exhibited bias based solely on the Commissioner’s position as Commissioner.<sup>128</sup> Therefore, Judge Stith rejected this claim of bias.<sup>129</sup>

## V. COMMENT

The FAA and the U.S. Supreme Court have provided that there are four exclusive ways to vacate arbitration decisions.<sup>130</sup> The most prevalent in this case involves evident partiality or corrupt arbitrators.<sup>131</sup> The majority in *Hewitt* determined that the NFL Commissioner was inherently biased and therefore had evident partiality because he was employed directly by one of the parties in the dispute.<sup>132</sup> Because the NFL team owners give the NFL Commissioner the rules, his pay, and the potential for contract renewal or termination, it is very unlikely that the Commissioner will exercise his powers impartially.<sup>133</sup> Other professional sports leagues have combatted this evident partiality by hiring independent arbitrators. The NFL should adopt this system.

### A. *NFL Commissioner Bias*

The majority opinion of the Missouri Supreme Court in *Hewitt* was correct in determining that the NFL Commissioner has an inherent, unavoidable bias and therefore should not arbitrate disputes. The majority further found the terms of the contract designating the NFL Commissioner, an employee of the team owners, as

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123. *Id.*

124. *Hewitt*, 461 S.W.3d at 817; see *Alexander v. Minnesota Vikings Football Club LLC*, 649 N.W.2d 464, 467 (Minn. Ct. App. 2002) (finding that the FAA does not expressly provide for the pre-award removal of an arbitrator and thus the Court declined to find the Commissioner to be a biased arbitrator).

125. *Hewitt*, 461 S.W. 3d at 818-819.

126. *Id.* at 818.

127. *Id.* at 818; see NFL CONSTITUTION AND BYLAWS, *supra* note 3, at 28.

128. *Hewitt*, 461 S.W. 3d at 819.

129. *Id.*

130. 9 U.S.C. § 10 (2012); see MO. REV. STAT. §435.405 (2000); see also *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (holding the statutory grounds are exclusive and cannot be supplemented by a contract).

131. 9 U.S.C. § 10. The other three reasons are when the award is done through corruption, fraud, or undue means; the arbitrator is guilty of misconduct like refusing to hear evidence; or where the arbitrators exceeded their powers. *Id.*

132. *Hewitt*, 461 S.W.3d at 813.

133. See generally, NFL CONSTITUTION AND BYLAWS, *supra* note 3, at 28 & 48.

the sole arbitrator with autonomous discretion to create arbitration rules was unconscionable and therefore unenforceable.<sup>134</sup> In her dissent, Judge Stith incorrectly believed this was not a presumptive bias.<sup>135</sup> The NFL team owners pay the Commissioner,<sup>136</sup> and in 2012, team owners decided to extend Commissioner Roger Goodell's contract until 2018.<sup>137</sup> Goodell, in his capacity as the Commissioner and arbitrator, has direct, definite, and demonstrable bias. His salary comes directly from the teams and thus, creates a bias, as he would be more likely to find in favor of those who pay him. Furthermore, the team owners have favored Goodell by renewing his contract.

The only restriction the NFL imposes on the Commissioner to eliminate bias is that he cannot have a direct or indirect financial interest in any professional sport.<sup>138</sup> This is not enough. The principal flaw in allowing the NFL Commissioner to decide employee and player disputes with management is that the Commissioner is naturally partial toward management. The NFL Commissioner is not a neutral third party. His employers, the NFL team owners, appoint him; and therefore the Commissioner is implicitly subject to control by them.<sup>139</sup> Not only does the NFL Commissioner's pay come from the team owners, but the team owners also adopt the rules and regulations under which he operates.<sup>140</sup> These same owners will eventually consider renewing the Commissioner's contract.<sup>141</sup> Right after the NFL established these rules and regulations, the NFL then gave the Commissioner power to arbitrate all claims.<sup>142</sup> Because the NFL and NFL teams owners issue the Commissioner's salary, establish the rules under which he operates, and hold the power over his contract renewal or termination, it is very unlikely that the Commissioner will exercise his powers impartially. Rather, the NFL Commissioner is capable of demonstrating bias against players and employees of the team owners, and the Commissioner has an appearance of bias toward NFL team owners.

The present system further encourages partiality to management because the current system allows the Commissioner to decide matters in which his own authority or actions are questioned. The Commissioner not only promulgates rules but also determines the outcomes of disputes between player conduct and personnel procedures.<sup>143</sup> The Commissioner also rules on the validity of disciplinary actions that he imposed as the Commissioner.<sup>144</sup> Within this system of no review, a Com-

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134. *Hewitt*, 461 S.W.3d at 803.

135. *Id.* at 816.

136. *NFL teams extend Goodell's contract through 2018 season*, NAT'L FOOTBALL LEAGUE (Jan. 25, 2012), <http://www.nfl.com/news/story/09000d5d826501f0/printable/nfl-teams-extend-goodells-contract-through-2018-season>. All NFL clubs pay the Commissioner's salary. However, there are only six team owners on the NFL Compensation Committee. All team owners must approve the NFL Compensation Committee's recommendation.

137. *Id.*

138. NFL CONSTITUTION AND BYLAWS, *supra* note 3, at 28.

139. *League Governance*, NFL OPS., (2015), <http://operations.nfl.com/football-ops/league-governance/> (last visited Feb. 22, 2016) (noting that the NFL Commissioner is responsible to the owners and an executive committee vote has the power to remove him). As an observation, male pronouns are used for the NFL Commissioner because only men have ever held the role of the Commissioner.

140. NFL CONSTITUTION AND BYLAWS, *supra* note 3, at 48 (stating that playing rules are amended or changed by affirmative vote of at least three-fourths or 21 members of the League).

141. *Id.* at 28.

142. *Id.*

143. *Id.* at 28-29.

144. *Id.* at 33.

missioner can promulgate a rule and later, while arbitrating a claim, have to determine whether or not he had the authority to promulgate that rule.<sup>145</sup> Since the Commissioner has unilateral power to interpret the rules and decisions he issues, the NFL dispute resolution system has an enormous potential for unfair decision-making and allows direct, definite, and capable-of-demonstration bias into the arbitration process. The Commissioner acts not only as the judge, jury, and executioner, but also as lead investigator, prosecutor, and the court of appeals.<sup>146</sup> Additionally, the system gives the appearance of bias, which is unacceptable under the Missouri interpretation of inherent bias in the MUAA.

### *B. Future Recommendations*

When the NFL player and employee unions renegotiate their contracts with the NFL, the arbitration provision, specifically as it provides for the NFL Commissioner as the sole arbitrator of employee and player disputes, should be removed. Several other professional sports leagues in the United States have done this and have been successful. Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) all use an independent arbitration process.

In 1921, the MLB created the office of the Commissioner through the Major League Agreement (MLA).<sup>147</sup> The role of MLB Commissioner was created in part because of alleged gambling problems that were hurting the image of the game.<sup>148</sup> As his first act in office, Commissioner Kenesaw Landis, a former federal judge, banned Chicago White Sox players from playing baseball for life because of allegations that they threw the 1919 World Series, despite the players having been acquitted by a jury for conspiring to defraud the public by throwing the 1919 World Series.<sup>149</sup> When these players challenged whether the MLB Commissioner should have this much power, the court found the Commissioner's wide-ranging discretion valid under the MLA.<sup>150</sup> Within the MLA, the parties gave the Commissioner considerable authority and discretion to hear cases and to use his own initiative to observe, investigate, and take action to ensure the provisions of the agreement were followed and to prevent conduct detrimental to the sport.<sup>151</sup> Under the current MLA enacted in 2012, the MLB Commissioner may bring sanctions against players and other employees if their conduct is not in the best interest of the league.<sup>152</sup> As stated before, the current MLA outlines the disciplinary structure and procedures in the

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145. *Id.* at 29-32.

146. H. Brian Holland, *Deflategate: Does The NFL Commissioner Enjoy Absolute Power?*, NEWSWEEK (Aug. 20, 2015, 11:59 AM), <http://www.newsweek.com/deflategate-does-nfl-commissioner-enjoy-absolute-power-364565>.

147. Robert Ambrose, Note, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1080 (2008) (discussing the shaping of the MLB Commissioner's authority and the appointment of Landis as the first Commissioner).

148. *Id.*

149. *SportsCenter Flashback: The Chicago Black Sox Banned From Baseball*, ESPN CLASSIC (Nov. 19, 2003), [http://espn.go.com/classic/s/black\\_sox\\_moments.html](http://espn.go.com/classic/s/black_sox_moments.html) (noting that Commissioner Kenesaw Landis banned the players two months into his term as the MLB Commissioner).

150. *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298, 301 (N.D. Ill. 1931).

151. *Id.*

152. *2012-2016 Basic Agreement*, MLB 49 (2012) [http://mlb.mlb.com/pa/pdf/cba\\_english.pdf](http://mlb.mlb.com/pa/pdf/cba_english.pdf).

league.<sup>153</sup> Article XII of the agreement states that a player's team, the vice president of on-field operations, or the Commissioner can discipline a player for "just cause."<sup>154</sup> This "just cause" requirement standard mandates that the discipline must reasonably commensurate with the offensive conduct.<sup>155</sup>

Once a valid party, like the Commissioner, disciplines a player, the player can use the multi-step grievance procedure outlined in Article XI to appeal the disciplinary decision if the player feels the decision was improper.<sup>156</sup> This process includes an independent arbitration if the initial steps of the procedure do not lead to settlement.<sup>157</sup> The MLB Collective Bargaining Agreement (CBA) employs one impartial arbitrator or a panel of three arbitrators, two of which are chosen by the parties.<sup>158</sup> If the parties disagree on an arbitrator, the American Arbitration Association provides a list from which the parties can choose an arbitrator.<sup>159</sup>

The only way a player cannot file a grievance under Article XI is if the action taken by the Commissioner involves "the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball."<sup>160</sup> This determination involving the integrity of baseball can occur at any point during the process.<sup>161</sup> If this occurs, the Commissioner will issue a decision that constitutes a "full, final, and complete" disposition of the complaint.<sup>162</sup> Thus, in most instances, an arbitrator may limit the MLB Commissioner's disciplinary authority.<sup>163</sup>

In contrast, the NFL Commissioner not only sanctions players but also handles all appeals of sanctions issued by him.<sup>164</sup> Furthermore, Hewitt's claim of alleged age discrimination has nothing to do with the preservation of the integrity of football or the maintenance of public confidence in football. The MLB policy of securing an independent arbitrator for disputes not pertaining to the integrity of the game ensures fairness and equity within the arbitration process and thereby prevents evident partiality in arbitration decisions.

The NBA Uniform Player Contract (UPC) outlines permissible player conduct.<sup>165</sup> The UPC requires a player to refrain from doing anything materially detrimental or prejudicial to the best interests of the NBA or an NBA team.<sup>166</sup> Among other infractions, if a player makes or endorses any statement or acts in a way det-

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153. *Id.* at 48.

154. *Id.*

155. *Id.*

156. *Id.* at 38.

157. *Id.* at 41.

158. *2012-2016 Basic Agreement*, *supra* note 152, at 41.

159. *Id.*

160. *Id.* at 39.

161. *Id.*

162. *Id.*

163. David Waldstein, *In Baseball vs. Rodriguez, a Show of Tough Posturing*, N.Y. TIMES (July 30, 2013), [http://www.nytimes.com/2013/07/31/sports/baseball/in-baseball-vs-rodriguez-a-show-of-tough-posturing.html?\\_r=0](http://www.nytimes.com/2013/07/31/sports/baseball/in-baseball-vs-rodriguez-a-show-of-tough-posturing.html?_r=0). In this article, the author noted this clause is "rarely used" and "the players association has long maintained that the clause relates only to gambling, and contends that all commissioners since the union's inception have agreed in writing not to apply it in other cases." *Id.*

164. Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 31 (2008).

165. *NBA Collective Bargaining Agreement*, NAT'L BASKETBALL PLAYERS ASS'N 79 (December 2011), <http://nbpa.com/cba/>.

166. *Id.* at 385.

perimental to the best interests of the NBA, the player can be subject to a Commissioner-imposed fine or suspension.<sup>167</sup> However, all disciplinary decisions of the Commissioner are subject to review by the Board of Governors and can be appealed under the grievance and arbitration procedure of the NBA CBA.<sup>168</sup> To file a formal grievance, a player must submit a timely statement of the issues.<sup>169</sup> Both parties must then agree on a grievance arbitrator, and either party retains the ability to discharge that arbitrator.<sup>170</sup> If the parties cannot jointly agree on an arbitrator, the parties must jointly request from the International Institute for Conflict Prevention and Resolution a list of 11 attorneys.<sup>171</sup> To be eligible, these attorneys, and their law firms, cannot have represented within the past five years “any professional athletes; agents or other representatives of professional athletes; sports leagues, governing bodies, or their affiliates; sports teams or their affiliates; or owners in any professional sport.”<sup>172</sup> The grievance arbitrator will hear the dispute and issue an award.<sup>173</sup>

Much like the MLB, the NBA has certain limits to its grievance process. If the NBA Commissioner’s decision concerns the integrity of the game and has a financial impact of \$50,000 or less, the appeal must be made to the Commissioner.<sup>174</sup> If the financial impact of the discipline is more than \$50,000, the player can bring an appeal before the grievance arbitrator.<sup>175</sup> The arbitrator will then apply an “arbitrary and capricious” standard of review to the Commissioner’s decision.<sup>176</sup> As such, having an independent arbitrator picked from an international institute prevents bias and evident partiality from infiltrating the arbitration process.

The NHL uses a different discipline system than other professional sports leagues. A hockey player may face discipline by his club for violations of club rules if the rules are reasonable and if the players receive proper notice of the rules.<sup>177</sup> The only articulated limit on these rules is that a player may not be fined for “indifferent play.”<sup>178</sup>

The Commissioner of the NHL can immediately expel a player for throwing a game or failing to report a solicitation to throw a game.<sup>179</sup> The Commissioner can

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167. *Id.*

168. *Id.* at 306.

169. *Id.* at 307.

170. *Id.* at 313.

171. *NBA Collective Bargaining Agreement*, *supra* note 165, at 313.

172. *Id.*

173. *Id.* at 312.

174. *Id.* at 314-15.

175. *Id.* at 317.

176. *Id.*

177. *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association*, NAT’L HOCKEY LEAGUE 171 (2013) [http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL\\_NHLPA\\_2013\\_CBA.pdf](http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf) [hereinafter *CBA between NHL & NHLPA*].

178. *Id.* See N.H.L. CONSTITUTION & BY-LAW § 17 (2013) <http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/NHLByLaw17.pdf> (giving comprehensive guidelines on the circumstances and conduct which may give rise to discipline, the nature of the discipline, and certain procedures with regard to its implementation).

179. *CBA between NHL & NHLPA*, *supra* note 177, at 124.



also fine, suspend, or expel a player for acting in a way that is “dishonorable, prejudicial to or against the welfare of the League or the game of hockey.”<sup>180</sup> Disciplinary grievances are separated into two categories in the NHL: on-ice and off-ice.<sup>181</sup> Unresolved grievances regarding discipline and disputes about an interpretation of club rules or the CBA go before an independent arbitrator.<sup>182</sup> Both parties must agree on which independent arbitrator to appoint.<sup>183</sup> Disputes regarding the severity of the discipline or the interpretation of the standard player contract go before the Commissioner to arbitrate.<sup>184</sup> However, if the discipline ordered by the Commissioner is suspension for six or more NHL games, the suspended player has a right to appeal to a Neutral Discipline Arbitrator.<sup>185</sup> An appeal made to an NDA is done on an expedited basis and the NDA issues a final and binding opinion and award as soon as practically possible.<sup>186</sup>

As evidenced, arbitration is the final step in a grievance procedure that is often governed by a CBA. The MLB, NBA, and NHL Commissioners have an impartial and neutral arbitration system as their Commissioners’ broad disciplinary authority is still subject to an independent arbitrator review. Currently, the NFL has no independent arbitration process and no chance to appeal to an independent arbitrator. If the NFL were to follow other professional sports leagues such as the MLB, NFL, or NHL, there would be less of an inherent bias in the arbitrator’s decisions because the arbitrators would be independent. If the NFL used independent arbitrators, fewer violations of arbitration principles outlined in U.S. Code Title 9, § 10 would result because the Commissioner would not have excessive authority. Furthermore, if the NFL adopted a policy like the NBA, in which the arbitrator cannot have had a tie to any element of professional sports within the past five years, it would prevent biased decisions.

## VI. CONCLUSION

Centralized authority in a role like the NFL Commissioner can have several advantages. However, these advantages should be balanced against the disadvantages of such a system. As the current system stands, the advantages do not outweigh the interference with the rights of the players and employees that the current system permits, as demonstrated in *Hewitt*. The lack of an effective appeal procedure and the unilateral settlement of disputes imposed by the Commissioner all point to the need for change. The Missouri Supreme Court took the correct first step by finding that the NFL Commissioner was indeed biased and therefore it was unconscionable to have him as an arbitrator. Other states should follow this precedent, and the NFL Player’s Association and the NFL should completely remove these arbitration provisions in the next collective bargaining agreement.

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180. *Id.*

181. *Id.* at 116 & 124.

182. *Id.* at 109-110.

183. *Id.*

184. *Id.* at 120.

185. *CBA between NHL & NHLPA*, *supra* note 177, at 121.

186. *Id.*