

Comments

PROFESSIONAL ATHLETES PLAYING VIDEO GAMES - THE NEXT PROHIBITED "OTHER ACTIVITY?"

I. INTRODUCTION

Statistically, Detroit Tigers pitcher Joel Zumaya ("Zumaya") had an excellent 2006 baseball season, his first in Major League Baseball ("MLB").¹ Unfortunately, during the 2006 American League Championship Series ("ALCS"), Zumaya was unable to pitch after suffering forearm and wrist inflammation in his pitching arm.² The video game *Guitar Hero* - not his pitching motion - caused the injury.³ Zumaya stopped playing the game and his pitching arm recovered in time for him to pitch in the 2006 World Series against the St. Louis Cardinals.⁴

1. See Joel Zumaya Player Page, <http://sportsline.com/mlb/players/player/page/580535> (last visited Nov. 15, 2007) (providing key statistics for Zumaya's 2006 season, including eighty-three and one-third innings pitched, six win-three loss record with one save, and ninety-seven strikeouts to forty-two walks).

2. See *Guitar Hero? Pitcher Hurt Playing Video Game*, MSNBC NEWS SERVICES, Dec. 14, 2006, <http://www.msnbc.msn.com/id/16212095/> [hereinafter *Guitar Hero*], (explaining Zumaya's injury). The injury kept Zumaya from being available to pitch in three American League Championship Series ("ALCS") games. See *id.* (stating duration of injury and its effect on Detroit Tigers).

3. See Dan Dormer, *Tigers Pitcher Suffered from Guitar Hero-itis*, ESPN.COM, Dec. 18, 2006, <http://sports.espn.go.com/videogames/news/story?id=2699140> (summarizing team trainers' conclusion inflammation was more consistent with guitar playing than pitching). Zumaya agreed that the injury probably resulted from playing the game, not from his pitching. See *id.* In an ESPN interview that same month, however, Zumaya said he believed his injury "wasn't 100% from the guitar," but that it was most likely a "50-50" contributor. See Mark Francescutti, *The Ticker: That Joey Harrington: He's No Lemon*, DETROIT FREE PRESS, Dec. 27, 2006, <http://freep.com/apps/pbcs.dll/article?AID=/20061227/SPORTS01/612270389/1050/SPORTS> (on file with author) (reporting Zumaya's comment on what caused his injury). *Guitar Hero* is a Playstation 2 ("PS2") game published by RedOctane, Inc. that uses a guitar-shaped controller allowing gamers to imitate being rock stars where buttons replace and simulate guitar strings. See IGN: *Guitar Hero* (Game & Guitar Controller Bundle), <http://ps2.ign.com/objects/748/748976.html> (last visited Nov. 15, 2007) (describing *Guitar Hero* game). *Guitar Hero* includes thirty rock songs and four difficulty levels. See *Guitar Hero - Gameplay*, <http://www.guitarherogame.com/gh1/gameplay.php> (last visited Nov. 15, 2007) (providing gameplay details for original *Guitar Hero* video game).

4. See *Guitar Hero*, *supra* note 2 (explaining when team became aware Zumaya played *Guitar Hero*, it asked him to stop playing and he did). Once Zumaya stopped playing, he pitched "pain-free in the World Series." Tim Surette, *Guitar Hero Benches Pro Athlete*, GAME SPOT, Dec. 14, 2006, <http://www.gamespot.com/>

Zumaya's injury gives rise to the question of whether video games should be included in the "other activities" clauses of the four major professional sports' standard player contracts.⁵ The "other activities" clause prohibits players from engaging in specific activities that can potentially cause injury and/or inhibit the player's ability to play for his team.⁶ Video games, unlike other off-field activities such as motorcycle riding, have not given professional sports teams reason to worry until Zumaya's injury.⁷

Video games, which may appear to be a harmless extracurricular activity, command a large following among professional athletes.⁸ In the wake of Zumaya's injury, playing video games, at least during the season, will become a topic that leagues and players' unions must begin to discuss.⁹ Zumaya's stubborn refusal to stop

news/6163209.html [hereinafter Surette, *Benches*] (providing result of Zumaya agreeing to stop playing *Guitar Hero*).

5. See Posting of Geoffrey Rapp to Sports Law Blog, <http://sports-law.blogspot.com/2006/12/does-baseball-need-to-broaden-its.html> (Dec. 14, 2006, 14:47 EST) (questioning whether Major League Baseball ("MLB") should broaden its "other activities" clause to include video games in wake of Zumaya's injury). Rapp questions whether Zumaya breached his contract and notes the limited nature of MLB's "other activities" clause. See *id.* (presenting possible legal questions arising from Zumaya's injury); see also *Rockin' Out on PS2 Sidelines Pitcher*, SEATTLE TIMES, Dec. 18, 2006 at D2, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=btdownload18&date=20061218&query=Rockin%27+out+on+PS2+sidelines+pitcher> (recognizing *Guitar Hero* is something teams might want to add to their other activities lists).

6. See Anthony Rieber, *Major Policies*, NEWSDAY, Oct. 13, 2006 at A-89, (compiling "other activities" clauses of four major professional sports). "Talented arms and legs can be fragile." Rob Biertempfel, *Athletes in Danger of More Restrictive Deals*, PITTSBURGH TRIB.-REV., June 18, 2006, http://www.pittsburghlive.com/x/pittsburghtrib/sports/steelers/s_458534.html (explaining professional athletes' desire to engage in dangerous activities make teams nervous).

7. See Biertempfel, *supra* note 6 (providing examples of most notable recent injuries from players engaging in dangerous activities). The recent concern has revolved around athletes riding motorcycles, especially in the wake of the injury to Pittsburgh Steelers quarterback Ben Roethlisberger. See Darren Rovell, *Teams More Likely to Keep Players off Bikes*, ESPN.COM, June 13, 2006, story?id=2481292 [hereinafter Rovell, *Players off Bikes*] (stating Roethlisberger's injury had potential to motivate teams to place specific language prohibiting use of motorcycles into players' contracts). Roethlisberger's injury followed motorcycle injuries to Chicago Bulls guard Jay Williams and Cleveland Browns tight end Kellen Winslow. See *id.*

8. See Greg Garber, *Athletes Find Games Virtually Impossible to Put Down*, ESPN.COM, May 17, 2002, s/2002/0515/1383101.html (finding that video games are integral to today's professional athletes because they grew up playing video games). "The truth is, professional athletes love sports video games." *Id.* See also Tim Surette, *Damon Leads Off Pro Baseball Gaming League*, GAME SPOT, Dec. 21, 2006, <http://www.gamespot.com/news/6163585.html> [hereinafter Surette, *Damon*] (discussing creation of video gaming league exclusively for professional baseball players).

9. See Biertempfel, *supra* note 6 (stating that more restrictive contracts are current trend in professional sports). Athletes not only play video games, but do so

playing *Guitar Hero*, is disconcerting to the Detroit Tigers and any other team with players who are passionate video gamers.¹⁰

The question for teams and professional sports leagues is whether fighting to have video games placed in “other activities” clauses is worth any possible collective bargaining problems.¹¹ Room must be given for each league’s “other activities” clause to evolve.¹² Professional athletes must also have some freedom to enjoy their off-field hobbies and interests.¹³ Zumaya’s league-minimum contract complicates including video games in the “other activities” clause found in standard player contracts.¹⁴ Perhaps it is easier for teams to discuss adding prohibitions to the guaranteed contracts of big name players, who are paid whether or not they play.¹⁵

for long periods of time. See Garber, *supra* note 8 (quoting players as saying “it isn’t unusual to play [video games] for three or four hours straight”).

10. See Francescutti, *supra* note 3 (quoting Zumaya). “I love the game. I won’t stop playing it. I’m just going to have to be more cautious with it.” *Id.*

11. Compare Holt Hackney, *Winslow Accident Refocuses Agents, Teams on Dangerous Activity Clause*, SPORTS LITIG. ALERT (Hackney Publ’ns, Austin, Tex.), Vol. 2, Issue 7, May 18, 2005, available at <http://www.sportslitigationalert.com/sample.html> (follow “Winslow Accident Refocuses Agents, Teams on Dangerous Activity Clause” hyperlink) (quoting agent stating that clauses can be as broad as teams want them to be), with Pete Dougherty, *Packers: Be Careful Out There*, PACKERSNEWS.COM, June 14, 2006, http://www.packersnews.com/legacy/mini06/stories/mini_1_26431173.shtml (explaining players’ union “pushed hard to prevent teams from recovering signing-bonus money for any reason”).

12. Jeff Reynolds, *Pros Should Yield to Paycheck, Obey Team*, PRO FOOTBALL WEEKLY, June 19, 2006, <http://www.profootballweekly.com/PFW/Commentary/Columns/2006/reynolds061906.htm> (concluding that players who are injured while riding motorcycles or from other “thrill-seeking ventures” leave teams no choice but to mandate against those activities); see also Rovell, *Players off Bikes*, *supra* note 7 (finding incidents have forced teams to prohibit activities that led to player injuries).

13. See Joe Kay, *Roethlisberger Discharged, Apologizes*, SPORTING NEWS, June 15, 2006, <http://www.sportingnews.com/yourturn/viewtopic.php?p=831310> (describing professional football player’s plea that teams do not impose more contractual limits on dangerous activities).

14. See Joel Zumaya Player Page, *supra* note 1 (indicating Zumaya’s 2007 salary was \$410,000). Unless renegotiated, Zumaya’s salary is near the MLB minimum, and will stay that way, until he is arbitration-eligible in 2009. See Joel Zumaya Biography, http://www.rotoworld.com/content/playerpages/player_main.aspx?sport=MLB&id=1408 (last visited Nov. 15, 2007) (providing details on Zumaya’s contract with Tigers). Zumaya is not arbitration-eligible until after his third year of MLB service. See MLB PLAYERS ASSOCIATION, 2007-2011 BASIC AGREEMENT, art. VI, Sec. F, Subsec. 1, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter 2007-2011 BASIC AGREEMENT] (delineating requirements for arbitration eligibility).

15. See Joel Zumaya Biography, *supra* note 14 (listing details of Zumaya’s contract status). The situation differs for those players with guaranteed contracts. See Rick Horrow, *Baseball Opening Month: Steroids and Stability?*, CBSSPORTSLINE.COM, Apr. 14, 2005, <http://cbs.sportslines.com/general/story/8385232> (explaining that

This Comment discusses the viability and practicality of prohibiting video game play within standard player contracts or a team's individually-negotiated player contracts.¹⁶ First, Section II discusses Zumaya's injury in detail and in comparison to other recent off-field extracurricular activities.¹⁷ Second, the Comment examines and compares the "other activities" clauses used by the four major professional sports leagues and discusses how teams can supplement or negate them.¹⁸ Third, the Comment provides a brief history of video games and their popularity with professional athletes.¹⁹ This section also explains the relationships between the American public and professional athletes to video games.²⁰ Fourth, Section III questions adding activities that are not necessarily dangerous but could become important in the context of modern sports and the 21st century professional athlete.²¹ Section III also explores possible legal arguments that the players' unions could make concerning "other activities" clauses as a future bargaining topic.²² Finally, Section IV concludes the Comment by stating that while Zumaya's injury may have given teams reason to worry about professional athletes playing video games, they have yet to add video games to the "other activities" prohibitions.²³

players with guaranteed contracts receive money whether "they perform or not"). *But see* Lewis Helfand, *Pro Sports Contract Violations*, http://www.askmen.com/sports/business_100/113_sports_business.html (last visited Nov. 15, 2007) (explaining multi-million dollar guaranteed contracts are laden with "prohibited activities that can invalidate them"). Guaranteed contracts cannot be voided unless there is a clear violation of the rules set forth in the contract or by the league. *See id.*

16. For a further discussion of the possibility of professional sports leagues including video games in their "other activities" clauses, see *infra* notes 123-67 and accompanying text.

17. For a further discussion of the facts surrounding Zumaya's injury and other off-field injuries, see *infra* notes 28-48 and accompanying text.

18. For a further discussion of "other activities" clauses of the four major professional sports leagues, see *infra* notes 49-75 and accompanying text.

19. For a further discussion of the history of video games, see *infra* notes 76-91 and accompanying text.

20. For a further discussion of the relationships that Americans and professional athletes in particular have with video games, see *infra* notes 92-104 and accompanying text.

21. For a further discussion of adding activities to "other activities" clauses and the challenges that additions would face, see *infra* notes 105-67 and accompanying text.

22. For a further discussion of the arguments players' unions could make, see *infra* notes 168-96 and accompanying text.

23. For a discussion summarizing the main points of this Comment, see *infra* notes 197-213 and accompanying text.

II. BACKGROUND

A. Facts of Zumaya’s Injury

In February 2006, Zumaya signed a one-year contract with the Detroit Tigers organization.²⁴ The Tigers added Zumaya to their roster as a relief pitcher in late March 2006.²⁵ Zumaya pitched well during the season, earning his first win in May 2006 against the Los Angeles Angels of Anaheim and his first save in June 2006 against the Toronto Blue Jays.²⁶ In July 2006, Zumaya missed two games to work on his throwing mechanics.²⁷

24. See Joel Zumaya Player News Feb.-Apr. 2006, http://fantasyfootball.usatoday.com/content/player_news.asp?sport=MLB&id=1408&line=172067 (on file with author) (explaining Zumaya was candidate for Tigers starting rotation or bullpen during second half of 2006 season). Zumaya has been with the Detroit Tigers organization since 2002. See Joel Zumaya Player Page, *supra* note 1 (providing Zumaya’s minor league pitching statistics). Zumaya was a 22-year-old-rookie in 2006. See *Guitar Hero*, *supra* note 2 (noting Zumaya’s age and level of MLB experience).

25. See Joel Zumaya Player News Feb.-Apr. 2006, *supra* note 24 (commenting on Zumaya making Tigers’ roster, saying he “has the talent to be a dynamite reliever” but has command problems). A relief pitcher is a pitcher “who takes over for another during a game.” Definition of Relief Pitcher – Merriam-Webster Online Dictionary, <http://www.merriamwebster.com/dictionary/relief+pitcher> (last visited Nov. 15, 2007).

26. See KFFL – Joel Zumaya, RP, Detroit Tigers, <http://www.kffl.com/player/12908/MLB> (last visited Nov. 15, 2007) (search HOTW Articles dates Jan. 1, 2006 thru June 30, 2006; then select June 11, 2006 entry: “Tigers – Zumaya Earns First Career Save”) (noting first career milestones for Zumaya).

A save is a statistic credited to a relief pitcher, as set forth in this Rule 10.19.

The official scorer shall credit a pitcher with a save when such pitcher meets all four of the following conditions:

- (a) He is the finishing pitcher in a game won by his team;
- (b) He is not the winning pitcher;
- (c) He is credited with at least a third of an inning pitched; and
- (d) He satisfies one of the following conditions:
 - (1) He enters the game with a lead of no more than three runs and pitches for at least one inning;
 - (2) He enters the game, regardless of the count, with the potential tying run either on base, or at bat or on deck (that is, the potential tying run is either already on base or is one of the first two batters he faces); or
 - (3) He pitches for at least three innings.

Official Sites of Major League Baseball – Official Info - Official Rules, http://mlb.mlb.com/mlb/official_info/official_rules/official_scorer_10.jsp (last visited Nov. 15, 2007) (scroll to Rule 10.19). In the game Zumaya earned his first save, he reached 100 miles per hour on the radar gun at least five times. See KFFL – Joel Zumaya, RP, Detroit Tigers, *supra* (noting one of Zumaya’s pitching traits is his ability to throw over 100 miles per hour). Zumaya is a “maximum effort guy.” See Joel Zumaya Biography, *supra* note 14 (providing reason why Zumaya throws his pitches so hard).

27. See Joel Zumaya Biography, *supra* note 14 (search “Previous News” and follow “More Player News” until posting for “Jul. 16-8:55 am et” appears) (reporting Zumaya was unavailable after not having control of his pitches due to mechan-

Tendinitis in his right wrist and forearm rendered Zumaya unavailable to pitch from September 12 to 15, 2006.²⁸ The tendinitis prevented him from pitching on September 16, 2006 as well.²⁹ Upon returning on September 17, 2006, Zumaya showed no signs of the injury.³⁰ He then went a month without any injury, but again suffered from forearm and wrist inflammation in his pitching arm during the ALCS.³¹ The injury caused Zumaya to miss Games Two, Three, and Four of the ALCS.³²

Zumaya made his next pitching appearance on October 24, 2006 during Game Three of the 2006 World Series.³³ “The Tigers

ics problem). “I can throw a ball 100 miles an hour and put it where I want it. But (Friday), balls were going up, left and right . . .” Joel Zumaya Player News Apr.-Oct. 2006, http://fantasyfootball.usatoday.com/content/player_news.asp?sport=MLB&id=1408&line=195621 (on file with author) (quoting Zumaya).

28. See KFFL – Joel Zumaya, RP, Detroit Tigers, *supra* note 26 (summarizing nature and extent of Zumaya’s injury). “He has a tendinitis in his right wrist, which is causing some tightness in his forearm.” Associated Press, *Notes: Tigers’ Zumaya Slowed by Tendinitis; Petite Leaves Start Early*, USA TODAY, Sept. 13, 2006, http://www.usatoday.com/sports/baseball/2006-09-12-note-book_x.htm (quoting diagnosis by Detroit Tigers trainer Kevin Rand). “Tendinitis is an inflammation or irritation of the tendon, a thick cord that attaches bone to muscle.” Tendinitis Causes, Symptoms, and Treatment on WebMD.com, <http://www.webmd.com/osteoarthritis/guide/arthritis-tendinitis> (last visited Nov. 15, 2007).

29. See Joel Zumaya Player News Apr.-Oct. 2006, *supra* note 27 (noting Zumaya’s sore right wrist kept him from pitching on Sept. 16, 2006). The weakness in Zumaya’s right wrist did not go away even after he threw in the outfield and out of the bullpen prior to the Sept. 15 game. See KFFL – Joel Zumaya, RP, Detroit Tigers, *supra* note 26 (noting injury kept Zumaya out longer than initially expected).

30. See Joel Zumaya Player News Apr.-Oct. 2006, *supra* note 27 (mentioning even though Zumaya missed over one week due to his injury, he seemed fine, striking out three batters and hitting 102 MPH on radar gun).

31. See *Guitar Hero*, *supra* note 2 (describing reoccurrence of Zumaya’s injury during ALCS). Tigers pitching coach Chuck Hernandez said the pain from this injury was similar to what Zumaya felt during his injury in September 2006, which caused him to miss a week’s worth of games. See Joel Zumaya Player News Apr.-Oct. 2006, *supra* note 27 (comparing similarities between Zumaya’s September and October injuries).

32. See Joel Zumaya Player News Apr.-Oct. 2006, *supra* note 27 (explaining that Zumaya was unavailable for Games Two and Three, and was not used for Game Four because Tigers were winning series three games to none). Describing the injury, Zumaya said, “I had no strength in my wrist and no strength running through my fingers. When you have that, it’s not a good sign.” KFFL – Joel Zumaya, RP, Detroit Tigers, *supra* note 26. Games Two, Three, and Four of the ALCS were played on October 11, 13, and 14, respectively. See Official Site of Major League Baseball – Schedule - 2006 Postseason, http://mlb.mlb.com/mlb/schedule/ps_06.jsp (last visited Nov. 15, 2007) (providing dates for 2006 MLB play-off schedule). The MLB League Championship Series are best-of-seven series. See *MLB Announces 2007 Postseason/World Series Schedule*, FOX SPORTS, May 25, 2007, <http://msn.foxsports.com/other/story/6843822> (providing prospective MLB playoff schedules).

33. See KFFL – Joel Zumaya, RP, Detroit Tigers, *supra* note 26 (noting Zumaya’s first game appearance since Game One of ALCS). Game One of the

asked Zumaya to stop playing the video game, and he did . . . [He] went 0-1 with a 3.00 ERA in three [World Series] appearances.”³⁴ After pitching pain-free in the World Series, news came out in mid-December 2006 that Zumaya’s ALCS injury was a result of playing the PlayStation 2 (“PS2”) video game *Guitar Hero*.³⁵ Zumaya initially agreed with the team that the injury was not from pitching.³⁶ However, later Zumaya stated that he believed the injury “wasn’t 100% from the guitar.”³⁷ In a February 2007 interview, he asserted that *Guitar Hero* played no part in causing his injury.³⁸ Despite the link between the game and his injury, Zumaya has no intention of putting *Guitar Hero* down for good.³⁹ Zumaya admitted he enjoys playing the game.⁴⁰ Zumaya’s injury is one of many injuries that have been attributed to *Guitar Hero* or recently released video game systems, such as the Nintendo Wii.⁴¹

ALCS took place on October 10, 2006. See Schedule - 2006 Postseason, *supra* note 32 (providing Tigers’ playoff schedule).

34. See Jon Paul Morosi, *Hummin’ Slowed by Strummin’: Guitar Video Game Hurt Zumaya’s Arm*, DETROIT FREE PRESS, Dec. 14, 2006 (on file with author) [hereinafter Morosi, *Hummin’*] (summarizing how Detroit Tigers handled Zumaya’s injury). The Tigers believe the injury will not reoccur. See *id.* (noting comments of Tigers President and General Manager Dave Dombrowski).

35. See *id.* (explaining team’s conclusion injury was caused by game and not Zumaya’s pitching motion). In *Guitar Hero*, “the player uses a guitar-shaped controller to simulate the performance of popular songs . . .” Amber Hunt, *Sales Rock for Instrument of Tiger’s Injury*, DETROIT FREE PRESS, Dec. 15, 2006, http://www.wzzm13.com/news/news_article.aspx?storyid=67010 (summarizing how *Guitar Hero* video game is played).

36. See Dormer, *supra* note 3 (stating Zumaya admitted his injury was similar to that of guitar players).

37. See Francescutti, *supra* note 3 (noting Zumaya’s explanation that *Guitar Hero* could be “50-50” contributor to his ALCS injury). The differing characterizations of Zumaya’s injury could come down to a “he-said/he-said question.” See Jason Beck, *Mailbag: Is There Room for Colon?*, DETROIT TIGERS.COM, Jan. 8, 2007, http://detroit.tigers.mlb.com/NASApp/mlb/news/article.jsp?ymd=20070107&content_id=1774476&vkey=news_det&fext=.jsp&c_id=det (highlighting disagreement between Tigers management and Zumaya over how he was injured).

38. See Tom Gage, *Zumaya Won’t Stop Rockin’*, DETROIT NEWS, Feb. 13, 2007, <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070213/SPORTS0104/702130316/1129> (“I grip the ball hard, I throw the ball hard and it spasmed up pretty good in there.”). Zumaya had previously claimed his grip on the baseball only contributed to the injury. See Francescutti, *supra* note 3 (providing Zumaya’s earlier explanation of what caused his injury).

39. See Francescutti, *supra* note 3 (quoting Zumaya as saying, “I won’t stop playing it. I’m just going to have to be more cautious with it.”).

40. See Gage, *supra* note 38 (quoting Zumaya calling *Guitar Hero* “a hobby” of his).

41. See Hunt, *supra* note 35 (quoting Bryan Lam, spokesman for *Guitar Hero*’s creator, RedOctane, Inc., stating Zumaya’s injury is not first related to *Guitar Hero*). Lam believes the problem is the player, not the game. See *id.* Furthermore, many gamers have suffered from blisters called “Nintendo thumb” and “Wii elbow” due to the new Nintendo Wii gaming system. See Jon Paul Morosi, *Guitar Video Game*

Zumaya's video game-related injury is not the first off-field injury suffered by a professional athlete in recent years.⁴² His video game injury highlights the notion that "[b]aseball players seem to have a knack for finding trouble."⁴³ Professional basketball and football players have also been injured while participating in prohibited activities.⁴⁴ Some of the injuries that have been sustained have been serious.⁴⁵ Other injuries have occurred under absurd and almost unbelievable circumstances.⁴⁶ Ben Roethlisberger's motorcycle injury was the most recent and publicized injury before Zumaya's and it refocused attention on these off-field "other activity" injuries.⁴⁷ The long and varied list of athletes' off-field injuries has begun talk of expanding the "other activities" clauses in their contracts.⁴⁸

Hurt Zumaya's Arm, COURIER NEWS, Dec. 14, 2006 (on file with author) (noting other injuries that demonstrate Zumaya's inflammation is not first video game related injury in recent months).

42. See Biertempfel, *supra* note 6 (listing notable "other activity" injuries suffered by professional athletes between 1994 and 2006 before Zumaya's injury); see also John Rolfe, *Fishy Tales*, SI.COM, June 14, 2005, http://sportsillustrated.cnn.com/2005/writers/john_rolfe/06/14/fishy.tales/index.html (expanding list to include injuries to baseball players Jeff Kent and Clint Barmes).

43. Mike McGann, *Pitcher's Injury Reminds Us: Video Games Are Almost As Dangerous As Real Life*, N.Y. BASEBALL CENT., Dec. 19, 2006, <http://www.nybaseballcentral.com/moxie/columns/pitchers-injury-reminds-u.shtml> (explaining baseball players were involved in strange accidents as early as 1903).

44. See Steve Seepersaud, *Athlete Contract Violations*, http://www.askmen.com/sports/business_100/135_sports_business.html (last visited Nov. 15, 2007) (providing list of various professional athletes from Major League Baseball ("MLB"), National Basketball Association ("NBA"), National Football League ("NFL"), and their respective injuries).

45. See *id.* (noting injuries to baseball player Aaron Boone, football players Kellen Winslow and P.J. Alexander, and basketball player Jay Williams with causes varying from pickup basketball to crashing motorcycles and off-road vehicles). These athletes were all under contract at the time of their injuries, but each player's team handled the situation differently. See *id.*

46. See Rolfe, *supra* note 42 (providing examples of strange injuries suffered by baseball players Jeff Kent and Clint Barmes). When they were first injured, Kent and Barmes provided less than truthful explanations for how their injuries occurred: Kent told his team he injured himself washing his truck, while Barmes originally told his team he fell carrying groceries to his apartment. See *id.*

47. See Rovell, *Players off Bikes*, *supra* note 7 (stating position of sports agents who believe that Roethlisberger's injury could persuade teams to increasingly include more specific language in contracts concerning prohibited activities like motorcycle use); see also Kay, *supra* note 13 (providing details on Roethlisberger injury). Each injury appears to prompt teams to become increasingly specific in spelling out prohibited activities. See *id.* (noting reaction of NBA teams to Jay Williams injury in 2003).

48. See Posting of Geoffrey Rapp to Sports Law Blog, *supra* note 5 (discussing Zumaya's and Roethlisberger's injuries in context of broadening "other activities" clauses).

B. Discussion of the “Other Activities” Clauses of the Major Professional Sports Leagues

Each of the four major professional sports leagues use standard player contracts that have within them a clause relating to players and prohibited dangerous activities.⁴⁹ All four leagues treat dangerous activities differently in their respective clauses.⁵⁰ Some leagues provide broader limitations, while others narrowly tailor their clauses to specific activities.⁵¹

1. *Major League Baseball*

Major League Baseball sets out two express prohibitions in its “Other Sports” Clause: players cannot participate in professional boxing or wrestling.⁵² Additionally, players must obtain written consent from their team prior to participating in activities such as skiing, car or motorcycle racing, or any sport that involves “a substantial risk of personal injury.”⁵³ Major League Baseball provides a

49. See Rieber, *supra* note 6 (detailing dangerous activities listed in MLB’s, NBA’s, NFL’s, and National Hockey League’s (“NHL”) standard player contract). For collective bargaining purposes, each league is composed of the owners from each team. See Len Pasquarelli, *Owners to Conference Tuesday on CBA Negotiations*, ESPN.COM, Feb. 28, 2006, <http://sports.espn.go.com/nfl/news/story?id=2347125> (disclosing that NFL owners were going to conduct conference call to discuss status of league’s Collective Bargaining Agreement (“CBA”) negotiations); see also Joseph A. Reaves, *MLB Owners Meetings to Cover Several Issues*, ARIZ. REPUBLIC, Jan. 18, 2006, available at <http://www.azcentral.com/arizonarepublic/sports/articles/0118bbmtgad0118.html> (explaining owners call meetings to discuss league business and giving examples of MLB owners’ business on agenda at specific meetings).

50. See Rieber, *supra* note 6 (describing each league’s clause with focus on flying planes).

51. See *id.* (delineating comparison of policies of each major professional sports league). For example, the NFL contains a broader prohibition while MLB contains a more specific list of prohibited activities. See *id.* (delineating textual differences in each league’s “other activities” clause).

52. See 2007-2011 BASIC AGREEMENT, *supra* note 14, at sched. A, cl. 5.(b), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (listing which sports baseball players are expressly prohibited from participating in).

53. See *id.* (explaining list of activities players need written permission to participate in). The full clause reads:

The Player and the Club recognize and agree that the Player’s participation in certain other sports may impair or destroy his ability and skill as a baseball player. Accordingly, the Player agrees that he will not engage in professional boxing or wrestling; and that, except with the written consent of the Club, he will not engage in skiing, auto racing, motorcycle racing, sky diving, or in any game or exhibition of football, soccer, professional league basketball, ice hockey or other sport involving a substantial risk of personal injury.

Id. The language in the new 2007-2011 Basic Agreement Uniform Player’s Contract differs only slightly from the language in the 2003-06 Basic Agreement:

Accordingly, the Player agrees that he will not engage in professional boxing or wrestling; and that, except with the written consent of the

list specifically stating the sports a player must obtain written permission from their team before participating in them.⁵⁴ The clause's final provision is much broader and prohibits players from engaging in sports that carry "a substantial risk of personal injury" without defining that phrase.⁵⁵ In addition to the standard player contract, major leaguers with guaranteed contracts are subject to further contractual prohibitions barring them from participating in specific activities.⁵⁶

2. *National Football League*

The "Other Activities" clause within the National Football League's ("NFL") standard player contract is much broader than MLB's, providing the NFL with greater opportunities to prohibit players from engaging in potentially injury-causing activities.⁵⁷ The NFL's standard contract prohibits players from participating in an activity that involves "a significant risk of personal injury."⁵⁸ Theoretically this provides teams a greater ability to prevent the athlete

Club, he will not engage in skiing, auto racing, motorcycle racing, sky diving, or in any game or exhibition of football, soccer, professional league basketball, ice hockey or other sport involving a substantial risk of personal injury.

MLB PLAYERS ASSOCIATION, 2003-2006 BASIC AGREEMENT, sched. A, cl. 5.(b), *available at* http://www.bizofbaseball.com/docs/2002_2006basicagreement.pdf (last visited Nov. 15, 2007) [hereinafter 2003-2006 BASIC AGREEMENT].

54. *See* 2007-2011 BASIC AGREEMENT, *supra* note 14, at sched. A, cl. 5.(b) ("[H]e will not engage in skiing, auto racing, motorcycle racing, sky diving, or in any game or exhibition of football, soccer, professional league basketball, [or] ice hockey . . .").

55. *See id.* (lacking language defining "substantial risk of personal injury").

56. *See* Helfand, *supra* note 15 (clarifying that multi-million dollar guaranteed contracts given to players are "usually loaded with prohibited activities that can invalidate them," providing better basis for teams to void those contracts).

57. *See* Biertempfel, *supra* note 6 (explaining NFL's standard player contract has most generic prohibition of four major sports leagues).

58. NFL PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT, App. C, Sec. 3 (Mar. 8, 2006), *available at* http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf [hereinafter "NFL CBA"] (providing standard NFL Player Contract). In full, the clause states:

OTHER ACTIVITIES. Without prior written consent of the Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve a significant risk of personal injury. . . . Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football-related activities other than for Club or from engaging in any activity other than football which may involve a significant risk of personal injury.

Id.

from engaging in particular activities.⁵⁹ The breadth of the NFL’s standard contract lends the clause to ambiguity.⁶⁰

NFL players may have explicit language written into their individual contracts prohibiting them from specific activities.⁶¹ The NFL is unique because most of its players do not sign guaranteed contracts.⁶² In turn, NFL players seek large signing bonuses, and teams attach restrictions to these bonuses.⁶³

3. *National Hockey League*

The National Hockey League’s (“NHL”) standard player contract, located in its Collective Bargaining Agreement (“CBA”), closely parallels the NFL’s through its inclusion of a broad “other activities” clause.⁶⁴ The NHL’s provision prohibits players from either participating in “other sports [which] may impair or destroy

59. Compare *id.* (supplying copy of NFL’s “Other Activities” clause), and Hackney, *supra* note 11 (examining broadness of standard clause), with Rocky Mountain News - Sports, http://blogs.rockymountainnews.com/denver/samadams/archives/2006/06/offfield_risks.html (last visited Nov. 15, 2007) (noting that, while concerned about athlete activities, teams do not always act to prevent athletes from engaging in dangerous activities). See also Rovell, *Players off Bikes*, *supra* note 7 (explaining that, despite team apprehension, Roethlisberger was not specifically forbidden from riding his motorcycle).

60. See Reynolds, *supra* note 12 (“The ambiguity of the NFL contract has more loopholes than grandma’s scarf, and, to be sure, many player agents are pleased with the open-ended language.”). “The NFL’s clause is not very specific. It’s subject to reasonable interpretation. Anytime you’re not specific, you invite some controversy.” Biertempfel, *supra* note 6 (quoting Eldon Ham, sports agent and professor at Chicago-Kent College of Law). But see Hackney, *supra* note 11 (referencing one agent who tries to negotiate ambiguities out of dangerous activities portion of contracts).

61. See Reynolds, *supra* note 12 (providing Kellen Winslow’s contract as example and noting that Winslow’s contract prohibited motorcycles). “Teams are permitted to add a specific list of banned activities to the terms of a player’s signing bonus.” Biertempfel, *supra* note 6.

62. See Reynolds, *supra* note 12 (describing lack of guaranteed contracts makes NFL distinct); see also Helfand, *supra* note 15 (“The NFL is the only one of the four major professional sports to not have guaranteed contracts.”). “The lack of guaranteed contracts in the NFL stems from practice, not precedent.” Matthew Levine, Comment, *Despite His Antics, T.O. Has a Valid Point*, 13 VILL. SPORTS & ENT. L.J. 425, 440 (2006). “Guaranteed contracts were never part of the NFL’s landscape . . .” *Id.* at 450.

63. See Helfand, *supra* note 15 (describing importance of signing bonuses because NFL players can sign seven-year contracts and be cut after first year). Teams attach their restrictions to a player’s signing bonus for this reason. See Biertempfel, *supra* note 6 (stating teams add restrictive language to signing bonuses).

64. See Rieber, *supra* note 6 (compiling four major professional sports leagues’ “other activities” clauses); see also NHL PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT BETWEEN NHL AND NHLPA, Exh. 1, Sec. 7 (2005), available at <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter “NHL CBA”] (providing standard NHL Player Contract as part of NHL CBA). The NHL CBA is effective from July 22, 2005 until September 15, 2011. See *id.* at cover sheet.

his ability and skill as a hockey Player” and expressly lists other athletic sports that require written consent from his team before a player may participate in them.⁶⁵ Despite expressly forbidding athletes from certain activities, the NHL’s clause remains open to interpretation because it fails to define the term “sport.”⁶⁶ Moreover, the NHL, similar to MLB, utilizes guaranteed player contracts, allowing stipulations to be added to individual player contracts.⁶⁷

4. *National Basketball Association*

The NBA’s standard player contract contains the longest and most complex list of restricted “other activities” of the four major sports.⁶⁸ The NBA’s clause requires players to obtain written permission from their team before participating in any activity “that a reasonable person would recognize as involving or exposing the participant to a substantial risk of bodily injury”⁶⁹ In addition,

65. See NHL CBA, *supra* note 64, at Exh. 1, Sec. 7 (providing players with broad prohibition of activities and list of athletic sports players may not engage in). The full provision reads:

The Player and the Club recognize and agree that the Player’s participation in other sports may impair or destroy his ability and skill as a hockey Player. Accordingly the Player agrees that he will not during the period of this SPC or during any period when he is obligated under this SPC to enter into a further SPC with the Club engage or participate in football, baseball, softball, hockey, lacrosse, boxing, wrestling or other athletic sport without the written consent of the Club, which consent will not be unreasonably withheld.

Id.

66. See *id.* at art. I (lacking definition of what constitutes “sport” for means of determining prohibited activities beyond those listed in sec. 7 of SPC). “Athletic” is the only word used to describe “sport.” See *id.* at Exh. 1, Sec. 7 (delineating wording of final clause).

67. See Helfand, *supra* note 15 (noting NHL contracts are guaranteed). While an NHL team may cut a player during the term of his contract, the team must still pay the majority of the contract depending on the player’s age. See *id.*

68. See Reynolds, *supra* note 12 (“The NBA outlaws everything from mopeds to skiing to skydiving no matter the season.”). When the NBA renewed its CBA in 2005, the league’s list of restricted other activities practically doubled from what was contained in the 1999 version of the CBA. See Biertempfel, *supra* note 6 (noting variety of activities excluded by clause, ranging from moped riding to bungee jumping and flying planes). The 1999 version of the NBA’s Uniform Player Contract only prohibited players from “professional boxing or wrestling, motorcycling, moped-riding, auto racing, sky-diving, and hang gliding” as well as athletic sports such as baseball, basketball, football, hockey, and lacrosse. See NBA PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT, Exh. A, para.12, available at <http://www.nbpa.com/downloads/CBA.pdf> [hereinafter “NBA CBA”] (listing restrictions on NBA players).

69. NBA CBA, *supra* note 68, at Exh. A, para.12. The Clause states:
12. OTHER ATHLETIC ACTIVITIES

The Player and the Team acknowledge and agree that the Player’s participation in certain other activities may impair or destroy his ability and skill as a basketball player, and the Player’s participation in any game or exhi-

the clause delineates an extensive, but unexhaustive, list of prohibited activities.⁷⁰ Finally, akin to MLB and the NHL, the NBA uses guaranteed contracts, thereby authorizing supplementary restrictive clauses to be placed within player contracts.⁷¹

5. *Violation of Guaranteed Contracts*

Players in the NBA, NHL, and MLB with guaranteed contracts must clearly violate the rules set forth therein, or violate league rules, before their team is able to terminate their contract.⁷² With respect to involvement in “other activities,” the player may engage in the activities prohibited by his contract as long as he is not caught or injured doing so.⁷³ If the player is caught or injured, the team may exercise its right to void the contract, but this is rarely

bition of basketball other than at the request of the Team may result in injury to him. Accordingly, the Player agrees that he will not, without the written consent of the Team, engage in any activity that a reasonable person would recognize as involving or exposing the participant to a substantial risk of bodily injury including, but not limited to: (i) sky-diving, hang gliding, snow skiing, rock or mountain climbing (as distinguished from hiking), rappelling, and bungee jumping; (ii) any fighting, boxing, or wrestling; (iii) driving or riding on a motorcycle or moped; (iv) riding in or on any motorized vehicle in any kind of race or racing contest; (v) operating an aircraft of any kind; (vi) engaging in any other activity excluded or prohibited by or under any insurance policy which the Team procures against the injury, illness or disability to or of the Player, or death of the Player, for which the Player has received written notice from the Team prior to the execution of this Contract; or (vii) participating in any game or exhibition of basketball, football, baseball, hockey, lacrosse, or other team sport or competition. If the Player violates this Paragraph 12, he shall be subject to discipline imposed by the Team and/or the Commissioner of the NBA. Nothing contained herein shall be intended to require the Player to obtain the written consent of the Team in order to enable the Player to participate in, as an amateur, the sports of golf, tennis, handball, swimming, hiking, softball, volleyball, and other similar sports that a reasonable person would not recognize as involving or exposing the participant to a substantial risk of bodily injury.

Id. The NBA CBA provides a standard form for a player to obtain the necessary written permission to participate in the desired prohibited activity. *See id.* at Exh. 5 (providing standard form for player to obtain written permission).

70. *See id.* (providing extensive and detailed list of seven activities prohibited by NBA’s “other activities” clause).

71. *See Helfand, supra* note 15 (presenting information on MLB’s, NBA’s, and NHL’s use of guaranteed contracts).

72. *See id.* (recognizing that player breach allows teams to avoid payment of guaranteed contracts).

73. *See Rocky Mountain News - Sports, supra* note 59 (discussing one agent’s description of what activities NFL players can do in face of league’s “other activities” clause).

done.⁷⁴ Therefore, until a player is injured while participating in a specific activity, it is possible a team will not prohibit him from it.⁷⁵

C. The Evolution of Video Games

In 1972, Magnavox released the first home video game console, the Odyssey, which included the game *Ping-Pong* among its twelve games.⁷⁶ Prompted by Ping-Pong's success, upstart company Atari subsequently released a console version of its popular arcade game, *Pong*, in 1975.⁷⁷ Accordingly, *Pong*'s success established Atari as the initial juggernaut in the video game industry, while also prompting many imitators of its games.⁷⁸

74. See Helfand, *supra* note 15 (focusing on consequences of injuries to Aaron Boone and Jay Williams). Both athletes violated the "other activities" clauses in their contracts, resulting in Boone losing all but about \$900,000 of his contractual salary when he was cut by the New York Yankees and the Chicago Bulls buying out the remainder of Williams's contract for \$3 million instead of cutting him outright. *See id.* Likewise, Kellen Winslow missed the entire 2005 NFL season and the Cleveland Browns only recovered some of his bonus money and over \$300,000 in salary. *See Seepersaud, supra* note 44 (noting contractual consequences for players caught participating in prohibited "other activities"). Teams seem reluctant to play "hardball" by invoking the clauses or punishing clause violations, but have done so on occasion. *See* Biertempfel, *supra* note 6 (quoting Eldon Ham concerning how teams invoke their league's other activities clauses). *Compare* Biertempfel, *supra* note 6 and Helfand, *supra* note 15, *with* Seepersaud, *supra* note 44 ("The four major sports are not particularly friendly to players who get hurt participating in risky pastimes.").

75. *See* Rocky Mountain News - Sports, *supra* note 59 (finding team concern over athletic activities does not always mean teams act to prevent athletes from engaging in "other activities"). It sometimes takes an injury involving a major star to galvanize teams into adding specific language about an activity into player contracts. *See* Rovell, *Players off Bikes, supra* note 7 (noting Ben Roethlisberger was not prohibited from riding his motorcycle prior to his injury).

76. *See* The Video Game Revolution - The History of Video Games - PBS, http://www.pbs.org/kcts/videogamerevolution/history/timeline_flash.html (last visited Nov. 15, 2007) [hereinafter Video Game Revolution] (explaining Odyssey as first home video game console and its capabilities). Ralph H. Baer originally created and patented the Odyssey in 1968. *See id.* The Odyssey was built using analog electronics. *See* Gamespot Presents: A Brief Timeline of Video Game Music, http://www.gamespot.com/gamespot/features/video/vg_music/p2_01.html (last visited Nov. 15, 2007) (explaining components of first video game console).

77. *See* Video Game Revolution, *supra* note 76 (claiming arcade version of *Pong* to be second milestone of 1972). Atari released its console version of *Pong* for Christmas 1975. *See* Danny Allen, *A Brief History of Game Consoles, as Seen in Old TV Ads*, PC WORLD, Dec. 22, 2006, <http://www.pcworld.com/article/id,128295-page,2-c,gameconsoles/article.html> [hereinafter Allen, *Game Consoles*] (noting long wait to play PONG arcade machine).

78. *See* Allen, *Game Consoles, supra* note 77 (noting appearance of *Pong* "clones" in stores). In 1976, the first plug-in cartridge console, Channel F, was released. *See* Video Game Revolution, *supra* note 76 (examining quick evolution of video game consoles).

During the second generation of video games in the late 1970s three game consoles, Atari 2600, Intellivision, and Colecovision, dominated the video game landscape.⁷⁹ In 1979, Activision entered the industry as the first third-party video game developer, bringing with it an excess of other independent companies that harmed the industry through game overproduction.⁸⁰ As a result, console video games were temporarily superceded by computer gaming until 1985, when Nintendo introduced the groundbreaking Nintendo Entertainment System (“NES”).⁸¹ The NES was an 8-bit system that provided color graphics, elaborate sound, and faster game play than its predecessors.⁸²

Additional technological advancements in the 1990s ushered in the modern age of video games.⁸³ Foremost, with the creation of the portable Nintendo Gameboy, handheld consoles emerged as the newest form of home video game systems.⁸⁴ In 1992, *Mortal*

79. See GameSpot – The History of Video Games – The Golden Age, http://www.gamespot.com/gamespot/features/video/hov/p4_01.html (last visited Nov. 15, 2007) [hereinafter Golden Age] (providing details about each second-generation console).

80. See Video Game Revolution, *supra* note 76 (explaining Activision was created by four former Atari employees). Many other third-party developers began to appear and create video games, such as *Pac-Man*, causing an oversupply at stores. See Golden Age, *supra* note 79 (stating result was Video Game Crash of 1983). “Numerous companies, including Mattel and Warner Communications, close[d] their game divisions while others [went] bankrupt.” Video Game Revolution, *supra* note 76 (recounting effects of video game crash).

81. See Nintendo Entertainment System (NES) - 1985-1995 – Classic Gaming, <http://classicgaming.gamespy.com/View.php?view=ConsoleMuseum.Detail&id=26&game=5> (last visited Nov. 15, 2007) (stating NES revived North American video game industry). *Super Mario Bros.* came bundled with the NES. See *id.* (explaining how bundle options aided in success of NES).

82. See Video Game Revolution, *supra* note 76 (discussing features of NES and reason for record sales). Sega also introduced the Sega Master System, a console that included 3D glasses, but its “sales pale[d] in comparison to those of the NES.” *Id.*

83. See *id.* (detailing decade’s major technological milestones). The decade saw the rise of digital images and 3D graphics, first-person shooter (“FPS”) games, real-time strategy (“RTS”) games, and new kinds of video game consoles. See *id.*

84. See GameSpot - The History of Video Games - The Home Market Expands 1989-1992, http://www.gamespot.com/gamespot/features/video/hov/p7_01.html (last visited Nov. 15, 2007) (using 1989 release of Nintendo Gameboy as example). Gameboy featured *Tetris*. See Video Game Revolution, *supra* note 76 (describing Gameboy). *Tetris* is a Russian puzzle game created in 1985 by mathematician Alex Pajitnov. See Gamespot - The History of Video Games - Video Games Are Back 1985-1988, http://www.gamespot.com/gamespot/features/video/hov/p6_01.html (last visited Nov. 15, 2007) (describing creation of *Tetris* as computer game). The initial fourth generation console, the Sega Genesis, also debuted in 1989. See Video Game Revolution, *supra* note 76 (noting Genesis debuted as first 16-bit console). Nintendo responded the next year with the Super Nintendo. See *id.* (explaining Super NES was also 16-bit but slower than Genesis).

Kombat became the first game to use “digitized images of real actors,” sparking the continuing competition for graphical realism.⁸⁵ The mid-1990s saw the advent of the 32-bit gaming console, followed shortly thereafter by 64-bit consoles introduced by Nintendo, Sega, and Sony.⁸⁶ These new systems provided superior graphics and the ability for more diverse gameplay, resulting in a greater variety of - and particularized specialty within - distinct video game genres, as the Nintendo 64 console established itself through first-person shooter (“FPS”) games while the Sony Playstation became the primary console for role-playing games.⁸⁷

The genre competition amongst the 64-bit consoles led to Sony’s emergence as a leading video game company while rival Sega was marginalized as a console provider.⁸⁸ In its stead, computer software heavyweight Microsoft entered the console industry in 2001 with the introduction of the high-powered, computer-like Xbox and its marquee game, *Halo*.⁸⁹ Microsoft again pushed the

85. See Video Game Revolution, *supra* note 76 (stating *Mortal Kombat*’s realism and gory character maneuvers made it controversial). Uproar over *Mortal Kombat* led to a 1993 Senate investigation of video game violence. See *id.* Senators Joseph Lieberman (D-Ct.) and Herbert Kohl (D-Wis.) led the inquiry into video game violence - and even threatened to ban violent video games - before settling on a compromise in favor of a rating system. See GameSpot - The History of Video Games - The 32-Bit Era Begins 1993-1997, http://www.gamespot.com/gamespot/features/video/hov/p8_01.html (last visited Nov. 15, 2007) (stating reasons for investigation and ultimate result). In 1994, the Entertainment Software Rating Board (“ESRB”) was established to provide video game ratings. See *id.* (explaining ESRB ratings provided recommended ages for games and whether games were violent); see also Video Game Revolution, *supra* note 76 (detailing complexity of ESRB rating system).

86. See Video Game Revolution, *supra* note 76 (noting introduction of 32- and 64-bit technology as major video game milestones of 1994, 1995, and 1996). The technology in these consoles made 3-D games possible, with *Mario 64* becoming a defining 3-D game. See *id.* (describing *Mario 64* and *Legend of Zelda* as Nintendo 64’s 3-D games).

87. See IGN - GoldenEye 007, <http://ign64.ign.com/objects/001/001991.html> (last visited Nov. 15, 2007) (describing *Goldeneye* as “one of Nintendo’s success stories”); see also IGN - Final Fantasy VII, <http://psx.ign.com/objects/000/000494.html> (last visited Nov. 15, 2007) (explaining how Playstation game *Final Fantasy VII* made role-playing games popular).

88. See Martyn Williams, *Sega’s Dreamcast is Over*, PC WORLD, Jan. 31, 2001, <http://www.pcworld.com/article/id,39902-page,1/article.html> (providing reason for Sega’s decline and withdrawal from console business). Sega, however, did make a lasting contribution to video game console technology. See Video Game Revolution, *supra* note 76 (quoting claim by *Popular Science* that Sega Dreamcast was “one of the most important and innovative products of 1999” because it allowed online gameplay). Sony, for its part, also made an innovative contribution to video games with the Playstation 2 (“PS2”), a 128-bit, DVD capable game system. See *id.* (calling PS2 first milestone video game system of 2000).

89. See Video Game Revolution, *supra* note 76 (describing introduction of Xbox as fourth milestone of 2001). “[Xbox] is the first console system to contain hard disk space comparable to that of a PC and to completely support HDTV.” *Id.*

technological limits of video games systems with the introduction of the Xbox 360 in November 2005, matched by the releases of Sony’s Playstation 3 (“PS3”) and Nintendo Wii in November 2006.⁹⁰ As a result of this renewed competition within the industry, today’s video games, including *Guitar Hero*, strive to create a more interactive, physically stimulating experience, allowing players to do more than just sit complacently in front of their television screens.⁹¹

Today, adults constitute over half the people playing video games.⁹² Some describe video games as an “institution” of American life.⁹³ For some families, video game consoles are “the center

Halo is a science-fiction themed FPS game. See Douglass C. Perry, *Halo*, IGN, May 11, 2000, <http://ps2.ign.com/articles/134/134552p1.html> (providing overview, screenshots, and game guides); see also Xbox.com - Halo – Game Detail Page, <http://www.Xbox.com/en-US/games/h/halo/default.htm> (last visited Nov. 15, 2007) (providing links to overview of gameplay, synopsis, and other related information).

90. See Martyn Williams, *Microsoft to Launch Xbox 360 November 22*, PC WORLD, Sept. 15, 2005, <http://www.pcworld.com/article/id,122560-page,1/article.html> (stating United States release date for Xbox 360); see also Danny Allen, *First Look: Sony PS3 Versus Nintendo Wii*, PC WORLD, Nov. 14, 2006, <http://www.pcworld.com/article/id,127881-page,1/article.html> (noting November 17, 2006 release date for Playstation 3 and November 19, 2006 release date for Nintendo Wii).

91. See Hunt, *supra* note 35 (“[T]he gaming industry of late is introducing more products that don’t confine players to their controllers.”). *Guitar Hero* provides players with a unique gameplay experience. See *Guitar Hero - Gameplay*, *supra* note 3 (detailing gameplay features of *Guitar Hero*); see also IGN: *Guitar Hero* (Game & Guitar Controller Bundle), *supra* note 3 (describing *Guitar Hero*’s unique controller).

92. See Editors of NEW ATLANTIS, *Life is Just a Game: The Rise of Video Games in American Culture*, NEW ATLANTIS, Winter 2004, at 106, available at <http://www.thenewatlantis.com/archive/4/soa/TNA04-StateOfTheArt-Life%20Is%20Just%20a%20Game.pdf> [hereinafter *Life is Just a Game*] (stating that those who grew up with Atari and Nintendo are today’s most devoted video game players); see also Associated Press, *Survey: Four in 10 American Adults Play Video Games*, FOXNEWS.COM, May 9, 2006, <http://www.foxnews.com/story/0,2933194659,00.html?sPage=fnc.technology/videogaming> [hereinafter *Survey*] (presenting survey results).

93. See *Life is Just a Game*, *supra* note 92, at 105 (“Ever since *Pong* first appeared in American homes and shopping mall arcades in the 1970s, video games have occupied a prominent place in American life.”). The sports video game genre is a prominent example of the effect video games have on Americans, especially among athletes. See Kelly Beaton, *Video Games Have Evolved; Athletes Are Taking Notice*, WATERLOO-CEDAR FALLS COURIER, Apr. 22, 2006, <http://www.wcfcourier.com/articles/2006/04/22/sports/local/doc4449afd7e1d84318022764.txt> (noting that athletes are also hardcore gamers); see also Greg Bishop, *The Game Outside the Game*, SEATTLE TIMES, Dec. 29, 2004, at D1, available at http://seattletimes.nwsourc.com/html/sports/2002133673_hawk29.html (quoting Tom Goedde, senior production manager at EA Sports, which produces *Madden*, that professional football players all want to be on cover of *Madden* football game because it is “the modern-day Wheaties box”).

of [family] entertainment.”⁹⁴ Video games are also a social outlet.⁹⁵ They are widely popular with the American public, and have the potential to surpass the movie industry.⁹⁶ The gaming industry’s popularity has allowed it to expand beyond its stereotypical demographic of children.⁹⁷

Today’s professional athletes avidly play video games.⁹⁸ This is not surprising since this generation of athletes grew up playing video

94. See *Survey*, *supra* note 92 (noting one family’s experience). Others have met new friends by playing games online. See *id.*

95. See *The Video Game Revolution – “Eight Myths About Video Games Debunked”* by Henry Jenkins – PBS, <http://www.pbs.org/kcts/videogamerevolution/impact/myths.html> (last visited Nov. 15, 2007) (dismissing myth that playing video games is socially isolating). Online capabilities have also helped video games expand their ability to be social outlets. See *Survey*, *supra* note 92 (noting impact of online gaming on American society and social networking).

96. See Bishop, *supra* note 93 (noting in 2001 video game industry had greater revenue than movie industry); *Life is Just a Game*, *supra* note 92, at 105 (“As video games acquire greater capabilities to simulate ‘real’ life, they are likely to outstrip Hollywood even further as America’s choice source of popular entertainment.”).

97. See Darren Rovell, *‘Keeping it Real’ Important in Sports Video Games*, ESPN.COM, May 17, 2002, <http://espn.go.com/sportsbusiness/s/2002/0515/1383096.html> (“[Kids] were once thought of as the target audience for sports video games, but things have changed. Today, the core demographic [is] . . . men with disposable income, ages 18 to 28”); *Survey*, *supra* note 92 (“Men, younger adults and minorities were most likely to play [video games].”).

98. See Garber, *supra* note 8 (“The truth is, professional athletes love sports video games.”). Some athletes hold video game tournaments with teammates. See Bishop, *supra* note 93 (pointing out one such tournament and consequences of losing). Athletes play the video games simulating their respective sports. See Staff, *Joe Horn Sounds Off on Madden and the NFL*, SPORTSGAMER.COM, Dec. 13, 2006, <http://www.sportsgamer.com/content/318/joe-horn-sounds-off-on-madden-and-the-nfl/> [hereinafter *Joe Horn*] (highlighting Horn’s statement that on every NFL team no less than fifty percent of players play *Madden*). Athletes, however, do not simply play the games for their specific sport, they play a wide variety of video games. See Staff, *San Jose Sharks YoungStar Matt Carle Talks Videogames*, SPORTSGAMER.COM, Jan. 28, 2007, <http://www.sportsgamer.com/content/435/san-jose-sharks-youngstar-matt-carle-talks-videogames/> [hereinafter *Matt Carle*] (noting Carle not only plays NHL video game, but also *Tiger Woods PGA Tour*); see also Staff, *Gilbert Arenas Talks adidas, NBA Live 07 and Halo*, SPORTSGAMER.COM, Nov. 4, 2006, <http://www.sportsgamer.com/content/189/gilbert-arenas-talks-adidas-nba-live-07-and-halo/> [hereinafter *Gilbert Arenas*] (using Gilbert Arenas as example showing how athletes play many genres of video games from *Contra* to *Super Mario Bros.* to *NBA Live* to *Halo*).

games.⁹⁹ Some athletes use video games as scouting tools.¹⁰⁰ Other players use video games simply as a way to relax.¹⁰¹ Professional athletes not only take their video game consoles on road trips, but they also play video games in the locker room.¹⁰² Video games have become so popular with athletes that some professional baseball players are part of a competitive gaming league.¹⁰³ No matter how athletes choose to use video games, the games are so integral to their lives that they are “a permanent part of the sporting conscience.”¹⁰⁴

99. See David Briggs, *Video Games Are Players' Pastime*, MLB.COM, Aug. 3, 2007, http://mlb.mlb.com/news/article.jsp?ymd=20070802&content_id=2125272&vkey=news_mlb&fext=.jsp&c_id=nlbb (“Today’s players are part of the first generation to grow up with video games. And by the time players reach the Majors, that MTV Generation lifestyle is deep-rooted.”). Today’s athletes, who grew up playing video games, care about how video games portray and rate them. See Jon Azpiri, *Video Game Fame*, SALON, Feb. 5, 2004, http://archive.salon.com/tech/feature/2004/02/05/sports_video/index.html (noting sports game company EA Sports routinely hears from athletes about ratings and abilities of their video game counterparts); see also Briggs, *supra* (explaining athletes’ thrill of being in games and disappointment when not portrayed as accurately as possible).

100. See Beaton, *supra* note 93 (noting how Minnesota Twins pitcher Johan Santana used *MLB Baseball 2006* to scout opponents); see also Bishop, *supra* note 93 (stating that some NASCAR drivers use video games to simulate races before actual race).

101. See Briggs, *supra* note 99 (explaining view of some baseball players that “video games serve as a time-killer, build camaraderie and provide off-field competition”); see also Beaton, *supra* note 93 (explaining that athletes use games to free themselves of team-imposed restrictions). Athletes will often play for hours at a time. See Garber, *supra* note 8 (stating athletes commonly play for three to four hours, perhaps even up to ten hours straight). The twenty-first century professional athlete’s passion for video games has created a dilemma for teams and coaches. See Bishop, *supra* note 93 (“On one hand, there are worse ways players could spend free time. On the other, staying up all night playing video games doesn’t exactly increase performance.”); see also Beaton, *supra* note 93 (discussing one athlete’s confusion about how teammates can play video games so much and still study their playbooks).

102. See Staff, *Jered Weaver Discusses Gaming and His Transition from College to Major League Star*, SPORTSGAMER.COM, Feb. 8, 2007, <http://www.sportsgamer.com/content/491/jered-weaver-discusses-gaming-and-his-transition-from-college-to-major-league-star/> [hereinafter *Jered Weaver*] (stating that video games are prominent in clubhouse and on team road trips). Players often play the video games against one another. See Matt Carle, *supra* note 98 (stating that team takes their games on road with them).

103. See Surette, *Damon*, *supra* note 8 (discussing formation of gaming league where fourteen participants are professional baseball players and other participants are fans). The formation of this gaming league lends credence to the idea that “video games seem to be quite popular with professional sports stars.” Dennis Yang, *Professional Baseball Players Form Professional Video Gamers League*, TECHDIRT.COM, Dec. 22, 2006, <http://www.techdirt.com/articles/20061221/151202.shtml> (providing creation of gaming league as example of how popular video games are with professional athletes).

104. Bishop, *supra* note 93. Professional athletes and video games are tightly connected. See *id.*

III. ANALYSIS OF EXPANDING “OTHER ACTIVITIES” CLAUSES TO INCLUDE VIDEO GAMES

Zumaya’s video game-induced injury became another in a long line of injuries to professional athletes at a time when the trend points toward the placement of more restrictions in player contracts.¹⁰⁵ The possibility of more injuries similar to Zumaya’s creates a new concern for professional sports organizations because, as with motorcycles, video games are popular among professional athletes.¹⁰⁶ Overuse of a video game can lead to various injuries whether or not the person playing them is a professional athlete.¹⁰⁷

In turn, the respective sports leagues and their teams must explore remedies that better protect themselves and their players from future “other activity” injuries.¹⁰⁸ In the wake of Zumaya’s video game injury, the leagues’ most logical response is to adjust their standard player contracts by adding video game play to their “other activities” clauses.¹⁰⁹ By attempting to alter the “other activities” clauses, teams and leagues create potential legal issues with their players’ union.¹¹⁰

105. See Biertempfel, *supra* note 6 (focusing on trend in collective bargaining pointing toward more restrictive “other activity” lists). The more off-field “other activity” related injuries occur, the more teams will be encouraged to place additional prohibitory language in their contracts. See Rovell, *Players off Bikes*, *supra* note 7 (describing possible effects of motorcycle-related accidents on teams and their contracting to protect investments).

106. See Bishop, *supra* note 93 (highlighting intimate connection between professional athletes and video games); Garber, *supra* note 8 (“Unlike the previous generation of athletes who played Pong and Atari, this current generation grew up playing sports video games. Like the Internet, it’s an integral part of their lives. Too integral, some would argue.”).

107. See Sue Kwon, *Video Game Players Getting More Injuries*, cbs5.com, Nov. 30, 2006, http://cbs5.com/technology/local_story_334195547.html (stating video gamers who overplay video game consoles suffer from various injuries caused by repetitive motions involved in playing games).

108. See Bishop, *supra* note 93 (noting ban against video games during season as one possible remedy). As a remedy, teams can tighten their “other activity” restrictions. See Biertempfel, *supra* note 6 (quoting attorney who believes prominence of these kinds of injuries will lead to more specific contracts).

109. See Reynolds, *supra* note 12 (“Players . . . leave their employers no choice but to mandate against the use of motorbikes and participation in other thrill-seeking [activities].”). Accidents and injuries related to certain “other activities” could provide teams with the necessary backing for specifically prohibiting their players from engaging in those activities. See Rovell, *Players off Bikes*, *supra* note 7 (explaining possibility of teams restricting players’ use of motorcycles after Roethlisberger’s injury). A motorcycle restriction can be analogized to video games, depending on each league’s “other activity” clause. See Posting of Geoffrey Rapp to Sports Law Blog, *supra* note 5 (indicating coverage of video games under “other activities” depends on video games being defined as sport).

110. See Reynolds, *supra* note 12 (explaining that as part of CBA negotiations, NFL Players Association (“NFLPA”) negotiated “with owners [over] the amount of

A. Injury Concerns: Teams Cannot Afford to Ignore the Potential for Injuries Caused by Athletes Playing Video Games

The increased risk of injury caused by some athletes’ extensive video game play should raise concerns among professional sports teams.¹¹¹ The landscape of modern sports injuries will not allow teams to ignore the danger of their athletes getting injured in any context.¹¹² With many of today’s professional athletes playing video games, teams cannot afford possible injuries stemming from their players’ favorite pastime.¹¹³ If teams act to impose some form of restriction, they could avoid another Zumaya-esque injury to one of their players.¹¹⁴ The Zumaya injury should serve as a warning to teams that excessive video game play can injure their players, rendering them unable to play at crucial points in the season.¹¹⁵

money that teams can recoup or withhold from players suffering off-field injuries . . .”). Additions to these clauses will draw attention from players’ unions because the clauses can be broadened or tailored in a specific player’s contract. See Hackney, *supra* note 11 (noting comments from one sports attorney on possibility of very broad clauses). The players can decide if they want the union to oppose an addition to the “other activity” clauses. See Associated Press, *Union to Ask Players for Help Outlining Conduct Rules*, SPORTING NEWS, Feb. 1, 2007, <http://www.sportingnews.com/yourturn/viewtopic.php?t=173342> (quoting NFLPA executive director Gene Upshaw). “The last thing I tell every team when I visit is that the only thing that can mess up the collective bargaining agreement is the players themselves[.]” *Id.*

111. See Beaton, *supra* note 93 (noting San Diego Chargers kicker Nate Kaeding believes professional athletes have so much free time, they will “play all day and all night”). Players will also spend free time at home playing video games. See Gilbert Arenas, *supra* note 98 (concluding that since younger players grew up playing video games, they go home and do same).

112. See Beaton, *supra* note 93 (“Welcome to sports in the 21st century: Where injuries run the gamut from high-ankle sprains to turf toe to calloused thumbs.”).

113. For a detailed discussion on how many of today’s professional athletes play video games, see *supra* notes 98-104 and accompanying text.

114. See *Guitar Hero*, *supra* note 2 (explaining Zumaya’s injury occurred even though his team knew he enjoyed playing *Guitar Hero*). Once the team concluded the injury resulted from the video game and not Zumaya’s pitching motion, their knowledge of his affinity for *Guitar Hero* should have been employed to prevent the injury from occurring in the future. See Morosi, *Hummin’*, *supra* note 34 (explaining team’s conclusion about cause of injury).

115. See Kwon, *supra* note 107 (describing types of injuries that can occur from extensive game play of various video game consoles such as Nintendo Wii and Playstation). As mentioned, Zumaya’s extensive playing of *Guitar Hero* caused wrist and forearm inflammation. See *Guitar Hero*, *supra* note 2 (describing Zumaya’s injury). For an in-depth discussion of Zumaya’s injury, see *supra* notes 28-40 and accompanying text. “[P]hysical therapists and chiropractors say just about anyone can get injured playing video games — especially people who don’t know when to quit.” Hunt, *supra* note 35. Factoring the likelihood of injury in with the amount of free time players have to play video games, the results do not bode well. See Beaton, *supra* note 93 (quoting Nate Kaeding on how many hours

Two teams have enacted policies prohibiting athletes from playing video games during the season.¹¹⁶ These restrictive video game policies run the risk of alienating athletes by creating too many in-season prohibitions.¹¹⁷ Teams choosing to enforce an outright video game ban must be prepared for a backlash from angry players.¹¹⁸ An overwhelming amount of today's professional athletes play video games in their free time.¹¹⁹ Despite such extensive participation, video game play by athletes has only resulted in one publicized injury.¹²⁰ Teams may opt to take a wait-and-see approach or adopt a player-by-player approach instead of placing the entire team under restriction.¹²¹ A full-scale ban, which may appear to be the proper preventive measure, in reality could be a hasty response that has an unnecessary affect on many athletes.¹²²

teammates play video games during road trips); Garber, *supra* note 8 (explaining how long this time period can be).

116. See Bishop, *supra* note 93 (explaining only University of Texas football team and NFL's Miami Dolphins have banned *Madden* during "portions of the season").

117. See Kay, *supra* note 13 (noting one player's concern that accidents could mean teams would impose further contractual restrictions on "other activities"). "They took away the [touchdown] celebrations. Now we can't enjoy ourselves outside of the facility? That's not fair." *Id.* (quoting Cincinnati Bengals wide receiver Chad Johnson). Adding to the potential unfairness is the fact that the major sports leagues profit from licensing their leagues and players to the companies producing sports video games. See Bishop, *supra* note 93 (explaining role of professional sports leagues in release of sports video games).

118. See Associated Press, *Union Gets on Ball, Files Unfair Labor Practice Charges*, ESPN.COM, Dec. 1, 2006, <http://sports.espn.go.com/nba/news/story?id=2682848> (describing NBA's unilateral actions in introducing new ball and "zero tolerance" behavior policy resulting in players' union filing unfair labor practice charges with National Labor Relations Board).

119. For a further discussion on the amount time athletes play video games and the variety of video games they play, see *supra* notes 98-104 and accompanying text.

120. See Morosi, *Hummin'*, *supra* note 34 (explaining Tigers' December 2006 acknowledgment that Zumaya's injury resulted from *Guitar Hero* and not his pitching motion). Zumaya's is not the only injury to result from playing *Guitar Hero*, but his is the only documented injury to a professional athlete. See Hunt, *supra* note 35 (noting injuries caused by playing *Guitar Hero*).

121. See Morosi, *Hummin'*, *supra* note 34 (finding Tigers handled Zumaya's injury by only asking him to stop playing *Guitar Hero* rather than prohibiting whole team).

122. See Seepersaud, *supra* note 44 (providing list of "other activity" injuries suffered by other professional athletes, mostly involving motorcycles or other motorcycle-type vehicles). The most recent "other activities" injuries, prior to Zumaya's were the motorcycle injuries to Kellen Winslow, Jr. and Ben Roethlisberger, and there have been no lasting repercussions to those athletes after their injuries. See Rovell, *Players off Bikes*, *supra* note 7 (noting Roethlisberger injury may encourage teams to put more restrictive language into player contracts). Jay Williams' motorcycle injury caused the NBA to tighten their restrictive language; how-

B. Leagues Do Have the Ability to Add Video Games to Their “Other Activities” Clauses

The situation Zumaya found himself in, heading into the playoffs to give his team a chance to play for the league’s championship, would appear to create enough of an incentive for an athlete to stop playing video games until the off-season.¹²³ As with the prohibition on motorcycles, teams can prevent athletes from playing video games by placing them onto the ever growing and evolving list of restricted “other activities.”¹²⁴ Teams depend on their players, and players choosing to engage in “other activities” create significant problems for professional sports franchises.¹²⁵

Rather than simply educating their players on the risks of certain activities and hoping players will adhere to warnings, teams must be more proactive when dealing with potential injury causing activities.¹²⁶ Each of the four major sports leagues has the power to expand the clause in their basic player contract to include additional “other activities.”¹²⁷ Teams also have the option of writing

ever, the NFL has not done so in the wake of the Winslow and Roethlisberger injuries. *See id.*

123. *See* Hunt, *supra* note 35 (“And if you’re a major league pitcher on your way to the World Series, maybe – just maybe – quit until the off-season.”).

124. *See* Biertempfel, *supra* note 6 (quoting one attorney’s belief that “contracts will become more specific”). The clause that prevents an athlete from engaging in off-field “other activities” can be expanded. *See* *Rockin’ Out on PS2 Sidelines Pitcher*, *supra* note 5 (suggesting teams add *Guitar Hero* to restricted activities list after Zumaya’s injury).

125. *See* Dougherty, *supra* note 11 (explaining concern of one general manager regarding off-field activities his players engage in). Ted Thompson, General Manager of the Green Bay Packers, notes that “You can worry yourself sick. ‘What about this? And what about that? And what about this?’ You just try to educate them as much as possible and encourage them in the safest path as possible, and you hope for the best.” *Id.*

126. *See id.* (quoting Ted Thompson about his concerns over players engaging in “other activities”). The rash of motorcycle injuries in recent years has proven that players often will not listen to the concerns and warnings from their teams. *See* Rocky Mountain News - Sports, *supra* note 59 (explaining Pittsburgh Steelers notified Roethlisberger in writing about their concerns over his riding motorcycles but he still rode his motorcycle and was subsequently injured). Similar to how the Pittsburgh Steelers knew of Roethlisberger’s motorcycle riding, the Tigers knew about Zumaya’s interest in playing *Guitar Hero*. *See* *Guitar Hero*, *supra* note 2 (explaining Tigers’ knowledge of Zumaya’s game play). These recent motorcycle injuries also demonstrate that, in addition to not listening to the concerns of team officials, athletes will also not heed the prohibitions in their own contract. *See* Seepersaud, *supra* note 44 (providing Jay Williams and Kellen Winslow as examples of athletes who had motorcycle prohibitions in their contracts but rode motorcycles anyway and were injured).

127. *See* Rieber, *supra* note 6 (providing excerpts from each major league’s clause); *see also* Biertempfel, *supra* note 6 (noting each league has “other activities” clause and that they have evolved with each new CBA). For a detailed discussion

player-specific prohibitions into individual player contracts.¹²⁸ Many of today's professional athletes play video games for extended periods of time, and because of this teams have a compelling argument that video games are a potential problem.¹²⁹ To protect their investment in their players, and to protect players from themselves, teams may have no other option but to restrict certain activities during the season.¹³⁰ A mandate against riding motorcycles is analogous to a mandate against video game play because both activities are popular with professional athletes.¹³¹

Although the clauses differ in their specific terms, each league has the ability to add activities, including video games, to the list of restricted activities.¹³² Despite these differences in language and specificity, each league's "other activities" clause can be strengthened.¹³³ Specifically prohibiting activities within an "other activities" clause strengthens the clause.¹³⁴ Leagues would benefit from expressly adding video games to their restricted lists because it would prohibit players and agents from applying personal interpretations to the clause.¹³⁵ Leagues should fortify their clauses a

about the various "other activities" clauses of the four major professional sports leagues, see *supra* notes 49-75 and accompanying text.

128. See Hackney, *supra* note 11 (noting clauses can be very broad, but may be tailored to specific player if team knows there are activities in which player likes to participate, including almost any activity); see also Reynolds, *supra* note 12 (noting Kellen Winslow's contract, but Ben Roethlisberger's, contained motorcycle prohibition).

129. For a detailed discussion regarding the lengths modern athletes will go to in order to play video games, see *supra* notes 100-04 and accompanying text.

130. See Reynolds, *supra* note 12 (noting rash of motorcycle injuries involving athletes has left teams no choice but to mandate against their players riding them).

131. See Garber, *supra* note 8 (explaining importance of video games to athletes and lengthy time periods athletes play video games); see also Dougherty, *supra* note 11 (providing examples of motorcycle popularity among professional athletes).

132. See Rieber, *supra* note 6 (providing synopsis of each league's clause and showing how each differs from one another). For a detailed discussion concerning each league's "other activities" clause, see *supra* notes 49-75 and accompanying text.

133. See Seepersaud, *supra* note 44 (noting language of clauses is not absolute and is therefore not immutable).

134. See Rocky Mountain News - Sports, *supra* note 59 (quoting agent Jack Mills) "You really don't need to prohibit a certain activity unless you want [] to strengthen a clause." *Id.*

135. See Biertempfel, *supra* note 6 (explaining and elaborating upon comments of Eldon Ham that lack of specificity leaves clauses open to "reasonable interpretation" and "invite[s] some controversy"). Tightening up the language of clauses by making them more specific will remove problematic interpretations and controversies. See *id.*

Zumaya-like injury to one of its players in the future.¹³⁶ The mechanism for adding video games to the “other activities” clauses is the same within all four leagues.¹³⁷ The question becomes how each league deals with the additions based on their specific contractual language.¹³⁸

1. *Major League Baseball*

Initially it appears the language of the “Other Sports” clause in MLB’s standard contract prohibits the league from adding video games or other activities to the list of restrictions.¹³⁹ The less physical nature of baseball makes adding minor activities, such as video games, an apparently meaningless exercise.¹⁴⁰ Conversely, baseball is a sport where the slightest change to a player’s mechanics, whether he is a pitcher or a position player, is alarming.¹⁴¹ Video

136. See *Rockin’ Out on PS2 Sidelines Pitcher*, *supra* note 5 (stating that teams may want to add *Guitar Hero* to restricted “other activities” after Zumaya’s injury). Analogizing video games to motorcycles because of similar popularity among athletes, one injury can be indicative of a possible trend. See *Biertempfel*, *supra* note 6 (listing various injuries caused by motorcycles before Roethlisberger injury and when they occurred). Motorcycle injuries and video game-related inflammation differ significantly. Both injuries, however, raise similar questions about contract violations and potential remedies when those injuries do occur among athletes. See Posting of Geoffrey Rapp to Sports Law Blog, *supra* note 5 (focusing on correlation between Zumaya and Roethlisberger injuries).

137. See *Biertempfel*, *supra* note 6 (using NBA as example to show additions are made to list of restrictions); see also *Rockin’ Out on PS2 Sidelines Pitcher*, *supra* note 5 (noting teams can add to list of restrictions). Once the leagues add a forbidden activity to their lists, it then becomes a topic of discussion at the bargaining table. See *Biertempfel*, *supra* note 6 (pointing out one attorney who has helped both NBA and MLB create CBAs has seen additions to restricted lists); see also William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL’Y REV. 61, 61 (2004) (noting struggle in professional sports in striking balance “between players’ concerns” and concerns of owners). For a further discussion of potential bargaining conflicts between owners and unions, see *infra* notes 177-96 and accompanying text.

138. See *Rieber*, *supra* note 6 (providing overview and comparison of different language used in each league’s clause).

139. For a detailed discussion of the language of MLB’s “Other Sports” clause, see *supra* notes 52-55 and accompanying text.

140. See *Levine*, *supra* note 62, at 441 (explaining that unlike football players, baseball players are not subject to “intense physical wear and tear”). Football players are subjected to a higher risk of injury because of the physicality involved in their sport, a physicality that is absent from baseball. See Andrew Valdez, *Baseball’s Appeal Lost on this Generation*, DAILY TROJAN, Apr. 4, 2007, at Opinion, available at <http://media.www.dailytrojan.com/media/storage/paper679/news/2007/04/04/Opinion/Baseballs.Appeal.Lost.On.This.Generation-2821826.shtml> (explaining differences between football and baseball, including football’s fast pace and risk of serious injury on every snap). But see Joel Zumaya Biography, *supra* note 14 (examining importance of mechanics to baseball pitchers).

141. See Rich Draper, *Zito Surprises Giants with New Delivery*, MLB.COM, Feb. 15, 2007, <http://sanfrancisco.giants.mlb.com/news/article.jsp?ymd=20070215&con->

game play risks damaging these delicate mechanics, and creates a potential problem for the player and the team.¹⁴²

The hurdle MLB must clear before it is able to add video gaming to its list of prohibited activities is clarifying the contractual language stating “or other sport involving a substantial risk of personal injury.”¹⁴³ Teams should argue the existence of professional gaming leagues, created due to the current popularity of video games, makes playing them a sport.¹⁴⁴ After establishing video games are a sport, specifically a competitive sport, teams already have proof that video games present a certain risk of personal injury.¹⁴⁵ The risk of injury, coupled with public knowledge that baseball players spend a substantial amount of time playing video games, may allow MLB teams to establish that video games should be included in the league’s “Other Sports” contract clause.¹⁴⁶ It would be best for the league to spell out the prohibition by placing video gaming within the list of prohibited sports alongside activities such as skiing, ice hockey, and basketball.¹⁴⁷

tent_id=1803330&vkey=spt2007news&fext=.Jsp&c_id=sf (describing how difference in Barry Zito’s new pitching delivery became cause of shock and concern for his new team). For a further discussion demonstrating the importance of mechanics for Zumaya, see *supra* note 27 and accompanying text.

142. For a detailed discussion on how video games can impact a baseball player’s ability to play for his team, see *supra* notes 31-34 and accompanying text.

143. See 2007-2011 BASIC AGREEMENT, *supra* note 14, at sched. A, cl. 5.(b), (providing general list of prohibited sports).

144. See MLG Forums - FAQ, <http://www.mlgpro.com/forum/faq.php> (follow “MLG General Questions” hyperlink) (last visited Nov. 15, 2007) (answering questions about competitive professional video game playing). MLG stands for Major League Gaming. See *id.* Professional athletes are also involved in gaming leagues. See Surette, *Damon*, *supra* note 8 (providing information on creation of gaming league for professional baseball players).

145. See Hunt, *supra* note 35 (providing reports on cause of Zumaya’s injury). Today’s video games allow players to do more than just sit in front of their television screens. See *id.*

146. See *Jered Weaver*, *supra* note 102 (noting Weaver’s answer that video games are present both in home locker room and on road trips); see also Beaton, *supra* note 93 (describing one pitcher’s use of video games to scout opponents).

147. See Reynolds, *supra* note 12 (“[New York] Mets pitcher Tom Glavine, who has a hockey background and was actually drafted to play in the NHL, was forced to sign a legal liability waiver before he was allowed participation in a non-contact skate with the Boston Bruins.”). Without an outright contractual prohibition, baseball players can continue to play video games and risk injury. See Franciscutti, *supra* note 3 (stating that despite warnings from his team, Zumaya will not stop playing *Guitar Hero*).

2. *National Football League*

In contrast to MLB’s clause, the NFL’s clause is broader.¹⁴⁸ This is a prominent feature of the NFL’s standard player contract.¹⁴⁹ Professional football’s physical and violent nature magnifies the need for this difference.¹⁵⁰ If teams wish to prohibit additional off-field activities, they could eliminate varying interpretations of the clause by making its language more specific.¹⁵¹

The NFL may utilize the same argument as MLB to characterize video games as an activity with the potential to cause significant injuries.¹⁵² Unlike other major sports, NFL players do not sign guaranteed contracts, meaning the NFL needs to enforce a video game ban differently than other leagues.¹⁵³ In the NFL, signing bonuses are the only way for football players to receive guaranteed money.¹⁵⁴ Rather than attempting to add video games to the league’s standard clause, the NFL should encourage its teams to place the prohibition in each player’s contract, by attaching it directly to the player’s signing bonus.¹⁵⁵ Teams would then have the investment protections they desire while an agent could still fight for his player during contract negotiations, putting both on the same page when spelling out the “other activity” prohibitions.¹⁵⁶

148. See Biertempfel, *supra* note 6 (comparing NFL clause to clauses of other leagues and calling it “the most generic”). For a further discussion on the broad language of the NFL’s “other activities” clause, see *supra* notes 57-60 and accompanying text.

149. See NFL CBA, *supra* note 58, at App. C, Sec. 3 (prohibiting players from off-field activities that involve “a significant risk of personal injury”).

150. See Levine, *supra* note 62, at 458 (describing football’s “frighteningly violent” nature and using it to explain shortness of NFL careers and lack of lucrative contracts in comparison to those found in baseball or basketball).

151. See Biertempfel, *supra* note 6 (explaining need for specificity in NFL’s “other activities” clause after Roethlisberger injury). Making the clause more specific would make it more difficult for players and their agents to advantageously interpret the clause. See *id.*

152. For a detailed discussion of the argument MLB could make, see *supra* notes 144-47 and accompanying text. Football players play video games as much as baseball players do. See Joe Horn, *supra* note 98 (providing one player’s comment about significant amount of football players on each team who play video games); see also Beaton, *supra* note 93 (including one NFL player’s statement that football players get involved in playing video games).

153. For a further discussion of the NFL’s lack of guaranteed contracts, see *supra* notes 62-63 and accompanying text.

154. See Helfand, *supra* note 15 (explaining importance of signing bonuses in NFL contracts); Levine, *supra* note 62, at 452-53 (providing further reasons why signing bonuses are norm in NFL).

155. See Reynolds, *supra* note 12 (noting presence of language in specific player contracts prohibiting use of motorcycles).

156. See Rovell, *Players off Bikes*, *supra* note 7 (explaining one agent’s plans to encourage more teams to place specific clauses banning motorcycles in contracts).

3. *National Hockey League*

The NHL's standard player contract, which contains a prohibition on "other activities," is a combination of the MLB and NFL clauses. It contains both a wide-ranging prohibition and a more specific list of other athletic sports a player may not engage in without the written permission of his team.¹⁵⁷ The NHL, similar to MLB, uses guaranteed contracts.¹⁵⁸ Specifically, teams may list video games as a sport within the contractual prohibition.¹⁵⁹ Both the clause's broad classification and the inclusion of the "other athletic sport" language, however, lend themselves to the idea that the NHL should either change the language in its clause or address this new issue within each individual player's contract.¹⁶⁰ The NHL must wait until 2011 to amend its standard player contract, meaning it is currently more practical for the NHL to confront this issue on a player-by-player basis.¹⁶¹ NHL players play video games with the same regularity as other professional athletes, so the NHL must find the best manner to deal with this emerging issue.¹⁶²

Agents want these clauses inserted in players' contracts because they are in the players' best interests. *See id.* Players will be more compliant if they know what they can and cannot do. *See* Hackney, *supra* note 11 (discussing agent Adam Heller's reasons for negotiating "gray out" of "dangerous activity" portion of contracts).

157. *See* NHL CBA, *supra* note 64 at exh. 1, Sec. 7 (providing language of NHL's "other activities" clause); *see also* Biertempfel, *supra* note 6 (noting similarities between MLB and NHL standard player contract "other activity" prohibitions).

158. *See* Helfand, *supra* note 15 (explaining guaranteed contracts in NHL context).

159. For a further discussion of video games as sport, *see supra* notes 144-46 and accompanying text.

160. *See* NHL CBA, *supra* note 64 at exh. 1, Sec. 7 (outlining prohibitions included in NHL's "other activities" clause). While the NHL, similar to MLB and the NFL, does not include a definition of the word "sport," it is the inclusion of the term "athletic" that creates the biggest interpretive problem. *See id.* (prohibiting specific sports and "other athletic sport without the written consent of the Club . . ."). It has been argued that playing video games can be considered sport, but it has not been argued that being a professional video gamer takes the same physical talent as being a professional baseball, basketball, football, or hockey player. *See* Trunkers, *How to Become a Professional Gamer*, MAJOR LEAGUE GAMING, Feb. 16, 2007, <http://www.mlgpro.com/?q=node/109808> (discussing how one can become professional gamer where training includes proficiency in specific game(s) and studying game tactics, but describes no necessary physical requirements).

161. *See* NHL CBA, *supra* note 64 at cover sheet (stating CBA is effective until September 15, 2011).

162. *See* Matt Carle, *supra* note 98 (interviewing San Jose Sharks player Matt Carle about his video game playing tastes and those of his teammates); *see also* Staff, *Canucks Star Ryan Kesler Claims He's Old School*, SPORTSGAMER.COM, Jan. 19, 2007, <http://www.sportsgamer.com/content/400/canucks-star-ryan-kesler-claims-hes-old-school/> [hereinafter *Ryan Kesler*] (interviewing hockey player from different team who provided answers on video games similar to Matt Carle's). Hockey players do not only play hockey video games, they also play other genres of video

4. *National Basketball Association*

The NBA’s clause, because of its language, probably presents the best chance for a league to specifically add video games to its list of prohibited activities.¹⁶³ Moreover, the NBA’s latest CBA negotiations indicate that, of all the major professional sports leagues, it would be the most receptive to adding video game play to its list of restrictions.¹⁶⁴ The NBA clause needs little, if any, manipulation to include a ban on video game play because playing them is extremely popular among NBA players.¹⁶⁵ The NBA, similar to MLB and the NHL, deals in guaranteed contracts.¹⁶⁶ Despite that fact, its “other activities” clause could encompass video game play if the league chose to go in this direction.¹⁶⁷

C. Challenges from Players’ Unions and the Players Themselves

Each of the major professional sports leagues has the power to add other activities to their “other activities” list, but all of them will face opposition from their players’ union if they attempt to do so.¹⁶⁸ Players’ unions act as the collective bargaining representative

games. See Staff, *Zach Parise a Devil of a Gamer*, SPORTSGAMER.COM, Feb. 12, 2007, <http://www.sportsgamer.com/content/501/zach-parise-a-devil-of-a-gamer/> (noting that hockey players not only play hockey video games, but also play games like *Guitar Hero* and *Halo*).

163. See Reynolds, *supra* note 12 (explaining long list of activities banned by NBA); see also NBA CBA, *supra* note 69, at exh. A, para.12 (providing full list of activities restricted by league).

164. See Bierthmpfel, *supra* note 6 (noting list included in 2005 CBA almost doubled from 1999 list).

165. See NBA CBA, *supra* note 69, at exh. A, para.12 (requiring players to obtain written permission from their team to participate in activities “that a reasonable person would recognize as involving or exposing the participant to a substantial risk of bodily injury . . .”). A reasonable person would recognize that a person playing today’s video games runs the risk of injury after prolonged play. See Kwon, *supra* note 107 (noting *Wall Street Journal* report of injuries from Nintendo Wii including “cases of numb arms, sore shoulders, and . . . ‘Wii-elbow’” caused by repetitive motions); see also APTA, *This Holiday Season, Physical Therapists Advise Parents to be Aware of Injuries Caused by Overuse of Video Games*, AM. PHYSICAL THERAPY ASS’N, Dec. 19, 2006, <http://www.apta.org/AM/Template.cfm?Template=/CM/HTMLDisplay.cfm&ContentID=35979> (noting possible injuries from overuse and ways to protect against those injuries). Many NBA players play video games. See *Gilbert Arenas*, *supra* note 98 (“You have a lot of NBA players who just sit at home and play [video games].”).

166. See Helfand, *supra* note 15 (providing information on NBA’s use of guaranteed contracts).

167. See NBA CBA, *supra* note 69, at Exh. A, para.12 (explaining list of prohibited activities is not limited to those seven explicitly mentioned activities).

168. See Dougherty, *supra* note 11 (elaborating on recent victories by NFLPA, including CBA concessions from NFL owners). For a discussion explaining why players’ unions will oppose the video game addition, see *infra* notes 169-71 and accompanying text.

for the players in a specific league.¹⁶⁹ Essentially, a players' union is a labor organization whose members are the professional athletes in a particular league.¹⁷⁰ Each major professional sports league has a players' union with the objective and job description of fighting for the interests of the players it represents.¹⁷¹

Players' unions are charged with representing the labor in professional sports, the players.¹⁷² "[I]t is clear that labor law has

169. See Major League Baseball Players Association: Frequently Asked Questions, <http://mlbplayers.mlb.com/pa/info/faq.jsp#mlbpa> (last visited Nov. 15, 2007) (describing what MLBPA does); NFL Players Association – About Us, <http://www.nflpa.org/AboutUs/AboutUs.aspx> (last visited Nov. 15, 2007) (“The National Football League Players Association is the union for professional football players in the National Football League.”). Collective bargaining is a recent occurrence in major professional sports, only gaining momentum within the last forty years. See WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* sec. 18:1 (2d ed. 2006) (“Collective bargaining is a recent phenomenon in sports[,]” with first CBA occurring in 1968 in MLB). Despite the recent emergence of unions in professional sports, these unions have seen their share of almost annual concerted activity and negotiations. See *id.* (examining history of strikes in professional baseball). The 1994-95 strike, the most widely known strike in sports history, wiped away an entire baseball season. See Lacie L. Kaiser, Comment, *Revisiting the Impact of the Curt Flood Act of 1998 on the Bargaining Relationship Between Players and Management in Major League Baseball*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 230, 251 (2004) (noting impact of 1994-95 strike on MLB fan relations). The most recent labor strife in major professional sports was the NHL lockout of 2004-05. See ESPN.Com - NHL Lockout, <http://sports.espn.go.com/nhl/feature/featureStory?page=nhlcba> (last visited Nov. 15, 2007) (providing timeline of NHL lockout).

170. See National Hockey League Players' Association, <http://www.nhlpa.com/AboutTheNHLPA/Whats.asp> (last visited Nov. 15, 2007) (noting players' association status as labor union whose directive is representing interests of league's players). The players' associations are “unique labor institution[s],” but function as would any other labor union. See NBA Player's Association, http://www.nbpa.com/about_nbpa.php (last visited Nov. 15, 2007) (noting mission is ensuring “the rights of NBA players are protected, and that everything possible is being done to help players maximize their opportunities and achieve their goals on and off the court”).

171. See NFL Players Association – About Us, *supra* note 169 (listing NFLPA's functions which include representing players' bargaining interests, enforcing league CBA, and defending players); see also NBA Player's Association, *supra* note 170 (stating ways NBPA represents NBA players, similar to NFLPA). While professional sports players' unions are unique because of the group they serve, they are still akin to the more common labor organizations. See CHAMPION, *supra* note 169, at sec. 18:1 (noting even with problems unique to sports, players' unions are similar to other labor unions).

[T]he [players' union's] primary thrust is very much a part of the mainstream tradition of the American labor movement, in that it is anchored to the goal of improved job related rights for its members. Strikes and other concerted actions are a major part of American labor. Concerted action and the threat of a concerted action is an essential component of effective bargaining.

Id. (internal citations omitted).

172. See Gould, *supra* note 137, at 61 (recognizing existence of labor-management relations and conflict in major professional sports, with focus on professional baseball); see also CHAMPION, *supra* note 169, at sec. 18:1 (describing goals of

emerged as preeminent in all of the major sports.”¹⁷³ The creation of players’ associations led to the application of the National Labor Relations Act (“NLRA”) and arbitration procedures to the major professional sports leagues.¹⁷⁴ Section 7 is widely regarded by commentators as the most important part of the NLRA.¹⁷⁵ Despite the NLRA’s overall importance to unions, it has limited applicability to the CBA’s entered into between leagues and unions.¹⁷⁶

Even with the limited backing of section 7, players’ unions will be able to challenge the addition of video games into a league’s “other activities” list.¹⁷⁷ Their most persuasive argument may be that Zumaya’s injury, the only documented injury to a professional athlete caused by playing video games, is unique.¹⁷⁸ Unions could

MLBPA). The motivations of other major professional sports unions can be analogized to the MLBPA because they followed MLB in unionizing. *See id.* (stating MLB was first professional sport to begin unionizing in 1954).

173. Gould, *supra* note 137, at 62 (explaining impact of labor law on professional sports in context of cases and statutes specifically related to professional sports).

174. *See id.* at 65 (outlining consequences of creating players’ unions or “associations” in labor law context). The National Labor Relations Act (“NLRA”) is “the primary law governing relations between unions and employers in the private sector.” NLRB - National Labor Relations Board, <http://www.nlr.gov/> (last visited Nov. 15, 2007).

175. *See* CHAMPION, *supra* note 169, at sec. 18:1 (describing sec. 7 as “the heart” of NLRA). The NLRA is codified at 29 U.S.C. §§ 151-169 (2007). Section 7 is codified at 29 U.S.C. § 157 (2007). Section 7 reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Id. Section 7 provides professional athletes with the right to unionize and bargain collectively through their representative, the players’ union. *See* Kaiser, *supra* note 169, at 238 (stating importance of sec. 7 and federal labor law to players’ unions).

176. *See* Kaiser, *supra* note 169, at 237 n.48 (explaining NLRB has limited jurisdiction over CBAs because it lacks provision allowing NLRB to “interpret and enforce” CBAs). “The NLRB will not interpret collective bargaining agreements in order to solve disputes arising under the agreement. . . . [T]he NLRB will only construe the collective bargaining agreement to determine unfair labor practices.” *Id.* at 237 (citing *NLRB v. C. & C. Plywood Corp.*, 385 U.S. 421 (1967)).

177. *See* Beaton, *supra* note 93 (commenting on importance of video games in players’ off-field lives). The unions are responsible for helping the players both on and off the court or field. *See* NBA Player’s Association, *supra* note 170 (providing mission of NBPA); NFL Players Association – About Us, *supra* note 169 (noting NFLPA is charged with protecting rights of NFL players).

178. *See* *Rockin’ Out on PS2 Sidelines Pitcher*, *supra* note 5 (concluding even ankle sprains from pick-up basketball games are more common than Zumaya’s video game injury).

claim that instead of adding video games, the “other activities” clause should only cover activities that cause injury more frequently.¹⁷⁹ Unions could use Zumaya’s quick recovery to deflect the contention that video games negatively affect on-field performance by asserting that there are much more dangerous, injury-causing, off-field activities a player could be engaging in.¹⁸⁰ In addition, teams may be faced with disgruntled players banned from playing video games, an activity they see as a harmless outlet from team-imposed rules.¹⁸¹

Adding video games to the “other activities” clause could also create a slippery slope that permits an activity to be added after just one player is injured.¹⁸² Adding video games, or even just *Guitar Hero*, would open the floodgates to placing other injury-causing activities into the clause.¹⁸³ The players’ unions would be forced to pressure teams to refrain from creating a “uniform injury clause” where any activity that caused injuries to a player during the season

179. See Seepersaud, *supra* note 44 (listing examples of athletes’ off-field injuries and demonstrating how majority occurred from some type of motorbike accident); see also Biertempfel, *supra* note 6 (adding Roethlisberger’s and Gant’s injuries to list of motorcycle accidents).

180. See Surette, *Benches*, *supra* note 4 (detailing how Zumaya was asked to stop playing, which he did, and his subsequent pain-free pitching in 2006 World Series). Unions can compare this to motorcycle injuries that, depending on severity, can take extended periods to recover from. See Biertempfel, *supra* note 6 (providing details of injuries suffered by Roethlisberger); Seepersaud, *supra* note 44 (detailing severe injuries Winslow and Williams suffered from after motorcycle accidents). Zumaya’s injury was nowhere near as severe as these injuries. See Morosi, *Hummin’*, *supra* note 34 (explaining that Zumaya’s right wrist and forearm inflammation kept him from pitching for only three games).

181. See Beaton, *supra* note 93 (explaining that though athletes may play video games for long periods, they view video games as way to relax and to escape team restrictions); Briggs, *supra* note 99 (finding video games are relaxing time-killers and help teammates bond).

182. See Posting of Geoffrey Rapp to Sports Law Blog, *supra* note 5 (questioning whether “other activities” clauses should be broadened after details of Zumaya’s injury were made public); see also *Rockin’ Out on PS2 Sidelines Pitcher*, *supra* note 5 (suggesting teams add *Guitar Hero* to “other activities” list immediately after Zumaya’s injury was fully publicized).

183. See Associated Press, *Cubs’ Wood Takes a Spill, but Shouldn’t Miss Much Time*, ESPN.COM, Feb. 18, 2007, <http://sports.espn.go.com/mlb/news/story?id=2767126> [hereinafter *Wood*] (noting Chicago Cubs pitcher Kerry Wood would not pitch from mound for few days due to stomach and chest injuries resulting from slip while getting out of his home hot tub). The unions could argue that creating this type of restriction would also extend so far as to ban household pets. See Associated Press, *Griese Returns to Practice After Tripping over Dog*, ESPN.COM, Sept. 26, 2002, <http://espn.go.com/nfl/news/2002/0926/1437245.html> [hereinafter *Griese*] (explaining how then-Denver Broncos quarterback Brian Griese sprained his ankle after tripping over his dog).

was inserted into the clause.¹⁸⁴ If activities were added this easily, unions could then assert that expanding the prohibited "other activities" harms players by creating too broad a clause.¹⁸⁵

A third argument against adding video games to the "other activity" prohibitions is that this addition will be met with the same reluctance and lack of enforcement other already prohibited activities receive.¹⁸⁶ A valid question that unions could raise is why a blanket ban on video games should be added when teams are unlikely to void a player's contract and actually enforce it.¹⁸⁷ Despite the notion that teams strictly enforce the "other activities" clauses in player contracts, in reality, the teams have not been so uncompromising.¹⁸⁸ While certain players have been monetarily disciplined for riding motorcycles in breach of their contracts, only a select few who were injured while engaging in "other activities" have actually had their contracts voided.¹⁸⁹ If teams decide to po-

184. See *Griese*, *supra* note 183 (describing how Griese's injury occurred days before Denver's upcoming Monday night game). Wood's injury happened at the beginning of Spring Training, which is the technical beginning of the baseball season. See *Wood*, *supra* note 183 (indicating Wood had participated in drills when pitchers and catchers first reported to spring training).

185. See *Hackney*, *supra* note 11 ("The clauses can go as broad as the imagination of the team . . ."). For a detailed discussion on the broad nature of current "other activities" clauses in major professional sports leagues, see *supra* notes 49-75 and accompanying text.

186. Compare *Rolfe*, *supra* note 42 ("[Winslow, Boone, and Gant] . . . are but a few of the athletes who have indulged their extracurricular passions and paid a stiff tab."), with *Seepersaud*, *supra* note 44 (detailing consequences of injuries to athletes Boone, Winslow, Williams et. al.). "[T]eams do seem reluctant to invoke this clause," even when the injury has a serious, career-altering effect on the athlete. See *Biertempfel*, *supra* note 6 (quoting Ham that teams are hesitant to "play hardball").

187. See *Reynolds*, *supra* note 12 (acknowledging players, like Roethlisberger, Winslow, and Williams, who have engaged in "other activities" that resulted in serious injury have left their teams no other choice but to prohibit their pursuit of "other activities"). The problem stems from the fact that prohibition of a certain activity does not always translate into a player's contract being voided without compensation. See *Seepersaud*, *supra* note 44 (explaining Winslow's contract prohibited him from riding a motorcycle, but his team only recouped some of his signing bonus money and a small amount of his salary after his accident).

188. See *Seepersaud*, *supra* note 44 (explaining teams have recouped money but have also given termination pay or severance pay and only taken parts of signing bonuses rather than voiding contracts without providing some compensation). Teams may believe that if they do not utilize their player's services for a period of time, they should get to recoup their money; on the contrary, teams remain reluctant to harshly penalize their players. See *Biertempfel*, *supra* note 6 (explaining team's thought process, but showing actual practice in wake of Roethlisberger injury). This is contrary to the idea that teams take a hard line with clause violators. See *Seepersaud*, *supra* note 44 ("The four major sports are not particularly friendly to players who get hurt participating in risky pastimes.").

189. See *Biertempfel*, *supra* note 6 (describing situations of Ron Gant and Aaron Boone). While Boone was released from his contract, he received termina-

lice what players see as a relaxing activity, they would become akin to parents who punish their children for certain behaviors, rather than professional organizations dealing with professional athletes.¹⁹⁰

Finally, unions could argue that video games should only be placed into the “other activities” clauses within individual player contracts.¹⁹¹ This is the best way for teams to avoid a CBA issue with the unions because it has already been done in the context of other specific activities without problem.¹⁹² Most unions, however, would probably acknowledge that this insertion does not completely avoid a CBA-related issue.¹⁹³ If a team wants to keep its players from playing video games during the season, this seems like the best option.¹⁹⁴ It is unlikely that any of the four major players’ unions would simply agree to such a prohibition, however, because it would be a detriment to those they represent.¹⁹⁵ The focus on fur-

tion pay and was offered a contract by another team. *See Seepersaud, supra* note 44 (discussing Boone’s situation). Jay Williams’ injury further demonstrates the reluctance of teams to completely discharge a player. *See id.* (stating Williams was cut for violating his contract, but received \$3 million in severance pay); *see also* Biertempfel, *supra* note 6 (explaining Chicago Bulls honored one year of Williams’ three remaining post-accident contract years). While teams may not appear to be friendly to players who violate their contracts, they are not completely unsympathetic, even after losing their investment in that player. *See id.* (providing Williams’ situation as example where team “didn’t play hardball” even though they had every right to under the player’s contract).

190. *See Franciscutti, supra* note 3 (stating that Zumaya admits he will not stop playing *Guitar Hero*, even after his injury, its bad timing, and its negative effect on his team); *see also* Garber, *supra* note 8 (commenting on athletes using video games for recreation). Unions could argue that professional athletes are just that - professionals - and they are able to determine when and when not to play video games. *See Briggs, supra* note 99 (quoting Cleveland Indians Manager Eric Wedge: “[t]hey understand what it means to be a pro and the time of when things should or shouldn’t happen.”).

191. *See Hackney, supra* note 11 (noting teams’ ability to specifically tailor “other activities” clauses within individual player contracts in accordance with player’s personal hobbies); Reynolds, *supra* note 12 (focusing on how some contracts contain specific prohibitions while others do not).

192. *See Hackney, supra* note 11 (explaining possibility for clause to be tailored to specific player if team is aware of activities in which player likes to participate); *see also* Reynolds, *supra* note 12 (citing Winslow as example of athlete who had prohibition against riding motorcycles in his contract); *see generally* Helfand, *supra* note 15 (concluding players can have their contracts revoked because of prohibitory clauses included in them).

193. *See Dougherty, supra* note 11 (explaining language of league’s CBA can limit ability to prohibit players from engaging in specific activities).

194. *See Bishop, supra* note 93 (finding that this prohibition has been done for one game by one professional team).

195. For a further discussion of why the unions’ agreement to this prohibition would be detrimental to the players they represent, *see supra* notes 168-71 and accompanying text.

ther restrictions on “other activities” does not necessarily mean the unions will simply yield and allow the leagues to insert whatever language they want into their players’ contracts.¹⁹⁶

IV. PREDICTING THE FUTURE OF VIDEO GAMES IN “OTHER ACTIVITIES” CLAUSES – ARE LEAGUES STUCK WITH UNEVOLVING CLAUSES IN STANDARD PLAYER CONTRACTS?

Initially, it might seem like an overreaction for teams to push for video game restrictions in player contracts after only one documented, non-permanent, video game-related injury.¹⁹⁷ Nonetheless, teams have the ability to restrict athletes from participating in off-field activities that could cause significant injuries or impair their athletic abilities. Teams have a persuasive argument that playing video games should be added to the already existing “other activities” restrictions.¹⁹⁸ Each league’s CBA-based standard player contract provides teams with the contractual ability to void a player’s contract for an off-field injury.¹⁹⁹ Teams cannot afford to adhere to the idea that athletes are simply ultra-competitive and to accept video game addiction as part of that competitiveness.²⁰⁰

196. See Biertempfel, *supra* note 6 (explaining trend in pro sports is to add restrictions to “other activities” clauses). “Contracts will become more specific” and this issue will be more prominent. *Id.* During CBA negotiations, unions will have to “negotiate with owners the amount of money that teams can recoup or withhold from players” injured engaging in off-field activities. See Reynolds, *supra* note 12 (explaining component of CBA ratification for NFL CBA negotiations). The unions will push and fight for concessions in collective bargaining. See Dougherty, *supra* note 11 (explaining how NFLPA fought for certain issues during negotiations to extend their CBA).

197. See *Guitar Hero*, *supra* note 2 (explaining Zumaya’s injury and how long it kept him from pitching); see also Morosi, *Hummin’*, *supra* note 34 (explaining Tigers’ training staff’s conclusion that his injury was similar to those caused by playing guitar). For a detailed discussion of Zumaya’s season, including his injury, see *supra* notes 24–40 and accompanying text.

198. See Rieber, *supra* note 6 (providing language of each league’s “other activities” clause and demonstrating ability of each to add more prohibited activities to clause). For a detailed discussion of how all four major sports leagues can add video games to their already existing “other activity” restrictions, see *supra* notes 123–67 and accompanying text.

199. See Seepersaud, *supra* note 44 (“[M]ost standard contracts in baseball, football, basketball, and hockey spell out what activities are definite don’ts.”).

200. See Hackney, *supra* note 11 (“[T]he reality is that professional athletes are ultra-competitive, often feel invincible, and are willing to put their bodies at risk”); Rolfe, *supra* note 42 (stating these characteristics “are understandable”). This competitive drive helps these athletes become great at what they do. See Hackney, *supra* note 11 (discussing impact of these qualities). These characteristics also make teams continue to place “other activities” clauses into contracts. See *id.* (noting team insistence on clauses).

While injuries from playing video games may not rise to the level of some more dangerous “other activities,” video games have the potential to cause more injuries during the season.²⁰¹

Any action taken by teams and the leagues will be met with resistance from the players’ unions.²⁰² The unions are vested with the duty of protecting the athletes both on and off the field.²⁰³ Allowing teams to prohibit an off-field activity after a minor injury would not conform to this duty.²⁰⁴ The unions could raise compelling arguments against including video games in “other activities” clauses.²⁰⁵ The most notable argument is that in the wake of recent “other activities” injuries, these clauses have rarely been completely enforced.²⁰⁶ The unions could also argue that the enforcement of other, more dangerous “other activities” should take priority over the enforcement of a ban against video games.²⁰⁷

The ultimate fact is that Zumaya did not breach his contract by playing *Guitar Hero* during the ALCS.²⁰⁸ At that time, no standard player contract included video games in its prohibitory “other activities” clause, and no team has sought to add video games to the clause.²⁰⁹ It is possible Zumaya’s injury could change this since it caused other professional sports teams to become aware of this po-

201. For a detailed discussion of how video games can impact a professional athlete during the season, see *supra* notes 98-104 and accompanying text.

202. See Dougherty, *supra* note 11 (noting unions will fight during CBA negotiations for concessions that are in best interest of their players).

203. See NBA Player’s Association, *supra* note 170 (stating NBPA’s purpose as example of purpose of all sports league unions).

204. See National Hockey League Players’ Association, *supra* note 170 (providing information exemplifying duty of NHLPA as labor union to represent their players’ interests).

205. For a detailed discussion of the arguments unions could make against adding video games to “other activities” clauses, see *supra* notes 177-96 and accompanying text.

206. See Biertempfel, *supra* note 6 (comparing position of teams who claim to want to get their money back to actual practice of those teams, who fail to set hard line with players); Seepersaud, *supra* note 44 (noting teams’ failure to void contracts, even when players are injured participating in prohibited activities).

207. See Seepersaud, *supra* note 44 (explaining how even though Jay Williams and Kellen Winslow committed blatant contract violations by riding their motorcycles their teams did not totally invalidate their contracts).

208. See Posting of Geoffrey Rapp to Sports Law Blog, *supra* note 5 (presenting initial inquiry into whether Zumaya breached his contract by playing game). Zumaya’s injury allowed fans and his own team to question his intelligence for playing *Guitar Hero* during the playoffs. See Hunt, *supra* note 35 (providing fan reaction to cause of Zumaya’s injury and Tigers’ confirmation of that cause).

209. For a detailed discussion of what “other activities” are prohibited by the standard player contracts of the four major professional sports leagues, see *supra* notes 49-75 and accompanying text.

tentially harmful activity.²¹⁰ The crucial component of any “other activity” is the potential for injury that accompanies participation in the activity.²¹¹ Video game play meets this crucial component, because it has been proven playing video games has the potential to cause injuries.²¹² For now, though, Joel Zumaya and his fellow professional athletes can continue to strum away at their favorite video games, even amongst speculation that the scope of “other activities” clauses might soon be widened.²¹³

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210. See *Rockin’ Out on PS2 Sidelines Pitcher*, *supra* note 5 (noting teams may want to add video games to contract restrictions if Zumaya’s injury is any indication of trend). Given that Zumaya’s injury occurred when it did, the Tigers would be well advised not to allow him to continue playing *Guitar Hero*, particularly in light of the fact that he plans to continue playing. See Franciscutti, *supra* note 3 (providing that Zumaya does not plan to stop playing *Guitar Hero*); see also Gage, *supra* note 38 (describing Zumaya’s feelings about *Guitar Hero*). For a further discussion of why it would be an improper decision to allow Zumaya to continue playing video games during the season, see *supra* notes 35-41 and accompanying text.

211. See Rieber, *supra* note 6 (detailing how each clause is aimed at off-field activities with most potential to cause injury); see also Seepersaud, *supra* note 44 (explaining “other activities” clauses further by providing examples of allowed activities).

212. For a detailed discussion of Zumaya’s injury and its aftermath, see *supra* notes 28-41 and accompanying text.

213. See Posting of Geoffrey Rapp to Sports Law Blog, *supra* note 5 (questioning whether MLB needs to broaden its “other activities” clause to include video games after reason behind Zumaya’s injury was made public); *Rockin’ Out on PS2 Sidelines Pitcher*, *supra* note 5 (suggesting teams in all leagues add *Guitar Hero* to list of restrictions).

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