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JJ. Pristanski

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**NO RISKY BUSINESS:
A PROPOSAL TO MODIFY THE HAZARDOUS ACTIVITIES CLAUSE IN
PROFESSIONAL SPORTS**

*J.J. Pristanski**

INTRODUCTION

The growth of the American sports industry in the 20th century led to an astronomical increase in player salaries. In 1904, the highest paid baseball player, Joe McGinnity of the New York Yankees, was paid \$5,000.¹ Compare this to 2017, where 36 Major League Baseball players were paid a salary of over \$20 million a piece.² This increase in player compensation has created a need for teams to protect their investments in highly paid talent.

One way owners have tried to protect their investment in multimillion dollar players is through the hazardous activities clause: a contractual provision that prohibits players from partaking in certain dangerous activities. While the hazardous activities clause is a logical way to limit avoidable player injury in theory, the current hazardous activities clauses employed by Major League Baseball (MLB), the National Hockey League (NHL), the National Basketball Association (NBA), the Women's National Basketball Association (WNBA), and the National Football league (NFL), are plagued by issues. Specifically, they fail to effectuate the parties' intent, and are difficult to interpret and apply.

The purpose of this article is threefold: (1) to offer a brief overview of the hazardous activities clause, including its history, purpose, enforcement, and shortcomings; (2) to demonstrate the difficulty in interpreting and applying the current hazardous activities clauses by applying them to various activities; and (3) to propose the adoption of an improved hazardous activities clause: the *abnormally dangerous clause*.

PART I: OVERVIEW OF THE HAZARDOUS ACTIVITIES CLAUSE

A. Jim Lonborg and the Birth of a Clause

Red Sox pitcher Jim Lonborg had a breakout season in 1967. Lonborg posted a 22-9 record and a 3.16 earned run average in 273.1 innings.³ This performance earned him an All-Star nod, Cy Young Award, and the American League MVP Award.⁴ In December of the same year, Lonborg took to the slopes of Lake Tahoe, forever altering the path of his career and the standard player contract in the process.⁵

* J.D. Candidate, University of Minnesota Law School, 2019; BA, Carleton University, 2016. I would like to thank Professor Christopher D. Soper for his thoughtful feedback on this Article. I would also like to thank my parents, Bambury and Bill, for their love and support.

¹ Michael Haupt, MLB's annual salary leaders since 1874, Society for American Baseball Research (2016), <http://sabr.org/research/mlbs-annual-salary-leaders-1874-2012> (last visited Nov 14, 2017).

² Cork Gaines, The 26 highest-paid players in baseball, Business Insider (2017), <http://www.businessinsider.com/mlb-highest-paid-players-2017-6/#1-clayton-kershaw-330-million-26> (last visited Nov 14, 2017).

³ Jim Lonborg Stats, Baseball-Reference.com, <https://www.baseball-reference.com/players/l/lonboji01.shtml> (last visited Nov 5, 2017).

⁴ *Id.*

⁵ Adam Kilgore, *Yes, there are some things pro athletes aren't allowed to do*, The Washington Post (2015), https://www.washingtonpost.com/news/sports/wp/2015/07/06/yes-there-are-some-things-pro-athletes-arent-allowed-to-do/?utm_term=.c03acc4b3802 (last visited Oct 8, 2017).

On his last run of the day, Lonborg crashed and tore ligaments in his left knee.⁶ To the dismay of the Red Sox, who had just given Lonborg a raise before his skiing accident,⁷ Lonborg would miss significant time in the 1968 season, not starting a game until the middle of June.⁸ His career was mostly *downhill* from there. He continued to battle various injuries⁹, and it took Lonborg the next four seasons to accumulate the number of wins he achieved in the 1967 season.¹⁰ Lonborg's misfortune caused owners to rethink the way they protect their investment in talent, ultimately leading to the creation of what we know today as the hazardous activities clause.¹¹

Around the same time Lonborg and his career took a tumble down a Lake Tahoe mountain, player salaries were beginning to skyrocket. The mainstream adoption of the television led to lucrative broadcasting agreements in the '50s and '60s, and it didn't take long for the players to get a piece of the pie.¹² In 1966 Sandy Koufax and Don Drysdale signed one-year deals worth a respective \$125,000 and \$110,000 with the Los Angeles Dodgers; the two largest contracts in baseball history at the time.¹³ With the increased investment in talent came an increased risk for owners, who quickly realized they couldn't afford to lose Cy Young and MVP Award winners to avoidable off-field injuries.

In today's sports economy, where the highest paid players earn over \$30 million a season *before endorsements*¹⁴, the need to protect investments in players is more important than ever. The hazardous activities clause is a contractual tool employed to mitigate the risk of injuries occurring away from the game.¹⁵ The clause generally allows a team to restrict a player's ability to partake in various listed activities through the reserved right to modify the player's pay in the event the player is found to be partaking in and/or is injured through a banned activity.¹⁶

Some form of the hazardous activities clause appears in the MLB, NHL, NBA, WNBA, and NFL's standard player contracts. These standard player contracts, sometimes referred to as uniform player contracts, are form employment contracts used by each league for all player

⁶ *Id.*

⁷ *Id.*

⁸ Jim Lonborg Stats, Baseball-Reference.com, <https://www.baseball-reference.com/players/l/lonboji01.shtml> (last visited Nov 5, 2017).

⁹ Adam Kilgore, *Yes, there are some things pro athletes aren't allowed to do*. The Washington Post (2015), https://www.washingtonpost.com/news/sports/wp/2015/07/06/yes-there-are-some-things-pro-athletes-arent-allowed-to-do/?utm_term=.c03acc4b3802 (last visited Oct 8, 2017).

¹⁰ Jim Lonborg Stats, Baseball-Reference.com, <https://www.baseball-reference.com/players/l/lonboji01.shtml> (last visited Nov 5, 2017).

¹¹ Adam Kilgore, *Yes, there are some things pro athletes aren't allowed to do*. The Washington Post (2015), https://www.washingtonpost.com/news/sports/wp/2015/07/06/yes-there-are-some-things-pro-athletes-arent-allowed-to-do/?utm_term=.c03acc4b3802 (last visited Oct 8, 2017).

¹² Debbie Stephenson et al., *When Did Athletes Start Getting Rich?* The DealRoom (2014), <https://www.firmex.com/thedealroom/when-did-athletes-start-getting-rich/> (last visited Nov 5, 2017).

¹³ *Id.*

¹⁴ Tyler Lauletta, *These are the 20 highest-paid athletes in the world* Business Insider (2017), <http://www.businessinsider.com/highest-paid-athletes-world-2017-6> (last visited Nov 5, 2017).

¹⁵ Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. Legal Aspects Sport 5, 14 (2011).

¹⁶ *Id.*

signings. Each league's standard player contract can be found in the respective league's collective bargaining agreement (CBA).¹⁷

The banned activities listed in each league's standard player contract vary from league-to-league, but generally include activities such as skydiving, wrestling, mountain climbing, riding motorcycles, operating aircrafts, and of course, skiing. For example, the current MLB standard player contract includes the following hazardous activities clause:

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.¹⁸

B. Enforcing the Hazardous Activities Clause

In 2004, the New York Yankees released third baseman Aaron Boone after Boone injured the anterior cruciate ligament (ACL) in his left knee during a game of pick-up basketball.¹⁹ Since the hazardous activities clause in his player contract prohibited him from participating in basketball, Boone's actions constituted a breach of contract.²⁰ As a result, the Yankees were able to release Boone and avoid paying the remainder of his salary.²¹ Although Boone was entitled to 30 days of termination pay per his contract, Boone's off-field basketball activity ultimately cost him \$4.8 million of his \$5.75 million one-year deal.²² Yankees General Manager Brian Cashman told reporters that the Yankees were "exercising [their] rights in the contract," before asking reporters, "[w]ould we want to pay him full salary despite the injury? That wouldn't make any sense whatsoever from a business perspective."²³

The Chicago Bulls chairman Jerry Reinsdorf did not share Cashman's view when newly signed Bulls prospect Jay Williams suffered a career-ending injury while riding a motorcycle in June 2002.²⁴ Instead of terminating Williams's contract for breaching the hazardous activities

¹⁷ See Major League Baseball, Collective Bargaining Agreement (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf>; see also National Hockey League, Collective Bargaining Agreement (Feb. 15, 2013), <https://www.nhlpa.com/the-pa/cba>; see also National Basketball Association, Collective Bargaining Agreement (Jan. 19, 2017), <https://nbpa.com/cba/>; see also Women's National Basketball Association, Collective Bargaining Agreement (Mar. 5, 2014), <https://wnbpa.com/wp-content/uploads/2017/07/WNBA-CBA-2014-2021Final.pdf>; see also National Football League, Collective Bargaining Agreement (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

¹⁸ Major League Baseball, Collective Bargaining Agreement (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf>.

¹⁹ Associated Press, With release, Boone is a free agent ESPN (2004), <http://www.espn.com/mlb/news/story?id=1744985> (last visited Nov 6, 2017).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Associated Press, Settlement reportedly worth \$3 million ESPN (2004), <http://www.espn.com/nba/news/story?id=1722485> (last visited Nov 6, 2017).

clause that banned motorcycling, the Bulls settled with Williams for an undisclosed amount believed to be over \$3 million.²⁵ Williams's agent acknowledged that his client could have been released for breaching his contract, noting, "[w]e're obviously extremely grateful to Jerry Reinsdorf. He has done something that he is not obligated to do, which basically is to give Jay quite a handsome settlement."²⁶ Although there is no definitive answer as to why the Bulls would agree to pay over \$3 million to a player who breached their agreement, the move was likely motivated by public relations interests.

C. Problems With Current Hazardous Activities Clauses

The hazardous activities clauses that are currently employed by the NHL, MLB, NBA, WNBA, and NFL seem to have been drafted as afterthoughts to the many other important provisions in the leagues' massive collective bargaining agreements.²⁷ The clauses fail to effectuate the parties' intent by banning many safe activities and permitting some dangerous ones, and by including weak catchall provisions. The current clauses are also difficult to interpret. Fortunately, each of these problems can be resolved, as indicated in Part III below.

i) Arbitrary List of Banned Activities and Failure to Effectuate the Parties' Intent

Presumably, the intent of the owners in negotiating and drafting a hazardous activities clause is to protect their players from injury, while the intent of the players is to reserve some individual liberty. Therefore, to best effectuate the parties' intent, the ideal clause would prohibit activities that are likely to lead to injury, while permitting athletes to partake in activities that involve minimal risk. One way to achieve this would be to rely on empirical evidence when drafting the hazardous activities clause; banning activities that are statistically proven to lead to significant injury, while permitting activities that are empirically safe. This is part of what I propose in Part III.

When safe activities are banned, and dangerous activities are inadvertently permitted, the hazardous activities clause fails to effectuate both the owners' intent to keep players' safe, and the players' intent to reserve individual liberty. Unfortunately, due to an apparent disregard of empirical evidence, this is the state of the current hazardous activities clauses.

²⁵ *Id.*

²⁶ *Id.*

²⁷ There is no indication that the hazardous activities clauses have ever been at the forefront of CBA negotiations. *See* Mark Jones, NHL Lockout: Details and Analysis on Every Topic of NHL's New CBA Offer, Bleacher Report (2017), <http://bleacherreport.com/articles/1373930-nhl-lockout-topic-by-topic-analysis-and-breakdown-of-nhls-new-cba-offer> (last visited Dec 1, 2017) (noting big issues during negotiation of NHL's 2013 CBA included: the salary cap, hockey-related revenue split, age of unrestricted free agency, year-to-year salary variation within contracts, maximum contract length, revenue sharing amongst teams, escrow, length of entry-level contracts, and how revenue would be split in a lock-out shortened season); *see also* Kevin Allen, NHL still in stalemate, stuck on three key issues, USA Today (2012), <https://www.usatoday.com/story/sports/nhl/2012/11/13/nhl-lockout-three-key-issues/1703175/> (last visited Dec 1, 2017) (noting big three issues during negotiation of NHL's 2013 CBA included: hockey-related revenue split, contract rights, and how revenue would be split in a lock-out shortened season).

Consider, for example, the NBA and WNBA's hazardous activities clauses. Both ban players from skydiving, but explicitly permit players to partake in softball and volleyball.²⁸ While this may seem logical to a layperson, empirical data suggests otherwise. The Consumer Product Safety Commission produced a report illustrating a distribution of injuries by sport in the United States in 2013.²⁹ The study tracked injuries treated in hospital emergency departments³⁰, and therefore excludes minor scrapes and bruises. In total, there were 100,010 softball injuries in 2013³¹, including one death³², and 50,845 volleyball injuries.³³ It is estimated that 40 million people play softball in the United States³⁴, and 46 million Americans play volleyball.³⁵ That leads to *hospitalized*-injury rates of one in 400 softball players, and one in 905 volleyball players. In comparison, the United States Parachute organization reported 2,129 skydiving injuries requiring medical care *of any kind*, or only one injury per 1,515 skydivers.³⁶ As a result of this arbitrary banning of skydiving and permission to partake in softball and volleyball, the NBA and WNBA's hazardous activities clauses prohibit an empirically safe activity while permitting two high-risk sports. As a result, the clauses fail to effectuate the owners' intent to protect highly paid athletes from injury, and the players' intent to reserve the individual liberty to partake in safe activities.

ii) NHL and MLB's Weak Catchall Provisions and Failure to Effectuate the Owners' Intent

The NHL and MLB's hazardous activities clauses also fail to effectuate the owners' intent through the inclusion of poorly drafted catchall provisions that only ban participation in other *sports*, and not dangerous activities *generally*.

The NBA, WNBA, and NFL each include a broad catchall provision within their hazardous activities clause. The NFL's clause, for example, notes, "[p]layer 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."³⁷ In comparison, however, the NHL and MLB leave the door open for players to engage in various dangerous activities by including a narrow catchall provision that only bans other *sports*. For example, the NHL's clause notes, "[p]layer agrees that he will not ... engage or participate in

²⁸ National Basketball Association, Collective Bargaining Agreement (Jan. 19, 2017), <https://nbpa.com/cba/>; Women's National Basketball Association, Collective Bargaining Agreement (Mar. 5, 2014), <https://wnbpa.com/wp-content/uploads/2017/07/WNBA-CBA-2014-2021Final.pdf>.

²⁹ National Safety Council, Injury facts: 2015 Edition (2015) (citing Consumer Product Safety Commission).

³⁰ *Id.*

³¹ *Id.*

³² Susan Shroder & Teri Figueroa, Boy dies on birthday after getting hit by softball, *sandiegouniontribune.com* (2013), <http://www.sandiegouniontribune.com/sdut-teen-softball-collapse-ramona-school-2013apr10-htmlstory.html> (last visited Dec 1, 2017).

³³ National Safety Council, Injury facts: 2015 Edition (2015) (citing Consumer Product Safety Commission).

³⁴ Peter Francesconi, Softball: Playing by the Numbers Sports Destination Management (2012), <http://www.sportsdestinations.com/Sports/Softball/softball-playing-numbers-5653> (last visited Nov 5, 2017).

³⁵ History of Volleyball, NCVA, <https://ncva.com/info/general-info/history-of-volleyball/> (last visited Nov 5, 2017).

³⁶ United States Parachute Association, Skydiving Safety United States Parachute, <https://uspa.org/Find/FAQs/Safety> (last visited Oct 9, 2017).

³⁷ National Football League, Collective Bargaining Agreement (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> (emphasis added).

football, baseball, softball, hockey, lacrosse, boxing, wrestling *or other athletic sport* without the written consent of the Club.”³⁸ The MLB’s clause similarly bans a number of activities “*or other sport* involving a substantial risk of personal injury.”³⁹

Since these catchall provisions only mention *other sports*, the NHL and MLB leave the door open to a myriad of dangerous activities that may not be classified as “sports”, but which are extremely dangerous nonetheless. As a result, an NHL or MLB team may have no recourse when a player suffers a career-ending injury while riding a motorcycle or cliff jumping, for example. Since there is no logical explanation as to why the owners would have intended this omission, the NHL and MLB’s weak catchall provisions fail to effectuate the owners’ intent.

A potential remedy for this problem, discussed at greater length in Part III, would be to include a catchall provision that bans *any* activity, sport-related or otherwise, which has been empirically proven to involve a high risk of serious injury.

iii) Issues in Interpretation

Finally, another issue with the current hazardous activities clauses is their ambiguity. In many cases, it is unclear whether an activity is within the scope of a league’s hazardous activities clause. Part II demonstrates this problem through an application of the current hazardous activities clauses to real examples of professional athletes becoming injured away from their sport. Ultimately, issues in interpretation could be ameliorated through the proposed clause discussed in Part III, which is more concrete and less ambiguous.

PART II: INTERPRETING HAZARDOUS ACTIVITIES CLAUSES

Because basketball and motorcycling were both explicitly banned in Aaron Boone and Jay Williams’ hazardous activities clauses, there was little doubt that they had breached their contracts. An issue arises, however, when a professional athlete is injured performing an activity that is not explicitly banned, and where it is unclear whether said activity constitutes a hazardous activity under a league’s ambiguous hazardous activities clause.

A. Injury By Drone

During the 2016 MLB Postseason, Cleveland Indians pitcher Trevor Bauer sliced his hand on one of his drones’ propellers.⁴⁰ As a result, Bauer’s start in Game 2 of the American League Championship Series (ALCS) was pushed back, and when Bauer did pitch in Game 3, he was forced to leave the game in the first inning due to severe bleeding.⁴¹ Although Bauer did not miss enough time for the Indians to consider terminating his contract pursuant to its hazardous activities clause, the injury raises an interesting question as to whether the hazardous

³⁸ National Hockey League, Collective Bargaining Agreement (Feb. 15, 2013), <https://www.nhlpa.com/the-pa/cba> (emphasis added).

³⁹ Major League Baseball, Collective Bargaining Agreement (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf> (emphasis added).

⁴⁰ Andrew Joseph, Trevor Bauer’s drone did some seriously disgusting damage to his finger USA Today (2017), <http://ftw.usatoday.com/2016/10/trevor-bauer-drone-gross-finger-indians-blue-jays-alc> (last visited Nov 6, 2017).

⁴¹ *Id.*

activities clauses found in the NHL, MLB, NBA, WNBA, and NFL standard player contracts would cover a similar drone-related injury.

The hazardous activities clause found in the NBA's standard player contract provides the clearest answer to this question. Its clause notes:

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: ... operating an *aircraft of any kind*...⁴²

Under this language, two arguments could be made for finding a prohibition on flying drones: (1) a reasonable person would recognize that operating a drone involves a substantial risk of injury; or (2) a drone is an aircraft, and is thus covered by the explicit language forbidding the operation of an "aircraft of any kind."⁴³ While the first argument would turn on whether a reasonable person would consider the operation of a drone to be dangerous, which is debatable, the second argument turns on the plain meaning of "aircraft". A dictionary definition notes an aircraft is "[a]ny machine supported for flight in the air by buoyancy or by the dynamic action of air on its surfaces, especially powered airplanes, gliders, and helicopters."⁴⁴ This definition would seemingly include drones. Therefore, an NBA player injured by drone could potentially be released under the league's hazardous activities clause.

In comparison, it is extremely unclear whether operating a drone would constitute a banned activity under the hazardous activities clauses in the WNBA and NFL standard player contracts. The relevant language in the WNBA hazardous activities clause provides, "[p]layer agrees that she will not, without the written consent of the Team, engage in any sport or activity that a *reasonable person* would recognize as involving or exposing the participant to a substantial risk of bodily injury."⁴⁵ This language is identical to the first part of the NBA's clause discussed above, and would be equally debatable based on whether a reasonable person would consider flying drones to be a dangerous activity. Similarly, the relevant language from the NFL's standard player contract provides, "[p]layer 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*."⁴⁶ Although this language removes the reasonable person standard found in the NBA and WNBA's clauses, the issue is similar, and will turn on a determination as to whether operating a drone involves a significant risk of personal injury.

It is also unclear whether operating a drone would constitute a hazardous activity under the NHL and MLB's hazardous activities clauses. The relevant language in the NHL's clause indicates, "[p]layer agrees that he will not during the period of this [Standard Player Contract] ... engage or participate in football, baseball, softball, hockey, lacrosse, boxing, wrestling or

⁴² National Basketball Association, Collective Bargaining Agreement (Jan. 19, 2017), <https://nbpa.com/cba/> (emphasis added).

⁴³ *Id.*

⁴⁴ Dictionary.com, *Aircraft*. Dictionary.com, <http://www.dictionary.com/browse/aircraft> (last visited Oct 9, 2017).

⁴⁵ Women's National Basketball Association, Collective Bargaining Agreement (Mar. 5, 2014), <https://wnbpa.com/wp-content/uploads/2017/07/WNBA-CBA-2014-2021Final.pdf> (emphasis added).

⁴⁶ National Football League, Collective Bargaining Agreement (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> (emphasis added).

other athletic sport without the written consent of the Club.”⁴⁷ Similarly, the MLB’s hazardous activities clause notes,

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*.⁴⁸

The arguments here will turn on whether operating a drone is an “athletic sport” under the NHL’s clause, or an “other sport involving a substantial risk of personal injury” under the MLB’s clause. While some would be quick to dismiss any argument suggesting that operating a drone could be a sport, would their view change if the drone operator were involved in a drone *race*? If car racing is considered a sport, why can’t drone racing be a sport? The Drone Racing League is broadcast on ESPN and ESPN2⁴⁹, and “[d]rone racing . . . has all the attributes of a modern sport: big money, TV coverage, speed, [and] fierce competition. . .”⁵⁰ Therefore, because operating a drone could be considered a sport in the broadest sense of the term, it is unclear whether operating a drone would be banned under both the NHL and MLB’s clauses.

To determine whether operating a drone breaches the WNBA, NFL, NHL, and MLB’s hazardous activities clauses reviewed above, the following questions need to be answered: (1) what constitutes the “reasonable person” standard articulated in the WNBA’s clause, (2) what constitutes the “significant risk of personal injury” standard in the NFL’s clause, (3) what constitutes an “athletic sport” in the NHL’s clause, and (4) what constitutes “other sport involving a substantial risk of personal injury” in the MLB’s clause? While canons of interpretation could be useful here, they ultimately do not solve the mysteries and ambiguities of the current hazardous activities clauses.

i) Intention of the Parties

Since the primary purpose of a contract is to memorialize a private agreement between parties, a key consideration in contract interpretation involves ascertaining the parties’ intentions in forming the agreement.⁵¹ In *Dobson v. Hartford Financial Services Group, Inc.*, the court used the presumed intent of the parties to hold that a contract to pay impliedly involved an interest charge for late payment. The court noted:

Under “general principles of contract law,” a failure to locate explicit contractual language does not mark the end of proper judicial interpretation and construction. Contracting parties often express their agreements imprecisely or incompletely. In such cases, if the

⁴⁷ National Hockey League, Collective Bargaining Agreement (Feb. 15, 2013), <https://www.nhlpa.com/the-pa/cba> (emphasis added).

⁴⁸ Major League Baseball, Collective Bargaining Agreement (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf> (emphasis added).

⁴⁹ Daniel Victor, Drone Racing Becomes ESPN’s Newest Televised Sport *The New York Times* (2016), <https://www.nytimes.com/2016/09/15/sports/drone-racing-espn-sky.html> (last visited Nov 7, 2017).

⁵⁰ Jamie Condliffe, Is Drone Racing a Sport Yet? *MIT Technology Review* (2016), <https://www.technologyreview.com/s/602374/is-drone-racing-a-sport-yet/> (last visited Nov 7, 2017).

⁵¹ 11 Williston on Contracts § 32:2 (4th ed. 1999).

interpreting court can discern from the contract as a whole what the parties “must have intended,” it should enforce that intention despite a lack of express terminology.⁵²

A team attempting to enforce the clause under this canon would likely argue that their intent was to retain a player’s services, and since the player’s services are of no value to the team if the player suffers a serious injury, the prohibited activities should be interpreted broadly. On the other hand, an athlete would likely argue that their intent was to retain some individual liberty and only be restricted from highly dangerous activities; therefore the prohibited activities should be interpreted narrowly. Due to these conflicting intentions, this contract interpretation principle does not resolve the ambiguities.

ii) *Ejusdem Generis*

The *ejusdem generis* principle suggests, “[w]here general words follow specific words ... the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.”⁵³ The Supreme Court used this canon of interpretation to construe what constituted a “violent felony” in a statute that defined the term as “any crime ... that ... is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”⁵⁴ The Court held that the inclusion of specific examples, such as burglary and arson, prior to the catchall provision, suggests that the catchall applies only to crimes similar in nature to the specific examples, and not *all* potentially dangerous crimes.⁵⁵ Otherwise, the Court noted, listing specific crimes before the catchall would be redundant.⁵⁶

Applying this canon of interpretation to the NHL’s hazardous activities clause may lead to a determination that operating a drone is not a banned activity under the clause. The NHL’s hazardous activities clause notes in part, “[p]layer agrees that he will not ... engage or participate in football, baseball, softball, hockey, lacrosse, boxing, wrestling *or other athletic sport* without the written consent of the Club.”⁵⁷ In the same way that burglary and arson were viewed by the Supreme Court to limit the broad language in the subsequent catchall provision to crimes similar to burglary and arson, the specific examples here, such as football and baseball, may limit the “other athletic sport” language to other *similar* sports, as opposed to *all* sports.⁵⁸ Therefore, even if flying or racing drones were considered sports, they would likely be excluded from the NHL’s clause because the specific sports listed in the clause, all of which are more traditional and physical sports, limit the scope of the catchall provision.

Applying *ejusdem generis* to the MLB’s hazardous activities clause would likely lead to a similar outcome. The relevant portion of the MLB’s clause notes, “[player] will not engage in ... any game or exhibition of football, soccer, professional league basketball, ice hockey *or other*

⁵² *Dobson v. Hartford Fin. Servs. Grp., Inc.*, 389 F.3d 386, 399 (2d Cir. 2004) (quoting 11 Williston on Contracts § 31:7 (4th ed. 1999)).

⁵³ *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003).

⁵⁴ *Begay v. United States*, 553 U.S. 137, 142-143 (2008), *abrogated by Johnson v. United States*, 135 S.Ct. 2551 (2015); 18 U.S.C. § 924(e)(2)(B)(ii), *invalidated by United States v. Ebron*, 2017 WL 3337260 (D. Nev. 2017) (*appeal filed*).

⁵⁵ *Begay*, 553 U.S. at 142.

⁵⁶ *Id.*

⁵⁷ National Hockey League, Collective Bargaining Agreement (Feb. 15, 2013), <https://www.nhlpa.com/the-pa/cba> (emphasis added).

⁵⁸ *See Begay*, 553 U.S. at 142.

*sport involving a substantial risk of personal injury.*⁵⁹ Like the NHL example provided above, the list of specific *traditional* sports involving human-to-human contact and a high degree of athleticism prior to the catchall language in the MLB's clause may lead to a determination that the catchall was only meant to include *similar* sports, and would thus not include operating a drone even if it were considered a sport.

The WNBA's hazardous activities clause, on the other hand, may include operating a drone under the *ejusdem generis* canon of interpretation. Its clause bans, "any sport or 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, motorcycling, auto racing, skydiving, bungee-jumping, hang-gliding, in-line skating, skiing, boxing, wrestling, football, soccer, baseball, field or ice hockey, or lacrosse)."⁶⁰ While this clause, like the NHL and MLB clauses discussed above, includes a list of specific activities in addition to a general catchall, its list of specific activities is much wider in scope. More specifically, because the WNBA's clause does not just list traditional sports, but also includes aerial activities, such as skydiving and hang-gliding, and activities involving motorized vehicles, such as motorcycling and auto racing, there is a greater chance that drone operation is similar enough in nature to the preceding specific words to constitute a hazardous activity. Ultimately, however, whether operating a drone constitutes a hazardous activity under the WNBA's clause remains unclear.

The *ejusdem generis* canon of interpretation is not applicable to the NFL's hazardous activities clause because its clause does not list specific examples of banned activities. Instead, it bans playing football for other clubs and "any activity other than football which may involve a significant risk of personal injury."⁶¹ Pursuant to the Supreme Court's reasoning in *Begay v. United States*,⁶² this exclusion of specific examples could lead to a broader interpretation of banned activities, and therefore may include flying a drone if the activity is found to involve "a significant risk of personal injury."⁶³

iii) *Empression Inius Est Exclusio Alterius*

Another canon of interpretation that could be useful here is *empression inius est exclusio alterius*, which suggests, "to express or include one thing implies the exclusion of another."⁶⁴ Under this canon, players in the NHL, WNBA, MLB, and NFL could argue that since the hazardous activities clause in their contract includes a list of banned activities that does not include operating drones, the activity isn't prohibited. Due to the catchall provision in each league's hazardous activities clause, however, which essentially indicate that the list of banned activities is not exhaustive, this is not a strong argument.

In *Quadrant Structured Products Co. v. Vertin*, the New York Court of Appeals expanded on *empression inius est exclusio alterius* by noting that the omission of a term which is generally

⁵⁹ Major League Baseball, Collective Bargaining Agreement (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf> (emphasis added).

⁶⁰ Women's National Basketball Association, Collective Bargaining Agreement (Mar. 5, 2014), <https://wnbpa.com/wp-content/uploads/2017/07/WNBA-CBA-2014-2021Final.pdf>.

⁶¹ National Football League, Collective Bargaining Agreement (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

⁶² *Begay*, 553 U.S. at 142-43.

⁶³ National Football League, Collective Bargaining Agreement (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

⁶⁴ *City of Rock Hill v. Harris*, 391 S.C. 149, 154 (2011).

found in similar contracts suggests the omission was intentional.⁶⁵ Here, the non-NBA players could try to argue that since the NBA's hazardous activities clause explicitly includes "operating an aircraft of any kind"⁶⁶, and the other leagues do not explicitly ban operating drones or aircrafts, the other leagues all intended the omission. However, since the NBA is the *only* league to include the ban on operating aircrafts, as opposed to being the industry standard, this is a weak argument.

iv) *Contra Proferentem*

Finally, the rule of *contra proferentem* indicates that ambiguous language should be interpreted in favor of the non-drafting party.⁶⁷ The rule is generally used as a tiebreaker and as last resort when other methods of interpretation fail to resolve an ambiguity.⁶⁸ The Restatement (Second) of Contracts notes, "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."⁶⁹ This principle provides an incentive for the drafting party to draft in clear and unambiguous language.⁷⁰

In *Westchester Resco Co. v. New England Reinsurance Corp.*, a case involving an insurance contract that listed two different policy periods within the same agreement, the court used *contra proferentem* to rule in favor of the non-drafting party, there the insured, by adopting the policy period that was more favorable to the insured.⁷¹

In theory, the *contra proferentem* principle could be similarly applied as a last resort to the ambiguous hazardous activities clauses. Although the CBAs containing the uniform player contracts and hazardous activities clauses are the result of significant negotiation between leagues and players' associations, the leagues are generally primarily responsible for drafting the CBAs. As a result, the players may try to argue that the ambiguities contained within the hazardous activities clauses should be interpreted narrowly and in their favor.

The NFL is the only league that protects itself from the *contra proferentem* principle. Its CBA contains a mutual drafting clause, which states:

This Agreement shall be deemed to have been mutually drafted and shall be construed in accord with its terms. No party shall be entitled to any presumption or construction in such party's favor as a result of any party having assumed the primary burden of drafting any part of this Agreement.⁷²

⁶⁵ *Quadrant Structured Prod. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (2014).

⁶⁶ National Basketball Association, Collective Bargaining Agreement (Jan. 19, 2017), <https://nbpa.com/cba/>.

⁶⁷ 11 Williston on Contracts § 32:10 (4th ed. 1999).

⁶⁸ *Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 456 (Mich. 2003) (quoting 11 Williston on Contracts § 32:12 (4th ed. 1999)).

⁶⁹ Restatement (Second) of Contracts § 206 (1981).

⁷⁰ Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 Mich. L. Rev. 1105, 1121 (2006).

⁷¹ *Westchester Resco Co. v. New England Reinsurance Corp.*, 818 F.2d 2, 3 (2d Cir. 1987).

⁷² National Football League, Collective Bargaining Agreement (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

This clause indicates that the contract is to be viewed as having been drafted by both parties, thus eliminating the possibility of interpreting any ambiguity in favor of the non-drafting party.

Ultimately, *contra profentum* and the other canons of interpretation discussed herein are difficult to apply and often lead to conflicting outcomes. As a result, the ambiguities in the hazardous activities clauses are left largely unresolved.

B. Other Examples: Injury by *Guitar Hero*, Paintball, and Fireworks

The drone injury suffered by Trevor Bauer is not the only instance in which applying the leagues' hazardous activities clauses is a tough task. The difficulty in applying the clauses to other real-world examples further demonstrates the issues with the current clauses, and the need to revise the hazardous activities clauses used in professional sport.

During the 2006 MLB Postseason, Detroit Tigers relief pitcher Joel Zumaya was sidelined with inflammation in his right arm.⁷³ Unlike most pitchers shelved with arm problems, Zumaya's injury had nothing to do with pitching, but instead stemmed from excessive *Guitar Hero* playing.⁷⁴ Although Zumaya's injury was not serious enough for the club to consider terminating his contract, the injury raises an interest question: would injury by videogame ever constitute a dangerous activity under any of the leagues' hazardous activities clauses? Thanks in part to the recent increase in popularity of e-sports⁷⁵, *Guitar Hero* could potentially be considered a sport and thus be banned under the "or other sport" language that appears in the MLB and NHL's clauses.⁷⁶ Ultimately, however, the answer is unclear.

Although fictional, Vernon Littlefield's torn achilles as a result of playing paintball in HBO's *Ballers* raises a similar question as to whether playing paintball could lead to a player's release pursuant to the "or other sport" language in the MLB and NHL's hazardous activities clauses.⁷⁷ Paintball isn't exactly played at the Olympics, but it does involve many sport-like characteristics, including athleticism, teams, rules, and winners and losers. Again, this example demonstrates that the scope of the existing hazardous activities clauses is unclear.

Finally, in 2015, New York Giants defensive lineman Jason Pierre Paul permanently dismembered his right hand when he attempted to host an Independence Day fireworks display in his South Florida neighborhood.⁷⁸ Luckily for him, because he plays a position in which his hands are of minimal importance, he was able to resume playing with a club taped over his dismembered hand.⁷⁹ If the same injury had occurred to a hockey, basketball, or baseball player, however, there is no doubt that a similar injury would have ended their career.

⁷³ Kyle Orland, *Guitar Hero benches big leaguer Engadget* (2016), <https://www.engadget.com/2006/12/14/guitar-hero-benches-big-leaguer/> (last visited Nov 11, 2017).

⁷⁴ *Id.*

⁷⁵ See Henry Young, *eSports: Is pro video gaming a sport?* CNN (2016), <http://www.cnn.com/2016/05/31/sport/esports-is-professional-gaming-a-sport/index.html> (last visited Nov 11, 2017) (noting similarities between e-sports and other sports, also noting the rise of injuries in e-sports).

⁷⁶ See Major League Baseball, *Collective Bargaining Agreement* (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf>; see also National Hockey League, *Collective Bargaining Agreement* (Feb. 15, 2013), <https://www.nhlpa.com/the-pa/cba>.

⁷⁷ *Id.*

⁷⁸ Jamie Lisanti, *Pierre-Paul opens up about his fireworks accident* SI.com, <https://www.si.com/nfl/2016/04/12/jason-pierre-paul-giants-fireworks-destroyed-hand-exclusive> (last visited Nov 12, 2017).

⁷⁹ *Id.*

Although putting on a firework display is not explicitly banned by any of the leagues discussed herein, this incident raises the question as to whether playing with fireworks, or explosives generally, would constitute a hazardous activity under the “or other dangerous activities” catchall provisions in the NFL, NBA, and WNBA’s hazardous activities clauses. As in the drone case discussed at length above, the answer is ultimately unclear.

PART III: PROPOSING A NEW CLAUSE

Realizing the issues with the hazardous activities clauses currently employed by the NHL, MLB, NBA, WNBA, and NFL, the leagues and their players could both benefit from a new and improved clause. An alternative worth considering is an adapted version of the abnormally dangerous activities rule from the Restatement (Second) of Torts § 520.

A. Restatement (Second) of Torts and Abnormally Dangerous Activities

The Restatement (Second) of Torts § 519 provides that an individual is strictly liable for the injuries and damage sustained through the performance of an abnormally dangerous activity.⁸⁰ Section 520 of the Restatement lists six factors that are to be considered in determining whether an activity is abnormally dangerous.⁸¹ These factors include:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.⁸²

The Restatement notes that all factors are to be considered by the court, but no one factor controls.⁸³

In *Klein v. Pyrodyne Corp.*, the Supreme Court of Washington applied the Restatement’s six factors to determine whether a firework display constituted an abnormally dangerous activity, and would thus subject the plaintiff to strict liability.⁸⁴ The court held that factor (a) was present because of the possibility that the fireworks will malfunction or be misdirected, and that factor (b) was satisfied because such malfunction or misdirection could lead to serious injury.⁸⁵ The court also held that factor (c) was present insofar as no amount of care could

⁸⁰ Restatement (Second) of Torts § 519 (1977).

⁸¹ Restatement (Second) of Torts discussed herein in place of Restatement (Third) of Torts because factors of Restatement (Second) of Torts are more applicable to hazardous activities clause in professional athlete’s contract.

⁸² Restatement (Second) of Torts § 520 (1977).

⁸³ *Id.*, comment f.

⁸⁴ *Klein v. Pyrodyne Corp.*, 117 Wash. 2d 1, 7, *amended*, 817 P.2d 1359 (Wash. 1991).

⁸⁵ *Id.*

guarantee that the fireworks would go off without a glitch, and that factor *(d)* was also satisfied because while many enjoy spectating fireworks, relatively few actually put on firework displays.⁸⁶ Factors *(e)* and *(f)* were not present, according to the court, because the fairgrounds where the firework display was carried out was an appropriate place for a firework show, and because the social value of celebrating the country's independence with fireworks outweighs the danger.⁸⁷ While the court did not mention how many of the six factors must be satisfied, it held that that setting off fireworks in this instance was abnormally dangerous since four of the six factors were present.⁸⁸

If *Klein* and the six factors discussed within were applied to Pierre Paul's firework display, it would likely be determined that his conduct constituted an abnormally dangerous activity. As in *Klein*, Pierre Paul's use of fireworks would satisfy factors *(a)* and *(b)* because the malfunctioning of fireworks could lead to serious injury, as it did when it dismembered Pierre Paul's hand. Factors *(c)* and *(d)* would also be present because no amount of care could guarantee that the fireworks would not malfunction, and, as the court noted in *Klein*, not many people set off fireworks.⁸⁹ As in *Klein*, factor *(f)* would similarly not be satisfied, since July 4th fireworks were said to serve a civic purpose.⁹⁰ In contrast to *Klein*, however, factor *(e)* would likely be satisfied, since the middle of a neighborhood is not a very safe place to light fireworks. Therefore, since even more factors are present in Pierre-Paul's case than were present in *Klein*, Pierre Paul's fireworks display would likely constitute an abnormally dangerous activity.

The application of the six factors contained in the Restatement (Second) of Torts § 520 to Pierre Paul's facts demonstrates the relative ease of determining whether an activity is abnormally dangerous under such factors. With this in mind, an adaptation of these six factors could be useful in drafting a more easily understood and less ambiguous hazardous activities clause.

B. The Proposed Abnormally Dangerous Activities Clause

Adapting the Restatement's six factors for determining abnormally dangerous activities to the hazardous activities clause in an athlete's contract, the new and improved clause could read as follows:

Abnormally Dangerous Activities. The Player and the Club recognize and agree that the Player's participation in certain abnormally dangerous activities may impair or destroy his ability and skill as an athlete. Accordingly, the Player agrees to not engage in any abnormally dangerous activities without prior written consent of the Club. In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (1) existence of a high degree of risk of some harm to Player;
- (2) likelihood that the harm that results from it will be great;

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

- (3) inability to eliminate the risk by the exercise of reasonable care;
and
- (4) inappropriateness of the activity to the place where it is carried
on.

In the proposed clause, factor (a) from the Restatement is modified to include only the risk of danger to the athlete, as opposed to also including danger to others and chattels. Factors (b), (c), and (e) are kept without any modification. Finally, factors (d) and (f) are removed entirely.

Factor (d) from the Restatement should be removed because the extent to which the rest of society undertakes certain dangerous activities is of no relevance to the ultimate risk that the danger poses to the athlete's career. For instance, just because playing football may be a common practice, it is nonetheless a dangerous activity that should be prohibited.⁹¹ Factor (f) should also be removed for its lack of relevance to a player contract. This factor is included in the Restatement (Second) of Torts to allow certain activities to be performed despite their inherent danger, because the positive impact the activity has on the community outweighs its risks.⁹² The example provided in the Restatement indicates that despite the obvious dangers, the operation of a cement plant which emits harmful pollutants into the air may not be an abnormally dangerous activity under factor (f) if the town in which the plant is located relies on the existence of the plant for its economic wellbeing.⁹³ This exemption would not be relevant to the abnormally dangerous activities clause in a player contract because society at-large is not a party to the agreement.

The remaining factors, renamed factors (1) through (4) in the proposed abnormally dangerous clause to avoid confusion, are all relevant in determining whether an activity should be banned in a professional athlete's player contract. Together, the first and second factors consider both the risk and severity of potential injury. As a result, only activities that are *actually* dangerous would satisfy these factors. This resolves the problem involving the arbitrary lists of banned activities and the failure to effectuate the intent of the parties that is discussed above.

The third factor is kept because, as noted in the Restatement, the inability to render an activity safe by taking precautions is indicative of the overall danger of said activity.⁹⁴ Consider basketball, for example, a sport that should probably be banned to protect players. No matter how much one tapes their ankles, there is still a significant risk of injury. In comparison, operating a drone, an activity that should probably be permitted, can be rendered safe by wearing thick gloves when coming into contact with the drone or its propellers.

Finally, the fourth factor remains relevant here because certain activities are only abnormally dangerous when the location in which the activity is being conducted is inappropriate. For example, while swimming in a backyard pool should probably not be considered abnormally dangerous, swimming across the Atlantic Ocean almost definitely is.

The proposed clause could be rendered even more concrete and easy to apply if it set a predetermined minimum injury incidence rate required to satisfy the first factor. For

⁹¹ See Outdoor Foundation, Outdoor Participation Report: 2014 Outdoor Participation Report (2014), <https://outdoorindustry.org/wp-content/uploads/2017/05/2014-OutdoorRecreationParticipationReport1.pdf> (last visited Nov 30, 2017) (noting 6,165,000 Americans played tackle football in 2013).

⁹² Restatement (Second) of Torts § 520 (1977), comment *k*.

⁹³ *Id.*

⁹⁴ Restatement (Second) of Torts § 520 (1977), comment *h*.

example, the updated clauses could include a provision that provides, “Factor (1) is only met when such activity has an injury incidence rate that is greater than or equal to five hospitalized injuries per 1,000 participants.” Ideally, the parties would also agree to a single official source for such injury statistics, to avoid discrepancies. The leagues and players’ associations would need to negotiate the injury incidence rate threshold to be used in the proposed clause. Additionally, the proposed clause could be rendered even more concrete by explicitly stating the number of factors that must be met in order for an activity to constitute an abnormally dangerous activity. Again, the number would need to be negotiated by the leagues and players’ associations.

Based on the injury statistics in the table below, I propose an injury rate threshold of 5 per 1,000 participants. There appears to be a natural gap between horseback riding, which has an injury rate of 6.761 per thousand participants, and scuba diving, which has an injury rate of 3.389 per thousand participants. This would prohibit dangerous sports and activities that owners would want their players to abstain from, such as basketball and rugby, while still permitting their players to enjoy many other empirically less dangerous activities, such as archery and golf.

HOSPITAL-TREATED INJURY INCIDENCE RATE OF SPORTS AND ACTIVITIES IN THE UNITED STATES, 2013			
Sport/Activity	Total Number of Hospital-treated Injuries⁹⁵	Total Number of Participants	Injury Rate Per 1,000 Participants
Football	420,581	6,165,000 ⁹⁶	68.221
Wrestling	42,633	1,829,000 ⁹⁷	23.309
Basketball	533,509	23,669,000 ⁹⁸	22.540
Skateboarding	120,424	6,350,000 ⁹⁹	18.964
Rugby	13,567	1,183,000 ¹⁰⁰	11.468
Bicycle Riding	521,578	46,603,000 ¹⁰¹	11.192
Baseball	143,784	13,284,000 ¹⁰²	10.824
Gymnastics	36,001	4,972,000 ¹⁰³	7.241

⁹⁵ National Safety Council, Injury facts: 2015 Edition (2015) (citing Consumer Product Safety Commission).

⁹⁶ Outdoor Foundation, Outdoor Participation Report: 2014 Outdoor Participation Report (2014), <https://outdoorindustry.org/wp-content/uploads/2017/05/2014-OutdoorRecreationParticipationReport1.pdf> (last visited Nov 30, 2017).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

Ice Hockey	16,871	2,393,000 ¹⁰⁴	7.050
Horseback Riding	54,609	8,089,000 ¹⁰⁵	6.751
Scuba Diving	1,437	424,000 ¹⁰⁶	3.389
Snowmobiling	9,270	2,984,000 ¹⁰⁷	3.107
Field Hockey	4,241	1,474,000 ¹⁰⁸	2.877
Softball	100,010	40,000,000 ¹⁰⁹	2.500
Ice Skating	20,443	10,679,000 ¹¹⁰	1.914
Golf	33,101	24,720,000 ¹¹¹	1.339
Volleyball	50,845	46,000,000 ¹¹²	1.105
Tennis	19,292	17,678,000 ¹¹³	1.091
Archery	5,153	7,647,000 ¹¹⁴	0.674
Bowling	16,982	46,209,000 ¹¹⁵	0.368

C. Applying the Proposed Abnormally Dangerous Activities Clause to Drones, *Guitar Hero*, and Paintball

Applying this new abnormally dangerous activities clause to the activities that were previously difficult to categorize under the leagues' current clauses demonstrates the superiority of the proposed clause.

Under the proposed clause, operating a drone would almost certainly not constitute an abnormally dangerous activity. Although there is a remote chance of injury, as demonstrated by the injury Bauer suffered during the ALCS¹¹⁶, the risk is not of a "high degree", as required by the first factor, because there have not been many other reported instances of drone

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Peter Francesconi, Softball: Playing by the Numbers Sports Destination Management (2012), <http://www.sportsdestinations.com/Sports/Softball/softball-playing-numbers-5653> (last visited Nov 5, 2017).

¹¹⁰ Outdoor Foundation, Outdoor Participation Report: 2014 Outdoor Participation Report (2014), <https://outdoorindustry.org/wp-content/uploads/2017/05/2014-OutdoorRecreationParticipationReport1.pdf> (last visited Nov 30, 2017).

¹¹¹ *Id.*

¹¹² History of Volleyball, NCVA, <https://ncva.com/info/general-info/history-of-volleyball/> (last visited Nov 5, 2017).

¹¹³ Outdoor Foundation, Outdoor Participation Report: 2014 Outdoor Participation Report (2014), <https://outdoorindustry.org/wp-content/uploads/2017/05/2014-OutdoorRecreationParticipationReport1.pdf> (last visited Nov 30, 2017).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Andrew Joseph, Trevor Bauer's drone did some seriously disgusting damage to his finger USA Today (2017), <http://ftw.usatoday.com/2016/10/trevor-bauer-drone-gross-finger-indians-blue-jays-als> (last visited Nov 6, 2017).

injuries.¹¹⁷ Additionally, the harm likely to result is not “great”¹¹⁸, as required by the second factor. The third factor is also not present here insofar as wearing thick gloves when holding the drone or its propellers is an exercise of reasonable care that could mitigate the risk. The fourth factor, on the other hand, may be satisfied if the location in which the drone is operated makes the activity dangerous. For instance, operating a drone in a park would not satisfy this factor, but operating a drone near the edge of cliff might. Therefore, this factor will need to be assessed on a case-by-case basis. Ultimately, since either three or four of the factors are not present here, operating a drone would likely not constitute a dangerous activity under the proposed abnormally dangerous clause.

A similar analysis would take place for *Guitar Hero* under the proposed clause. The first two factors would not be present insofar as playing the videogame does not involve a high degree of risk¹¹⁹, nor is the degree of harm that may result very serious.¹²⁰ The third factor is present, however, since there are no steps that could be taken to mitigate the type of arm inflammation injury suffered by Zumaya. Finally, the fourth factor is likely not present, since the game is most often played within the safe confines of personal residences. As a result, since only one factor is satisfied, playing *Guitar Hero* would likely not constitute an abnormally dangerous activity under the proposed clause.

Finally, paintball would also likely not be considered an abnormally dangerous activity under the new clause. It is doubtful that the first factor would be satisfied, since a study indicated only 0.45 per 1,000 paintball participants are treated in hospitals for injuries.¹²¹ The second and third factors are also not likely present, since 95.5% of injured paintball players were treated and released from hospital without being admitted, and taking certain precautions, such as wearing protective headgear, eliminates a significant amount of the risk.¹²² Depending on where the activity is conducted, similar to the drone example above, the fourth factor may or may not be present.¹²³ Ultimately, since either three or four of the factors are not satisfied here, paintball would likely not constitute an abnormally dangerous activity under the proposed clause.

Although the above application of the proposed clause to drones, *Guitar Hero*, and paintball may make it seem as though the new clause is pro-player, this is not the case. It is important to remember, as discussed above, that a particular injury-rate threshold relating to the first factor is to be negotiated by each league and their corresponding players’ association.

¹¹⁷ Only one other article regarding a drone user being significantly injured is readily available. See Kate Pickles, Toddler is left blind in one eye after drone propeller sliced his eyeball in half DailyMail(2015), <http://www.dailymail.co.uk/health/article-3336366/Horrific-picture-shows-toddler-left-blind-one-eye-drone-propeller-sliced-eyeball-half.html> (last visited Nov 13, 2017).

¹¹⁸ R.J. Anderson, Cubs-Indians World Series Game 2: Final score, things to know as Cubs even series CBS Sports (2016), <https://www.cbssports.com/mlb/news/cubs-indians-world-series-game-2-final-score-things-to-know-as-cubs-even-series/> (last visited Nov 12, 2017) (noting Bauer’s hand recovered in time to throw 87 pitches in Game 2 of the World Series).

¹¹⁹ No other reported incidents of *Guitar Hero* injuries readily available.

¹²⁰ See Kyle Orland, Guitar Hero benches big leaguer Engadget (2016), <https://www.engadget.com/2006/12/14/guitar-hero-benches-big-leaguer/> (last visited Nov 11, 2017) (noting Zumaya quickly recovered and was able to pitch in three World Series games that Postseason).

¹²¹ J. M. Conn, *Injuries from paintball game related activities in the United States, 1997-2001*, 10 Injury Prevention 139–143 (2004).

¹²² *Id.*

¹²³ *Id.* (noting playing paintball in a forest is more dangerous than playing at an indoor paintball facility).

Additionally, the number of required factors is also to be negotiated.¹²⁴ Therefore, each league and their respective players' association would ultimately get to decide where to draw the line.

D. Benefits of the Proposed Abnormally Dangerous Activities Clause

The proposed abnormally dangerous activities clause would reduce or eliminate the issues with the current hazardous activities clause by being easier to interpret and apply, as demonstrated in the examples above, and by better effectuating the parties' intent by eliminating the arbitrary list of banned activities and weak catchall provisions.

As noted above, many of the current hazardous activities clauses include lists of banned activities that appear to have been compiled without any reliance on empirical evidence as to the actual risk of injury associated with each activity. As a result, some safe activities are banned, while some dangerous activities are permitted. Since the intent of the owners is to prevent injury of their highly paid players, and the intent of the players is to retain the liberty to partake in safe activities, these arbitrary lists that mistakenly permit dangerous activities while banning safe ones undermine the parties' intent. The proposed abnormally dangerous clause would eliminate this problem by restricting activities based on factors that gauge the degree of risk through empirical evidence, and the likelihood that such risk will result in great harm. By banning activities that are *actually* dangerous and permitting safe ones, the proposed clause would better effectuate the parties' intent.

The proposed abnormally dangerous clause would also better effectuate the NHL and MLB's owners' intent by eliminating their leagues' weak catchall provisions. As discussed above, the current clauses in the NHL and MLB's standard player contracts ban a list of activities before also banning "other athletic sports," in the NHL's case, and "other sport involving a substantial risk of personal injury," in the MLB's.¹²⁵ In both leagues, this allows athletes to partake in a number of dangerous activities that are not "sports" per se, such as cliff diving. The proposed abnormally dangerous activities clause would avoid this mess altogether by using a four-factor test to determine which activities, sports or otherwise, are dangerous enough to require a ban, thereby better effectuating the owners' intent of protecting their players from injury.

CONCLUSION

With some player salaries now in the tens of millions of dollars, there is an obvious need for teams to protect their investments in talent. While prohibiting involvement in certain activities is a logical way to minimize risk, there are a number of problems with the current hazardous activities clauses employed by the MLB, NHL, NBA, WNBA, and NFL. As a result of arbitrarily assembled lists of banned activities, and weak catchall provisions, the hazardous activities clauses in use today do a poor job effectuating the owners' intent to protect their investment in highly paid athletes, and the players' intent to retain the individual liberty to

¹²⁴ *Id.*

¹²⁵ National Hockey League, Collective Bargaining Agreement (Feb. 15, 2013), <https://www.nhlpa.com/the-pa/cba>; Major League Baseball, Collective Bargaining Agreement (Dec. 1, 2016), <http://www.mlbplayers.com/pdf9/5450407.pdf>.

perform relatively safe activities. Additionally, as demonstrated in Part II, the current hazardous activities clauses are difficult to interpret and apply.

The proposed clause would either minimize or completely eliminate each of these problems. It would better effectuate the intent of the parties by banning only activities that are empirically proven to lead to serious injury, and by eliminating the NHL and MLB's poorly drafted catchall provisions that inadvertently overlook many dangerous non-sport activities. As demonstrated in Part III, the proposed clause is also significantly easier to interpret and apply. The MLB, NHL, NBA, WNBA, and NFL, and their respective players' associations, should take note, and adopt the proposed abnormally dangerous activities clause in their next CBAs.