

## A MORE PERFECT UNION: MMA ATHLETES AND UNIONIZATION

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I wanted to talk to you today about a passion project of mine: the sport – yes, it is a sport – of mixed martial arts. My background is baseball and baseball litigation, probably the sorts of cases that [other lawyers] groan over, are my day-to-day, and I think of them as “fan behavior cases” or “when good fans go bad.” But, I became interested in the sport of mixed martial arts a few years ago, having nothing to do with mixed martial arts but a different blood sport – New York politics. For many, many years, New York was the only state where that sport was not legal in North America – the only state. And in my class I was able, Columbia gave me the opportunity, to study why that is, because it didn’t seem to me that New Yorkers had such delicate sensibilities, that we would be the only place in the continent where it was not permitted. And what had sort of happened in New York as the law, which was very poorly written, that banned the sport was implemented professional MMA was prohibited, but amateur was allowed and virtually unregulated. This allowed for a climate where fighters faced significant risk of injury, they were not cared for, even spectators who were not protected from things like blood and other bodily fluids entering the stands, there were significant health risks that were posed even to the spectators. The sport was illegal, and in fact, what we learned was that the single biggest impediment to the sport was the assembly speaker, Sheldon Silver in New York state, who never even allowed a vote on the sport over a period of many years – to reach a vote, no up or down vote in the New York Senate to permit it. This sort of offended my idea of the democratic process, so I got into studying the sport more out of politically – why was this happening and why is the democratic process, which I care very much about, being subverted. Fast forward to 2015:

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surprise, surprise, Mr. Silver was exited on corruption charges from his role at the Assembly in New York state and like the Red Sea things parted, and the sport of mixed martial arts was finally permitted in New York, shortly thereafter.

So, it's been a very exciting time, as the sport came in – how to regulate it, how to implement safety regulations, wonderful business opportunity, and quickly thereafter, the Ultimate Fighting Championship sold for \$4 billion to William Morris Endeavor an IMG. This caught the attention of many people. I love what [another speaker] said about “follow the money,” and I am actually going to piggyback on that, as well as “put the same amount of care into care and regard for others” because that's very much a theme here, too. So, with this explosion of interest, and hey this is a real money maker and this is a real legitimate sport, let's get in on the ground level came all sorts of other issues. Not surprisingly, people started to realize that the fighters themselves had actually very bad deals for the most part. Not everybody is a Conor McGregor, not everybody is a Ronda Rousey, and their deals were really quite disadvantageous to the fighters themselves. Would you be surprised to know that most fighters – it's a contractive adhesion – it's basically you take this contract or you're done. Would you be surprised to know that there is no healthcare, or very little healthcare, permitted for or allowed for in the contracts for the fighters, notwithstanding the type of work that they do. Their image rights are signed away in perpetuity. For those of you students who care about the O'Bannon litigation and the rights of the college athletes, I suggest to you that this is a place for you to look as well to make a difference because this is the landscape that these fighters are dealing with – no pension, no long-term health care, CTE care over time for these fighters basically non-existent – it's a crying shame. So if you want to put some love and attention towards athletes and athletes rights the sport of mixed martial arts offers you a valuable opportunity to do that. With these issues and the explosion of perhaps the financial interest in the sport, several efforts have cropped up to unionize the athletes and give them a voice at the table. You might be surprised to know that one of the efforts to unionize was helmed by a really well-known agent called Scott Borris, perhaps you know about him from your studies. Fighters Associations started up, Fighters fought amongst themselves about whether unionization was a good idea. Because there are so few promoters, they were also very concerned about

being black balled for having joined or started union processes. Some of those unionization efforts fizzled out, but there is a new union that is interesting and exciting because it has been started not by agents, not by outsiders, but by the fighters themselves. The name of this project is Spearhead, and it is right now in the process of getting enough signatures, which will be kept confidential and not shared with lets say the UFC or Bellator, and they will get those signatures and submit and see if they can be certified as a union. What's interesting about this is – and perhaps you have learned about this in some of your classes – there is a fight about whether they are independent contractors or are they employees? It's a very important distinction, because if they are independent contractors they won't be able to proceed with the union and it does seem as though a union is the best way to protect their health care, pension, and other rights, their image rights for example. This union, by the fighters for the fighters, has just started and is in the process of this, once they have enough fighters willing to sign cards, authorization cards, there will be a study or an evaluation by the National Labor Relations Board about whether they were employees in fact – and that could have interesting ramifications because those fighters would be owed back pay among other things.

And there is an eleven-step process that the NLRB will do in order to evaluate – are you an independent contractor? Are you an employee? Some of the factors you may be well aware of, I mean, who has the right to control the work, who says what the means and method of the work is. They've recently added an additional factor, the eleventh factor, and this has to do with – are you as the independent contractor or employee engaged in some entrepreneurial activity that really doesn't have anything to do with this supposed employer? And that can be a very interesting factor for the MMA fighters as they try to unionize. Are they on their own entrepreneurial? For example, can they fight for another promoter, are they doing other things, aside from being an MMA fighter? This is a very interesting development that will be studied by the NLRB.

From that point, they can determine if they are in fact employees and they can certify.

This test by the way has been used by groups of employees as diverse as Fedex drivers and exotic dancers, right, so we are analogizing exotic dancers and MMA athletes. But this seems like one of their best chances to get a baseline of healthcare, decent wages and salaries, a right to

control their image, not having to sign that sort of thing away. Some people have argued perhaps what they need is something like the Muhammad Ali Act, expanded to MMA fighters, it applies to boxers now. But in reality, the way the law has been used . . . the Muhammad Ali Act, it's a bit toothless, unfortunately, it was supposed to fare it out, promoters who had financial interests in boxing matches and provide for more transparency about fighter rankings and financial deals, but it just really hasn't panned out that well for boxing. Which doesn't mean if it is applied to combat sports like MMA it might not work, it's just that it doesn't have a great track record from the year 2000, so it seems like unionization is really the answer to these fighter's prayers. I like to talk about this sport because not everybody, as [other speakers] have told you, can work at a team or a league, but there are numerous opportunities for people who want to get involved in sports law, in particular, if you have an interest in fighter welfare and fighter rights, that this sport offers you, and it's sort of, it's still emerging, even though it's been around for quite a long time, it's just finding its feet.

It's a valuable opportunity for you students as you go out into the workforce to consider as well. And this is why I refer to Project Spearhead as a more perfect union, because I think the fact that it is by fighters and for fighters makes it more responsive to their needs, so it's worth watching.