

1-1-1995

Bodyslam From the Top Rope: Unequal Bargaining Power and Professional Wrestling's Failure to Unionize

Stephen S. Zashin

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Stephen S. Zashin, *Bodyslam From the Top Rope: Unequal Bargaining Power and Professional Wrestling's Failure to Unionize*, 12 U. Miami Ent. & Sports L. Rev. 1 (1995)

Available at: <http://repository.law.miami.edu/umeslr/vol12/iss1/3>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF MIAMI
ENTERTAINMENT & SPORTS
LAW REVIEW

ARTICLES

BODYSLAM FROM THE TOP ROPE:
UNEQUAL BARGAINING POWER AND
PROFESSIONAL WRESTLING'S FAILURE
TO UNIONIZE

STEPHEN S. ZASHIN*

Wrestlers are a sluggish set, and of dubious health. They sleep out their lives, and whenever they depart ever so little from their regular diet they fall seriously ill.

Plato, *Republic*, III

I don't give a damn if it's fake! Kill the son-of-a-bitch!

An Unknown Wrestling Fan

The lights go black and the crowd roars in anticipation. Light emanates only from the scattered popping flash-bulbs. As the frenzy grows to a crescendo, *Also Sprach Zarathustra*¹ pierces the crowd's noise. Fireworks shoot from both sides of the blue entrance ramp's silhouette, producing showers of silver glitter. The flash

* B.S., 1991, University of Pennsylvania; J.D./M.B.A. 1995, Case Western Reserve University. The author would like to thank Arthur "The Professor" Austin for his invaluable support and assistance.

1. Richard Strauss, *Also Sprach Zarathustra*, on *Also Sprach Zarathustra* (Telarc Records 1988) (also known as the theme to 2001 A SPACE ODYSSEY).

bulbs begin popping at a feverish pace. Suddenly, the spotlight focuses on a figure making his way through the crowd. Fans rise in anticipation and strain just to catch a glimpse. With his long flowing pink feathered and sequined robe and cascading blond hair, he makes his way. His glamorous robe symbolizes success, opulence and arrogance. "The Nature Boy," Ric Flair, has arrived. As a ten-time World Heavyweight Champion of World Championship Wrestling² ("WCW"), the crowd readies itself for the evening's hotly contested main event between Flair and the rogue, "Ravishing" Rick Rude.

This scene repeats itself nightly as professional wrestlers, like Flair and Rude, travel the globe to entertain throngs of professional wrestling fans. While detractors claim that professional wrestling is nothing but a "fixed" freak-show, millions of wrestling fans watch a multitude of television broadcasts,³ spend top dollar to watch frequent pay-per-view telecasts,⁴ hoard millions of dollars worth of souvenirs⁵ and purchase tickets to see their favorite stars live at local arenas.⁶ Quite simply, professional wrestling is big business.⁷

Yet, behind this corporate veil lies an ugly underbelly filled with corruption, drug abuse, poor working conditions, sexual harassment and blackmail. Because wrestling is "sports entertainment,"⁸ it is seen as frivolous and has, therefore, avoided both

2. Flair was also the World Wrestling Federation's ("WWF") World Heavy Weight Champion on two occasions.

3. Twenty million viewers regularly watch WWF's weekly syndicated shows. William O. Johnson, *Wrestling with Success; Vince McMahon Has Transformed Pro Wrestling from a Sleazy Pseudosport to Booming Family Fun*, SPORTS ILLUSTRATED, Mar. 25, 1991, 42 at S1.

4. "In the decade or so that U.S. pay-per-view programming has been available, no single program has ever been sold to a million homes. But, Wrestlemania IV (at \$19.95 per view) drew 909,000 homes and WM V (at \$24.95) drew 915,000, while WM VI (at \$29.95) drew 825,000." *Id.* Thus, these three Wrestlemanias alone grossed over \$65 million. *See, id.* Moreover, 26 of the 50 all-time top grossing pay-per-view events came from the WWF. Kenneth R. Clark, *The Man Behind the Masks; Wrestling Impresario Goes to the Mat with the Feds*, CHI. TRIB., Mar. 13, 1994, at C1.

5. The WWF grosses over \$200 million in annual sales of its own merchandise plus licenses. Johnson, *supra* note 3.

6. In 1987, the WWF sold \$80 million worth of tickets to its live wrestling shows. Christopher Palmeri, *We Want to Be Like Disney*, FORBES, Oct. 17, 1988, at 133.

7. In 1991, *Sports Illustrated* estimated that TitanSports, Inc., the parent corporation of the WWF, was worth \$500 million. Johnson, *supra* note 3. In 1987, *Forbes* estimated that TitanSports had a cash flow of \$19 million and that its owner, Vincent K. McMahon, was "easily a centimillionaire." Palmeri, *supra* note 6.

8. Professional Wrestling has been deemed "sports entertainment" because it is "fixed," meaning that promoters control who wins and loses. *See infra* notes 231-34 and accompanying text.

tough legislation and threats of unionization.⁹ Perhaps wrestling is the last “unprotected” sports industry.

Essentially, there are two distinct categories of wrestlers: stars (heroes and villains the promoters use to sell their pay-per-views and local cards) and journeymen (those who are mercilessly abused on television bouts and who compromise the under-cards of live shows). Though promoters treat these two groups differently, both are subject to promoters’ unfair bargaining power. For the journeyman, wrestling stardom can be an uphill climb. Often these men earn \$100 a night, receive no workers’ compensation or health care coverage, and face unwanted homosexual advances and false promises of future stardom. These journeymen have little power, since there are so many aspiring wrestlers who would gladly take their places. Any attempts to criticize or deviate from a promoter’s plans, or requests for better treatment, are almost always met with termination.

Ironically, the stars also face unequal bargaining power. These wrestlers are only loved or despised because promoters have chosen to give them priceless television time and top-billing on cards throughout the world. Promoters believe that if a blond superstar gets hurt, asks for more money, or tries to start a union, they can fire him and create a new one. All it takes is a bottle of peroxide, a catchy name and good physique, and the crowds will love him.¹⁰ Yet, injured stars usually have no health insurance and do not receive workers’ compensation.¹¹ Moreover, stars that are fired do not possess many alternatives once they are let go.¹² Thus, for both

9. See, Jeff Savage, *Sleaze No Illusion in the World of Wrestling: Sex, Drug Abuse Seen in Industry of “Heroes,”* SAN DIEGO UNION-TRIB., Mar. 11, 1992, at A1 (former professional wrestler, “The Living Legend” Bruno Samartino, stating that the wrestling industry has been ignored because regulators take the attitude, “Who cares about wrestling? Its fake anyway.”). This line of thinking is also evident in the judicial system. For example, in *Meyers v. George*, 271 F.2d 168 (8th Cir. 1959), Meyers brought an action alleging that the National Wrestling Alliance (“NWA” which has been renamed WCW), through their monopoly on wrestling in the United States, deprived him of an opportunity to earn a living as a wrestler. Judgment for the NWA was reversed and remanded because the trial judge “ridicule[d] and belittle[d] plaintiff’s calling and his alleged cause of action and tended to make a mockery out of the trial.” *Id.* at 174.

10. See, e.g., Milton Richman, UNITED PRESS INT’L, Nov. 21, 1984.

11. See *infra* notes 264-71 and accompanying text.

12. Since there are only two major wrestling organizations in the United States, World Championship Wrestling, owned by Ted Turner, and the World Wrestling Federation, owned by Vincent K. McMahon, a star can either switch promotions, wrestle in a foreign country or work the independent circuit. Jumping promotions, however, can be difficult. Quite often, the other organization will know the reason for the switch and, therefore, will attempt to exert its bargaining power knowing that the wrestler cannot return to his former promotion. While the foreign circuits can be lucrative, being forced out of the country to

stars and journeymen, the power rests almost exclusively with the promoters.

This Article addresses the bargaining power disparity that exists in professional wrestling and suggests that unionization within the industry could provide a more evenhanded contest. Part one will examine the sport's historical evolution which has led to much of wrestling's current predicament. Part two focuses on whether wrestlers are employees and, therefore, have a right to unionize under the National Labor Relations Act. Finally, part three suggests that unions could provide a powerful vehicle for wrestling reform which would solve much of the bargaining power inequity without jeopardizing the sport's integrity.

I. THE FIRST HEAD-BUTT: THE HISTORY OF PROFESSIONAL WRESTLING

A. *The Rude Awakening—Wrestling's Origins*

In 1938, American anthropologists excavating a 5000-year-old Sumerian temple discovered a cast bronze figurine of wrestlers gripping each other's hips.¹³ This statuette is the oldest known record of wrestling.¹⁴ This statuette is significant, in that it was found at a religious site, since "historians agree in tracing the origins of wrestling in ancient times to cults celebrating life and death."¹⁵

The first relic of modern wrestling technique was found in the Egyptian tombs of Beni Hassan, dating back to 1850 B.C.¹⁶ Nearly four hundred paintings depicting the course of a match indicate that the Egyptians knew most of the holds and escapes that comprise modern freestyle wrestling.¹⁷ Written taunts accompanying these paintings suggest that the Egyptians tried to psyche out their opponents.¹⁸ For example, one interpretation of these writings is: "I'm going to pin you—I'll make you weep in your heart and cringe with fear—Look, I'm going to make you fall and faint away right in front of the Pharaoh."¹⁹

find work is not very pleasant. Moreover, the independent circuit can even be more grueling and pay far less than the major promotions.

13. GEORGE W. MORTON & GEORGE M. O'BRIEN, *WRESTLING TO RASSLIN': ANCIENT SPORT TO AMERICAN SPECTACLE* 7 (1985).

14. *Id.*

15. *Id.*

16. MICHAEL R. BALL, *PROFESSIONAL WRESTLING AS A RITUAL DRAMA IN AMERICAN POPULAR CULTURE* 38 (1990); Morton & O'Brien, *supra* note 13.

17. Morton & O'Brien, *supra* note 13.

18. Morton & O'Brien, *supra* note 13.

19. Morton & O'Brien, *supra* note 13 (quoting CARL DIEM, *WELTGESCHICHTE DES*

Wrestling also developed in ancient Greece. There, wrestling originated in Greek rituals, without any rules.²⁰ In Chapter 23 of the *Iliad*, Homer gives a detailed account of a wrestling match between Ajax and Odysseus. This match was one event held in the funeral games to honor Patroclus.²¹

Wrestling developed concurrently in the rest of the world. In particular, with the rise of the civilized world, Greco-Roman wrestling refined more ancient forms and added rules to reflect society's growing civility.²² Wrestling "served as a cultural bond along with language, religion and commerce in an ever expanding Hellenic World."²³ Wrestling, boxing, discus and javelin competitions, and chariot and foot races made up the program of Greek athletic festivals.²⁴ These events survived the loss of Greek independence and were taken over by the Roman Empire.²⁵

Wrestling also has a rich tradition in Judaism. The Jews were enthusiastic wrestlers. This is best illustrated by Jacob's bout with a messenger from G-d. "The name Israel, bestowed on him, has been interpreted as wrestler with G-d."²⁶ The Jews wrestled with distinctive belts which were prized possessions.²⁷ "Leaders were often successful wrestlers as is suggested when Judah is recognized by his staff, signet and belt."²⁸ "The Messiah is to wear a belt of righteousness that is, to be a wrestling champion in the struggle of good and evil."²⁹

Although it was apparently very popular, the Christians rejected wrestling.³⁰ Evidencing this point, a document from England in 1258 stated: "[w]e also decree that the clergy proclaim in their churches that no one is to take it on himself to engage in wrestling

SPORTS 120 (1971)).

20. Morton & O'Brien, *supra* note 13.

21. Morton & O'Brien, *supra* note 13.

22. Ball, *supra* note 16, at 38. "Myth says rules for the sport were established by the Athenian hero and king Theseus who had conquered the murderous Cercyon by skill rather than brute force in a wrestling match." Morton & O'Brien, *supra* note 13. Another version, however, reveals that Palaestra, daughter of Mercury, formulated wrestling's rules. Support for this contention comes from the Grecian practice area for boxing and wrestling, known as the *palaestra*. Morton & O'Brien, *supra* note 13.

23. Morton & O'Brien, *supra* note 13, at 8.

24. Morton & O'Brien, *supra* note 13, at 8.

25. Morton & O'Brien, *supra* note 13, at 8.

26. Morton & O'Brien, *supra* note 13, at 14 (citing ROBERT BARSH, HOW DID SPORTS BEGIN 398 (1970)).

27. Morton & O'Brien, *supra* note 13, at 14.

28. Morton & O'Brien, *supra* note 13, at 14 (citing Genesis 38:18).

29. Isaiah 11:5, *cited in* Morton & O'Brien, *supra* note 13, at 14.

30. This, however, can be attributed to the fact that Christians shunned athletics generally. Morton & O'Brien, *supra* note 13, at 14.

. . . especially on church feast-days."³¹ Such a prohibition, and similar subsequent statements, indicate that wrestling was a popular activity engaged in by commoners but prohibited by the church.³²

Medieval France and England also added to the origins of modern wrestling. "The Bretons believed in fair sport. They met after making the sign of the cross, shook hands, promised to be friends whatever the outcome, and assured each other that they carried no magic charms and had not signed a pact with the devil to win."³³ In Britain, wrestling can be traced back to "the arm-lock Beowulf used to conquer Grendel."³⁴

The English devised three different styles of wrestling. The Cumberland and Westmoreland style required wrestlers to wear tights and to only use a few accepted holds.³⁵ The Cornish and Devonshire style had wrestlers facing each other trying to grab a harness that each participant wore.³⁶ The Lancashire style, developed from the above two styles, allowed almost any means to throw your opponent. "[O]nly a few of the more dangerous holds—such as the 'strangle hold'—were barred."³⁷

Wrestling, however, was not limited to Europe. Contests in Asia can be traced back more than six hundred years.³⁸ China, Japan and India all have rich histories in wrestling. Some of their traditions continue today in Sumo, Jujitsu, professional, and other types of wrestling.

B. *The Patriot Missile—Early American Wrestling*

Wrestling also has a rich tradition in American history. Wrestling in North America began long before English settlers claimed the new land. Native Americans engaged in wrestling matches, which were conducted as follows:

At the start of the match opponents gripped each other above

31. Morton & O'Brien, *supra* note 13, at 15 (quoting Albert M. Landry, "Synodal Legislation as a Source of Medieval Popular Culture" at the Popular Culture Convention in Chicago, 1976).

32. Morton & O'Brien, *supra* note 13, at 15.

33. Morton & O'Brien, *supra* note 13, at 16 (citing CARL DIEM, *WELTGESCHICHTE DES SPORTS* 120 (1971)).

34. Morton & O'Brien, *supra* note 13, at 16 (citing Calvin S. Brown, Jr., *Beowulf's Arm Lock*, PMLA, Vol 55/3, at 621-27).

35. Ball, *supra* note 16, at 39.

36. Ball, *supra* note 16, at 39.

37. Ball, *supra* note 16, at 39.

38. Morton & O'Brien, *supra* note 13, at 12.

the hips. All moves and holds including kicking and arm twisting were allowed as contestants struggled to bring each other to the ground. As soon as a part of the body other than the feet touched the ground, an athlete lost.³⁹

“It has been said that skilled Indian wrestlers would travel about from tribe to tribe making a profession of their art.”⁴⁰

Colonial Americans engaged in wrestling as early as 1680.⁴¹ “Rough and tumble bouts and even pankration encounters came naturally to a people pushing back the frontier and tilling the soil.”⁴² The free-for-all style was favored on the frontier.⁴³ Wrestling not only provided recreation for youths, but resolved disputes among town members and settled inter-county conflicts.⁴⁴

Wrestling became increasingly popular amidst the Civil War.⁴⁵ “[W]restling became the foremost sport of the Union Army.”⁴⁶ As cities grew,⁴⁷ a public for spectator events, including sports, developed.⁴⁸ By the 1880s, wrestling was drawing “thousands of dollars in side bets and big money gates from Boston and New York, through Detroit and out to San Francisco.”⁴⁹ Betting further raised the interest of the participants and the general population.⁵⁰ In a nation developing an appetite for sports, wrestling bouts between local champions brought out the crowds.⁵¹

Starting in the 1860s, Harry Hill, a saloon owner, recognized the potential that wrestling had as a spectator sport. In his club, Hill’s customers would chip in to set a purse for wrestling matches.⁵²

39. Morton & O’Brien, *supra* note 13, at 19.

40. Morton & O’Brien, *supra* note 13, at 19.

41. *Id.* (citing FOSTER R. DULLES, *AMERICA LEARNS TO PLAY* 26 (1963)).

42. Morton & O’Brien, *supra* note 13, at 20.

43. Morton & O’Brien, *supra* note 13, at 20. While George Washington gained repute as a wrestler skilled in the gentlemanly “common British” style, Abraham Lincoln was a local free-for-all champion. *Id.* It was not on the frontier, however, where collar and elbow wrestling (or “scuffling”) was perfected. Eventually, collar and elbow wrestling would most influence professional and amateur wrestling. *Id.*

44. Morton & O’Brien, *supra* note 13, at 21.

45. Morton & O’Brien, *supra* note 13, at 22.

46. CHARLES M. WILSON, *THE MAGNIFICENT SCUFFLERS: REVEALING THE GREAT DAYS WHEN AMERICA WRESTLED THE WORLD* 43 (1959).

47. From 1869 through 1893, the American economy grew at an unusually high rate. LOUIS GALAMBOS & JOSEPH PRATT, *THE RISE OF THE CORPORATE COMMONWEALTH: UNITED STATES BUSINESS AND PUBLIC POLICY IN THE 20TH CENTURY* 26 (1988).

48. Morton & O’Brien, *supra* note 13, at 23.

49. Morton & O’Brien, *supra* note 13, at 22.

50. Morton & O’Brien, *supra* note 13, at 22.

51. Morton & O’Brien, *supra* note 13, at 23.

52. Morton & O’Brien, *supra* note 13, at 25.

[I]t was at Hill's nefarious saloon that the requisites for professional sport, in this case for wrestling, came together. There were men of the press to give coverage to matches, to stir up interest, to proclaim champions. There was Harry himself who provided the arena and carried the costs. But even more importantly, Harry set house rules and on occasion refereed so that the contest would be fair lest the rugged betting fans become an unruly mob.⁵³

But wrestling was not without its problems. Many matches were dull because they often lasted many hours and ended in draws. True wrestling did not give the people what they wanted. "[G]enuine bouts could drag on for hours of dull defensive maneuvers and stand-off counterholds."⁵⁴ As the *Saturday Evening Post* reported:

Wrestlers who are fanatically in earnest spend most of their time in a reclining posture, tangled up together like swamp trees and so intermingled that it is impossible to determine, without tattoo marks or some definitely distinguishable mutilation, whose arm is whose, and whose tibia has been twisted into the shape of a wishing ring. They may even, on occasion, lie almost inert for periods ranging from two hours to two days. This is remarkable proof of tenacity and endurance, but it is not calculated to raise a fever in the spectator who can barely glimpse them from afar.⁵⁵

Fair, epic struggles did not bring back paying customers.⁵⁶ Therefore, "[t]he question was and is, how can the action be enlivened and lead to a decisive victory without rigging the match."⁵⁷

One important patron of Hill's was none other than famed circus promoter P.T. Barnum.⁵⁸ Barnum hired "Little" Ed Decker who, at five foot six and 150 pounds, was perfect for Barnum's purposes.⁵⁹ Barnum's circus "posted an open offer of \$100 to anyone

53. Morton & O'Brien, *supra* note 13, at 25.

54. Morton & O'Brien, *supra* note 13, at 25.

55. Milton MacKay, *On the Hoof*, SATURDAY EVENING POST, Dec. 14, 1935, at 8-9.

56. Ball, *supra* note 16, at 44. Subsequent attempts to promote "honest" wrestling have also proven dismal failures. Most recently, "[a]n attempt to start a 'professional collegiate wrestling' association took place in 1970. It was to feature ex-college stars, half of whom were former NCAA champions . . . Fewer than 500 people showed up to watch the first event, and the promoters lost around \$8,000. Additionally, injuries prevented any immediate rematches from taking place." Ball, *supra* note 16, at 44 (citing Joe Jares, *Down With Masked Villains*, SPORTS ILLUSTRATED, Apr. 27, 1970, at 60-61).

57. Morton & O'Brien, *supra* note 13, at 25.

58. Morton & O'Brien, *supra* note 13, at 25.

59. Morton & O'Brien, *supra* note 13, at 29 (citing Wilson, *supra*, note 46).

who could throw the Little Wonder from Vermont, and \$50 to anybody who could remain upright in the ring with him for three minutes. The circus never had to pay a cent."⁶⁰ Soon there were no more challengers, so Barnum switched the act by hiring John McMahon to vie with Decker in daily exhibitions.⁶¹ McMahon, who previously toured the country and the world, wrestled daily with Decker in twenty-minute prearranged bouts.⁶² Besides their athleticism, Barnum's wrestling depended on their colorful personalities.⁶³ Each came to the ring in gaudy outfits and each day there was a "new" champion.⁶⁴ Their attire consisted of "scarlet jackets, green trunks and purple tights."⁶⁵ Professional wrestling was born!

As their fame spread, so did converts to the collar and elbow style, and so did the popularity of wrestling as a spectator sport.⁶⁶ Like boxing, wrestling grew on the fringe of respectable society.⁶⁷ Unlike team sports, however, wrestling evolved with little local identification and no need for regulatory boards to set schedules, arrange meets and design rules.⁶⁸ "The muscular sports were not for the gentle people . . . Wrestling was only for the churls; it was not, sportingly speaking, a sport at all!"⁶⁹ Therefore, the rules in these early bouts were determined by the participants and their backers.⁷⁰ "In truth, professional wrestling remained in a condition of brawny anarchy."⁷¹

Unlike other sports, professional wrestling and boxing had no natural season. Instead, it depended on traveling athletes and monied promoters to arrange contests. There was never a "homecourt," since there were not enough athletes in any one locale for continued competition, whether for league or tournament matches. Wrestlers thus joined vaudeville and traveling shows, the circus and fair circuits of America in the 1880s and 1890s, when even actors, musicians and opera stars regularly toured the nation

60. Morton & O'Brien, *supra* note 13, at 29 (citing Wilson, *supra* note 46).

61. Morton & O'Brien, *supra* note 13, at 29 (citing Wilson, *supra* note 46).

62. Morton & O'Brien, *supra* note 13, at 29 (citing Wilson, *supra* note 46).

63. Morton & O'Brien, *supra* note 13, at 29 (citing Wilson, *supra* note 46).

64. Morton & O'Brien, *supra* note 13, at 29 (citing Wilson, *supra* note 46).

65. Wilson, *supra* note 46, at 49.

66. Wilson, *supra* note 46, at 50. Coincidentally, other wrestling groups developed at other infamous locations like Owey's Old House. Wilson, *supra* note 46, at 60.

67. Morton & O'Brien, *supra* note 13, at 30.

68. Morton & O'Brien, *supra* note 13 at 30.

69. Wilson, *supra* note 46, at 55.

70. Morton & O'Brien, *supra* note 13, at 30.

71. Wilson, *supra* note 46, at 60.

to survive their trade.⁷²

Wrestlers, therefore, needed promoters to book matches and promote bouts. As a result, the relationship between promoters or bookers and the early wrestlers grew quite naturally. "Of course the alliance easily led to bogus bouts, fleecing the betting public and an ever increasing emphasis on show over sport."⁷³ When "fixes" were inadvertently discovered, however, fans were outraged.⁷⁴ Clearly then, "professional wrestling was caught between two undesirable extremes. On the one hand, audiences were bored by the bureaucratically controlled ritual, and on the other hand, they were outraged at the deceit of the promoters."⁷⁵

Moreover, some of professional wrestling's most serious internal troubles can be traced back to the conditions surrounding its development from about 1880 to 1910. First, there were international, national and regional stars, each jealous of the other's reputation.⁷⁶ Second, there was a confusion of styles, rules, and titles. Third, there was a dangerous combination of performers and serious athletes.⁷⁷ Finally, and perhaps most importantly, promotions were in the hands of individuals interested primarily in profits, who had learned their trade in the theater.⁷⁸ Thus, "[f]rom the beginning[,] the search for a clear, clean line between sport and show in professional wrestling is in vain, for there was none."⁷⁹

By the end of World War I, wrestling was invaded by young men who first learned sports in the military and those who participated in intercollegiate athletic programs.⁸⁰ Moreover, an influx of European wrestlers also added to the sport's excitement.⁸¹ "Those

72. Morton & O'Brien, *supra* note 13, at 31. In the 1890s, professional wrestling entered into what was to be the first of many slumps. In an effort to remain profitable during that period, promoters gathered small troupes of four to six wrestlers to travel the summer fair circuits. By 1901, "there was a looseknit organization of booking offices for the fairs. They kept the sport going and on the side recruited new blood into the game." Morton & O'Brien, *supra* note 13, at 38. By 1908, as wrestling emerged from its slump in popularity, "the promotional network of booking offices . . . had moved from the old rural fair circuit into the cities to expand operations to year-round matches that would draw on the large metropolitan public." Morton & O'Brien, *supra* note 13, at 38.

73. Morton & O'Brien, *supra* note 13, at 31.

74. For example, once in 1929 in New York City, "a drunken press agent accidentally released all the next night's winners to the newspapers." Ball, *supra* note 16, at 43 (citing Bill Cunningham, *The Bigger They Are* —, *COLLIER'S*, Dec. 17, 1932, at 9).

75. Ball, *supra* note 16, at 43.

76. See Morton & O'Brien, *supra* note 13, at 37.

77. See Morton & O'Brien, *supra* note 13, at 37.

78. See Morton & O'Brien, *supra* note 13, at 37.

79. See Morton & O'Brien, *supra* note 13, at 37.

80. See Morton & O'Brien, *supra* note 13, at 39.

81. See Morton & O'Brien, *supra* note 13, at 40.

who entered wrestling were intent on making money as promoters fed the ever-growing entertainment appetite of the public in the rambunctious, iconoclastic twenties."⁸²

Wrestling and its role in American society changed, however, as America entered the Great Depression. "[P]rofessional wrestling struggled to survive more as a diversion than as a serious sport."⁸³ Cage matches, tag-team events, women, and midget matches all became popular elements.⁸⁴ Former collegiate football stars, however, rejuvenated some serious interest in the sport.⁸⁵ But the biggest blow to wrestling came with the advent of radio. Unlike other sports, radio was unkind to wrestling because the sport is basically visual.⁸⁶ It was virtually impossible to capture a "play-by-play" account of the action and describe the wrestlers' theatrics.⁸⁷ Thus, "as radio was tending to strengthen most spectator sports, [it] kept on contributing to hard times on the mats."⁸⁸

Before World War II, wrestling was divided primarily into two distinct camps or "wheels." The Western Wheel, operated out of Chicago, was controlled by Billy Sandow, Ed Lewis, and "Toots" Mondt.⁸⁹ The Eastern Wheel was controlled by Jack Curley.⁹⁰ There was also an independent circuit that toured outlying areas.

The fact that there were several major circuits which did not exchange wrestlers meant that at any given time, several men could be recognized as the reigning 'World Champion' This multiplicity of "champions" did not injure the sport, however. Fans seemed to flock to wrestling bouts because almost everyone could be billed as a fight for the 'title.'⁹¹

In order to succeed, promoters had to "create" stars and groom them for championships.⁹² "It became apparent [, however,]

82. See Morton & O'Brien, *supra* note 13, at 40.

83. Morton & O'Brien, *supra* note 13, at 42.

84. See Morton & O'Brien, *supra* note 13, at 42.

85. See Ball, *supra* note 16, at 44.

86. Morton & O'Brien, *supra* note 13, at 43.

87. Wilson, *supra* note 46, at 87.

88. Wilson, *supra* note 46, at 87.

89. Ball, *supra* note 16, at 49 (citing MARCUS GRIFFIN, *FALL GUYS: THE BARNUMS OF BOUNCE* (1937)).

90. Ball, *supra* note 16, at 49 (citing Bill Cunningham, *The Bigger They Are—*, *COLLIER'S*, Dec. 17, 1932, at 9). Most notably, Rudy Dusek set up local matches in many small communities throughout the South. Ball, *supra* note 16, at 49 (citing Griffin).

91. Ball, *supra* note 16, at 49. This condition continues today as there are numerous promotions (e.g., WWF, WCW, and Smoky Mountain Wrestling) which all have their own champions. Strangely, WCW had two heavyweight championship belts—the WCW World's Heavyweight Title and the National Wrestling Alliance International Heavyweight Title.

92. Ball, *supra* note 16, at 50.

that cooperation was necessary for the successful planning of such a complex organization. Promoters [, therefore,] began to join forces and reach agreements as to who could wrestle whom, and where the action was to take place."⁹³

During this period, professional wrestling encountered other problems which nearly spelled its demise. Wrestling still contained a number of old wrestlers who were "straight shooters," or real wrestlers. "They deplored the tactics used by the newcomers, although many consented to employing the new action in their bouts."⁹⁴ Alternatively, "workers" were those who employed theatrics.⁹⁵ "The strange mixture of 'shooters' and 'workers' produced unpredictable outcomes and was disastrous for the organizers."⁹⁶ In particular, while promoters:

choreographed the fight and predetermined outcomes, they had no guarantee that the fighters would stick to the script. It was not unusual for specific wrestlers who were being groomed for the championship by mutual agreement of promoters to be unexpectedly beaten by an aggressive new wrestler who did not understand the rules or who recognized the opportunities available through cooperation and fabrication.⁹⁷

Wrestling also had other problems during the 1930s and 1940s. Its ritual popularity in large cities withered due to the inability of wrestlers and promoters to quickly resolve their territorial conflicts. For example, no matches were held in Madison Square Garden between 1938 and 1949, although this had been a center for wrestling activity.⁹⁸ Exemplifying the conflict, wrestlers were sometimes *rented* to local promoters by the pound.⁹⁹

C. *The Abdominal Stretch—Modern American Wrestling*

With the advent of the television, wrestling came into its own after World War II. Television "multiplied fans at least a thousandfold, and created such outrageous caricatures as wrestlers in

93. Ball, *supra* note 16, at 50.

94. Ball, *supra* note 16, at 50.

95. Ball, *supra* note 16, at 50.

96. Ball, *supra* note 16, at 50.

97. Ball, *supra* note 16, at 50. Likewise, a recent example of this problem appeared in *Tattie v. Milarski*, No. EQ 85-019 (C.P. Butler County, Pa. 1985). See *infra* notes 236-43 and accompanying text.

98. A.J. Liebling, *A Reporter at Large from Sarah Bernhardt to Yukon Eric*, *NEW YORKER*, Nov. 13, 1954, at 132.

99. For example, promoter Jake Pfeffer was known to rent his wrestlers for \$10 per ton plus transportation expenses. Ball, *supra* note 16, at 52.

long blond hair, Indian headdresses, and fur capes. This mixture of showmanship and violence packed arenas."¹⁰⁰ Wrestling was perfect for television since production costs and performance fees were low.¹⁰¹ "Weekly evening television broadcasts of studio cards made wrestling stars, both heroes and villains, into nationally known personalities."¹⁰² Television interviews between matches afforded wrestlers an opportunity to elaborate on their ring personas through costume and histrionics.¹⁰³ Moreover, ethnicity allowed some wrestlers to be revered and others to be hated.¹⁰⁴

By early 1950, Chicago had become the core of professional wrestling. Chicago was the home of the only two wrestling shows broadcast on national television. The Rainbo Arena sponsored "Wednesday Night Wrestling" on ABC, and The Marigold Arena sponsored "Saturday Night Wrestling" on the DuMont Television Network.¹⁰⁵ "The two groups remained quite separate, with neither accepting wrestlers from the other."¹⁰⁶ These studio cards were necessary to promote the live cards.¹⁰⁷ Thus, this format provided the promoter with a "blatant" hour's commercial.¹⁰⁸

In order to promote the live cards, the promoters also had to retain a stable of "journeyman losers" and young men "learning the ropes" to pit against class wrestlers on TV. "The losers [were] clearly overmatched in these encounters Very rarely [did] two name wrestlers meet on television. If they [did], the confrontation [ended] as an inconclusive prelude to the 'real' match on the coming arena card."¹⁰⁹

100. Myron Cope, *The Rich, Full Life of a Bad Guy*, SATURDAY EVENING POST, Feb. 12, 1966, at 90.

101. Morton & O'Brien, *supra* note 13, at 47. In fact, *Business Week* speculated that professional wrestling was responsible for the early introduction of television into many American homes. Ball, *supra* note 16, at 54.

102. Morton & O'Brien, *supra* note 13, at 47.

103. Morton & O'Brien, *supra* note 13, at 47. In particular, wrestlers like Gorgeous George became a star everyone loved to hate through his prissy villainous persona. Morton & O'Brien, *supra* note 13, at 47.

104. See Morton & O'Brien, *supra* note 13, at 47; see also Ball, *supra* note 16, at 51.

105. John Kobler, *Where Grandma Can Yell 'Bum'*, COSMOPOLITAN, Dec. 12, 1953, at 120-27.

106. Ball, *supra* note 16, at 54 (citing Kobler, *supra* note 105).

107. Morton & O'Brien, *supra* note 13, at 48; Ball, *supra* note 16, at 54-55.

108. Morton & O'Brien, *supra* note 13, at 49 ("The television card is one long promotion of the matches the cardmaker has booked in the near future at an arena in the viewing area.").

109. Morton & O'Brien, *supra* note 13, at 49. This format has changed somewhat with the addition of the WWF's "Monday Night RAW" and WCW's "Monday Nitro." These cable television programs contain more "main event" matches, but their results are inconclusive. Therefore, these shows are also used as vehicles to hype both live cards and pay-per-

D. *The Catapult—The Formation of Wrestling Combines*

As wrestling became more profitable, the promoters' interests in protecting those profits became more important. Accordingly, in an attempt to resolve differences and cooperate for the betterment of the sport and the enhancement of profits, professional wrestling's first national association, the National Wrestling Alliance ("NWA"), was formed in 1948.¹¹⁰ "The NWA consisted of thirty-nine promoters nationwide, and in Hawaii, Mexico, and Canada."¹¹¹ Previously,

[the] trouble was that some promoters were lining up bouts in other promoters' territories, a form of unfair competition with other promoters who were then not able to get wrestlers in their own areas. This led to many disputes among the promoters themselves, as well as a lot of confusion for the fans.¹¹²

Thus, the NWA enabled the promoters to exchange the best wrestlers among different areas, which guaranteed a broader audience.¹¹³ However, such an alliance also led to restraints of trade by monopolizing wrestling bookings and "blackballing" wrestlers.¹¹⁴

This singular alliance was short-lived. In 1957, a group of pro-

view events.

110. ROBERTA MORGAN, MAIN EVENT: THE WORLD OF PROFESSIONAL WRESTLING 15 (1979). In 1988, television mogul Ted Turner bought the NWA for \$8 million and renamed it World Championship Wrestling. Vicki Contavespi, *Ted Turner and El Gigante*, FORBES, July 9, 1990, at 106.

111. Ball, *supra* note 16, at 55.

112. Morgan, *supra* note 110, at 15.

113. Morgan, *supra* note 110, at 15.

114. As a result, in 1956, the NWA entered into a consent decree with the Justice Department. This decree required that the NWA:

admit to membership upon non-discriminatory terms and conditions any booker or promoter . . . ; [and forbid] [r]equiring, requesting or inducing any person to refuse to promote or book any wrestler; [or] preventing, restricting or impeding any wrestler, booker or promoter from participating in studio exhibitions or discriminating against any wrestler, promoter or booker because such person participated in the booking or promotion of studio exhibitions.

United States v. National Wrestling Alliance, 1956 Trade Cas. (CCH) ¶68,507 (1956). However, this decree did not prove effective, since subsequent plaintiffs could not affirmatively prove that they were "squeezed out" of the wrestling business or blackballed from the industry. In *National Wrestling Alliance v. Myers*, 325 F.2d 768 (8th Cir. 1963), for example, the court determined that a promoter/wrestler was not thwarted in his efforts to promote wrestling. The court held that there was "no proof in the record of this case from which the jury could reasonably find that the Alliance, . . . *per se* had 'the power either to remove or to exclude or keep out, competitors from the field of competition.'" *Id.* at 775. Moreover, the court denied relief to the promoter/wrestler because he could not prove damages resulting from his blackballing. *Id.* at 777. See also *Contos v. Capital Wrestling Corp.*, 1963 Trade Cas. (CCH) ¶70, 737 (1963) (determining that there was no "hard evidence" that plaintiff promoters were prevented from booking matches in Baltimore, Maryland).

motors were unhappy with the results of a championship bout between Lou Thesz and Edouard Carpentier. Though Carpentier defeated Thesz, by virtue of certain rules, Thesz still held onto the title. Many promoters, dissatisfied with this decision, recognized Carpentier as the new champion and scheduled bouts recognizing him as such. In 1958, after Carpentier lost his "belt" to Verne Gagne, Gagne challenged the then NWA champion Pat O'Connor. When O'Connor did not respond, Gagne was declared the first champion of the American Wrestling Association ("AWA").¹¹⁵

As a contender, Thesz, in 1963, defeated NWA champion Buddy Rodgers. Two weeks later, a rematch provided the same result. However, many east coast promoters challenged the decision, insisting that a championship match could not be decided on the basis of a single fall.¹¹⁶ As a result, these promoters formed their own organization, the World Wide Wrestling Federation ("WWWF"), and crowned Buddy Rodgers as their champion.¹¹⁷

There were also still the small independent promotions resembling the earlier wrestling promotions. These independents were either a part of one of the three larger organizations or were truly independent. Their scope was limited to small regions and, often, individual cities. Cumulatively, these separate promotions created "wrestling fiefdoms all over the country, each with its own little lord in charge. Each little lord respected the rights of his neighboring little lord. No takeovers or raids were allowed."¹¹⁸

E. The Superplex—Vince McMahon and the Future of Professional Wrestling

1982 was a watershed year for professional wrestling. Vincent K. McMahon bought out his father and became the head of the WWF.¹¹⁹ He then "declared war" on the structure of American professional wrestling by selling WWF's programming to stations in other "fiefdoms."¹²⁰ The WWF productions were more upscale

115. Morgan, *supra* note 110, at 15.

116. Instead, these East Coast promoters claimed that the title could only change hands in a match with two out of three falls or pins.

117. Morgan, *supra* note 110, at 17-18. The WWWF subsequently shortened its name to its current formulation, the World Wrestling Federation (WWF).

118. Morgan, *supra* note 110, at 51 (quoting Vincent K. McMahon). The NWA promoted matches in the South, the WWF in the Northeast, and the AWA in the Northwest.

119. Morgan, *supra* note 110, at 51 (quoting Vincent K. McMahon). McMahon owns both the WWF and its parent corporation, TitanSports, Inc.

120. Morgan, *supra* note 110, at 51 (quoting Vincent K. McMahon). Says McMahon, "[h]ad my father known what I was going to do, he never would have sold his stock to me." Morgan, *supra* note 110, at 51. McMahon also believes that had he not purchased his fa-

and began to catch on.¹²¹ "To place his shows regularly on important local stations in enemy territory, he used wads of money for ammunition, paying stations to carry WWF events, sometimes as much as \$100,000."¹²²

McMahon and other promoters capitalized on the spread of cable television to millions of homes.¹²³ This allowed promoters easier access to broader national audiences. The reduced cost and increased ease and availability of transportation also helped free wrestling from its inability to serve vast geographic regions.¹²⁴ These advances enabled promoters to reach new markets.¹²⁵

Today, along with scattered, independent wrestling promotions, there are only two primary wrestling organizations: the WWF and WCW.¹²⁶ Both attempt to cover the entire United States, Canada, and much of Europe. McMahon is currently the owner and operator of the WWF. In 1988, *Forbes* estimated that McMahon was a centimillionaire and that the WWF was worth \$100 million.¹²⁷ In 1991, *Sports Illustrated* valued TitanSports, Inc., the parent corporation of the WWF, as a "\$500 million corporate empire."¹²⁸

WCW is owned by cable mogul Ted Turner and is operated by Eric Bischoff and Virgil Runnels, Jr.¹²⁹ Turner purchased the NWA from David Crockett in 1988 for \$8 million and renamed it "World Championship Wrestling."¹³⁰ Turner bought the promotion because it provided cheap programming for TBS, his cable television station, and substantial cash flow from its live events.¹³¹

ther's stake in the company, "there would still be 30 [small wrestling promotions], fragmented and struggling." Morgan, *supra* note 110, at 51. He continued: "I, of course, had no allegiance to those little lords." Morgan, *supra* note 110, at 51.

121. Morgan, *supra* note 110, at 51 (quoting Vincent K. McMahon).

122. Morgan, *supra* note 110, at 51 (quoting Vincent K. McMahon).

123. Morton & O'Brien, *supra* note 13, at 53.

124. See Morton & O'Brien, *supra* note 13, at 52.

125. See Morton & O'Brien, *supra* note 13, at 52.

126. The third major promotion, the American Wrestling Association, went out of business in the mid-to-late 1980s. Kevin Maler, *Creating Scenes from a Maul: Start-Up Wrestling Group Strives for Lock on Profits*, MINNEAPOLIS-ST. PAUL CITY BUSINESS, July 16, 1993, at 1, 32.

127. Palmeri, *supra* note 6 at 136. While McMahon has made millions of dollars, much of this money has come at the expense of the wrestlers. Says former WWF wrestler Greg "The Hammer" Valentine, "[McMahon's] a slick snake in the grass. He's a millionaire and I'm not. He's turned his back on the guys who've made him a millionaire." Interview with Greg "The Hammer" Valentine, Professional Wrestler, in Cleveland, OH (Feb. 12, 1994).

128. Johnson, *supra* note 3.

129. Runnels is also known as the "American Dream" Dusty Rhodes.

130. Contavespi, *supra* note 110, at 106.

131. Contavespi, *supra* note 110, at 106.

Though the WCW lost approximately \$5 million from 1988 to 1990, this figure only represented about 3% of Turner Communications' total revenues.¹³² Recently, however, because the WCW has successfully cultivated its own stars and lured many former WWF luminaries, it appears to be catching up with the WWF's popularity.¹³³

There are numerous local and regional promotions that are "either headed by up-start promoters, trying to carve out a share of the market with lesser talent, or they are local promoters of long standing affiliated with one or other of the . . . major associations for the supply of mat talent."¹³⁴ In 1982, there were approximately thirty-five independent or minor league wrestling promotions in the United States.¹³⁵

F. *The Small Package—The Wrestling Mafia*

While many wrestlers are recruited from the ranks of scholastic athletics, others come from families that are rich in wrestling tradition.¹³⁶ Wrestlers often compete into their forties and fifties; it is not uncommon for a father to wrestle with, and pass his "ring name" to, his son. Similarly, wrestling promoters have also passed the reigns of their promotions to their children or to other former wrestlers.¹³⁷ "The game is a profitable business and is kept in the family."¹³⁸

132. Contavespi, *supra* note 110, at 107.

133. For example, the WCW cultivated such stars as "The Nature Boy" Ric Flair, "Sting," Sid Vicious, Ricky "The Dragon" Steamboat, "The Natural" Dustin Rhodes, and "Stunning" Steve Austin. Meanwhile, they captured such stars as "Ravishing" Rick Rude, "Earthquake (now known as "Shark"), and "The British Bulldog" Davey Boy Smith. Additionally, the WCW secured perhaps the most talented broadcast team in the history of wrestling, including Jesse "The Body" Ventura, "Mean" Gene Okerlund, Bobby "The Brain" Heenan, and Tony Schiavone. Alternatively, the WWF has picked up some former WCW stars, like the Steiner brothers and Lex Luger, but was seemingly unable to capitalize on their former popularity. Moreover, the WWF lost its two main superstars, Hulk Hogan and the Ultimate Warrior, when they decided to pursue acting careers.

134. Morton & O'Brien, *supra* note 13, at 67. Examples include Smoky Mountain Wrestling, United States Wrestling Association, Global Wrestling Federation, World Organization of Wrestling, and Cleveland All-Pro Wrestling.

135. See Morton & O'Brien, *supra* note 13, at 64.

136. See Morton & O'Brien, *supra* note 13, at 62. Examples include the Von Erichs, the Gagnes, the Briscos, the Windhams, the Armstrongs, the Grahams, the Funks, the Rhodes, the Zbyscos and the Hennings. See Morton & O'Brien, *supra* note 13, at 62, 63.

137. For example, control of both the WWF and NWA passed generationally. Moreover, WCW is now being run by former wrestler Dusty Rhodes, as is World Organization of Wrestling by Jim Brunzell. The now defunct Universal Wrestling Federation was run by Bruno Samartino.

138. See Morton & O'Brien, *supra* note 13, at 62, 63.

The prevalence of this inbreeding has created secretive, close-knit, fraternal "societies." It has been stated that, "[i]f classified information in the United States were as difficult to penetrate as the inner workings and the Trappist-like silence of the cognoscenti in professional wrestling, then the government and the CIA would have little to fear about national security leaks."¹³⁹ As one unnamed matman wrote,

[w]restling is sort of a closed corporation. If you become part of it you will learn all the little tricks of the trade, but don't expect anyone to tell them to you to write about. There is too much money at stake. Wrestling is a business and very well run. They intend to keep it that way.¹⁴⁰

The promotions are known for "tight control of corporate finances, information, production and all workers in the trade."¹⁴¹

G. *The Razor's Edge—Stars and Slugs*

The road to success in professional wrestling is not guaranteed, nor is it easy. Because the spotlight is supposed to shine on the stars, "[p]romoters and franchise owners retain in their stables some second-rate weekend warriors, 'good ol' boys,' and assorted physical oddities."¹⁴² These men often earn as little as \$100 per night and receive no travel, medical, or insurance benefits. These men are often used by promoters to deal with unruly stars. As "Pretty Boy" Larry Sharpe, a former wrestler and current owner of a professional wrestling school called "The Monster Factory," said, "[a] promoter will call and say one of his wrestlers has a bad attitude He needs an attitude adjustment."¹⁴³ This meant that one of Sharpe's eager proteges would knee him in the hamstrings.¹⁴⁴

Promoters are often concerned that "newer wrestlers or newcomers to a franchise may try to get ahead by discrediting their opponents. For this reason, alliances are known to keep competent wrestlers called 'policemen' who, in preliminary bouts, weed out

139. See Morton & O'Brien, *supra* note 13, at 68.

140. See Morton & O'Brien, *supra* note 13, at 66 (quoting Gregory Stone, *Wrestling—the Great American Passion Play in SPORT: READINGS FROM A SOCIOLOGICAL PERSPECTIVE*, 310 (1972)).

141. Morton & O'Brien, *supra* note 13, at 67.

142. Morton & O'Brien, *supra* note 13, at 63.

143. Franz Lidz, *Want to be a Pro Wrestler? Learn the Ropes at the Monster Factory*, *SPORTS ILLUSTRATED*, Sept. 15, 1986, at 96.

144. *Id.*

any rogue wrestlers before they might meet the local champion."¹⁴⁵ Moreover, new wrestlers are carefully screened before they can enter the "fraternity." "The major factor deciding if a wrestler survives, if he works or not, is his relationship to the wrestling establishment [W]restlers do not have agents, and are not drafted and do not sign long term contracts."¹⁴⁶ Wrestlers are, in a sense, individual entrepreneurs who sell themselves. On the other hand, professional wrestlers are *completely* subject to the owners, i.e., promoters and regional alliances.¹⁴⁷

H. The Power Bomb—Wrestling Regulation

While there are a few states that regulate professional wrestling, in recent years these regulatory commissions have diminished in number. Regulatory proponents claim that such regulation provides necessary safety for the wrestlers. For example, the New Jersey Athletic Control Board requires "wrestlers to purchase an annual license, which is granted after a cardiovascular exam. An ambulance must be present at all shows and a board-assigned doctor must remain at ringside throughout the match. Also, promoters are required to provide medical insurance for the contestants."¹⁴⁸

Opponents claim that the promoters already engage in safe practices and that the primary goal of this regulation is to collect a 5% sales tax on the live gates.¹⁴⁹ They also claim that some of the regulations are utterly moronic. For example, an egregious display of misregulation came from an event held in Pittsburgh, Pennsylvania in 1972.¹⁵⁰ There, an overeager commissioner, Joe Cimino, ordered the strict enforcement of all amateur rules.¹⁵¹ His referee dutifully set about disqualifying wrestlers for fake punches, hair-pulling, and use of the ropes.¹⁵² An hour's worth of live televised scheduled matches lasted a mere twenty-two minutes.¹⁵³ But those watching at home did get an unusual treat: an unrehearsed, honest, on-camera shouting match between Cimino and wrestler Bruno

145. Morton & O'Brien, *supra* note 13, at 65.

146. Morton & O'Brien, *supra* note 13, at 65.

147. Morton & O'Brien, *supra* note 13, at 65.

148. Dawn M. Weyrich, *Pro Wrestling's Legitimacy on the Ropes in New Jersey*, WASH. TIMES, Feb. 5, 1990, at A1.

149. Irvin Muchnick, *The Thwak! Deregulation of Thump! Pro Wrestling; the Bu-reaucrats Behind Hulk Hogan*, WASH. MONTHLY, June 1988, at 20, 21.

150. *Id.* at 22.

151. *Id.*

152. *Id.*

153. *Id.*

Samartino.¹⁵⁴

A 1985 promotion in New York illustrates a similarly hilarious regulation. There, a steel cage match was to take place between "Classy" Freddy Blassie, the "Hollywood Fashion Plate," then 69 and with an artificial hip which forced him to walk with the aid of a cane, and Captain Lou Albano, then 52 and grotesquely obese.¹⁵⁵ "Thanks to New York regulations and the attending physician, we have it on good authority that Blassie's and Albano's diastolic readings passed muster."¹⁵⁶

In June 1988, only thirty-one states regulated professional wrestling.¹⁵⁷ "In many states, the powers that control wrestling . . . quietly and successfully lobbied to keep their 'turfs' free of supervision by the athletic commissions."¹⁵⁸ In others, where regulations already existed, the WWF said that professional wrestling is merely a form of "entertainment"¹⁵⁹ and not a sport. As a result, in 1989, for example, "both California and Texas deregulated pro wrestling on the grounds that it was entertainment not sport."¹⁶⁰ Other states, like New Jersey and Washington have been much harder to convince and remain regulated by these commissions.¹⁶¹ Most importantly, wrestlers do not believe that the current regulation has helped them secure better safety and prevent promoters from making huge profits at their expense.¹⁶²

I. *The Cobra Clutch—Compensation, Contracts and Control*

Prospective wrestlers enter the sport for numerous reasons. However, "their primary reason for entering the game is quite obvious: money."¹⁶³ Wrestling promotions pay wrestlers differently. Generally, though, in the large and medium promotions, stars are usually paid a percentage of the gate receipts.¹⁶⁴ Therefore, com-

154. *Id.*

155. *Id.*

156. *Id.*

157. *See id.*

158. Morton & O'Brien, *supra* note 13, at 66.

159. Weyrich, *supra* note 148.

160. B.J. Del Conte, *Wrestling: Growth of Sport Linked to Pay-Per-View*, UNITED PRESS INT'L, Mar. 31, 1990.

161. *Id.*

162. *See* Telephone Interview with J.T. Lightning, Booker and Professional Wrestler (Feb 11, 1994) (stating that the regulation "is a rip off and a joke").

163. Morton & O'Brien, *supra* note 13, at 61.

164. For example, the WWF's booking contract states:

WRESTLER shall be paid by PROMOTER an amount equal to such percentage of the receipts for such Event as is consistent with the nature of the match in which WRESTLER appears, i.e., preliminary bout, main event, etc.; the prevail-

pensation is based on

unwritten breaking points in percentage pay between preliminary performers, semi-finalists, and main eventers. But since each man is dealt with individually, the wrestlers themselves are reluctant to tell one another how much they are earning. Top performers, contrary to the belief of many wrestlers themselves, do not have written contracts giving them a guaranteed income. But since most wrestlers rely on percentages and percentage bonuses, it is not uncommon at matches to see wrestlers in the wings checking the crowd so that they will not be scalped by the promoter when he pays them after the matches are over. The promoter's personal take of the gate runs about 20%.¹⁶⁵

Alternatively, the WCW guarantees all of its stars a salary, as does the WWF for its top two or three stars.¹⁶⁶ Preliminary wrestlers in the larger and medium promotions are also generally paid a flat fee per match.¹⁶⁷ In the smaller promotions, everyone is paid a flat fee per bout.¹⁶⁸

ing practices of the United States professional wrestling community; and any standards PROMOTER or others establish specifically for such Event. However, such amount shall not be less than One Hundred and Fifty (\$150.00) Dollars, per event.

TitanSports, Inc., Booking Contract, Payments, pt. 7.1. See also *Frick v. Ensor*, 557 So.2d 1022, 1023 (La. Ct. App. 1990) (stating that wrestlers are paid a percentage of the gate).

165. Morton & O'Brien, *supra* note 13, at 69. Proof that wrestlers are jealous over each other's salaries was evidenced in a real fight, while the WCW was touring London, England. There, Sid Vicious and Arn Anderson began to argue in a hotel bar over their respective salaries. "Later, they had a savage real-life battle in Anderson's hotel room involving chairs, tables, and scissors, resulting in 20 stab wounds to Anderson and four to Vicious." M.L. Curly, *Rasslin'*, DETROIT NEWS, Nov. 12, 1993. Ironically, in an absurd attempt to prove that WCW wrestling was real, WCW spokesman, Mike Weber, told a London newspaper: "[i]t just shows that what you see in the ring is what you see in real life." *Id.* Moreover, many former wrestling greats now express the view that their promoter took too much. As Ax Demolition said of Vince McMahon: "For every dollar I made, Vince made \$1000." Interview with Ax Demolition, Professional Wrestler, in Cleveland, OH (Feb. 12, 1994). See also *supra* note 127.

166. Telephone Interview with David Meltzer, publisher of *Wrestling Observer Newsletter* (Dec. 12, 1993). In October 1993, it was reported that Vader asked WCW for a \$9.75 million — six year deal. Norman Da Costa, *Hulk Seeking Return to Ring to Reclaim Heavyweight Belt*, TORONTO STAR, Oct. 14, 1993, at C13. Under a contract that expired in December 1992, the Steiner brothers received \$256,000 plus insurance from WCW. Norman Da Costa, *Hit Man Survives Mat Marathon for WWF Crown*, TORONTO STAR, Oct. 15, 1992, at B16. In 1986, Hulk Hogan, perhaps the most famous WWF wrestler of all time, earned \$2.5 million a year, and the Road Warriors, Animal and Hawk, wrestling in the WCW, each made \$500,000. Kevin Scanlon, *Wrestling's Hard Sell*, MACLEAN'S, May 19, 1986, at 34; Norman Da Costa, *Legion of Doom Hangs Up Belts After Years of 'Dining on Danger'*, TORONTO STAR, Sept. 17, 1992, at B8.

167. See Bob Howard, *Wrestling School Means Business*, LOS ANGELES BUS. J., Aug. 1, 1988, at 1 (stating that preliminary wrestlers typically receive \$100 per bout).

168. J.T. Lightning, booker and wrestler for Cleveland All-Pro, stated that all Cleve-

Successful wrestlers on tight travel schedules can be booked for as many as six live matches, plus a few televised promotional bouts, per week.¹⁶⁹ "Promoters thus exercise control and conformity by the number of bouts a wrestler gets—that is, the number of chances he gets to work."¹⁷⁰ The number of bookings depends on the promoter's subjective assessment of the wrestler's talent. As one anonymous wrestler explained:

[w]restlers are hired on by oral agreement to work an area for a set time—initially usually three months. A promoter, typically, guarantees the newcomer to his territory: "You will have matches." That means he will have a chance to develop a following in the region booked out of the franchise city.¹⁷¹

Though wrestlers are often unhappy with the way that they are used, there is little that they can do to change their situation. "Wrestlers complain . . . about unimaginative, lazy promoters who let the tried-and-true wrestling formula earn income, recognition and tax write-offs for the promoters while they neglect furthering the careers of the wrestling performers."¹⁷² This is true because "[w]restlers are cowed by the threat of economic deprivation with fewer matches or no promoter willing to hire them if they talk too much or if they buck the system and its pecking order."¹⁷³ "The promoters, like old dock foremen essentially say who is going to work and who isn't."¹⁷⁴

Wrestling promoters call all of the shots: "who will win, how they will win, how long the match will take [T]he wrestler who doesn't obey orders is blacklisted. There are no pensions, no medical insurance, no unions or any kind of protection for the individual wrestler."¹⁷⁵ As Barry "O," a former wrestler, who was

land All-Pro wrestlers are paid a fixed amount in cash after their bout. Telephone Interview with J.T. Lightning, *supra* note 162. Moreover, a small independent wrestling promotion in Minneapolis, called the World Organization of Wrestling, pays its wrestlers on a sliding scale from \$100 to \$3,000 per night, plus hotel and travel expenses. Maler, *supra* note 126.

169. Morton & O'Brien, *supra* note 13, at 61.

170. Morton & O'Brien, *supra* note 13, at 69.

171. Morton & O'Brien, *supra* note 13, at 68 (quoting an anonymous letter written by a professional wrestler).

172. Morton & O'Brien, *supra* note 13, at 68 (quoting an anonymous letter written by a professional wrestler).

173. Morton & O'Brien, *supra* note 13, at 69.

174. Richard Corliss, *Hype! Hell Raising! Hulk Hogan!: Upscale or Down-Home, Wrestling is a National Mania*, TIME, Apr. 15, 1985, at 104 (quoting Gerald Morton).

175. Robert E. Gould, *The Trouble With Wrestling*, N.Y. TIMES, Nov. 9, 1985, § 1, at 27. Professor Robert E. Gould, M.D. is a professor of psychiatry at New York Medical College and director of the New York State office of the National Coalition on Television Violence.

blackballed for refusing a promoter's homosexual advances, stated

because there are no unions, there is no type of security at all for any of the employees. And that's even intertwined because the employees aren't actually called employees. They're called self-employed individual contractors. And that looks good on the surface but . . . [i]f you go and you complain . . . then you're gone, and there's nothing you can do about it.¹⁷⁶

Quite simply, wrestlers who get out of line are blackballed.¹⁷⁷ Clearly then, wrestlers and promoters are not on equal footing. Unionization, therefore, may provide a necessary mechanism to balance the power between the wrestlers and the promoters.

II. THE BRAIN-BUSTER: THE LEGAL ANALYSIS

A. *The Pinning Predicament—The National Labor Relations Act and Early Cases*

Professional wrestlers can unionize only if they are deemed employees, not independent contractors. Section 7 of the National Labor Relations Act ("NLRA" or the "Act") states that "[e]mployees 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."¹⁷⁸ Section 2(3) of the NLRA defines an em-

176. *Larry King Live: Scandal In the Wrestling World*, (CNN Television Broadcast, Mar. 13, 1992).

177. Yet, even the blacklisted remain quite silent outside of wrestling organizations. There are, however, a few public reports of this blacklisting. Most notably: "Big" Jim Wilson and Barry "O," for refusing the homosexual advances of a promoter; "The Magnificent Zulu" Ron Pope, for joining the NAACP's suit charging discrimination against black wrestlers in California; "The Continental Lover" Eddy Mansfield, for protesting his payment for a bout; Claude "Thunderbolt" Patterson and "Jumping" Jim Brunzell, for attempting to organize unions. N. Brooks Clark, *What You See Is Not Always What You Get*, SPORTS ILLUSTRATED, April 29, 1985, at 60 ("Wilson says he's a 'former' wrestler because he refused to engage in a homosexual act with a wrestling promoter."); *Larry King Live*, *supra* note 176; Gary Pomerantz, *From the Outside Looking in; Backer of Wrestling Commission Laments: The Fix Is In*, ATLANTA J. AND CONST., Mar. 4, 1991, at D3; Dan Jacobson, *Wrestlers*, UNITED PRESS INT'L, Oct. 8, 1985; Kenneth B. Noble, *Ex-Wrestler Fights in a New Arena*, N.Y. TIMES, Mar. 21, 1988, at A14; Maler, *supra* note 126.

178. 29 U.S.C. § 15.7 The rationale behind the law is best explained within the law itself. § 1 of the National Labor Relations Act states in pertinent part that:

[i]nequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners

ployee as:

*any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, . . . but shall not include . . . any individual having the status of an independent contractor.*¹⁷⁹

Thus, whether professional wrestlers may lawfully organize a labor union depends on their status as “employees” or “independent contractors.”

*Rubin v. American Sportsmen Television*¹⁸⁰ is the only case that has ever addressed professional wrestlers’ employment status under the NLRA. In *Rubin*, promoters of professional wrestling matches in Los Angeles County, California commenced an action against American Sportsmen Television Equity Society (“ASTES”), a non-recognized labor organization,¹⁸¹ to restrain picketing after the promoters refused to sign a tendered labor agreement on behalf of professional wrestlers performing in television events.¹⁸² The promoters contended that “the wrestlers [were] independent contractors and therefore [were] not covered by the law.”¹⁸³ Alternatively, ASTES sought “a judicial determination

in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

179. 29 U.S.C. § 152(3) (emphasis added).

180. 254 P.2d 510 (Cal. 1953).

181. An application was pending, however, with the United States Department of Labor.

182. *Id.* at 510-11.

183. *Id.* at 511.

that the wrestlers [were] 'employees' because they receive[d] from the plaintiffs some instruction relating to the kind of holds and maneuvers to be used to give color to the contest."¹⁸⁴ The court held that:

[t]he evidence in the record is neither clear nor conclusive that the wrestlers are employees and not independent contractors. Nor do the facts necessarily support a conclusive determination that the wrestlers have no employment relation with the plaintiffs. On the present showing . . . the relationship falls into that characterized . . . as 'entrepreneurial enterprise,' rather than into employment subject to the protections of the federal act. The present record suggests no obstruction to the free flow of commerce which would be served by employment coverage under federal labor law.¹⁸⁵

The court continued, however, that: "[t]he factual problem . . . is not necessarily finally resolved by the issuance of the preliminary injunction. The question of the existence of the employment relationship is one which it is assumed will be determined on the trial of the action."¹⁸⁶

There are two significant problems with this decision. First, *Rubin* was never finally adjudicated. Therefore, since a ruling on preliminary injunction must be viewed with caution, the employment status of professional wrestlers remains unclear. Second, and perhaps more importantly, *Rubin* relied on *NLRB v. Hearst*.¹⁸⁷ Subsequently, *Hearst* was superseded by statute and overruled in *NLRB v. United Insurance Co. of America*.¹⁸⁸

In *Hearst*, the United States Supreme Court applied an "economic realities" test to uphold the findings by the National Labor Relations Board ("NLRB") that a group of newspaper delivery boys were subject to 29 U.S.C. § 152(3).¹⁸⁹ The Court stated that the act is to be "determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications."¹⁹⁰ Thus, *Hearst* determined that, under the original formulation of § 2(3) of the NLRA, independent contractors could fall within the purview of the Act's

184. *Id.*

185. *Id.* at 511-12 (citations omitted).

186. *Id.* at 512.

187. 322 U.S. 111 (1944), *overruled* by *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

188. 390 U.S. 254 (1968).

189. *See Hearst*, 322 U.S. at 128.

190. *Id.* at 129.

protections.

B. The Kickout—Changes in the NLRA and the Common Law Agency Test

Acting in response to the Supreme Court's decision in *Hearst*, Congress amended § 152(3) via the Taft-Hartley Amendment § 2(3). In connection with this amendment, the House Committee Report stated:

An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *NLRB v Hearst Publications, Inc.*, the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying on the theoretic "expertness" of the Board, upheld the Board In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors." "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits To correct what the Board has done and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee."¹⁹¹

Accordingly, the Supreme Court overruled its decision in *Hearst*, and therefore, its economic realities test, in *NLRB v. United Insurance Co. of America*.¹⁹² There, the Supreme Court recognized that the purpose of the amendment was to have the NLRB and the courts apply general agency principles in distinguishing between independent contractors and employees in an

191. H.R. Rep. No. 245, 80th Cong., 1st Sess. at 18 (1947).

192. 390 U.S. 254 (1968) (stating that "[i]nitially this Court held in *NLRB v. Hearst Publications*, 322 U.S. 111, that 'Whether . . . the term 'employee' includes [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation.'" 322 U.S. at 124. Thus, the standard was one of economic policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse, and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor's from the definition of 'employee' contained in § 2 (3) of the Act.").

NLRA context.¹⁹³ Thus, in determining who is protected by the NLRA, courts and other administrative bodies do not use an “economic realities” test, but rather, use common-law agency principles.¹⁹⁴ Therefore, “there is no shorthand formula or magic phrase that can be applied to find the answer, but all incidents of the relationship must be assessed and weighed with no factor being decisive.”¹⁹⁵

In determining whether United Insurance Company’s debit agents were employees, the Court stated that the decisive factors were the following:

the agents do not operate their own independent businesses, but perform functions that are an essential part of the company’s normal operations; they need not have any prior training or experience, but are trained by company supervisory personnel; they do business in the company’s name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company’s policies; the “Agent’s Commission Plan” that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for funds they collect under elaborate and regular reporting procedure; the agents receive the benefits of the company’s vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.¹⁹⁶

The Court continued:

[p]robably the best summation of what these factors mean in the reality of the actual working relationship was given by the chairman of the board of the respondent company . . .

if any agent believes he has the power to make his own rules and plan of handling the company’s business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company’s plan, then the com-

193. NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (stating that “[t]he obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act”).

194. *Id.* at 256 (“there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor”).

195. *Id.* at 258.

196. *Id.* at 259.

pany will be forced to make the agents final [sic] . . .
[W]e will not allow anyone to interfere with us and our
successful plan.¹⁹⁷

The Court thus concluded that the company's debit agents were employees, and afforded them the Act's protections.¹⁹⁸

Essentially then, *United Insurance* recognized that there is no concise formula to determine if a worker is an employee or an independent contractor. Thus, determining if a worker is an employee, and hence protected by § 7 of the NLRA, requires an analysis of all of the elements of common-law agency.¹⁹⁹

The Second Restatement of Agency provides some guidance on the factors that must be considered in this analysis. Restatement (Second) of Agency § 220 (2) states:

(2) [i]n determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of the control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business.²⁰⁰

Additionally, "servant" and "independent contractor" are defined in Restatement (Second) of Agency §2:

(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. (3) An independent contractor is a person who contracts with another to do something for him but who is not con-

197. *Id.*

198. *Id.* at 260.

199. See *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756 (3d Cir. 1951); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969).

200. Restatement (Second) of Agency §220 (2) (1958).

trolled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.²⁰¹

Following the factors set out in § 220(2) Restatement (Second) of Agency and *United Insurance*, courts have not identified a set formula for determining employment status.²⁰² Rather, the courts and NLRB have considered more than twenty-one factors to ascertain employment status under 29 U.S.C. § 152(3).²⁰³ Employment status, however, ultimately depends upon an assessment of "all of the incidents of the relationship . . . with no one factor being decisive."²⁰⁴ Thus, determining employment status requires "case-by-case determinations whether the relationship between a business enterprise and other persons is that of employer and employee or falls within the exclusion of 'any individual having the status of an independent contractor.'"²⁰⁵

In the professional wrestling context, the following seventeen factors apply to determine status:

- (1) whether the worker controls the manner and means by which the intended result is accomplished;²⁰⁶ (2) whether the worker

201. Restatement (Second) of Agency §2 (1958).

202. In *United Insurance*, the Court said: "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor [T]here is no shorthand formula or magic phrase that can be applied to find the answer." 390 U.S. 254, 258 (1969).

203. 55 A.L.R. Fed. 20 (1992) (delineating twenty-one specific factors plus "other factors" to consider when determining whether truckers are employees or independent contractors).

204. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1969) ("[A]ll of the incidents of the relationship must be assessed and weighed with no one factor decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."). See also *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971) (concluding that no single factor is determinative); *NLRB v. Warner*, 587 F.2d 896 (8th Cir 1978) (same); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969) (same). *But see Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974), in which the court, although recognizing that a number of factors must be considered in determining whether truck owner-operators are employees or independent contractors, observed that the right to control has traditionally been the decisive question.

205. *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, 446 (2d Cir. 1975) (quoting 29 U.S.C. § 152(3)).

206. Various courts and the NLRB have recognized that a reservation of control by the person for whom the work is done over the methods and means by which the work is accomplished indicates employee status while control reserved only as to final result indicates independent contractor status. See, e.g., *International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756 (3d Cir. 1951).

operates his own individual business;²⁰⁷ (3) whether the work done is an essential part of employer's business;²⁰⁸ (4) whether the worker supplies the tools to carry out the job requirements;²⁰⁹ (5) whether the worker pays for operating expenses;²¹⁰ (6) whether skill is required to perform the job;²¹¹ (7) whether there is permanence in the relationship;²¹² (8) whether the worker is paid on a time or unit basis, or receives a fixed amount or an amount based on a formula;²¹³ (9) whether the worker has an opportunity for profit or loss;²¹⁴ (10) whether the worker re-

207. An individual operating a distinct trade or business indicates independent contractor status, while the fact that work was an essential part of the business for whom the work was completed indicates employee status. *See, e.g., Meyer Dairy Inc. v. NLRB*, 429 F.2d 697 (10th Cir. 1970); *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383 (9th Cir. 1969).

208. As a corollary to the premise that an individual's operation of a distinct trade or business indicates independent contractor status, when work is performed as an essential part of the employer's business, it is indicative of employee status. *See, e.g., Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969).

209. An employer generally furnishes the tools, equipment, and materials used to accomplish the work, while an independent contractor generally furnishes his/her own. *See, e.g., NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969). *Cf. NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756, 759 (3d Cir. 1951), where the court stated:

[t]he fact of ownership of tools or equipment is helpful in deciding whether one is an independent contractor only because of the inference of the right to control arising from ownership. But if the owner, as part of the agreement to perform service, surrenders complete dominion over the instrumentality and the right to decide how it shall be used, as here, then the fact of ownership loses its significance.

210. Generally, an employer will pay for operating expenses, but an independent contractor will bear such expenses him/herself. *See, e.g., Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *Meyer Dairy Inc. v. NLRB*, 429 F.2d 697 (10th Cir. 1970); *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383 (9th Cir. 1969).

211. The exercise of special skill is generally that of an independent contractor, while little or no skill tends to indicate employee status. *See, e.g., Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383 (9th Cir. 1969); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *NLRB v. Warner*, 587 F.2d 896 (8th Cir. 1978).

212. Permanence of a relationship or regularity in the performance of services would tend to indicate an employer-employee relationship, while sporadic performance limited to a specific job would indicate an independent contractor. *See, e.g., Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383 (9th Cir. 1969); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756 (3d Cir. 1951).

213. Employees are usually paid on a time or a unit basis, while independent contractors are usually paid an agreed amount or an amount determined by a formula for the performance of a particular job. *See, e.g., Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383 (9th Cir. 1969); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756 (3d Cir. 1951).

214. Generally, an independent contractor makes a substantial investment in the enterprise in which he engages and bears the risk of the loss or has the opportunity for profit from his investment and his activity. Alternatively, the employee is usually paid a fixed

ceives employee-type withholding and benefits;²¹⁵ (11) whether the worker has control over days or hours worked;²¹⁶ (12) whether the worker has a right to hire, discharge or discipline another worker;²¹⁷ (13) whether the worker has a right to work in the service of another;²¹⁸ (14) whether the worker must wear an identifying uniform or symbol;²¹⁹ (15) whether the worker must attend job training and promotional programs;²²⁰ (16) whether the parties believe their relationship to be that of employer and employee;²²¹ and (17) whether the terms of the contract reflect employee or independent contract status.²²²

In light of weaknesses within the *Rubin* decision, the changes

wage irrespective of the profit or loss of the enterprise. *See, e.g., Meyer Dairy Inc. v. NLRB*, 429 F.2d 697 (10th Cir. 1970); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971).

215. The presence or absence of employee-type withholdings and benefits, such as withholding of taxes, social security, providing vacations, paid holidays, health and life insurance, pensions, retirement plans, and bonuses is another important factor. *See, e.g., International Bhd. of Teamsters v. Oliver*, 358 U.S. 283 (1959); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971).

216. Independent contractors generally have the right to choose what days and hours they will work, while employers specify the days and hours their employees must be on the job. *See, e.g., NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756 (3d Cir. 1951); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974).

217. The right to hire, discharge and discipline workers is a mark of an independent contractor. The absence of such a right tends to indicate employee status. *See, e.g., Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969).

218. A requirement that work be done exclusively for an employer, or that permission to work in the service of another be obtained from the employer, would indicate employee status. Alternatively, the absence of such a requirement indicates independent contractor status. *See, e.g., Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756 (3d Cir. 1951); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969).

219. Wearing distinctive uniforms which identify an employer indicates an employer-employee relationship. *See, e.g., NLRB v. Amber Delivery Service*, 651 F.2d 57 (1st Cir. 1981); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974); *Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697 (5th Cir. 1964).

220. The presence or absence of compulsion to attend promotional programs operated by the person for whom services were performed was recognized as a factor to be considered in determining status. *See, e.g., Frito Lay, Inc. v. NLRB*, 385 F.2d 180 (7th Cir. 1967); *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974).

221. Generally, courts will consider the intent of the parties when entering into a work agreement as evidence of a particular employment status. *See, e.g., Lorenz Schneider Co. v. NLRB*, 517 F.2d 445 (2d Cir. 1975); *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981).

222. Certain language, particularly words indicating that the person for whom services were performed had the right to control the method and means by which the work was accomplished, has been recognized as at least some evidence of status. *See, e.g., NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756 (3d Cir. 1951); *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969); *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971).

made by the Taft-Hartley Amendment to the NLRA and the courts' subsequent interpretations of these changes, the employment status of professional wrestlers must be re-examined. Accordingly, determining a professional wrestler's employment status requires a detailed analysis of the six most relevant factors and a general discussion of the remaining determinants.

1. Arm Drag and Twist—The Right to Control the Manner and Means

Though not dispositive, courts have recognized that a reservation of control by the person for whom the work is done over the methods and means by which the work is accomplished indicates employee status. Alternatively, control reserved only as to the final result indicates independent contractor status.²²³ Professional wrestling promoters reserve complete control over the methods and means by which the work is accomplished.

In *International Brotherhood of Teamsters v. Oliver*,²²⁴ the Supreme Court held that an owner-lessor of a fleet of trucks who, on certain occasions, drove his truck in the service of the lessee-motor carrier, was an employee of the carrier for which he drove.²²⁵ In considering employment status, the Court relied on the language within the collective bargaining agreement. The language provided that at such times as the lessor-driver himself drove his vehicle in the service of the lessee-carrier, the carrier expressly reserved the right to control the manner, means and details of, and by which the owner-operator performed his services, as well as the ends to be accomplished.²²⁶ Similarly, in *NLRB v. Nu-Car Carriers, Inc.*,²²⁷ determining whether owner-operator automobile carriers were employees or independent contractors, the Third Circuit Court of Appeals relied on language within a lease agreement between the carriers and Nu-Car. The agreement stated that the equipment was to be "used solely 'under the direction and supervision of the Company' and that the operation of all leased vehicles and equipment shall [be] under exclusive and direct supervision and control of the Company."²²⁸ The court held that "[i]f the company has not reserved by this language the right to control the

223. See *supra* note 206 and accompanying text.

224. 358 U.S. 283 (1959).

225. *Id.* at 294.

226. *Id.* at 287.

227. 189 F.2d 756 (3d Cir. 1951).

228. *Id.* at 758.

manner and means of driving these tractor-trailers and loading and unloading them, there are not words in the English language capable of doing so.”²²⁹ Though the court also considered other factors, it concluded that “[t]he degree of control over the work of its drivers which [Nu-Car] had the right to exercise under the . . . agreements is so great as to make the drivers clearly ‘employees’ within the coverage of the National Labor Relations Act, and not ‘independent contractors.’ ”²³⁰

Because professional wrestling is fixed, the promoters determine which wrestlers face each other in a bout, how long the “competition” will take, the type of match desired and who will ultimately win. As the attorney for Jesse “The Body” Ventura and other professional wrestlers, David Bradley Olsen, stated, “the promoters all admit today that it’s not a bona fide athletic contest. [The wrestlers] are all told what costumes to wear, how to wrestle, when to wrestle, where to wrestle and who’s going to win.”²³¹ Moreover, a WWF professional wrestling employment contract states that the professional wrestler: “shall use his/her skills and talents as professional wrestler and be responsible for developing and executing the various details, movements, and maneuvers of each match consistent with and *complying with all requirements, directions and requests made by PROMOTER* in connection with the booking of WRESTLER at scheduled events.”²³² The agreement further states that:

*WRESTLER agrees all matches should be finished in accordance with PROMOTER’s direction.*²³³ Breach of the paragraph shall cause forfeiture of any payment due WRESTLER . . . for the event at which the breach occurs and shall terminate PROMOTER’s guarantees . . . as well as all other obligations of PROMOTER to WRESTLER . . . , but such breach shall not

229. *Id.* at 759.

230. *Id.* at 758.

231. Telephone Interview with David Bradley Olsen, Attorney (Dec. 15, 1993). In fact, the WWF had publicly asked that the New Jersey Senate define professional wrestling “as an activity in which participants struggle hand-in-hand primarily for the purpose of providing entertainment rather than conducting a bona fide athletic contest” so as to avoid certain state taxes and regulation of true sporting events. Bob Verdi, *Rassling With Some Grim News*, *СН. ТРЪВ.*, Feb. 14, 1989, at C1.

232. TitanSports, Inc., Booking Contract, *Wrestler’s Obligations*, pt. 9.4 (emphasis added).

233. This sentence explicitly reveals that professional wrestling matches are not honest competitions. *See also*, World Championship Wrestling, Inc., Memorandum of Agreement, *Wrestler’s Obligations*, pt. 8.8 (stating “WRESTLER agrees all matches will be finished in accordance with the match maker’s or his representative’s direction.”).

terminate PROMOTER's licenses and other rights.²³⁴

The WWF booking contract even goes so far as to control what is done with a wrestler's name, intellectual property and likeness. The contract states in pertinent part:

WRESTLER acknowledges the right of PROMOTER to make decisions with respect to . . . the exercise of any other rights respecting the Intellectual Property or Name and Likeness, and in this connection *WRESTLER acknowledges and agrees that PROMOTER's decision with respect to any agreements disposing of the rights to WRESTLER's Intellectual Property and/or Name and Likeness are final, except as to WRESTLER's legal name, which PROMOTER may only dispose of upon WRESTLER's consent.*²³⁵

The extent to which a promoter can control a wrestler was the subject of *Tattrie v. Milarski*,²³⁶ a case filed in Butler County, Pennsylvania, Court of Common Pleas. There, the promoter, Newton Tattrie, alleged that Robert Milarski²³⁷ "refus[ed] to act according to the plaintiff promoter's directions while wrestling and attempt[ed] to use his best efforts to win all matches as opposed to entertaining the wrestling audience."²³⁸ The employment contract between the wrestler and the promoter stated that:

[t]he EMPLOYEE agrees to use the same efforts in each bout as is common to the wrestling entertainment industry . . . [and] [t]hat he shall promptly and faithfully do and perform all services pertaining to said employment that are or may be assigned to him by the EMPLOYER during the term of this contract.²³⁹

Accordingly, the promoter sought a court order to force the wrestler to act as a wrestling entertainer in accordance with the employment contract.²⁴⁰

In his answer, the Defendant, Brother Igor, asserted that:

[i]t is denied that the wrestling entertainment industry purports

234. TitanSports, Inc., Booking Contract, Wrestler's Obligations, pt. 9.6 (emphasis added).

235. *Id.* pt. 9.7 (emphasis added).

236. *Tattrie v. Milarski*, No. EQ 85-019 (C.P. Butler County, Pa. 1985).

237. Also known as "Brother Igor."

238. Plaintiff's Complaint in Civil Action-Equity at 2, *Tattrie v. Milarski*, No. EQ 85-019 (C.P. Butler County, Pa. 1985).

239. Plaintiff's Complaint in Civil Action-Equity at Exhibit "1," pt. 3.a. & 3.b., *Tattrie v. Milarski*, No. EQ 85-019 (C.P. Butler County, Pa. 1985).

240. *Id.* at 3. Mr. Tattrie's attorney said, "[w]e want to be able to tell him what to do: 'You have 15 minutes to fill, we want you to use your 15 minutes.'" *Wrestling With a Thorny Issue*, NAT'L L.J., July 15, 1985, at 63.

rules and regulations governing the actions of entertainment wrestlers. To the contrary, the Pennsylvania Athletic Commission governs the wrestling entertainment industry and said commission requires wrestlers to use their best efforts in the wrestling match as opposed to their best efforts at entertaining the wrestling audience.²⁴¹

The Defendant contended that the promoter's contract interpretation "directly conflict[ed] with the rules of the Pennsylvania Athletic Commission."²⁴² Unfortunately, this case was dismissed with prejudice for a failure to prosecute because it remained inactive for over two years.²⁴³

Previous judicial decisions regarding the vicarious liability of promoters for the torts of their wrestlers are inconsistent but do illustrate the extent of control, both in manner and means, that promoters exert on professional wrestlers. For instance, in *Langness v. Ketonen*,²⁴⁴ in holding the promoter, Ketonen, vicariously liable for the tort of professional wrestler Skagway Clements, the Supreme Court of Washington determined that "it was the custom of . . . promoters . . . to control the actions of wrestlers while the latter were in the ring."²⁴⁵ There, the court relied heavily on the testimony of Nick Zvolis, a former wrestler, promoter and referee. The questioning went as follows:

Q. Are you familiar with the customs of the in the trade [of professional wrestling] for the last thirty years, up to today? A. Yes Q. Mr. Zvolis, who, if anyone, if you know, is in complete control of a wrestling exhibition? A. The promoter, of course Q. Who gives the directions to the wrestler? A. The promoter gives the wrestler [directions] Q. Does the promoter give them any instructions as to how and what he is to do in the ring? A. Yes, the promoter give [sic] him [directions].²⁴⁶

Though the promoter testified that "he did not exercise control over Clements or any other wrestler while the exhibition was in

241. Defendant's Answer and New Matter, pt. 6, *Tattrie v. Milarski*, No. EQ 85-019 (C.P. Butler County, Pa. 1985).

242. *Id.* at 3.

243. Notice at 1, *Tattrie v. Milarski*, No. EQ 85-019 (C.P. Butler County, Pa. 1989).

244. 255 P.2d 551 (Wash. 1953).

245. *Id.* at 554.

246. *Id.* See also, Morton & O'Brien, *supra* note 13, at 69 (quoting an anonymous letter written by a professional wrestler, stating that before a match: "[a] promoter asks the wrestler for so many 'changes' for a given time. As to who wins—that depends on local conditions. Whatever will draw the best crowd for the next week will be the deciding factor. The wrestlers normally would not decide such matters. They are hired help.").

progress,"²⁴⁷ the court found that there was substantial evidence that the wrestler was an employee and under control of the promoter.²⁴⁸

Similarly, in *White v. Frenkel*,²⁴⁹ a promoter was held vicariously liable when a wrestler, driving to his next bout, collided with an oncoming car. In concluding that the professional wrestler was an employee and not an independent contractor, the court addressed the promoter's substantial control over the wrestler.²⁵⁰ The court stated that the wrestler "was told where to go, when to be there and exactly what to do when he got there."²⁵¹ In determining that the wrestler was subject to the complete control and direction of the promoter, the court relied on evidence that Frenkel wrestled practically every night; could not refuse to wrestle in a scheduled bout without being fined or fired; could not wrestle for any other promotion except with the promoter's permission; received compensation payments not based on whether he won or lost; and had to do exactly what the promoter told him or he would be fired.²⁵²

The court also relied on testimony that the promoter controlled who would win and who would lose; decided which of the wrestler/entertainers were preliminary wrestlers and main event wrestlers; and collected all of the proceeds from the sale of concessions, memorabilia and television payments.²⁵³ The evidence revealed that the promoter maintained the right to control the work of Frenkel and exercised that right.²⁵⁴ The Third Circuit Court of Appeals held the promoter vicariously liable, since it found Frenkel was an employee and was within the scope of his employment when the accident took place.²⁵⁵

247. 255 P.2d at 554. Here, using an argument similar to that of the wrestler in *Tat trie v. Milar ski*, see *supra* notes 236-243 and accompanying text, the promoter contended that it would be unlawful, according to Washington state's statutes, to exercise control for the purpose of producing a sham or fake wrestling match or exhibition. 255 P.2d at 554.

248. 255 P.2d 551, 555 ("[w]e are of the view that there was sufficient evidence to the effect that an employer-employee relationship existed, to take that question to the jury" and "it is our opinion that it should not be held, as a matter of law, that Clements was acting outside the scope of his employment at the time he kicked Mrs. Langness."). *Id.* at 556. Note, however, that the judgment below was reversed because the trial court failed to give the promoter's requested instructions on the theory of non-liability for the actions of independent contractors and also on contributory negligence. 255 P.2d at 556-57.

249. 615 So. 2d 535 (La. Ct. App. 1993).

250. *Id.* at 537.

251. *Id.* at 539.

252. *Id.* at 540.

253. *Id.* at 541.

254. *Id.* at 539.

255. *Id.* at 550. See also *Caldwell v. Maupin*, 22 N.E.2d 454 (Ohio Ct. App. 1939) (a promoter was held vicariously liable when wrestlers injured a fan, since the wrestlers were

The promoters' control extends past the ropes of the wrestling ring. In 1992, several former wrestlers have come forward to reveal that their wrestling success was predicated on unwanted sexual advances. As "The Living Legend" Bruno Samartino revealed about the WWF:

[a]s far as the wrestlers themselves, . . . there was always talk of some up-and-coming, good-looking young wrestlers . . . who were put in situations that if they wanted to further their career, if they wanted to advance, if they wanted to climb that ladder, they would have to cooperate. And if they did not, then their career would be nowhere.²⁵⁶

Former WWF referee, Mike Clark said that he knew "of a . . . few wrestlers . . . that have . . . gotten their jobs from doing sexual favors."²⁵⁷

Professional wrestling promoters' right to control extends well beyond those dominions imposed in *Oliver* and *Nu-Car Carriers*. Based on the contractual provisions, performance instructions and other external controls, professional wrestling promoters control the manner and means by which the intended result is accom-

employees of the promoter and were engaged in doing what they were employed to do); *Massey v. Jim Crockett Promotions, Inc.*, 400 S.E.2d 876 (W. Va. 1990) (court held that summary judgment inappropriate—jury should decide whether "Sweet Stan" Lane was in the course of his employment when he struck a fan with his fist); *Frick v. Ensor*, 560 So.2d 446 (La. Ct. App. 1990) (per curiam) *reh'g denied*, 563 So.2d 1158 (La. Ct. App. 1990) (found promoter liable when "Nature Boy" Buddy Landell hit a fan even though the promoter did not supply a W-2 form, withdraw taxes or furnish workers' compensation). However, a Georgia appeals court, in *Davis v. Jones*, 112 S.E.2d 3 (Ga. Ct. App. 1959), found a wrestling promoter not liable for injuries to a time keeper/plaintiff at a wrestling bout suffered when one wrestler hurled himself out of the ring and onto the plaintiff. In so holding, the court stated:

[t]he contention of the plaintiff that the defendants should have anticipated the behavior attributed to the defendant [wrestler] and should have warned the plaintiff thereof is wholly without merit because to our minds the defendants, in order to have anticipated such behavior, would not only have had to be clairvoyant but would have had to be equipped with supernatural powers beyond the capacity of common man. *Id.*

Therefore, this court took the naive view that the promoters do not control the actions of professional wrestlers. *Id.* See also *Klause v. Nebraska State Board of Agriculture*, 35 N.W.2d 104 (Neb. 1948) (holding that because wrestler was not a servant and was acting outside the scope of his employment when he injured a fan, no liability for the promoter); *Wiersma v. Long Beach*, 106 P.2d 45 (Cal. Ct. App. 1940) (promoter not liable where employee-wrestler, if a wrestler is such an employee, committed a deliberate and malicious assault upon a fan); *Ramsey v. Kallio*, 62 So. 2d 146 (La. Ct. App. 1952) (even if wrestlers were employees, malicious acts against fans were not within the scope of the wrestler's employment).

256. *Now It Can Be Told: Wrestling's Ring of Vice* (syndicated broadcast, April 3, 1992).

257. *Id.*

plished. Accordingly, professional wrestlers satisfy the common law agency test's right-to-control component.

2. The Write-Off—Withholdings and Employee Benefits

Tax withholdings, social security payments, vacations, paid holidays, health and life insurance, pensions, retirement plans, and bonuses have all been used to determine employment status.²⁵⁸ In *Oliver*, the Court relied on language in the collective bargaining agreement which provided that at such times as the lessor-driver himself drove his vehicle in the service of the of the lessee-carrier, the carrier agreed to pay social security tax, compensation insurance, public liability, and property damage insurance.²⁵⁹ The Court considered this fact relevant when it determined that the owner-lessee was an employee of the carrier for which he drove.²⁶⁰

In affirming the decision of the NLRB, the First Circuit Court of Appeals, in *Seven-Up Bottling Co. v. NLRB*, held that distributors of fountain syrup and beverages were employees.²⁶¹ The court considered that the company did not pay any salaries, unemployment insurance, Social Security or workers' compensation insurance, and took no tax deductions on behalf of the distributors.²⁶² The court explicitly supported the NLRB's findings even though the company failed to provide benefits and make employee-type withholdings. This fact was "outweighed by other facts demonstrating the company's effective control over the distributors' operations."²⁶³ Therefore, a failure to provide benefits or make employee-type withholdings will not necessarily invalidate employee status. Within the wrestling industry, being subject to withholdings and receiving benefits depends on the wrestling promotion. Generally, the larger promotions do offer some employment benefits, but most do not withhold taxes. Alternatively, the smaller promotions provide for neither withholdings nor employee benefits.²⁶⁴

Indicative of the larger promotions, the WWF's contract says

258. See *supra* note 215 and accompanying text.

259. 358 U.S. 283, 287 (1959).

260. *Id.* at 294.

261. 506 F.2d 596 (1st Cir. 1974).

262. *Id.* at 598.

263. *Id.* at 599.

264. See Plaintiff's Complaint in Civil Action-Equity at Exhibit "1," in *Tattie v. Milarski*, No. EQ 85-019 (C.P. Butler County, Pa. 1985) (the employment contract does not mention any withholdings or any benefits); Eric Zorn, *Rock 'N' Wrestling: TV Hypes a New Tag Team*, CHI. TRIB., February 18, 1985, at C1. (Eddy Mansfield, a retired wrestler stated, "injuries are particularly grim in wrestling because the performers seldom have medical or retirement benefits."). *Id.*

that “[a]ll payments made to WRESTLER are in full *without* withholding of any federal, state or local income taxes, and/or any social security, FICA or FUTA taxes.”²⁶⁵ As to benefits, the WWF booking contract states that the “WRESTLER agrees to cooperate fully and in good faith with PROMOTER in the event PROMOTER deems it necessary to obtain life, disability, or other insurance upon WRESTLER in such amount as PROMOTER may determine necessary.”²⁶⁶ While it is clear the WWF does not withhold any taxes for its wrestlers, it may, at its option, provide health benefits to its wrestlers. The WWF contract does not mention pensions, retirement plans, bonuses, paid holidays or vacations. By implication, the WWF provides none of these benefits.²⁶⁷ The WCW does, however, provide workers’ compensation and health benefits.²⁶⁸ As Ax Demolition stated, “when [WCW] wrestlers get hurt they’re covered. When they get hurt they get paid.”²⁶⁹

In contrast, the independent promotions almost uniformly do not provide wrestlers with any benefits. As “Thunderbolt” Patterson aptly put it, “I couldn’t even get the promoter to get me a ride to the hospital . . . much less pick up the hospital bill.”²⁷⁰ In *Frick*

265. TitanSports, Inc., Booking Contract, Payments, pt. 7.10. Ironically, the WWF featured a villainous wrestler known as Irwin R. Scheyster or “IRS” who talked of tax cheats and whose finishing move was the “write-off.”

266. TitanSports, Inc., Booking Contract, Wrestler’s Obligations, pt. 9.8. Note that promoters have a substantial stake in the health of their wrestlers. As the Sunset Advisory Commission reported to the Texas Legislature, “[t]he industry also appears to be largely self-regulating given the promoters’ interest in keeping wrestlers healthy enough to maintain the road show.” Bob Lowry, UNITED PRESS INT’L, August 16, 1988.

267. Point 13.2 of the WWF’s agreement with its wrestlers says:

[t]his agreement contains the entire understanding of the parties with respect to the subject matter hereof and all prior understandings, negotiations and agreements are merged in this Agreement. There are no other agreements, representations, or warranties not set forth herein with respect to the subject matter hereof, and this Agreement may not be changed or altered except in writing signed by PROMOTER and WRESTLER.

TitanSports, Inc., Booking Contract, Miscellaneous, pt. 13.2.

268. Interview with Ax Demolition, *supra* note 165 (stating WCW wrestlers receive salaries, worker’s compensation and health benefits); Telephone Interview with David Meltzer, *supra* note 166 (Meltzer stated: “[the WCW] has benefits”). See also Norman Da Costa, *supra* note 166 (“[u]nder their WCW contract, which expires in December [1992], [the Steiner brothers] each get \$256,000 plus insurance”). See also, World Championship Wrestling, Inc., Memorandum of Agreement, Promoter’s Obligations, p.t 7.3 (stating that “PROMOTER agrees to bear the risk of injury to or the illness of WRESTLER, and any inability of WRESTLER to wrestle by reason of illness or injury shall not release PROMOTER from its obligation [to guarantee the wrestler’s earnings]”).

269. Interview with Ax Demolition, *supra* note 165.

270. Noble, *supra* note 177.

v. Ensor, the court concluded that “[w]restlers are responsible for all of their own benefits, and [the promoter] does not provide W-2 forms or withhold taxes. No workers’ compensation or unemployment benefits are available to the wrestlers through [the promoter].”²⁷¹

David Bradley Olsen believes that this is the industry norm because promoters wish to avoid extra employment costs and tort liability.²⁷² This fact might also help the promoters in a unionization context since it supports their view that wrestlers are not employees. However, based on *Seven-Up*,²⁷³ the absence of these types of withholding is not, itself, dispositive. Because the promoters do provide health benefits on certain occasions, wrestlers might retain enough benefits to satisfy this factor. Since this is a question for a trier of fact, this component of the agency test remains unclear.

3. The Boston Crab—Control over Days and Hours

Independent contractors generally choose what days and hours they work, while employers specify the days and hours that their employees must be on the job.²⁷⁴ The United States Eighth Circuit Court of Appeals, in *NLRB v. Warner*,²⁷⁵ considered this factor when deciding whether a driver was an employee, and therefore, able to vote in a union representation election. Among other factors, the court noted that all drivers worked substantially the same hours, were required to report to the company’s owner at 7:30 each morning, and were required to notify the owner if they were going

271. 557 So. 2d 1022, 1023 (La. Ct. App. 1990). Similarly, Cleveland All-Pro Wrestling’s contract includes the following requirements for its wrestlers:

I will be responsible for any and all tax that may result from the said [wrestling] event and will not hold Cleveland All-Pro Wrestling or its members responsible for any penalties or fees from [wrestler’s] compensation. I also understand and agree that I have been asked by the officials of Cleveland All-Pro Wrestling to carry and maintain my own personal liability insurance and have done so. I will not hold [Cleveland All-Pro Wrestling] responsible in any way for any injuries that may occur to myself or to any person, place or thing which may come in contact with myself before, during or after the scheduled wrestling event.

Telephone Interview with J.T. Lightning, *supra* note 162.

272. Telephone Interview with David Bradley Olsen, *supra* note 231. Mr. Olsen believes, however, that “if you look as a matter of law in just about any state, the direction and control given to these wrestlers it would probably be determined, for worker’s compensation purposes, that these wrestlers were actually employees.” Telephone Interview with David Bradley Olsen, *supra* note 231.

273. *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974).

274. See *supra* note 216 and accompanying text.

275. 587 F.2d 896 (1st Cir. 1974).

to be late or absent.²⁷⁶ The court found that the driver was an employee since he was subject to the same control and supervision as the other employees.²⁷⁷ In *Nu-Car Carriers*, the court noted that Nu-Car controlled its workers' days and hours.²⁷⁸ According to agreements between the parties, though, "[t]here [was] no provision requiring the driver to be on the job so many days a week and so many hours a day, . . . [the drivers were] subject to call by the Company for rendering of service with equipment at all times."²⁷⁹ The court considered this control when it concluded that "[b]oth the contracts made by the parties and the manner of carrying on operations by the company and drivers support the conclusion that there was here an employer-employee relationship."²⁸⁰

The WWF contract illustrates that promoters have substantial control over its wrestlers' days and hours:

PROMOTER shall schedule events and book WRESTLER for Events. In doing so, PROMOTER shall select the time and location of the Events at which WRESTLER is booked, WRESTLER's opponent, and any other wrestlers who will appear at such Event. PROMOTER shall provide WRESTLER with reasonable advance notice and of the date, time, and place of any such Event, and WRESTLER shall appear at the designated location for any such Event no later than one hour before the designated time. If the WRESTLER fails to appear as required without advance 24 hour notice to PROMOTER and PROMOTER must substitute another wrestler to appear in WRESTLER's place at the Event, then WRESTLER shall be subject to a fine to be determined by promoter.²⁸¹

Clearly then, the WWF satisfies this element of control.

The smaller promotions similarly control what days and hours their wrestlers will work. In *White v. Frenkel*,²⁸² the court found a promoter vicariously liable for a wrestler's car accident, in part because the wrestler:

[w]restled thirty matches in thirty-one days at the direction of Mid-South Sports, Inc. Frenkel could not refuse to wrestle in a match scheduled by Mid-South without being subject to being fined, or being fired Furthermore, Frenkel testified that he

276. *Id.* at 900.

277. *Id.* at 901.

278. *NLRB v. Nu-Car Carriers, Inc.*, 189 F.2d 756, 759 (3d Cir. 1951).

279. *Id.*

280. *Id.* at 760.

281. *TitanSports, Inc., Booking Contract, Promoter's Obligations*, pt. 8.3.

282. 615 So. 2d at 535.

had to arrive one hour before his scheduled match and was not allowed to leave the premises after he completed his match but was told he had to remain in case Mid-South declared to put on a final free-for-all match called "a lights out brawl."²⁸³

Promoters' control over the days and hours wrestlers work is much more substantial in professional wrestling context than either *Warner* or *Nu-Car Carriers* indicated. Therefore, it is highly likely that promoters' control over days and hours is substantial enough to satisfy this prong of the agency test.

4. The Scorpion Death Lock—The Right to Work in the Service of Another

The requirement that work be done exclusively for an employer, or that permission to work in the service of another be obtained from the employer, indicates employee status. Alternatively, the absence of such a requirement suggests independent contractor status.²⁸⁴ In *Seven-Up*, the First Circuit considered the fact that distributors of fountain syrups and beverages could "not sell products in competition with those of the company."²⁸⁵ Applying the common law agency test, including the right to work in the service another, the court concluded that the distributors were employees.²⁸⁶ Similarly, in *NLRB v. Brush-Moore Newspapers, Inc.*, the Sixth Circuit weighed the fact that distributors of newspapers signed contracts that "prohibited the distributors from selling other newspaper or advertising without [Brush-Moore's] permission."²⁸⁷ In finding other additional indicia of employee status, the court upheld the NLRB's earlier determination that the distributors were employees. Alternatively, in *Herald Co. v. NLRB*,²⁸⁸ the court noted evidence that owner-drivers who distributed newspapers under franchise contracts were sometimes permitted to hold other jobs and distribute other newspapers which occasionally competed with the publisher's paper. Though the court indicated that such facts suggested independent contractor status, this evidence was outweighed by other indicia of employee status.²⁸⁹ Therefore, the fact that an employer does not require exclusivity

283. *Id.* at 540.

284. *See supra* note 218 and accompanying text.

285. *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596, 598 (1st Cir. 1974).

286. *Id.* at 600.

287. 413 F.2d 809, 813 (6th Cir. 1969).

288. 444 F.2d 430 (2d Cir. 1971).

289. *Id.* at 435.

will not necessarily invalidate employee status.

On exclusivity, the WWF contract is quite clear:

WRESTLER hereby grants *exclusively* to PROMOTER, and PROMOTER hereby accepts, the following worldwide rights: (a) During the term of this Agreement, to book wrestler for and to arrange WRESTLER's performance in wrestling matches at professional wrestling exhibitions, as well as appearances of any type at other events, engagements or entertainment programs in which WRESTLER performs services as a professional wrestler . . . whether such events are staged before a live audience, in a broadcast studio, on location (for later viewing or broad cast), or otherwise. . . . (c) During the term of this Agreement, to solicit, negotiate, and enter into agreements for and on behalf of WRESTLER for the exploitation of publicity, merchandising, commercial tie-up, publishing, personal appearance, performing in non-wrestling events, and endorsement rights . . . of WRESTLER, his/her legal and/or ring name, likeness, personality, and character, or any other of his/her distinctive or identifying indicia; provided PROMOTER shall inform WRESTLER of any such agreements.²⁹⁰

The contract continues:

It is the understanding of the parties that all rights, licenses, privileges and all other items herein given or granted to PROMOTER during the term of this Agreement *are exclusive to the PROMOTER even to the exclusion of WRESTLER* In the event WRESTLER desires to participate in any commercial activity in which the promoter is not otherwise engaged, and WRESTLER's participation in such activity requires the use of his/her Intellectual Property or Name and Likeness, PROMOTER may at its discretion, upon WRESTLER's written request, execute a sublicense to WRESTLER for the limited purpose of authorizing WRESTLER to participate in such specific

290. TitanSports, Inc., Booking Contract, Booking, pt. 1.1(a) & 1.1(c) (emphasis added). This clause has created the plight for the formerly-known "Typhoon." Because he left the WWF, which created his character and likeness, this wrestler can no longer use that name nor wear a similar outfit. Thus, he is now known as "The Shockmaster" and sports completely different ring attire. As a result, he has seemingly not been able to capitalize on his once huge popularity because it is unclear whether the young wrestling fans even know that The Shockmaster was Typhoon. Such restrictions can be even more deadly for the wrestler and more lucrative for the promoter. Take for instance the WWF's character "Doink the Clown." Originally, the character was portrayed by Matt Bourne. However, when Bourne left the organization, he could not take the character's likeness with him. Instead, the WWF has been able to use other wrestlers as "Doink" to make fans believe that he still wrestles for the organization. See also World Championship Wrestling, Inc., Memorandum of Agreement, Trademark License, pt. 2.1.

commercial activity upon mutually agreeable terms and conditions.²⁹¹

Major promoters control the wrestlers' right to work in the service of others through less conventional means. Specifically, the wrestling industry is notorious for blackballing wrestlers who have different beliefs than their promoters or who fail to comply with their promoters' wishes.²⁹² Regarding freedom to work for other promotions while maintaining his persona, Ax Demolition said about the WWF:

I know blackballing exists, [McMahon] tried to blackball me. McMahon intimidates the small promoters with threats of lawsuits which they don't want to deal with. So McMahon exerts his control in that regard which results in the wrestlers being forced to accept his terms absolutely or else not wrestle at all.²⁹³

Thus, the larger promoters can ensure exclusivity even if the wrestler does not wish to comply with the terms of his contract.

The smaller promoters differ from the WWF in that they generally demand less exclusivity. For instance, Mid-South wrestling, a regional wrestling promotion throughout Texas, Louisiana, Arkansas, Mississippi, Oklahoma and Florida, does not permit their

291. TitanSports, Inc., Booking Contract, Exclusivity, pt. 5.1 & 5.2 (emphasis added). The consequences of the WWF's exclusivity clause can be devastating. For instance, Barry "O" stated that: "[the WWF] did put me back to work sporadically for about three months, and then I was laid off and nobody bothered to tell me and I sat by the phone for five weeks while the bills stacked up." Larry King Live, *supra* note 176. Recently, however, the WWF has allowed non-main event wrestlers to wrestle in smaller promotions. However, those wrestlers may only do so if they are not scheduled to appear in a WWF event. Moreover, they may not wrestle with a competing organization such as WCW. See Telephone Interview with J.T. Lightning, *supra* note 162 (stating "the Bushwackers, Rick Martel, Virgil, guys like that, they're somewhat independent. They take the bookings Vince McMahon gives them and when they are not working for the WWF, they are free to go where they want."); Telephone Interview with David Meltzer, *supra* note 166 (suggesting that some WWF wrestlers can work in other smaller promotions on days they are not scheduled to wrestle for the WWF).

292. See *supra* notes 173-77 and accompanying text. See also *supra* note 114.

293. Interview with Ax Demolition, *supra* note 165. In fact, Ax Demolition, along with his former tag team partner Smash, have sued McMahon and the WWF disputing royalty payments and the continued use of the names "Ax," "Smash," and "Demolition." Because the WWF feared the effects of revealing professional wrestling's trade secrets, the case has been sealed. In an affidavit on file in federal court in New Haven Connecticut, Margaux Levy, a WWF Attorney, stated: "Inquiry and public dissemination of information concerning . . . their uniquely specialized conduct as professional wrestlers including physical tricks, devices, moves and maneuvers which they employ during professional wrestling exhibitions, and/or demonstrations of wrestling holds, could seriously impair their ability to attract a large audience." Jack Ewing, *The Greatest Show in Court: 'Wrestlemania,'* NAT'L L.J., Apr. 12, 1993, at 8. See also notes 177-79 and accompanying text; Interview with Greg "The Hammer" Valentine, *supra* note 127 ("wrestlers have been blackballed").

wrestlers to “wrestle with any other promoter except Mid-South without Mid-South’s permission and if allowed, Mid-South [will] be paid a percentage of [the wrestler’s] earnings received from another promoter.”²⁹⁴ However, Newton Tattie’s Wrestling promotion, a local promotion limited to one hundred miles within Butler, Pennsylvania had no such exclusivity limitation. Tattie’s contract stated that “[t]he EMPLOYEE shall remain free to contract with any other EMPLOYER to perform the same of similar type employment and does not agree to wrestle exclusively for Newton Tattie, but agrees to wrestle 1 (one) bout per month for 24 (twenty-four) consecutive months.”²⁹⁵ Similarly, Cleveland All-Pro Wrestling’s booking contract has no such exclusivity clause.²⁹⁶

The WWF’s contract is so exclusive that it indicates its wrestlers are employees. As in *Seven-Up*,²⁹⁷ the WWF’s contract leaves the wrestler with no opportunity to work for anyone else. Because Mid-South requires a right of first refusal, its contract also suggests employee status pursuant to *Brush-Moore Newspapers*.²⁹⁸ Though the small promotions do not retain the exclusivity required to satisfy this prong of the agency test, according to *Herald*,²⁹⁹ this will not nullify a finding that a worker is an employee if other factors outweigh it.

5. The Million Dollar Dream—The Beliefs of the Parties

Though not the most important factor, the parties’ own beliefs are relevant to determining employment status.³⁰⁰ For example, in *Lorenz Schneider Co., Inc. v. NLRB*,³⁰¹ the court, in granting review of the NLRB’s finding that the company’s workers were employees and denying a cross-petition for enforcement, stated that “intent is pertinent ‘insofar as such belief indicates an assumption of control by the other’ or the opposite.”³⁰² There, owner-drivers and lessee-drivers, who were former employees of a snack food distributor, thought that, by entering into franchise contracts with the distributor, they were altering their employment relationship.

294. *White*, 615 So. 2d at 540.

295. Plaintiff’s Complaint in Civil Action-Equity at Exhibit “1,” pt. 3.a., Tattie v. Milarski, No. EQ 85-019 (C.P. Butler County, Pa. 1985).

296. Telephone Interview with J.T. Lightning, *supra* note 162.

297. *Seven-Up Bottling Co. v. NLRB*, 506 F.2d 596 (1st Cir. 1974).

298. *NLRB v. Brush-Moore Newspapers, Inc.*, 413 F.2d 809 (6th Cir. 1969).

299. *Herald Co. v. NLRB*, 444 F.2d 430 (2d Cir. 1971).

300. See *supra* note 221 and accompanying text.

301. 517 F.2d 445 (2d Cir. 1975).

302. *Id.* at 449 (quoting Restatement (Second) Agency §220 cmt. m (1958)).

The court found that their beliefs were relevant, though not controlling, in finding that these drivers were independent contractors.

Professional wrestlers also believe that they are employees and not independent contractors. As Barry "O" stated: "[T]hroughout [wrestling] history . . . employees aren't actually called employees. They're called self-employed individual contractors. And that looks good on the surface but, in fact you know, you're [an employee]."³⁰³ Or, as former WWF star Ax Demolition stated, "[T]here was no question that I was an employee."³⁰⁴ Alternatively, David Bradley Olsen states, "[T]he wrestling industry, including TitanSports [WWF], Turner [WCW], and every other promoter who ever existed, has consistently taken the position that all of the wrestlers are independent contractors."³⁰⁵

Accordingly, a trier of fact must determine the subjective beliefs' of the parties based on the promoters' and wrestlers' statements. It is quite likely, however, that a trier of fact would conclude that the promoters' articulations are to avoid higher operating costs and union threats.³⁰⁶ Thus, it appears, at least with some certainty, that professional wrestlers would satisfy this part of the agency test.

6. The Steiner Line—Terms of the Contract

Contractual language³⁰⁷ has been recognized as at least some evidence of employment status.³⁰⁸ In *Herald*, the company placed great emphasis on the fact that its newspaper distributors signed contracts "which explicitly stat[ed] that the distributors occupie[d] at all times the position of an independent contractor and control[led] 'all ways and means relating to the proper performance and completion of the contract.'"³⁰⁹ Yet, the court agreed with the NLRB in overlooking such contractual language because "the Employer . . . maintained control over . . . the manner and means of accomplishing the results."³¹⁰ Similarly, in *Warner*, a driver signed three written employment contracts, all of which contained sub-

303. *Larry King Live*, *supra* note 176.

304. Interview with Ax Demolition, *supra* note 165.

305. Telephone Interview with David Bradley Olsen, *supra* note 231.

306. *See supra* note 272 and accompanying text.

307. For example, words like "employee" and "independent contractor."

308. *See supra* note 222 and accompanying text.

309. *Herald Co. v. NLRB*, 444 F.2d 430, 433 (2d Cir. 1971).

310. *Id.* at 434. The court found "substantial evidence to support the Board's conclusion that . . . Herald's distributors [were] employees . . . rather than independent contractors." *Id.* at 435.

stantially the same provisions, including that the driver was an "independent contractor."³¹¹ Nevertheless, the court determined that based on a review of the entire record, there was substantial evidence that the company controlled the manner and means of the work accomplished.³¹² By implication, an explicit label within a contract of "independent contractor" or "employee" is not dispositive in determining status.

The WWF contract states in no uncertain terms that a "WRESTLER is an independent contractor."³¹³ However, less weight should be placed on the labels within the WWF contract since it was admitted by the WWF's own legal counsel, Ted Din-smoore, that "[i]n most instances, wrestlers are not well educated."³¹⁴ Moreover, the contracts presented to WWF wrestlers are contracts of adhesion.³¹⁵

Conversely, contracts in the smaller promotions are either silent as to the relationship or explicitly call their wrestlers employees.³¹⁶ Based on the decisions in *Herald* and *Warner*, this label is not dispositive, because in the larger promotions, wrestlers sign adhesion contracts, including the term "independent contractor." Rather, a court will look at all indicia of the relationship between the wrestler and the promoter. In the smaller promotions where the wrestlers are labeled "employees," a court will weigh such evidence in connection with the other evidence of employee status. Finally, where the contracts are silent as to status, a court will sim-

311. NLRB v. Warner, 587 F.2d 896, 900-01 (8th Cir. 1978).

312. *Id.* at 901 (the court stated that [the worker] was subject to the same degree of supervision and control exercised over the other [employees]).

313. TitanSports, Inc., Booking Contract, Miscellaneous, pt. 13.1. See also Frick v. Ensor, 557 So.2d 1022, 1023 (La. Ct. App. 1990) ("All wrestlers are . . . referred to in the contracts entered into between Mid-South and wrestler as independent contractors."); Telephone Interview with David Bradley Olsen, *supra* note 231 (stating WCW wrestlers are deemed independent contractors in their employment contracts).

314. Edward A. Adams, *Lawyer Goes to the Mat for Professional Wrestling*, N.Y.L.J., May 11, 1990, at 1 (suggesting that it often takes some explaining for the wrestlers to understand the terms of the contract).

315. Telephone Interview with Scott S. Centrella, Attorney (Nov. 26, 1993). There are no contract negotiations and often wrestlers who attempt to negotiate different terms in their contracts are blackballed. See Telephone Interview with David Bradley Olsen, *supra* note 231 (stating that he currently represents a wrestler who was blackballed for trying to negotiate different terms in his contract).

316. Cleveland-All Pro Wrestling's contract does not refer to its wrestlers as independent contractors or employees. Telephone Interview with J.T. Lightning, *supra* note 162. However, Newton Tattrie's promotion in Pennsylvania specifically calls the wrestler an employee. See Plaintiff's Complaint in Civil Action-Equity at Exhibit "1," Tattrie v. Milarski, No. EQ 85-019 (C.P. Butler Co., Pa. 1985) (the contract states "IT IS HEREBY AGREED between Newton Tattrie hereinafter referred to as EMPLOYER and Robert Milarski hereinafter referred to as EMPLOYEE").

ply look to the other factors of the relationship.

7. The Sharpshooter—Other Relevant Considerations

While the six aforementioned factors will probably be most important, none alone, nor collectively, are necessarily determinative. A court will also likely consider the following indices of the relationship.

First, a court may examine whether wrestlers operate their own individual businesses. Work done as a distinct trade or business indicates independent contractor status, while work that is an essential part of the business of the person for whom the work is done suggests employee status.³¹⁷ While wrestling promoters would likely argue that each individual wrestler constitutes an independent business venture, such a position is untenable. While it is true that a wrestler can initially choose between wrestling organizations and capitalize on his popularity and reputation within the industry, an individual wrestler cannot stage his own event. Since promotions have become increasingly complex, expensive and competitive, promoters provide indispensable economies of scale. Because wrestling requires such a substantial investment in administrative and operating costs, it is unlikely that professional wrestlers could fulfill the necessities of the professional wrestling industry on their own.

Second, a court may consider whether the work done is an essential part of the employer's business. Work performed as an essential part of a business suggests employee status, while non-essential work indicates independent contractor status.³¹⁸ Without wrestlers, the promoters have nothing to promote. By definition,

317. See *supra* note 207 and accompanying text. In *Meyer Dairy, Inc. v. NLRB*, the Tenth Circuit Court of Appeals determined that milk men operated their own business and, therefore, were not employees, but rather, independent contractors. 429 F.2d 697 (10th Cir. 1970). The court stated:

[w]e think it quite clear that the distributors operate and own their individual businesses for profit, the amount of which depends on their own efforts. The Company pays no salary, commissions or expenses. It has no investment of any kind in the distributor's operation. Its only benefit from the contracts is profit from the products purchased. The distributors do not collect money for the Company. They do not represent and cannot bind the Company in any manner.

Id. at 702. As such, the milk men's petition for union certification under 29 U.S.C. § 159(c) was denied. *Id.*

318. See *supra* note 208 and accompanying text. In *Seven-Up Bottling Co. v. NLRB*, the court found that: "[Daily] employment in the regular business of the employer' is a factor which has led state courts to find the driver to be a servant—especially if he is employed at will." 506 F.2d 596, 600 (1st Cir. 1974) (citing *W. SEAVY, AGENCY* § 84, at 143 & nn. 41-42).

the actual wrestling is an integral part of the employers' business.

Third, a court may investigate whether the promoter furnishes the tools necessary to carry out the job requirements and pays the resulting operating costs. An employer customarily furnishes the tools, equipment, and materials used to accomplish the work, while an independent contractor generally furnishes his own.³¹⁹ Moreover, employers pay for the associated operating expenses, but independent contractors bear such expenses themselves.³²⁰ As stated in the WWF contract, the promoter shall provide and bear the costs of all appropriate wrestling licenses, location rentals, sound and lighting equipment, the wrestling ring, officials, police and fire protection, promotional assistance, costs of mass media communication, and licensing and merchandising fees.³²¹ The fact that the WWF and other promoters furnish these tools and pay for the incidental costs of operating wrestling events suggests that wrestlers are employees and not independent contractors.

Fourth, a court may examine whether skill is required to perform the job. While the exercise of special skill is generally that of an independent contractor, little or no skill tends to indicate employee status.³²² While most professional wrestlers do go to a professional wrestling school, currently this is not an industry requirement.³²³ In fact, many legendary wrestlers now complain that current wrestlers display little or no wrestling knowledge. As former WWF high flyer "Jumpin'" Jim Brunzell stated, "[i]n my

319. See *supra* note 209 and accompanying text. In *NLRB v. Brush-Moore*, the court considered, among other factors, the fact that Brush-Moore supplied route tubes, a room, and brown paper for wrapping newspapers. 413 F.2d 809 (6th Cir. 1969). Accordingly, the court held that the distributors were company employees and not independent contractors. *Id.* at 813.

320. See *supra* note 210 and accompanying text. In *Seven-Up Bottling Co. v. NLRB*, even though the company's distributors paid all expenses for the operation, maintenance and garaging of their trucks and for their uniforms, the court considered the fact that the company paid for the painting of the trucks, any advertising and promotional material carried by the trucks, and the insignias worn on the distributors uniforms, in determining that the distributors were employees. 506 F.2d 596, 598-99 (1st Cir. 1974).

321. See, e.g., TitanSports, Inc., Booking Contract, Promoter's Obligations, pt. 8.1 & 8.2 (contractual provisions outlining the promoter's obligations).

322. See *supra* note 211 and accompanying text. In determining that two owner-operators were independent contractors, the court in *Associated Independent Owner-Operators, Inc. v. NLRB* stated "[e]ach was a skilled operator . . . which is again some evidence of independent contractor status." 407 F.2d 1383, 1386 (9th Cir. 1969) (citing Restatement (Second) Agency §220(2)(b) (1958)). In *NLRB v. Warner*, the court noted the fact that the "work was essential to the Company's normal business and did not require a high degree of skill." 587 F.2d 896, 901 (8th Cir. 1978). Based on the driver's skill level, and other indices of employee-like characteristics, the court found the driver was an employee. *Id.* at 901.

323. Telephone Interview with J.T. Lightning, *supra* note 162.

generation, we were there because of our ability in the ring and on the microphone. Now you get these fellows in the main event—he jumps up and down, then he splashes the guy. I don't consider that wrestling."³²⁴ Wrestling promoters, however, might argue that wrestlers are highly skilled, since they must learn how to apply numerous maneuvers, avoid injuries, and develop personas.³²⁵ Since skill level is a factual question, it is up to a trier of fact to decide this issue.

Fifth, a court may consider whether the relationship is sporadic or permanent. Permanence of a relationship, or regularity in the performance of services, tends to indicate an employer-employee relationship, while sporadic performance limited to a specific job suggests independent contractor status.³²⁶ Wrestlers, in both big and small promotions, are usually contractually obligated to wrestle for a promoter for two years.³²⁷ However, promoters only guarantee a limited number of bookings per year.³²⁸ As a result, even though wrestlers are obligated for a specific time period, their actual work can be sporadic. Employment status predicated on this factor remains unclear.

Sixth, a court may probe the promotion's payments to its wrestlers. Employees are usually paid on a time or a unit basis, while independent contractors are generally paid an agreed

324. Maler, *supra* note 126.

325. Lidz, *supra* note 143 (discussing the necessary requirements to become a professional wrestler).

326. See *supra* note 212 and accompanying text. In *Associated Independent Owner-Operators, Inc. v. NLRB*, the court also considered the permanence of the working relationship. In determining that the owner-operators were independent contractors the court noted that "each was employed only for as long as was required to do a specific job. No continuing relationship was implied." 407 F.2d 1383, 1386 (9th Cir. 1969). However, in *NLRB v. Nu-Car Carriers, Inc.*, the court relied on the fact that "[r]egularity and availability [were] guaranteed by the provisions that the drivers must work 'exclusively and loyally for the Company' and 'be subject to call by Company for the rendering of service with equipment at all times'" in determining that such drivers were employees. 189 F.2d 756, 759 (3d Cir. 1951).

327. See, e.g., TitanSports, Inc., Booking Contract, Term and Territory, pt. 6.1 ("The term of the Agreement shall be two (2) years from the date hereof"); Plaintiff's Complaint in Civil Action-Equity at Exhibit "1," pt. 3.a., Tattie v. Milarski, No. EQ 85-019 (C.P. Butler County, Pa. 1985) ("EMPLOYEE [wrestler] agrees that he shall wrestle 1 (one) bout per month for the EMPLOYER").

328. See, e.g., TitanSports, Inc., Booking Contract, Booking, pt. 1.2 ("during the term of this Agreement PROMOTER guarantees WRESTLER a minimum of ten (10) bookings per year at PROMOTER's events"); Plaintiff's Complaint in Civil Action-Equity at Exhibit "1," Tattie v. Milarski, No. EQ 85-019 (C.P. Butler Co., Pa. 1985) ([wrestler] agrees . . . to wrestle 1 (one) bout per month for 24 (twenty-four) consecutive months"). However, some wrestlers, like Tommy "Wildfire" Rich, travel the independent circuit and wrestle on a match-by-match basis. Telephone Interview with J.T. Lightning, *supra* note 162.

amount, or an amount determined by a formula, for the performance of a particular job.³²⁹ Independent contractors typically make substantial investments in their enterprises and bear the risk of loss or profit, while employees have no such investment.³³⁰ Generally, since the large and medium promotions pay stars a percentage of the gate,³³¹ these wrestlers are investing in the success of their organization.³³² Conversely, because preliminary wrestlers and wrestlers in smaller organizations uniformly receive a flat fee per match,³³³ they do not invest in the success of their organizations. Therefore, wrestlers who receive a percentage of the gate³³⁴ tend to

329. See *supra* note 213 and accompanying text. The court in *Associated Independent Owner-Operators, Inc. v. NLRB* recognized that "each man was paid on an hourly basis, which, standing alone, is some indication that each was an employee." 407 F.2d 1383, 1386 (9th Cir. 1969). The court concluded, however, that based on the cumulative record, the owner-operators were independent contractors. *Id.* at 1387. However, in *NLRB v. Nu-Car Carriers, Inc.*, the court observed that "[t]he driver's compensation is computed by crediting with a gross 'rental' of so much per mile varying with the number of cars hauled per load and the length of the trip The company guarantees minimum net earnings of 11 cents per loaded mile." 189 F.2d 756, 759 (3d Cir. 1951). The court concluded:

[i]t is not apparent how this method of compensation shows the drivers to be independent contractors. What little inference of right to control in the driver that arises from such a method of compensation, as opposed to a straight hourly wage rate, is overshadowed by the express contract elaborately providing for company control.

Id. The court, therefore, considered this fact when it concluded that the carriers were employees rather than independent contractors. *Id.* at 760.

330. See *supra* note 214 and accompanying text. In *Meyer Dairy Inc. v. NLRB*, the court weighed the fact that company had "no investment of any kind in the distributor's operation" in determining that milk men were independent contractors. 429 F.2d 697, 702 (10th Cir. 1970). Alternatively, in *Herald Co. v. NLRB*, the court recognized that the contracts, under which owner-drivers distributed newspapers, provided compensation through resale profits from selling to carriers of the papers were some indication of an independent contractor status. 444 F.2d 430, 433 (8th Cir. 1978). However, the court held that this fact was outweighed by other evidence that by manipulating the amount of extra-contractual payments, such as bonuses, subsidies, and promotional monies, which were an important source of the distributors' income, the publisher could control the earning power of the distributors and regularly exercised that control. *Id.* at 434. Considering the foregoing, among other factors, the court held that the distributors were employees. *Id.* at 435.

331. See *supra* notes 164-66 and accompanying text. Note that such a pay system is very similar to that in *NLRB v. Nu-Car Carriers*, 189 F.2d 756 (3d Cir. 1951).

332. However, the more likely explanation for a wrestler's willingness to take only a piece of the gate is best explained by Wrestling Observer Newsletter publisher David Meltzer. He stated: "Wrestlers are ego maniacs They're told it's the big time. I've seen twenty guys take \$50,000 pay cuts a year with families to go to what they perceive to be the big time I mean, that's just how wrestlers are." Telephone Interview with David Meltzer, *supra* note 166.

333. See *supra* notes 167-68 and accompanying text. See also, Howard, *supra* note 167 (stating that preliminary wrestlers typically receive \$100 per bout); Telephone Interview with J.T. Lightning, *supra* note 162 (stating that Cleveland All-Pro wrestlers are paid a fixed amount in cash after their bout).

334. For example, WWF wrestlers.

indicate independent contractor status because they are paid through a formula and invest in their organization. However, wrestlers who receive guarantees³³⁵ or flat fee payments³³⁶ resemble employees because they are paid on a time or per unit basis and do not invest in the promotion. Thus, whether a court weighs this factor for or against employee status depends on the wrestler's promotion and his standing within the wrestling industry.

Seventh, a court may examine whether the promoter requires an identifying uniform or symbol. Wearing distinctive uniforms identifying the employer is indicative of an employer-employee relationship.³³⁷ Professional wrestling utilizes costumes, characterizations and stereotypes.³³⁸ Costumes and distinguishable behaviors add to the excitement and provide readily identifiable personas for the wrestlers. The WWF contract states that "WRESTLER shall be responsible for supplying all wardrobe, props, and make-up necessary for the performance of WRESTLER's services at any Event at which WRESTLER appears."³³⁹ In the large- and medium-sized promotions, the rights to the character and character's likeness are owned by the promoter at least during the length of the agreement.³⁴⁰ The character becomes a symbol of the organization. In

335. For example, WCW wrestlers. See World Championship Wrestling, Inc., Memorandum of Agreement, Consideration, p. 6.1.

336. For example, wrestlers in small promotions and all preliminary wrestlers.

337. See *supra* note 219 and accompanying text. In *NLRB v. Amber Delivery Service, Inc.*, in coming to the conclusion that Amber's package delivery drivers were employees, the court considered the fact that "[e]ach driver must wear a uniform with the company insignia and must paint his vehicle in the company colors; Amber bears half the cost of uniforms and the entire cost of painting." 651 F.2d 57, 62 (1st Cir. 1981).

338. For example, the Iron Sheik insists on singing the Iranian national anthem before each bout, waves an Iranian flag depicting the head of the Ayatollah Khomeini and hurls anti-American insults at the crowds. Of course, this only serves to rile the crowd before the match. Compare this with a Native American wrestler, Tatanka. On a February 1994, WWF broadcast, he was endowed with a new headdress by legendary American Indian Wrestlers Chief Wahoo McDaniel and Chief Jay Strongbow.

339. TitanSports, Inc., Booking Contract, Wrestler's Obligations, pt. 9.3. Ironically, the WWF often creates the character and supplies the uniform, but then charges the wrestler a premium for the outfit. Interview with Ax Demolition, *supra* note 165.

340. The WWF contract states in pertinent part:

WRESTLER hereby grants to PROMOTER and PROMOTER hereby accepts, the exclusive license and right during the term of the term of this Agreement, to Use WRESTLER's service marks, trademarks and any and all of his/her other distinctive and identifying indicia, including but not limited to his/her legal name, his/her ring name, likeness, voice, signature, costumes, props, gimmicks, routines, themes, personality, character, and caricatures as used by or associated with WRESTLER in the business of professional wrestling, (collectively the "Intellectual Property").

TitanSports, Inc., Booking Contract, Trademarks, pt. 3.1. The contract continues:

If WRESTLER does not own, possess or use service marks, trademarks or dis-

the small promotions, the rights to the names and likenesses are usually owned by the wrestlers.³⁴¹ Recognized champions are required to wear "their" championship belts in all promotions.³⁴² Since all identifiable costumes and symbols vest with the employer in the larger promotions, and all wrestlers are required to wear symbols/championship belts, this factor suggests that wrestlers are employees and not independent contractors.

Finally, a court may consider whether the worker must attend promotional programs operated by the person for whom services were performed.³⁴³ The larger promotions require wrestlers to attend promotional events and to hype product tie-ins and upcoming wrestling bouts.³⁴⁴ The smaller promotions, however, typically only

distinctive and identifying indicia and PROMOTER develops such service marks, trademarks, and distinctive and identifying indicia for WRESTLER, they shall belong to PROMOTER and PROMOTER shall have the exclusive license and right in perpetuity to use, and to authorize others to use, WRESTLER's . . . [Name and Likeness] . . . even to the exclusion of the WRESTLER.

TitanSports, Inc., Booking Contract, Trademarks, pt. 3.2. Thus, for example, because the WWF created the character Doink the Clown, when "Maniac" Matt Bourne left the WWF, he could no longer legally use the character. See *supra* note 289.

341. Telephone Interview with J.T. Lightning, *supra* note 162 (asserting that Cleveland All-Pro Wrestling does not own the names or likenesses of its wrestlers).

342. *Id.* (stating that Cleveland All-Pro Wrestling's North American Heavy-Weight Champion, Ron Cumberledge, may not take his belt and wrestle in a different promotion. The belt is the exclusive property of Cleveland All-Pro Wrestling).

343. See *supra* note 220 and accompanying text. In *Frito Lay, Inc. v. NLRB*, the court, in deciding that single-truck snack food distributors were not employees, stated: "[s]ales meetings are used generally to explain the Company's sales promotion and advertising plans, whereas occasional route riding by district sales managers involve actual assistance and suggestions for increasing sales. Attendance at sales meetings and permitting managers to ride the routes is at the distributor's option." 385 F.2d 180, 185 (7th Cir. 1967). Conversely, in *Seven-Up Bottling Co. v. NLRB*, the court, in coming to the conclusion that snack food distributors were employees, observed, among other things, that "[t]he company invites distributors to attend periodic company sales meetings, which provide information on improving sales and on incentive programs. One distributor, who had the lowest sales results, was suspended by the company's director of marketing when he refused to attend the sales meetings." 506 F.2d 596, 599 (1st Cir. 1974).

344. See, e.g., TitanSports, Inc., Booking Contract, Wrestler's Obligations, pt. 9.5 ("WRESTLER agrees to cooperate and assist in the publicizing, advertising and promoting of scheduled Events, and to appear at and participate in a reasonable number of joint and/or separate press conferences, interviews, and other publicity or exploitation appearances or activities WRESTLER will receive no additional compensation in connection therewith.") Moreover, WWF wrestlers often must promote WWF or related merchandise, such as WWF Hasbro Action Figures and ICOPRO's Bodybuilding Supplements, at the request of the promoter. TitanSports, Inc., Booking Contract, Trademarks, pt. 3.1, states:

It is the intention of the parties that the license granted with respect to Intellectual Property is exclusive to PROMOTER during the term hereof, even to the exclusion of WRESTLER, and the license includes the right to sublicense, promote, expose, exploit and otherwise use the Intellectual Property in any commercial manner now known or hereafter discovered.

use wrestlers' names and likenesses to promote upcoming matches. Nevertheless, because both large and small wrestling promotions require some promotional assistance from their wrestlers, this factor suggests employee status.

Based on a cumulative analysis of the common law's agency test, it is highly likely that professional wrestlers are employees. As one famous wrestler's attorney stated, "[a]nytime a [question of a wrestler's employment status] gets in front of a judge and you look at all the factors, most judges would agree . . . that the wrestlers are employees."³⁴⁵ Therefore, because wrestlers will likely fall within 29 U.S.C. § 152(3)'s definition of an employee, they should have the right to unionize pursuant to 29 U.S.C. § 157.

III. THE HEART PUNCH—PRACTICAL CONSIDERATIONS AND SOLUTIONS

Assuming, *arguendo*, that professional wrestlers can unionize, the question of whether or not they desire to do so remains unanswered. As the publisher of *Wrestling Observer Newsletter*, David Meltzer, pointed out, "[w]restlers . . . are not the type of people who unionize and the promoters have taken advantage of that [T]hey're all very jealous and they do not stick together."³⁴⁶ The behavior and actions of wrestlers at all levels of the industry supports this conclusion. At the local level, J.T. Lightning, booker and current co-holder of Cleveland All-Pro Wrestling's North American Tag Team Championship, stated that "[e]verything [in the professional wrestling business] is cut throat For every friend you got [sic] you got [sic] twenty guys stabbing you in the back."³⁴⁷ At the national level, Greg "The Hammer" Valentine voiced a similar opinion, stating that "[t]here aren't two wrestlers you can trust."³⁴⁸

Meltzer believes that if a mega-star, such as Hulk Hogan, would demand a union, one might be possible. However, he stated

For instance, a recent WWF magazine stated:

In addition to donating their time to many charities each month, the World Wrestling Federation superstars are also available for paid appearances. That's right, you can have a World Wrestling Federation superstar visit your local grocery store, car dealership, bank, restaurant, or even your home to celebrate a birthday, reunion or family festival.

Lou Gianfriddo, *Where They Have Been: Superstars Step Out*, WWF MAGAZINE, January, 1994, at 67.

345. Telephone Interview with David Bradley Olsen, *supra* note 231.

346. Telephone Interview with David Meltzer, *supra* note 166.

347. Telephone Interview with J.T. Lightning, *supra* note 162.

348. Interview with Greg "The Hammer" Valentine, *supra* note 127.

that “[invariably] guys underneath [Hogan,] because they’re all so jealous of each other, . . . would go, ‘oh well screw Hogan, I’m going to stay on [Vince McMahon’s] side because if Vince fires Hogan then maybe I can be the next [mega-star].’”³⁴⁹ Meltzer continued, “[t]here is a big difference between wrestlers and [other athletes,] . . . wrestler’s [sic] don’t have guts.”³⁵⁰ Based on their bargaining predicament,³⁵¹ however, wrestlers’ fears of back stabbing are well grounded.

Wrestlers need to understand the advantages of unionization. First, promoters cannot lawfully discharge or discriminate against any wrestler for suggesting the formation of a union. The NLRA maintains that it is an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [157]; . . . dominate or interfere with the formation or administration of any labor organization . . . [or] discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.”³⁵² Any promoter who blackballs a wrestler for attempting to organize a union violates the NLRA and commits an unfair labor practice.

Second, wrestlers must come to understand that unions would protect, not endanger, the big salaries of the top stars. Like unions in other professional sports, a professional wrestling union need only agree to minimum salaries and an external mechanism for resolving disputes.³⁵³ Thus, a union can reserve comfortable minimums for journeymen, newcomers and aging veterans, while not simultaneously putting a cap on the salaries of the big stars.

Third, a union could provide badly needed health, safety, and retirement benefits. Instead of wrestlers sidelined for months, and sometimes years, without compensation because of ring injuries, workers’ compensation and health care benefits would provide much needed financial, and even emotional, support. Moreover, income in a wrestler’s declining years could be made available through mechanisms like pensions and profit sharing plans.

Fourth, a wrestling union could demand a much-needed griev-

349. Telephone interview with David Meltzer, *supra* note 166.

350. *Id.*

351. See *supra* notes 172-77 and accompanying text.

352. 29 U.S.C. § 158 (a)(2) & (4).

353. Professional baseball and basketball are excellent examples of this proposition. In 1985, the minimum salary in the National Basketball Association (“NBA”) was \$75,000 and \$60,000 for Major League Baseball (“MLB”). However, the NBA’s average salary was \$320,000 and MLB’s was \$371,000. Michael Stanton, *Playing for a Living: The Dream Comes True for Very Few*, Occ. Outlook Q., Spring 1987, at 11. Moreover, professional baseball utilizes an extensive arbitration system for salary disputes.

ance procedure. Because wrestlers have historically been subjected to inconsistent treatment, homosexual advances, blackballing and inadequate compensation, such a procedure would help prevent this type of promoter misconduct. Such proceedings are also advantageous since they can provide an impartial means to show that treatment is consistent and fair. Therefore, by unionizing and forcing the promoters to engage in collective bargaining, the wrestlers will have more leverage, and will not be forced to submit to unfair treatment and sign adhesion contracts devoid of important benefits.

Like all other employed Americans, professional wrestlers deserve the protections of the National Labor Relations Act. It is time that promoters and wrestlers recognize that wrestlers, as employees, have the right to "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."³⁵⁴ Otherwise, wrestlers will be subject to the same sleeper hold that has plagued them for decades.

354. 29 U.S.C. § 151.