

## A GOOD PIECE OF PAPER SPOILED:<sup>1</sup> AN EIGHTEEN-HOLE ROUND-UP OF AMERICAN HOLE-IN-ONE JURISPRUDENCE

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“A hole-in-one is quite a thrill because it happens so infrequently – perhaps one chance in 40,000, rarer than a 300 game in bowling.”<sup>3</sup> Even rarer than a hole-in-one is a hole-in-one that pops back out of the cup and into court. This essay examines, in chronological order, sixteen actual holes-in-one, one hole-in-one-that-wasn’t, and one “closest-to-the-pin” shot that have caromed right off the golf course and into the published opinions of various federal and state courts.<sup>4</sup> The essay continues with several observations from the nineteenth hole and concludes with a short set of tips from the pro shop.

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<sup>1</sup> Mark Twain is credited with defining golf as “a good walk spoiled.” BARTLETT’S FAMILIAR QUOTATIONS 563 (17th ed. 2002); *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661, 701 (2001) (Scalia, J., dissenting) (“Many, indeed, consider walking to be *the central feature* of the game of golf – hence Mark Twain’s classic criticism of the sport: ‘a good walk spoiled.’”) (emphasis in the original); Hennessey v. Pyne, 694 A.2d 691, 693 (R.I. 1997) (“Ever since Mark Twain quipped that golf was nothing more than ‘a good walk spoiled,’ the game of golf has continued to excite flamboyant commentary concerning those who ply its greensward.”) (citation omitted). Twain’s felicitous phrase has even graced the covers of at least two books. *See* JOHN FEINSTEIN, A GOOD WALK SPOILED: DAYS AND NIGHTS ON THE PGA TOUR (Little Brown & Co. 1996); Michael Flynn, *Cart 54 Where are You? The Liability of Golf Course Operators for Golf Cart Injuries*, 14 U. MIAMI ENT. & SPORTS L. REV. 127, 151 n.244 (1997) (citing MYLES DUNGAN, A GOOD WALK SPOILED (Poolbeg Press Ltd., 1995)).

<sup>2</sup> The author is an adjunct professor at Franklin Pierce Law Center (where he earned his J.D. in 1999) and a law clerk for the Hon. Steven J. McAuliffe, United States District Judge for the District of New Hampshire. Judge McAuliffe scored his first hole-in-one on May 16, 2004, while a draft manuscript of this article lay open on his desk. I claim full responsibility for any errors in this article, and partial credit for planting the subliminal seed that blossomed into my judge’s ace. The judge, of course, claims credit for getting this article published; my acceptance letter arrived the day after his ace. Finally, a shout-out to another ace-maker, my dad, who taught me to play golf when I was a lad.

<sup>3</sup> *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998). Different judges have reported different probabilities. *See infra* note 59. But all agree on the “thrill” factor. *See, e.g.,* *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248, 1252 (Pa. Super. Ct. 1989) (Popovich, J., dissenting) (“While every golfer dreams of the day when his ball flawlessly flies into the cup, few ever experience the thrill of a hole-in-one.”).

<sup>4</sup> This essay discusses nearly every golf-related match generated by a Westlaw search on the phrase “hole-in-one.” (Specifically omitted, however, are cases involving companies that offer hole-in-one insurance that do not involve an actual hole-in-one.) My “hole-in-one” search also generated enough references to exit wounds and other

## HOLE ONE: A HOLE-IN-ONE IS A FEAT OF SKILL

Hole number one is located in the deserts of Nevada, and the opinion that resulted from the litigation of that hole-in-one is noteworthy for establishing – for no apparent reason – that making a hole-in-one is a feat of skill rather than a product of chance.

In approximately 1960 – the opinion does not give a date – Las Vegas Hacienda, Inc. “made a public offer to pay \$5,000 to any who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course.”<sup>5</sup> George Gibson paid his money, aimed his shot, and made a hole-in-one.<sup>6</sup> Las Vegas Hacienda, however, refused to pay Gibson the advertised prize money.<sup>7</sup> Gibson sued, and won, on a breach of contract theory.<sup>8</sup>

On appeal, Las Vegas Hacienda argued that the trial court committed two errors: “not holding that the alleged contract on which the action is based was a wagering contract and therefore unenforceable,”<sup>9</sup> and “finding that the shooting of a ‘hole in one’ is a feat of skill and not a feat of chance.”<sup>10</sup> The Nevada Supreme Court affirmed the trial court’s decision that Gibson’s claim was not an attempt to enforce a gambling contract, explaining that “[i]t is generally held, in the absence of a prohibitory statute, that the offer of a prize to a contestant therefore who performs a specified act is not invalid as being a gambling transaction.”<sup>11</sup>

Despite the court’s ruling in Gibson’s favor on the gambling issue, which made it

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unsavory perforations to give me nightmares for a month.

<sup>5</sup> Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 86 (Nev. 1961).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (citing Porter v. Day, 37 N.W. 259 (Wis. 1888)).

unnecessary to reach the second issue raised by *Las Vegas Hacienda*,<sup>12</sup> Justice McNamee teed it up anyway. On the question of whether a hole-in-one is a feat of skill or one of luck, Justice McNamee played down the same side of the fairway as the trial court.<sup>13</sup> In so doing, he discussed “the testimony of one Capps, a golf professional.”<sup>14</sup> At trial, Capps “testified that luck is a factor in all holes in one where skill is not always a factor.”<sup>15</sup> But Capps also “testified that ‘a skilled player will get it (the ball) in the area where luck will take over more often than an unskilled player.’”<sup>16</sup> Based upon Capps’s testimony and the principle that “[t]he test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element,”<sup>17</sup> Justice McNamee concluded that the record contained sufficient evidence to sustain the trial court’s finding that a hole-in-one is a feat of skill rather than a product of chance.<sup>18</sup>

While Justice McNamee’s affirmation of the skill involved in making a hole-in-one is surely a comfort to golfers everywhere, the interesting legal question raised by his opinion is why he chose to reach the skill/luck issue in the first place, in light of his own statement that resolution of that issue was unnecessary to the court’s decision.<sup>19</sup> In other words, why did Justice McNamee keep on putting after the court had already holed out by deciding the first issue on appeal in Gibson’s favor? Perhaps Justice McNamee was sporting a pair of plus fours underneath his robes on the day he heard the oral argument in *Las Vegas Hacienda*.

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<sup>12</sup> *Id.* at 87.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (citing *People ex rel. Ellison v. Lavin*, 71 N.E. 753 (N.Y. 1904)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

## HOLE TWO: SEVENTEEN IS SOMETIMES EIGHT . . .

On September 1, 1974, Lloyd B. Grove scored a hole-in-one during the first day of the Dickinson (North Dakota) Elks Club's annual Labor Day golf tournament.<sup>20</sup> Posters announcing the tournament and a sign placed on an automobile at the tournament site contained an offer by Charbonneau Buick-Pontiac, Inc. (hereinafter "Charbonneau") to award "a 1974 Pontiac Catalina 4-door sedan with factory air to the first entry who shoots a hole-in-one on Hole No. 8."<sup>21</sup> After he scored a hole-in-one on what he claimed to be hole number eight, Grove attempted to collect his prize.<sup>22</sup> Charbonneau refused to hand over the keys to the car, claiming that Grove "had not scored his hole-in-one on the 8th hole, as required, but had scored it on the 17th hole."<sup>23</sup>

Charbonneau did not claim that Grove had lied about his physical location at the time he made his hole-in-one; all agreed as to where Grove's golf shoes were planted when he struck his magnificent shot. Rather, the disagreement concerned the numerical designation of the hole that Grove ached. As it happened, the Dickinson Elks Club held a tournament composed of eighteen-hole rounds on a golf course with only nine holes.<sup>24</sup> Thus, to complete an eighteen-hole round, competitors were obligated to play the course twice.<sup>25</sup> Grove scored his hole-in-one the second time he played hole number eight rather than the first,<sup>26</sup> which was the basis for Charbonneau's

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<sup>20</sup> Grove v. Charbonneau Buick-Pontiac, Inc., 240 N.W.2d 853, 855 (N.D. 1976).

<sup>21</sup> *Id.* at 857.

<sup>22</sup> *Id.* at 855.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* Each of the nine holes had two "separately located and marked tee areas." *Id.*

<sup>26</sup> *Id.* In his opinion, Judge Sand noted that on his first attempt at playing hole number eight, Grove had "scored a 3 on the hole." *Id.* Later on in his opinion, Judge Sand observed:

The distance from tee No. 17 to hole No. 8 was greater than the distance from tee No. 8 to hole No. 8. Thus an argument cannot be made that a player had an advantage playing from tee No. 17 to hole No. 8, as compared to playing from tee No. 8 to hole No. 8. Actually, it would be a disadvantage.

claim that Grove made his ace on the seventeenth hole rather than the eighth, notwithstanding the fact that the Dickinson Golf Course had no hole number seventeen.<sup>27</sup>

When Charbonneau refused to give him the car, Grove sued, asserting breach of contract.<sup>28</sup> Grove won,<sup>29</sup> and Charbonneau appealed, arguing that: (1) “the evidence was insufficient to support the trial court’s finding that Grove had properly accepted and performed in accordance with [its] offer . . . so as to impose a contractual duty upon Charbonneau to deliver the automobile or in the alternative be liable for damages;”<sup>30</sup> (2) “the trial court applied the wrong rule of law,”<sup>31</sup> and (3) “the [trial court’s] findings of fact [were] clearly erroneous.”<sup>32</sup>

Legally, the case involved garden-variety unilateral contract principles.<sup>33</sup> The question before the North Dakota Supreme Court was the proper construction of the contract term “Hole No. 8” in the context of “a 9-hole course [that] was converted to an 18-hole course [on which] each hole had an actual number and a hypothetical number.”<sup>34</sup> Judge Sand subsequently framed the question more expansively, as follows:

The crucial or pivotal point in this case rests upon the meaning of the language “a hole-in-one on Hole No. 8,” where the 9-hole golf course was converted to or used as an 18-hole course without adding any additional holes. Does this language, “on hole No. 8,” refer to the actual, physical designation of the hole, which is generally identified with the number on the flagstick, or does it refer to the hypothetical number given to the hole because of the sequence in which it is

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*Id.* at 861. One can only wonder how the case would have been decided if hole No. 8 had played shorter, rather than longer, from tee No. 17.

<sup>27</sup> *Id.* at 859. No less than the Charbonneau of Charbonneau Buick-Pontiac testified that “there is no such thing as hole number 17 at the Dickinson Golf Course.” *Id.*

<sup>28</sup> *Id.* at 855.

<sup>29</sup> *Id.* Rather than ordering Charbonneau to cough up the Catalina, “[t]he court awarded damages to Grove of \$5,800.00 plus interest.” *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 856 (citations omitted).

<sup>34</sup> *Id.* at 857.

“played”? If it is the latter, the 8th hole could also become the 17th hole in the second round of an 18-hole game of golf where the course is played around twice to make an 18-hole course out of a 9-hole course. The term could also mean the 8th hole in sequence of play regardless of the actual physical identification of the hole; as an example, if a player were to start his game with or on hole No. 2 (actually so marked) the 8th hole in sequence would be the 9th hole (actually so marked). The 8th hole under this concept would change depending upon the actual numerical designation of the hole from which the player started.<sup>35</sup>

Based upon the foregoing analysis, and the fact that the tournament employed a shotgun start in which Grove actually began to play on the hole marked “No. 4.”<sup>36</sup> Judge Sand asked: “Why were the holes not played in the following sequence: 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 1, 2, 3; instead of: 4, 5, 6, 7, 8, 9, 1, 2, 3, 13, 14, 15, 16, 17, 18, 10, 11, 12?”<sup>37</sup>

In an attempt to define the elusive term of the offer, “Hole No. 8,” Judge Sand consulted “The Rules of Golf as approved by the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland,”<sup>38</sup> an article on golf in the *Encyclopedia Britanica*,<sup>39</sup> and “an article by John P. May, entitled ‘Hole-in-One Roundup’ found in *Golf Digest* for March 1976.”<sup>40</sup> Finding those sources unavailing,<sup>41</sup> and recognizing that

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<sup>35</sup> *Id.* at 859. It is not uncommon for players in a golf tournament to begin their rounds somewhere other than on the hole marked “No. 1.”

Generally, there are two different ways to start a golf tournament. The first is to have all of the contestants begin their rounds at one or two specific tees. These tees are usually located on the first and tenth holes. The groups of contestants are staggered and begin their rounds after the previous group has played far enough ahead so as not to be subject to being hit. The second way to start a golf tournament is via a “shotgun start.” In theory, a “shotgun start” golf tournament begins with groups of players on the tee of each hole of the golf course. A shotgun or other loud device is fired or sounded, usually from the clubhouse, which is the signal for the contestants to begin play. The contestants play around the golf course, finishing their rounds at the cup of the hole prior to the tee on which they began.

Young v. Gregg, 480 N.W.2d 75, 77 (Iowa 1992).

<sup>36</sup> *Grove*, 240 N.W.2d at 859.

<sup>37</sup> *Id.* at 860.

<sup>38</sup> *Id.* at 855. More specifically, he consulted the version of those rules that went into effect on January 1, 1974. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 860.

“misunderstandings arise in converting a 9-hole course into an 18-hole course,”<sup>42</sup> the court ultimately concluded that, at least on the Dickinson Golf Course, the term “Hole No. 8” is ambiguous,<sup>43</sup> construed that term against the drafter,<sup>44</sup> and affirmed the trial court’s judgment in favor of Grove.<sup>45</sup> Judge Sand noted that if the court did not construe the ambiguous contract term against Charbonneau, the promoter of a hole-in-one contest, if so inclined, could “keep adding requirements or conditions which were not stated in the offer.”<sup>46</sup> Then Judge Sand conjured up a truly chilling parade of horrors<sup>47</sup> that might be unleashed against unsuspecting golfers by unscrupulous promoters: “‘must use a certain club; the ball must be of a certain brand; the play must be accomplished by a person playing left-handed,’ to name only a few.”<sup>48</sup>

Despite Judge Sand’s Ruthian<sup>49</sup> effort in *Grove*, he did not write the last word on hole-in-one contests on nine-hole golf courses; a peek through the trees to hole number nine and hole number twelve will reveal two more cases involving variations on this theme.

### HOLE THREE: ANOTHER LOSING BET ON THE GAMBLING DEFENSE

Nineteen Seventy-Four seems to have been a bad year for automobile dealers donating

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<sup>41</sup> *Id.* at 861.

<sup>42</sup> *Id.* at 860.

<sup>43</sup> *Id.* at 861.

<sup>44</sup> *Id.* at 862.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> One can only imagine the splendor of those horrors marching down the fairway in two-tone wing-tips and plaid polyester sans-a-belt slacks.

<sup>48</sup> *Id.*

<sup>49</sup> “When something is bigger than big, it’s huge. When it’s huger than huge, it’s Ruthian.” Robert M. Jarvis & Phyllis Coleman, *Benjamin N. Cardozo: New York Giant*, 13 MARQ. SPORTS L.J. 63, 93 n.229 (2002) (quoting Jeff Jacobs, *As Century Closes, Babe Still Having Big Impact*, HARTFORD COURANT, Oct. 23, 1999, at C1, available at 1999 WL 19955261). While purists might object to a baseball metaphor in an essay on golf, “Jonesian” (as in Bobby), “Nicklausian” (as in Jack), and “Woodsian” (as in Tiger), just don’t have the same cachet as a reference to the Sultan of Swat. See *Ruth v. Congress of the U.S.*, 71 F.R.D. 676, 680 (D.N.J. 1976) (“Herman Max Ruth [the

cars to golf tournaments sponsored by Elks. Charbonneau Buick-Pontiac got stung by Lloyd Grove's hole-in-one at the Dickinson Elks Club Labor Day tournament in 1974. And just over a month later, Marcel Motors (hereinafter "Marcel") found itself in the crosshairs when Alpee Chenard made a hole-in-one on the thirteenth hole of the Fairlawn Country Club in a tournament sponsored by the Lewiston (Maine) Lodge of Elks.<sup>50</sup> Marcel Motors was potentially on the hook because it had "agreed to give any golfer who shot a hole in one a new 1974 Dodge Colt."<sup>51</sup>

"On the day of the tournament, an agent of the defendant drove a new 1974 Dodge Colt to the golf course and parked it near the clubhouse."<sup>52</sup> Later that day, "in the presence of the other members of his foursome, the plaintiff allegedly shot a hole in one."<sup>53</sup> Marcel disbelieved Chenard and refused to hand him the reins to the Colt.<sup>54</sup> Chenard sued, and won.<sup>55</sup>

At trial and on appeal, Marcel argued that its agreement to award the car was unenforceable because it was an illegal gambling contract<sup>56</sup> which was doubly illegal for having been entered into on a Sunday.<sup>57</sup> Marcel also objected to the trial court's admission of certain evidence about the value of the car offered as a prize.<sup>58</sup> The Maine Supreme Court ruled in

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plaintiff] may have been a namesake of the Sultan of Swat, but in this case, as in his criminal cases, he has struck out.").

<sup>50</sup> *Chenard v. Marcel Motors*, 387 A.2d 596, 598 (Me. 1978).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Interestingly, Justice Delahanty used golfing jargon to when he referred to "the other members of [Chenard's] foursome," *id.*, while in *Grove*, Judge Sand referred, more generically, to "Grove and his group of players," 240 N.W.2d at 859. Yet more evidence for the "golfer/not a golfer" guessing game that meanders, like a lateral water hazard, throughout this essay.

<sup>54</sup> *Chenard*, 387 A.2d at 598.

<sup>55</sup> *Id.* As with *Grove*, Chenard did not get the car, but instead, was awarded damages of \$2,984. *Id.* It is unclear from the opinions in *Grove* and *Chenard* why a North Dakota hole-in-one was worth a Catalina while a similar shot in Maine merited only a Colt.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 601.

<sup>58</sup> *Id.* at 602-03.

Chenard's favor on the first two issues and declined to reach the third.<sup>59</sup> More importantly, however, from the standpoint of hole-in-one jurisprudence, *Chenard* represents the last reported attempt by a car dealer to ace out a golfer by arguing that a hole-in-one contest is an illegal gambling game.<sup>60</sup>

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<sup>59</sup> *Id.* at 603.

<sup>60</sup> While no defendant has since raised the gambling defense, it was raised, sua sponte, in Judge Popovich's dissenting opinion in *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248. (Pa. Super. Ct. 1989). The point of the dissent was that hole-in-one contests necessarily give rise to unenforceable gambling contracts because even though "golf . . . is a sport requiring precise skills," *id.* at 1251, "[m]aking a hole-in-one . . . is such a fortuitous event that skill is almost an irrelevant factor," *id.* Judge Popovich criticized the majority for relying upon unilateral contract principles, which it was able to do only by "seem[ing] to opine that scoring a hole-in-one is an act of skill which a golfer can choose to undertake [when the] truth is quite the opposite." *Id.* at 1252. To support the position that a hole-in-one is a matter of luck rather than a feat of skill, Judge Popovich noted:

In 1988, approximately 21.7 million golfers played 434 million rounds of golf with only 34,469 holes-in-one being reported to the United States Golf Association. *Golf Digest*, using figures amassed since 1952, estimates that a golfer of average ability playing a par-3 hole of average difficulty has a mere 1 in 20,000 chance of aceing the hole.

While the chances increase for a professional golfer, the possibility of a hole-in-one, even for the world's best players, is still remote. Last year only 22 holes-in-one were recorded during the Professional Golf Association's tournament schedule. With approximately 300 touring professionals playing in 47 tournaments (four rounds per tournament, four par-3's per round), the odds increased to approximately 1 in 10,000.

However, even at 10,000 to 1, the professional's chances of aceing a hole are more akin to an act of God than a demonstration of skill.

*Id.* (citations and footnotes omitted). One might be inclined to conclude that Judge Popovich is a frustrated golfer who "doth protest too much." *Women's Dev. Corp. v. City of Central Falls*, 764 A.2d 151, 159 (R.I. 2001) (citing WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 3, sc. 2). Judge Wieand, author of the majority opinion in *Cobaugh* did not go so far as to suggest that Judge Popovich was a frustrated golfer, but did write a lengthy rebuttal to Judge Popovich's dissent in which he argued:

Even if this Court could legitimately consider the "facts" which the dissent introduces from a popular magazine, those statistics demonstrate that a professional golfer is generally twice as likely to shoot a hole-in-one as an amateur golfer. Under these circumstances, it cannot be said that skill is "almost an irrelevant factor."

*Cobaugh*, 561 A.2d at 1250 n.1 (citing *Las Vegas Hacienda v. Gibson*, 359 P.2d 85, 87 (Nev. 1961)). Concern with appellate fact-finding in the golfing contest, as expressed by Judge Wieand, will surface again on the eighteenth hold

## HOLE FOUR: CLOSE ENOUGH

“While some might say that close only counts in horseshoes, hand grenades, and ballroom dancing,”<sup>61</sup> close counted pretty nicely for James Henry in the Ninth Del Webb Sahara

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of this round-up.

<sup>61</sup> *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 989 n.11 (1st Cir. 1995); *see also* *Taylor v. Wolff*, 158 F.R.D. 671, 672 (D. Nev. 1994) (“According to a venerable slang expression, ‘Close only counts in horseshoes and hand grenades.’”).

The foregoing bit of folk wisdom has been applied to several different areas of the law. *See, e.g.*, *James v. City of Dallas*, No. Civ.A. 3:98-CV-436-R, 2003 WL 22342799, at \*12 (N.D. Tex. Aug. 28, 2003) (“mootness is not akin to a game of horseshoes where one gets points for being close to the target”); *Old Person v. Brown*, 312 F.3d 1036, 1048 (9th Cir. 2002) (“elections are not horseshoes, and having a close win is not the same as losing an election”); *Hart v. Avetoom*, 115 Cal. Rptr. 2d 511, 514 (Cal. Ct. App. 2002) (“‘Close’ is good enough in horseshoes and hand grenades, but not in the context of the [California] sanctions statute.”); *In re The Singer Co. N.V.*, No. M-47 (MBM), 2002 WL 10452, at \*3 (S.D.N.Y. Jan. 3, 2002) (“Compliance with [the deadlines for filing a bankruptcy appeal] is not a game of horseshoes; close doesn’t count.”); *LZT/Filliung P’ship, LLP v. Cody/Braun & Assocs., Inc.*, 117 F. Supp. 2d 745, 754 (N.D. Ill. 2002) (“Close only counts in horseshoes, not copyright law.”); *United Rope Distribs., Inc. v. Seatrion Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991) (“United Rope stresses that Duluth [Minnesota] is right across the border from Wisconsin, but close counts only in horseshoes [not personal jurisdiction.]”); *Cale v. Transamerica Title Ins.*, 275 Cal. Rptr. 107, 112 (Cal. Ct. App. 1990) (Sims, J., dissenting) (“As has been said, ‘close’ counts in horseshoes but not upon a summary judgment”); *Hill v. Gerber*, 350 N.W.2d 545, 548 (Neb. 1984) (due process “is neither horseshoes nor hand grenades, and ‘close’ does not count”).

Perhaps the most dire warning of the dangers of allowing close to count comes from the Mississippi Supreme Court:

I concur in the result reached by the majority in this case but would find that Claude Clark meets the requirements of a spiritual leader and that the Universal Life Church meets the requirements of a religious body in the eyes of the laws of this State.

My concern is with the language of the majority that Claude Clark is “enough of a spiritual leader” and that the Universal Life Church is “enough of a religious body.” The majority continues its new school of legal interpretation which I prefer to call the “horseshoes school” which began in this State with the landmark decision of *Dye v. State, Ex Rel. Hale*, 507 So.2d 332 (Miss. 1987).

It is difficult enough for the bench and bar to anticipate and predict future rulings of this Court when we limit ourselves to simple statements of what the law does and does not allow. It is an impossible task when, by the use of “horseshoe jurisprudence,” we begin to apply our new “close enough to count” standard as to what is lawful and to what is not. Close counts in horseshoes and hand grenades.

I am “almost persuaded” that the Gartin Justice Building is on the verge of becoming the twentieth century’s Tower of Babble.

I concur in the result only.

*In re Last Will & Testament of Blackwell*, 531 So.2d 1193, 1197 (Miss. 1988) (Sullivan, J., specially concurring).

There are, however, several areas of the law in which courts have held that close is good enough. *See, e.g.*, *Williams v. Balcor Pension Investors*, No. 90 C 0726, 1995 WL 23061, at \*1 (N.D. Ill. Jan. 17, 1995) (attorneys

Tahoe Amateur Golf Classic, at which he won Cadillac in a “closest-to-the-pin” contest.<sup>62</sup> In addition to being a skillful golfer,<sup>63</sup> Henry was also a member of the board of the Tahoe Regional Planning Agency (hereinafter “TRPA”).<sup>64</sup> His Cadillac-winning shot landed in court when the opponents of a parking garage project he had voted for as a member of the TRPA tried to turn his good fortune to their advantage by accusing him of bias.<sup>65</sup> It seems that the parking garage Henry voted to approve had been proposed by the Sahara Tahoe Corporation (hereinafter “Sahara”), which had also sponsored the golf tournament at which Henry had won his Cadillac,<sup>66</sup> thus making Sahara, at least in a technical sense, the source of Henry’s classy new ride.

Judge Reed of the United States District Court for the District of Nevada ruled that Henry’s victory in the closest-to-the-pin contest – and the Caddy he received from Sahara – did not cause Henry to be biased in favor of Sahara and, thus, did not deprive plaintiffs of their right to due process.<sup>67</sup> In so ruling, Judge Reed noted that “an examination of the transcript from the December 20, 1978 TRPA meeting indicate[d] no bias on the part of Mr. Henry in favor of Sahara.”<sup>68</sup> He also observed that while “some contestants were invited to participate in the

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seeking to reduce the amount of a Rule 11 sanction award argued that “they came close to properly filing [the pleadings that led to sanctions] and that close counts in sanctions as well as in horseshoes,” to which Judge Zagel responded: “I think that is true.”); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 831 F. Supp. 1354, 1359 (N.D. Ill. 1993) (“In patent law, as in horseshoes, close enough counts.”) (citation omitted); *United States v. Crawford*, 34 M.J. 758, 761 (A.F.C.M.R. 1992) (“... ‘close’ counts in horseshoes, hand grenades and, generally, in *Craig* issues”) (citing *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989)).

<sup>62</sup> *Cal. Tahoe Reg’l Planning Agency v. Sahara Tahoe Corp.*, 504 F. Supp. 753, 761 (D. Nev. 1981). The record does not indicate the year or the model of the Cadillac Henry won, nor does it give the car’s value. However, whatever the value of his prizemobile may have been, there can be little doubt that Henry got more for his hole-in-more-than-one than either Grove or Chenard got for their aces.

<sup>63</sup> He bested 353 other contestants to win the Cadillac. *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 762.

<sup>68</sup> *Id.* at 761.

tournament compliments of Sahara, Mr. Henry paid the full entry fee of \$500.00.”<sup>69</sup> Most interestingly, Judge Reed noted that “[t]here are no allegations of impropriety in the manner in which the tournament was organized or the manner in which Mr. Henry came to win the Cadillac.”<sup>70</sup> Judge Reed clearly had his eye on the ball, as the very next hole demonstrates just how impropriety could creep into the manner in which one comes to win a hole-in-one contest.

#### HOLE FIVE: THE HOLE-IN-ONE THAT WASN'T

The events that took place on the ninth hole of the Country Lakes Country Club on June 19, 1985, which initially appeared to be “[a] golfer’s dream c[o]me true,”<sup>71</sup> ultimately turned out to be more of a nightmare for those involved, but a dream come true for those for a taste for amazing stories. In the words of Judge Easterbrook:

A golfer’s dream came true for Andy Sarallo. On June 19, 1985, Andy lined up at the ninth tee at Country Lakes Country Club and struck the ball; an observer on the ninth green pulled Andy’s ball out of the hole. Andy’s foursome jumped up and down and shouted for joy. Because the ninth hole at Country Lakes was the subject of a hole-in-one contest that day, Andy had just won his choice of a 1931 Cadillac or a check for \$40,000!

A hole-in-one is quite a thrill because it happens so infrequently – perhaps one chance in 40,000, rarer than a 300 game in bowling. But Andy’s chances were close to 100%, because his father was mayor of Oakbrook Terrace, Illinois, and the mayor’s support was needed for a bond offering to finance an apartment complex to be built by Robert Krilich – who sponsored the contest, pulled the ball out of the hole, and became the defendant in this criminal case. Krilich and Mayor Sarallo agreed to use the golf tournament as the vehicle for a payoff. Krilich palmed one of Andy’s golf balls, put his hand into the cup, and displayed the ball. Delivering the bribe in this way enabled Krilich to shift the cost to the National Hole-In-One Association, which provided insurance. Thus fraud and

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998).

bribery were coupled.<sup>72</sup>

In this particular case, what happened in court is not nearly so interesting as what happened on the links, and there is no good reason to loiter around the green of the hole-in-one-that-wasn't.

#### HOLE SIX: DON'T LOOK AT MY ACE; DON'T LOOK AT MY FACE

In his opinion in *Krilich*, Judge Easterbrook mentioned the National Hole-in-One Association (hereinafter "Hole-in-One"), which Krilich tried to stick with the bill for his bribe. On this hole, the two-tone wing-tip is on the other foot; rather than being targeted as the victim of a planned theft, Hole-in-One was the target of professional golfer Dan Pooley's claim that it had stolen from him by misappropriating his name and image.<sup>73</sup>

At the 1986 Bay Hill Classic, Pooley made a hole-in-one.<sup>74</sup> But his great shot was not just any old hole-in-one. In addition to whatever advantage it gave him in the Bay Hill Classic – the record does not disclose where Pooley finished that week – his ace was worth an additional one million dollars, half for him and half for Arnold Palmer's Children Hospital Charity.<sup>75</sup> The million dollar hole-in-one purse was available thanks to a promotion run through Hole-in-One.<sup>76</sup>

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<sup>72</sup> *Id.* Judge Easterbrook, like Judge Delahanty in *Chenard*, demonstrated his acquaintance with proper golfing lingo by referring to young Sarallo's playing group as a foursome.

<sup>73</sup> *Pooley v. Nat'l Hole-in-One Ass'n*, 89 F. Supp. 2d 1108, 1109 (D. Ariz. 2000).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1111.

<sup>76</sup> *Id.* at 1110-11. As Hole-in-One itself explained in the promotional videotape at issue:

We've pioneered a new product – the Million Dollar Hole-In-One Shootout. It's the ideal fundraiser for any type of charity. . . . Traditionally, the newer events can raise up to \$30,000, however, the more mature, well-managed events can raise up to \$50,000. . . . The National Hole-In-One Association is the only entity in America that can provide tournament insurance, promotion, and execution. . . . You advertize a million dollars and it turns some heads. It's different than any other tournament in the Phoenix area. Most of them have car give-aways . . . This is the only one that has a million dollars and gives them an opportunity to shoot for that million dollars. We pay the premium and if somebody puts it in the can, it[']s the insurance

The rub came when Hole-in-One made an eight-minute promotional videotape that mentioned Pooley's ace<sup>77</sup> and "show[ed] a two-second clip of [Pooley] teeing off at the Bay Hill Classic followed by a four-second clip of him walking up the fairway after making [his] hole-in-one."<sup>78</sup> Based upon the videotape, Pooley sued Hole-in-One for invading his right of publicity.<sup>79</sup> After determining that Arizona courts would recognize the right of publicity,<sup>80</sup> as set out in *Eastwood v. Superior Court*,<sup>81</sup> Judge Marquez of the United States District Court for the District of Arizona denied Hole-in-One's motion to dismiss for failure to state a claim.<sup>82</sup> The court then went on to rule that the "incidental use" defense did not apply because "Defendant's inclusion of Plaintiff's name and hole-in-one for a million dollar ace was integral to Defendant's advertisement and clearly enhanced the marketability of Defendant's service."<sup>83</sup> In so ruling, the court rejected the Hole-in-One's argument that "[a]ny golfer making a hole-in-one would have been sufficient in the video,"<sup>84</sup> ruling that "Plaintiff's hole-in-one was not fungible to that of any other golfer, not even Ray Wilkinson."<sup>85</sup>

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companies['] ball game . . .

*Id.* at 1110 (quoting Def.'s Ex. 1).

<sup>77</sup> *Id.* at 1111. Pooley was mentioned in the videotape in the following way:

Has anyone ever made a million dollar hole-in-one? You bet. At the 1986 Bay Hill Classic, Don Pooley electrified a national television audience as he knocked this ball in on the fly for a million dollar ace. Pooley received half the prize and the other half went to the Arnold Palmer's Children Hospital Charity. And in 1991, an amateur named Ray Wilkerson made the shot of a lifetime and generated national exposure for the title sponsor and charity . . .

*Id.* (quoting Def.'s Ex. 1).

<sup>78</sup> *Id.* at 1110-11.

<sup>79</sup> *Id.* at 1109.

<sup>80</sup> *Id.* at 1112.

<sup>81</sup> 198 Cal. Rptr. 342, 346 (Cal. Ct. App. 1983).

<sup>82</sup> *Pooley*, 89 F. Supp. 2d at 1112.

<sup>83</sup> *Id.* at 1113.

<sup>84</sup> *Id.* (citation omitted).

<sup>85</sup> *Id.*

## HOLE SEVEN: RAKE THE TRAPS AND TAKE DOWN YOUR SIGNS

From an early age, golfers are taught to rake their footprints from sand traps and to repair ball marks on the greens. Hole number seven illustrates an even more important aspect of golf-course clean-up and maintenance.

On May 17, 1987, Amos Cobaugh was playing in the East End Open Golf Tournament on the Fairview Golf Course in Cornwall, Lebanon County. When he arrived at the ninth tee he found a new Chevrolet Beretta, together with signs which proclaimed: “HOLE-IN-ONE Wins this 1988 Chevrolet Beretta GT Courtesy of KLINK-LEWIS Buick Chevy Pontiac \$49.00 OVER FACTORY INVOICE in Palmyra.” Cobaugh aced the ninth hole and attempted to claim his prize. Klick-Lewis refused to deliver the car. It had offered the car as a prize for a charity golf tournament sponsored by the Hershey-Palmyra Sertoma Club two days earlier, on May 15, 1987, and had neglected to remove the car and posted signs prior to Cobaugh’s hole-in-one.<sup>86</sup>

After Klick-Lewis refused to deliver the car, Cobaugh sued to compel delivery,<sup>87</sup> and won on summary judgment.<sup>88</sup>

More importantly, Cobaugh kept the car on appeal.<sup>89</sup> As in the prize cases discussed above, Judge Wieand of the Pennsylvania Superior Court employed traditional unilateral contract principles,<sup>90</sup> and determined that Klick-Lewis made “an offer [that] specified the performance which was the price or consideration to be given.”<sup>91</sup> More specifically,

[b]y its signs, Klick-Lewis offered to award the car as a prize to anyone who made a hole-in-one at the ninth hole [and that a] person reading the signs would reasonably understand that he or she could accept the offer and win the car by performing the feat of shooting a hole-in-one.<sup>92</sup>

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<sup>86</sup> Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248, 1249 (Pa. Super. Ct. 1989).

<sup>87</sup> *Id.* For reasons that are unclear, Cobaugh appears to be the only car-winning ace maker to sue for the car rather than money damages. Perhaps Cobaugh’s fee agreement with his attorney allowed the attorney to drive the car every third day.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1251.

<sup>90</sup> *Id.* at 1249.

<sup>91</sup> *Id.* at 1250.

<sup>92</sup> *Id.*

Accordingly, the court rejected Klick-Lewis's argument that "it did nothing more than propose a contingent gift and that a proposal to make a gift is without consideration and unenforceable."<sup>93</sup> The court also rejected Klick-Lewis's defense based upon mutual mistake.<sup>94</sup> As Judge Wieand explained: "The mistake upon which appellant relies was made possible only because of its failure to (1) limit its offer to the Hershey-Palmyra Sertoma Club Charity Golf Tournament and/or (2) remove promptly the signs making the offer after the Sertoma Charity Golf Tournament had been completed."<sup>95</sup> The lesson of this case, it seems, is clear.

#### HOLE EIGHT: HOLE-IN-ONE DAMAGES ARE NOT THRICE AS NICE

While the prize cases discussed above demonstrate that courts are generally amenable to enforcing a golfer's contractual right to collect a prize for making a hole-in-one, they tend to be less impressed when a golfer seeking to collect a hole-in-one prize pulls a novel theory out of the bag.

On May 12, 1990, the Topsail (North Carolina) Area Jaycees, Inc. (hereinafter "Jaycees") held a golf tournament at the North Shore Country Club in Onslow County.<sup>96</sup> In their advertisements, the Jaycees offered "a prize of either \$10,000 or a new car for anyone who hit a hole in one at the 17th hole."<sup>97</sup> Lois T. Malone aced the hole, and was presented with a simulated check for \$10,000.<sup>98</sup> However, the Jaycees later informed Malone that she would not be receiving an actual check "because an insurance policy was not in place as they had planned

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<sup>93</sup> *Id.* at 1249-50 (citing RESTATEMENT (SECOND) OF CONTRACTS § 25 cmt. b).

<sup>94</sup> *Id.* at 1251.

<sup>95</sup> *Id.*

<sup>96</sup> *Malone v. Topsail Area Jaycees, Inc.*, 439 S.E.2d 192, 193 (N.C. Ct. App. 1994).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

on the date of the tournament, and the organization did not have the resources to pay \$10,000 without the coverage.”<sup>99</sup>

Malone sued in several counts, “alleging entitlement to certain prize money and asserting claims for negligence, fraud and unfair or deceptive practices.”<sup>100</sup> The trial court granted Malone summary judgment, apparently on the contract claim, and awarded her \$10,000, but also granted the Jaycees summary judgment on Malone’s unfair or deceptive practices claim.<sup>101</sup> Presumably because success on that claim would have entitled her to treble damages, Malone appealed.<sup>102</sup> Finding “no evidence indicating that the golf tournament sponsored by the Jaycees was a business activity as defined [either] by Chapter 75 [the statute governing unfair or deceptive practices]”<sup>103</sup> or the North Carolina Supreme Court,<sup>104</sup> the North Carolina Court of Appeals affirmed the trial court’s ruling that the Jaycees contest fell outside the scope of state’s law against unfair or deceptive business practices.<sup>105</sup> Judge Lewis further explained that because the Jaycees intended to have insurance coverage and believed that they had, in fact, secured such coverage, “[p]laintiff has failed to show any evidence of at least one of the elements of fraud, the intent to deceive.”<sup>106</sup> The moral of this story, it seems, is that when a golfer makes a hole-in-one and gets stiffed by a party purporting to provide a prize, the courts stand ready to help her collect her just desserts, but only one slice, not three.

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<sup>99</sup> *Id.* at 193-94.

<sup>100</sup> *Id.* at 193.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 194.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 196.

<sup>106</sup> *Id.* at 194.

The closing hole on the front nine is “*deja vu* all over again,”<sup>107</sup> with a slight twist. As

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<sup>107</sup> The Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York, 278 F. Supp. 2d 313, 321 (N.D.N.Y. 2003). According to Judge McCurn, author of *Canadian St. Regis Band*, “[t]his epigram is often attributed to Yogi Berra, ‘a man as famous for mangling the English language as for belting baseballs.’” *Id.* (quoting *Williams v. Ashland Eng’g Co.*, 45 F.3d 588, 589 n.1 (1st Cir. 1995), *rev’d on other grounds*, *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136 (1st Cir. 2000)).

A Westlaw search on “*deja vu* all over again” yields an astounding forty-five matches. Yogi Berra is often, but not always, cited as the source of the phrase. *See, e.g.*, *State v. Klayman*, 835 So.2d 248, 256 (Fla. 2002) (Wells, C.J., dissenting) (“Remarkably, in a Yogi Berra-like ‘*deja vu* all over again,’ the majority, in reality, merely returns to a path which this Court started down before but then from which this Court appropriately receded.”) (citations omitted); *Rosmer v. Pfizer Inc.*, 272 F.3d 243, 244 (4th Cir. 2001) (Wilkinson, C.J., concurring in the denial of rehearing en banc) (“Indeed, the two dissents bring to mind Yogi Berra’s immortal words . . . .”); *Saints & Sinners v. City of Providence*, 172 F. Supp. 2d 348, 351 (D.R.I. 2001) (“As Yogi Berra, that great 20th Century American philosopher said . . . .”); *Jenkins v. Missouri*, 216 F.3d 720, 738 n.19 (8th Cir. 2000) (Beam, J., dissenting) (“ . . . as philosopher Yogi Berra might have said . . . .”); *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 95 F. Supp. 2d 169, 171 (S.D.N.Y. 2000) (“But this case brings to mind Yogi Berra’s immortal line . . . .”); *Smith v. Beal Acceptance Corp.*, 244 B.R. 487, 491 (N.D. Ga. 2000) (“In simple terms, to paraphrase Yogi Berra, *res judicata* prevents a court from being subjected to ‘*déjà vu* all over again”); *ANR W. Coal Dev. Co. v. Basin Elec. Power Co-op*, No. CIV A1-92-105, 2000 WL 33340293, at \*1 (D.N.D. Jan. 25, 2000) (referring to “the purported words of Yogi Berra”); *Frederick v. United States*, 741 A.2d 427, 433 (D.C. 1999) (referring to “Yogi Berra’s immortal phrase”); *DeRolph v. State*, 712 N.E.2d 125, 297 (Ohio C.P. 1999) (“Hearing the problems that continue to plague the schools of this State, without relief in sight, reminds this Court of baseball great Yogi Berra’s confused quote . . . .”); *People v. Mendez*, 81 Cal. Rptr. 2d 301, 315 & n.1 (Cal. 1999) (Brown, J., concurring) (“In the words of the inimitable Yogi Berra . . . .”) (citing William D. Araiza et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697, 714 (1997); RALPH KEYES, “NICE GUYS FINISH SEVENTH” – FALSE PHRASES, SPURIOUS SAYINGS, AND FAMILIAR MISQUOTATIONS 152 (1992) (questioning whether Yogi Berra did, in fact say “it’s *deja vu* all over again”)); *Smith v. Palmer*, 24 F. Supp. 2d 955, 957 (N.D. Iowa 1998) (“This case reminds the court of something the New York Yankees’ Hall of Fame catcher Lawrence Peter ‘Yogi’ Berra once said . . . .”); *Minhlong Enters., Inc. v. Common Ground Community HDFC, Inc. (In re N.Y. Int’l Hostel, Inc.)*, Nos. 88-B-11126 (TLB), 92-9706A (TLB) & 95 Civ. 8475(HB), 1997 WL 633522, at \*2 (S.D.N.Y. Oct. 14, 1997) (“Paraphrasing former New York Yankee Yogi Berra, the Court concluded, ‘this motion seems like *deja vu* all over again.’”); *State ex rel. Reece v. Wyo. State Bd. of Outfitters & Prof’l Guides*, 931 P.2d 958, 959 (Wyo. 1997) (“The only other reference to authority within appellant’s argument is the quote attributed to Yogi Berra stating . . . .”); *McCoy v. Major League Baseball*, 911 F. Supp. 454, 458 (W.D. Wash 1995) (“This case presents a situation that the baseball sage Yogi Berra might describe as . . . .”) (citations omitted); *In re Estate of Tabas*, 879 F. Supp. 464, 465 n.3 (E.D. Pa. 1995) (“We also note that Harriette’s petition is (to quote Yogi Berra) ‘*deja vu* all over again.’” (citing BARTLETT’S FAMILIAR QUOTATIONS 754 (16th ed. 1992)); *Williams*, 45 F.3d at 589 n.1 (following Keyes in rejecting the Berra attribution, and concluding that “[t]he phrase’s origin is unknown”); *Butterworth v. Nat’l League of Prof’l Baseball Clubs*, 644 So.2d 1021, 1021 n.1 (Fla. 1994) (“In the words of baseball great Yogi Berra, judicial review of baseball’s antitrust exemption is ‘*deja vu* all over again.’”) (citation omitted); *Fetterly v. Paskett*, 15 F.3d 1472, 1472 (9th Cir. 1994) (Kozinski, J., dissenting from order rejecting the suggestion for hearing en banc) (“As Yogi Berra is said to have said . . . .”); *Parsons v. Parsons*, 490 N.W.2d 733, 739 (S.D. 1992) (Sabers, J., dissenting) (“This case is starting to remind me of the statement sometimes attributed to Yogi Berra . . . .”); *Davis v. Coopers & Lybrand*, 787 F. Supp. 787, 804 n.41 (N.D. Ill. 1992) (“When this Court began this section of the opinion with a strong sense of (as Yogi Berra put it) ‘*deja vu* all over again’ . . . .”); *Claussen v. Aenta Cas. & Sur. Co.*, 754 F. Supp. 1576, 1577 (S.D. Ga. 1990) (“As Yogi Berra once said . . . .”); *United States v. Davenport*, 740 F. Supp. 1371, 1372 (S.D. Ind. 1990) (referring to “the saying attributed to Yogi Berra”); *Nat’l Rifle Ass’n of Am. v. Fed. Election Comm’n*, 854 F.2d 1330, 1336 (D.C. Cir. 1988) (“as Yogi Berra is reputed to have said . . . .”); *Gruber v. Hubbard Bert Karle Weber*,

with hole number two, where Lloyd Grove beat Charbonneau out of the cost of a car, this hole involves a hole-in-one contest on “a nine-hole course, which was played twice, for a game of eighteen holes.”<sup>108</sup> But here, it’s not the golfer suing the donor of the hole-in-one prize, it’s the donor suing the provider of its hole-in-one insurance for breach of contract.<sup>109</sup>

The troublesome ace was scored on July 9, 1990, at the Quail Run Golf Course, in a tournament sponsored by the City of Santa Fe, New Mexico, and Quail Run Association, Inc.<sup>110</sup> Crawford Chevrolet, Inc. (hereinafter “Crawford”) had “agreed to provide a new vehicle to any participant who scored a hole-in-one on a certain hole during the tournament.”<sup>111</sup> The specified hole was number nine.<sup>112</sup> After Don Zamora “scored a hole-in-one on physical hole #9, but on his second time around the course,”<sup>113</sup> he claimed the prize, which Crawford delivered.<sup>114</sup> Crawford, in turn, made a claim on its hole-in-one insurance carrier, the now-familiar National Hole-in-One Association (“Hole-in-One”),<sup>115</sup> the potential victim on hole number five and the defendant on hole number six.

Hole-in-One denied coverage, making the same argument to Crawford that Charbonneau Buick-Pontiac had made to Lloyd Grove, namely, that when a nine-hole course is played twice,

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Inc., 684 F. Supp. 879, 882 n.2 (W.D. Pa. 1988) (attributing the phrase to Yogi Berra); *United States v. Manni*, 810 F.2d 80, 81 (6th Cir. 1987) (referring to “the words of that contemporary philosopher, Yogi Berra”).

Finally, it would be nothing short of irresponsible to conclude this footnote without quoting Judge Patterson of the Southern District of New York who began his opinion in *Peterson v. Lacy* by stating: “In this habeas corpus petition, to misquote Yogi Berra, ‘It’s Catch-22 all over again.’” No. 97 Civ. 7795 RPP KNF, 1998 WL 883302, at \*1 (S.D.N.Y. Dec. 17, 1998).

<sup>108</sup> *Crawford Chevrolet, Inc. v. Nat’l Hole-in-One Ass’n*, 828 P.2d 952, 953 (N.M. 1992).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 952.

<sup>111</sup> *Id.* The new vehicle Crawford offered was valued at \$19,736. *Id.* at 953.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

only aces made on the first nine-hole round qualify for hole-in-one prizes.<sup>116</sup> The argument worked no better for Hole-in-One than it did for Charbonneau; at summary judgment, Crawford won damages of \$19,796 against Hole-in-One<sup>117</sup> and Crawford held its judgment on appeal.<sup>118</sup>

In affirming the trial court, the New Mexico Supreme Court did not cite *Grove*, but employed similar logic; its decision in favor of Crawford rests upon the identification of an ambiguous contract term.<sup>119</sup> While Crawford, echoing Lloyd Grove, argued that the term “hole #9” was ambiguous<sup>120</sup> – the winning argument in the trial court – Justice Montgomery found “the term ‘shots’ [to be] ambiguous because it could mean either the number of *attempts* to score a hole-in-one on physical hole #9 (in this tournament, 120) or the number of *golfers* playing physical hole #9 (in this tournament, sixty.)”<sup>121</sup> But instead of simply construing the ambiguous term against the drafter, as in *Grove*, the court “examin[ed] the facts of [the] case to determine what the parties intended the contractual language to mean,”<sup>122</sup> and then found that “the parties intended that ‘number of shots’ meant ‘number of players’ [and] interpret[ed] the contract as providing insurance against the risk that any of the 60 players might score a hole-in-one on hole #9, either on his or her first or second time around the nine-hole course.”<sup>123</sup>

The court’s determination of the parties’ intent is somewhat remarkable in light of the

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 956.

<sup>119</sup> *Id.* at 954.

<sup>120</sup> *Id.* According to Crawford, the term “hole #9” was ambiguous because it was

subject to at least three different interpretations: physical hole #9, on either the first or second round of the course; physical hole #9, but only the first time around the course; and the ninth hole played, regardless of whether it is physical hole #9.

*Id.* Here, as in *Grove*, the third interpretation was in play due to the use of a shotgun start. *Id.*

<sup>121</sup> *Id.* (emphasis in the original).

<sup>122</sup> *Id.* (citing 2 GEORGE J. COUCH, COUCH CYCLOPEDIA OF INSURANCE LAW § 15:74, at 357 (2d ed. rev. vol. 1984)).

record. In its application for hole-in-one insurance, Crawford had to designate a “target hole,” indicate its yardage, and project the number of shots that would be taken at that target hole.<sup>124</sup> One can only presume that such information was necessary for Hole-in-One to perform the actuarial calculations necessary to determine an appropriate premium.<sup>125</sup> Crawford designated hole number nine, gave its yardage as 165, and estimated that sixty-five shots would be taken at the hole.<sup>126</sup> Moreover, the application contained the following provision:

NUMBER OF SHOTS: Each category of shots specified on this Certificate permit[s] a 10% variance, plus or minus (+ or -), without a change in the certificate fee. Shot variance greater than 10% must be reported to [Hole-in-One] prior to tournament. Certificate fee adjustment will be billed after the tournament.

IMPORTANT: The prize value will be prorated downward if a Hole-in-One occurs and the number of shots has been understated by more than the allowed 10% variance. (Example: Number of shots insured divided by number of shots taken times the prize value = Amount Paid.)<sup>127</sup>

After Crawford submitted its application for coverage, Hole-in-One asked Crawford, by letter, to inform Hole-in-One of “any variance in the *number of players*.”<sup>128</sup> Crawford did so, informing Hole-in-One “that the number of players would be 60 rather than 65.”<sup>129</sup>

Despite the contract provisions outlined above, and the unassailable logic that 120 shots at a hole rather than sixty would double the chances of a hole-in-one (and, consequently, the risk faced by the insurer), the court determined that the parties intended the term “number of shots”

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<sup>123</sup> *Id.* at 955.

<sup>124</sup> *Id.* at 952-53.

<sup>125</sup> To take things to extremes, one could probably purchase hole-in-one insurance for a very low premium to protect against one tee shot to be taken on a 500-yard hole, while the premium would be considerably higher if 10,000 tee shots were to be taken at a hole that was fifty yards away.

<sup>126</sup> *Crawford*, 828 P.2d at 953.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (emphasis added).

<sup>129</sup> *Id.*

to mean “number of players,” rather than “number of shots.”<sup>130</sup> In so ruling, the court relied upon a “‘Certificate of Participation,’ issued to Crawford by Hole-in-One”<sup>131</sup> that contained the following Target Hole Data: “CATEGORY OF SHOTS: 48 AMATEURS, 12 CLUB PROS.”<sup>132</sup> The court also relied upon the letter from Hole-in-One to Crawford, reminding Crawford to inform Hole-in-One of “any variance in the number of players,”<sup>133</sup> which, in the court’s view, indicated that Hole-in-One itself considered the number of shots to be the number of players.<sup>134</sup> As well, the court noted that Hole-in-One’s application materials did not “inform[] the applicant that, in an eighteen-hole game played on a nine-hole course, the number of shots is twice the number of players if the applicant intends to insure the physical hole on both the first and second rounds of play.”<sup>135</sup>

Based upon the foregoing factors, the court determined, in essence, that Crawford and Hole-in-One agreed that Hole-in-One would insure any number of tee shots taken at hole number nine, so long as they were taken by no more than sixty golfers. That is, of course, absurd. The key to the court’s flawed reasoning may, perhaps, be found in its suggestion that Hole-in-One was somehow obligated to inform potential policy holders that the number of shots is double the number of players when a nine-hole course is used for an eighteen-hole tournament.

The phrase “number of shots” is unambiguous on its face.<sup>136</sup> A shot is a shot. Ten shots by one golfer or one shot by each of ten golfers create more or less the same risk of a hole-in-

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<sup>130</sup> *Id.* at 955.

<sup>131</sup> *Id.* at 954.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 955.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Indeed, Chief Justice Ransom wrote a reluctant special concurrence stating his difficulty in “see[ing] any ambiguity in the risk underwritten by Hole-in-One.” *Id.* at 956 (Ransom, C.J., concurring).

one. The number of shots determines the risk; the number of golfers is virtually immaterial.<sup>137</sup> Thus, it should be entirely obvious to anyone in Crawford's position that the number of shots is double the number of golfers when an eighteen-hole tournament is played on a nine-hole course.

Moreover, Crawford must have known – or could easily have learned – that the Quail Run Golf Course had only nine holes. But there is nothing in the record to indicate that Crawford ever informed Hole-in-One of that fact. Thus, based upon the information Crawford provided Hole-in-One, which seems not to have included the number of holes at Quail Run, Hole-in-One made the assumption that the tournament was to be contested on a standard eighteen-hole golf course.<sup>138</sup> Based upon that entirely reasonable assumption, Hole-in-One treated “number of shots” and “number of players” as interchangeable, which they would have been on a standard eighteen-hole layout.

In the end, *Crawford* was wrongly decided. In order to rule in Crawford's favor, the court determined, against all logic, that Hole-in-One intended to insure any number of shots at hole number nine, so long as they were taken by a fixed number of golfers. And it penalized Hole-in-One for failing to state the obvious in its contract materials, *i.e.*, that the number of shots is double the number of golfers when an eighteen-hole tournament is contested on a nine-hole course, while imposing no obligation on Crawford to inform Hole-in-One of the fact that the site of its hole-in-one contest was a nine-hole golf course. One wonders whether Hole-in-One would have been held liable if its policy did not specify the use of a standard-sized hole and Crawford

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<sup>137</sup> An argument could be made that one golfer taking ten shots at the ninth hole would create a slightly greater risk of a hole-in-one than ten golfers taking one shot each, due to increased familiarity with the contours of the green, etc., but statistically speaking, any advantage the one golfer would have on his tenth shot must be considered negligible, at best.

had decided to improve the odds by setting up the ninth green with a hole the size of a basketball goal or a manhole cover.<sup>139</sup> While the car dealer in *Cobaugh* was rightly compelled to award a car to a golfer who had no way of knowing what the dealer knew, that the prize he thought he was shooting for was only intended to be offered to participants in a tournament held two days earlier,<sup>140</sup> it seems unfair to hold Hole-in-One liable for failing to state an obvious principle (“shots” equals “competitors” times two on a nine-hole course), when the fact triggering the application of the principle (the relatively unusual occurrence of an eighteen-hole tournament on a nine-hole course), was well within the scope of Crawford’s knowledge, but not Hole-in-One’s.<sup>141</sup>

The real shame of the *Crawford* decision is that the proper resolution of the dispute between Crawford and Hole-in-one was spelled out in the application for insurance itself, which specified that if the number of shots taken at the target hole was more than ten percent more than the number listed in the application, the amount that Hole-in-One would pay the insured would be prorated downward, according to a set formula.<sup>142</sup> Applying that formula to the facts of *Crawford*, Hole-in-One should have been found liable to Crawford for half the cost of the car Crawford awarded to Zamora or, in the alternative, the New Mexico Supreme Court should have reduced Crawford’s damages to half the cost of the car. Hole-in-One, in fact, argued for just

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<sup>138</sup> Continuing this essay’s leitmotif of “golfer/not a golfer,” one might reasonably conclude that if Justice Montgomery, author of *Crawford*, were a golfer, he might have taken judicial notice of the fact that most golf courses consist of eighteen holes.

<sup>139</sup> According to the United States Supreme Court, such a modification might constitute an unacceptable “fundamental alteration” of the game of golf for purposes of the Americans with Disabilities Act. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001) (“changing the diameter of the hole from three to six inches might be . . . a modification” that is unacceptable because it would fundamentally alter “an essential aspect of the game of golf”).

<sup>140</sup> *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248, 1250-51 (Pa. Super. Ct. 1989).

<sup>141</sup> Moreover, unlike the plaintiff in *Cobaugh*, one must presume that Crawford Chevrolet was a sophisticated corporate entity, well able to protect its own legal rights.

<sup>142</sup> *Crawford*, 828 P.2d at 953.

such a resolution of Crawford's claim,<sup>143</sup> but the court disposed of that argument, explaining that "[b]ecause 'number of shots' meant 'number of players,' Crawford did not understate the number of shots taken on hole #9"<sup>144</sup> and, as a consequence, "there was no 'shot variance' and no basis for reducing the trial court's damage award."<sup>145</sup>

#### HOLE TEN: INTER-GENDER ACES, PART ONE

The first hole on the back nine involves the second litigated hole-in-one by a female golfer, but the first instance in which gender itself was an issue.

On the last day of a golf tournament held at Moccasin Creek Country Club in Aberdeen, South Dakota, Jennifer Harms scored a hole-in-one.<sup>146</sup> At first blush, her ace appeared to win her a new Ford Explorer, offered as a hole-in-one prize by Northland Ford Dealers (hereinafter "Northland").<sup>147</sup> Northland, however, "refused to award her the new vehicle."<sup>148</sup> Just like *Crawford*, this case involves the complex interplay between a prize donor, its insurance company, and unstated assumptions.

The golf tournament in this case was hosted by Moccasin Creek Country Club (hereinafter "Moccasin Creek") and was part of the four-tournament Dakota Tour.<sup>149</sup> The tournament was "open to both men and women, professional and amateur."<sup>150</sup> Northland offered to sponsor a hole-in-one contest, in which it would award a new car to "the first golfer to 'ace' a

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 956.

<sup>145</sup> *Id.*

<sup>146</sup> Harms v. Northland Ford Dealers, 602 N.W.2d 58, 59-60 (S.D. 1999).

<sup>147</sup> *Id.* at 59.

<sup>148</sup> *Id.* at 60.

<sup>149</sup> *Id.* at 59.

<sup>150</sup> *Id.*

specified contest hole.”<sup>151</sup> In order to protect itself, Northland purchased hole-in-one insurance from Continental Hole-in-One, Inc. (hereinafter “Continental”).<sup>152</sup> For three days worth of coverage, Northland paid a premium of \$4,602.<sup>153</sup> Unlike the insurer in *Crawford*, which did not anticipate the possibility of an eighteen-hole tournament being contested on a nine-hole course, Continental did anticipate the possibility that both men and woman would be playing in the tournament at Moccasin Creek, and stated in the application form it sent to Northland that “ALL AMATEUR MEN & WOMAN WILL UTILIZE THE SAME TEE.”<sup>154</sup> Northland, however, seems not to have informed either Moccasin Creek or the players in the tournament that women would have to play from the men’s tees in order to participate in the hole-in-one contest.<sup>155</sup> Rather, the tournament was contested under United States Golf Association rules, which included one that specified: “Professionals will play from the blue tees. Male amateurs will play from the yellow tees, female amateurs will play from the red tees.”<sup>156</sup> As instructed by the rules, Jennifer Harms was playing from the red tees when she made her hole-in-one.<sup>157</sup> When the hole was measured and found to be less than 170 yards long from the red tees, Northland refused to award Harms the Ford Explorer.<sup>158</sup>

In response, Harms sued both Moccasin Creek and Northland for breach of contract,

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<sup>151</sup> *Id.* The specified contest hole was number eight. *Id.* at 63.

<sup>152</sup> *Id.* at 60.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* The policy further specified that on the third day of the tournament, the minimum length of the contest hole was required to be 193 yards for professionals and 170 yards for amateurs. *Id.* Continental further warned Northland that it was “imperative that these yardages are correct each day to keep [its] hole-in-one coverage valid.” *Id.* As well, “Continental asked Moccasin Creek to find someone to sit at the green and act as a ‘spotter’ to verify claims of a hole-in-one.” *Id.*

<sup>155</sup> *Id.* “[A]s Moccasin Creek’s course superintendent later reflected, ‘I assumed it was a men’s prize and was not informed either way, that women were also competing with it . . . .’” *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

prevailed on summary judgment, and was awarded \$25,125 plus interest and costs.<sup>159</sup> Moccasin Creek and Northland cross-claimed each other, and Moccasin Creek prevailed, also on summary judgment.<sup>160</sup> Left holding the bag on both Harms's and Moccasin Creek's claims against it, Northland appealed.<sup>161</sup>

On appeal, Justice Konenkamp of the South Dakota Supreme Court made short work of Northland's appeal of the trial court's judgment in favor of Harms:

No one can seriously dispute that, based on the promulgated contest rules, Harms earned the prize when she sank her winning shot. She registered for the tournament and paid her \$160 entrance fee. During play at the contest hole, she teed off from the amateur women's red marker, as she had done on all the other holes that day and the two previous days of the tournament. Concededly, she hit from a point under the minimum distance dictated by Northland's insurer, but she was following the tournament rule that required amateur women to tee from the red markers, not the yellow or the blue, as with the amateur men and the professionals. None of the participants knew of the minimum yardage requirement. Yet only amateur women stood ineligible to win the car if they followed the tournament rules.<sup>162</sup>

Relying upon well-settled principles of unilateral contract law, the court explained that "Northland must abide by the rules it announced, not by the ones it left unannounced."<sup>163</sup>

Perhaps sensing impending defeat on its contract claim, Northland tossed up one interesting but unsuccessful Hail Mary.<sup>164</sup> Jennifer Harms scored her hole-in-one during the

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 61.

<sup>163</sup> *Id.*

<sup>164</sup> A "Hail Mary" pass is a "last-minute attempt by a losing quarterback in a football game to salvage the game by throwing the ball to the end-zone, without regards to the relative positions of the players, hoping that one of his teammates would catch the ball and score a touchdown." Theo I. Ogune, *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?*, 30 U. BALT. L.F. 4, 11 n.49 (2001). In light of my extended homage to Yogi Berra, *supra* note 106, it only seems fair to give equal time to a venerable football metaphor.

The Hail Mary pass has found its way into no small number of judicial opinions. *See, e.g., Baker v.*

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Commonwealth, 103 S.W.3d 90, 98 (Ky. 2003) (Keller, J., concurring) (“In short, Appellant’s trial counsel, no doubt recognizing that he had little ability to muster a factual defense to this offense [using a minor in a sexual performance] given his client’s admission that he took nude photographs of his pre-teen step-granddaughter, made a clever attempt – albeit a bit of a “Hail Mary” – to win a directed verdict on a technicality.”); *Hade v. Capozzi*, No. 91 CIV. 5897 (CSH), 1996 WL 426394, at \*3 (S.D.N.Y. July 30, 1996) (“This unparticularized, speculative allegation is the pleadings equivalent of a ‘Hail Mary’ pass, and there is no one in the end zone to catch it.”); *United States v. Ortiz-Miranda*, 931 F. Supp. 85, 92 (D.P.R. 1996) (“In what we must conclude was a strategic “hail Mary,” defense counsel has requested a new trial under Fed.R.Crim.P. 33, even after we initially ruled from the bench against defendant’s *Brady* argument, for if the requirements of *Brady* are stringent, much more so are those of Rule 33.); *Nat’l Football League Players Ass’n v. Pro-Football, Inc.*, 857 F. Supp. 71, 75-76 (D.D.C. 1994) (“The defendants next turn to the ‘Hail Mary’ of challenges to an arbitrator’s decision, public policy. . . . Such public policy arguments, much like Hail Mary passes, are usually unsuccessful. . . . By articulating a credible public policy argument, defendants have completed their Hail Mary pass. Nevertheless, to win the game by succeeding on the merits, the defendants must persuade the Court that the arbitrator incorrectly interpreted *Mobil Oil*.”) (footnote omitted); *Etherington v. Bankers Life & Cas. Co.*, 747 F. Supp. 1269, 1280 (N.D. Ill. 1990) (“That legal equivalent of the end-of-the-game Hail Mary pass cannot achieve either of its intended purposes.”); *Committee of Equity Security Holders v. Lionel Corp.* (In re *Lionel Corp.*), 722 F.2d 1063, 1072 (2d Cir. 1983) (Winter, J., dissenting) (“The courts below were quite right in not treating [the equity holders’] arguments seriously for they are the legal equivalent of the ‘Hail Mary pass’ in football.”).

Perhaps the most exuberant invocation of the Hail Mary metaphor came in a case in which a Los Angeles Rams season-ticket holder sued the team for moving to St. Louis in 1994:

This is not the first time this case has visited us. In *Fight for the Rams v. Superior Court* (1996) 48 Cal. Rptr. 2d 851, we determined plaintiff’s predecessor timely sought to recuse a superior court judge and granted relief. There, the author of this opinion wrote the following: “Despite the trial judge’s probably accurate observation that this lawsuit has little prospect of success, he was not called upon to, nor did he, make ‘a determination of contested fact issues relating to the merits.’” (*Id.* at 851.) This admittedly gratuitous forearm shiver brought an amusingly ironic audible at oral argument from plaintiff’s attorney: He moved to disqualify the author of his side’s earlier appellate triumph in a motion from the podium. (There was no effort to send Justice Rylaarsdam from the bench to the showers, although he signed off on the offending remarks in *Fight for the Rams*.)

Plaintiff’s counsel should huddle with more experienced teammates before attempting such a “Hail Mary” in the future. Or he could consult the Supreme Court’s “playbook.” (*See, Kaufman v. Court of Appeal*\_(1982) 647 P.2d 1081) As we said from the bench, the motion is denied.

*Charpentier v. Los Angeles Rams Football Co.*, 89 Cal. Rptr. 2d 115, 117 n.1 (Cal. Ct. App. 1999) (parallel citations omitted).

Finally, while examining the above-cited examples of “Hail Mary” jurisprudence, I discovered one bit of exegesis that may, possibly, sow the seeds of doctrinal confusion. In *National Football League Players Ass’n*, Judge Hogan augmented his third reference to the Hail Mary pass with the following explanatory statement:

The success of a public policy argument in this circumstance is not unlike Franco Harris’ Immaculate reception during an AFC playoff game on December 23, 1972. With only 22 seconds remaining in the game, Harris caught Terry Bradshaw’s desperation fourth-down pass just before it struck the ground and ran for a touchdown to give the Pittsburgh Steelers a remarkable victory over John Madden’s Oakland Raiders. While such plays do occur, they are quite rare.

857 F. Supp. at 76 n.7. Although Christian theology would suggest that a catch named the “Immaculate Reception” must necessarily have involved a “Hail Mary” pass, Terry Bradshaw did not throw, and Franco Harris did not catch,

summer between her junior and senior years at Concordia College, where she was a member of the golf team.<sup>165</sup> While she made her prize-winning shot while she was still in college, she did not file suit to collect the prize until after she had graduated.<sup>166</sup> Northland seized upon Harms's status as a collegiate golfer at the time of the contest, and the amateurism rules of the National Collegiate Athletic Association, to argue that by returning to college and playing on the golf team during her senior year, Harms had unambiguously renounced any right to claim the prize in the Moccasin Creek hole-in-one contest.<sup>167</sup> The court disagreed, noting that once Northland decided that Harms's shot did not qualify for the prize, Harms never had a chance to waive her right to collect it.<sup>168</sup> Judge Konenkamp was similarly dismissive of Northland's claim that Harms was barred by the doctrine of estoppel from attempting to collect the prize, reasoning that as a logical matter, Northland could not have relied to its detriment on Harms's decision to use her last year of college eligibility because it refused to award her the prize before it even knew that she had decided to play her senior season.<sup>169</sup>

While Harms's case was a slam dunk,<sup>170</sup> it did involve one tight contest – the dispute between Moccasin Creek and Northland over who would be stuck with the bill for Harms's prize. Moccasin Creek had prevailed on its motion for summary judgment against Northland in

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a Hail Mary. Harris's catch was miraculous not because Bradshaw put the ball up for grabs in the end zone, but rather, because the ball bounced off one or two other players before it landed in Harris's hands inches above the turf.

<sup>165</sup> *Harms*, 602 N.W.2d at 60.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 62.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 62-63.

<sup>170</sup> One could easily fill a peach basket with judicial opinions calling a particular argument or even an entire case a slam dunk for one side or the other. On the other hand, it has been said "that there are no slam dunks in the law." *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 656 (S.D.N.Y. 2001).

the trial court,<sup>171</sup> but the South Dakota Supreme Court reversed and remanded.<sup>172</sup> The court determined that Northland and Moccasin Creek had a contract under which Moccasin Creek agreed to include the hole-in-one contest in its tournament,<sup>173</sup> and under which it “took part responsibility for the contest.”<sup>174</sup> The genuine issue of material fact that precluded summary judgment was whether Moccasin Creek, through the actions of its course superintendent, breached its contractual duties to Northland by placing the women’s tees on the contest hole in a spot that automatically disqualified women’s tee shots from coverage under Northland’s hole-in-one insurance.<sup>175</sup> Judge Konenkamp seemed particularly troubled by the actions of the golf course superintendent, who assumed that the hole-in-one contest was for men only,<sup>176</sup> and who seems not to have contemplated the possibility that a female golfer was capable of making a hole-in-one from the men’s tees.<sup>177</sup>

#### HOLE ELEVEN: INTER-GENDER ACES, PART TWO

On May 10, 1996, Jeri Foster made a hole-in-one on the eleventh hole at the Cress Creek Golf & Country Club, while playing in a charity golf tournament sponsored by Good Shepherd Interfaith Volunteer Caregivers, Inc. and the Rotary Club of Shepardstown, West Virginia.<sup>178</sup>

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<sup>171</sup> *Id.* at 60.

<sup>172</sup> *Id.* at 64.

<sup>173</sup> *Id.* at 63.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (quoting the superintendent’s testimony that “it never occurred to [him] that there was a possible inequity that would happen if a lady got a hole-in-one” and that women teeing off from the men’s tee box “would have a very, very low chance of making a hole-in-one from those kind[s] of yardages.”) Judge Konenkamp went on to note that “[a]mateur women were thus tacitly declared ineligible [for the hole-in-one contest], not by Northland, and not by its insurer, but by a false assumption.” *Id.*

<sup>178</sup> *Foster v. Good Shepherd Interfaith Vol. Caregivers, Inc.*, 502 S.E.2d 178, 179 (W. Va. 1998).

Foster celebrated her hole-in-one,<sup>179</sup> presumably because she believed she had won a “new car valued at \$20,000.00 from Opequon Motors,”<sup>180</sup> which was listed in the tournament’s official rules as the prize for a hole-in-one on the hole she aced.<sup>181</sup> Foster’s celebration was short-lived, as she was soon “informed that she would not be awarded the prize because she had played from the ladies’ tee and not the men’s,”<sup>182</sup> even though she was instructed to use the ladies’ tees by the tournament’s rules.<sup>183</sup> Foster “filed suit requesting that the defendants honor their promise of a new car.”<sup>184</sup> The trial court dismissed Foster’s claim on procedural grounds.<sup>185</sup> Unfortunately, for purposes of this essay, her appeal was also decided – in her favor – on procedural grounds,<sup>186</sup> which did not allow the West Virginia Supreme Court to make any contribution to the canons of hole-in-one jurisprudence.

#### HOLE TWELVE: . . . BUT EIGHT IS NEVER SEVENTEEN

After *Grove* and *Crawford*, it is hard to imagine that anyone would ever hold another hole-in-one contest on a nine-hole golf course. But on August 3, 1996, Burford Distributing, Inc. (hereinafter “Burford”) did just that; at its 10th Annual Lite Open golf tournament, an eighteen-hole event contested on the nine-hole Deer Trails Golf Course (in Fort Chaffee, Arkansas), Burford sponsored a hole-in-one contest.<sup>187</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 180.

<sup>186</sup> *Id.* at 183.

<sup>187</sup> *Burford Distrib., Inc. v. Starr*, 20 S.W.3d 363, 364 (Ark. 2000).

Burford, however, did seem to learn a thing or two from the tournament sponsors in *Grove* and *Crawford*. Rather than having its contest on a hole on the front nine, it held the contest on the back nine (or, more precisely, the second playing of the only nine). Specifically, Burford placed “a large banner on Hole No. 17 that stated that the first person to make a hole-in-one on that hole would win a 1996 Buick Regal from Harry Robinson Pontiac.”<sup>188</sup> In addition, the Buick Regal in question was parked near the seventeenth tee.<sup>189</sup>

Enter Danny Starr. Starr made a hole-in-one while playing in the Lite Open, and he did so on the hole where the banner was posted and the car was parked.<sup>190</sup> However, he made his hole-in-one the first time he played that hole rather than the second,<sup>191</sup> which means that the hole was still number eight at the time of Starr’s star-crossed ace.<sup>192</sup> Of course, that little detail did not stop him from trying to collect the prize,<sup>193</sup> nor did it stop him from filing suit when Burford refused to give it to him.<sup>194</sup> And Starr was not even deterred by the fact that “the tee box for Hole No. 17 [which shared a green with Hole No. 8] was located farther away from the hole than the tee box for Hole No. 8.”<sup>195</sup>

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<sup>188</sup> *Id.* The opinion does not explain why Harry Robinson Pontiac was offering to give away a Buick.

<sup>189</sup> *Id.* at 367 (Imber, J., dissenting). Justice Imber also noted that Burford had published “misleading and deceptive information regarding the hole-in-one contest,” *id.*, because in addition to the banner and car placed at the seventeenth tee, Burford had also placed “a sign in the clubhouse that said first hole-in-one on Hole No. 8 wins a car,” *id.*

<sup>190</sup> *Id.* at 364.

<sup>191</sup> *Id.*

<sup>192</sup> Therein lies the genius of Burford’s decision to run its hole-in-one contest on the second nine rather than the first. In *Grove*, a hole-in-one on the seventeenth hole played was made on physical hole number eight, and the contest rules did not specify whether the contest was on physical hole number eight or the eighth hole out of eighteen played. Here, by contrast, the course had no physical hole number seventeen, so the seventeenth hole could only be hole number eight played the second time. In other words, while eight can sometimes be seventeen, seventeen can never be eight.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* In fairness to Starr, he based his claim on a flyer that promised a car to the first player who scored a hole-in-one during the tournament without limiting the contest to any particular hole. *Id.*

<sup>195</sup> *Id.*

Starr sued under two theories, “breach of contract and violation of the Arkansas Prize Promotion Act.”<sup>196</sup> For reasons that are not stated, Starr dropped his contract claim.<sup>197</sup> He went to trial on the statutory claim and won a jury verdict of \$40,000, which was twice the value of the car, plus attorney’s fees of \$10,000.<sup>198</sup> His good fortune was not to last; he lost his jury verdict on appeal when the Arkansas Supreme Court, in a split decision, ruled that Burford’s hole-in-one contest did not fall within the Arkansas Prize Promotion Act because the contest was not a sweepstakes intended to inspire or compel customers to buy a product in exchange for the chance of winning a prize.<sup>199</sup> Echoing several other courts that have been called upon to characterize hole-in-one contests, Justice Corbin explained that “the hole-in-one competition at issue in this case [was] a game of skill,”<sup>200</sup> which took it outside the coverage of the Prize Promotion Act.<sup>201</sup>

#### HOLE THIRTEEN: MULLIGANS COUNT!

Joe Spinks made one of the more unusual holes-in-one ever to be litigated. His ace was so unusual because it took him two shots to score it. Here’s how. On August 10, 1997, mayoral candidate Jimmy K. Wright’s election committee sponsored a golf tournament, the Jimmy K. Wright 4 Person Scramble, as a campaign fundraiser.<sup>202</sup> The tournament featured a hole-in-one

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<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 365.

<sup>199</sup> *Id.* at 365-66.

<sup>200</sup> *Id.* at 366.

<sup>201</sup> *Id.*

<sup>202</sup> *Wright v. Spinks*, 722 N.E.2d 1278, 1278 (Ind. Ct. App. 2000).

contest, with a \$10,000 prize, on hole number one.<sup>203</sup> Not only did the tournament raise money through entry fees, Wright's enterprising election committee came up with another income stream: it sold mulligans.<sup>204</sup> Spinks bought one.<sup>205</sup> After he hit an unsatisfactory tee shot on hole number one, he decided to use his mulligan, which landed in the hole after just one shot.<sup>206</sup> He was not, however, awarded the \$10,000 hole-in-one prize.<sup>207</sup> In an attempt to collect the prize, Spinks sued for breach of contract, "asserting that Wright was liable to him for \$10,000 because he had made a hole-in-one on the first hole."<sup>208</sup> Wright defended on grounds that

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* "[A] mulligan is a free shot sometimes awarded a golfer when the preceding shot was poorly played." *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1485 (1976)). "Under the United States Golf Association's Rules of Golf, mulligans are actually never permitted. See USGA R. 15-1, 27-2. Many amateur golfers, however, disregard this prohibition as they see fit." *MacNeill Eng'g Co. v. Trisport, Ltd.*, 59 F. Supp. 2d 199, 200 n.2 (D. Mass. 1999).

Joe Spinks's fateful shot on the first hole of the Jimmy K. Wright 4 Person Scramble is the only hole-in-one in this round-up to have been scored with a mulligan, but Spinks's mulligan is not the only mulligan to have landed in court.

In *Schick v. Ferolito*, one golfer sued another in negligence for striking him in the right eye with "an unannounced and unexpected second tee shot, or 'mulligan,' after all members of the foursome had teed off." 767 A.2d 962, 963 (N.J. 2001). In *Monk v. Phillips*, the defendant hit one bad tee shot and then hit a mulligan. 983 S.W.2d 323, 324 (Tex. Ct. App. 1998). Because the mulligan was easier to find, the defendant decided to play that ball rather than his first shot. *Id.* The defendant's second shot on his mulligan ball was hardly better than errant tee shot that inspired him to take the mulligan; he shanked it, causing it to fly approximately ninety degrees off line. *Id.* Unfortunately, his poor second shot struck and partially blinded one of his playing partners who was at the time searching for the defendant's first tee shot. *Id.* Similarly, in *Allen v. Donath*, the plaintiff in a negligence action suffered "a fractured skull, a concussion, temporary loss of speech, loss of memory, loss of hearing, loss of general motor functions, and damage to his jaw" after being struck in the left temple by an allegedly unannounced mulligan taken by the defendant, who was a member of his threesome. 875 S.W.2d 438, 439 (Tex. Ct. App. 1994). *Gant v. Hanks* was a negligence case brought by a caddy who was struck in the temple and seriously injured by a mulligan taken by the golfer for whom he was caddying. 614 S.W.2d 740, 741-42 (Mo. Ct. App. 1981). The law, it seems, is relatively indifferent toward mulligans per se, but takes a rather dim view of golfers who load them up without alerting those, such as their playing partners or caddies, who are potentially in the line of fire.

In addition to deciding cases involving actual mulligans, several courts have used the term metaphorically. See, e.g., *MacNeill Eng'g*, 59 F. Supp. 2d at 200 (D. Mass. 1999) ("Litigants, like golfers, often miss the mark on their first attempt. Akin to golf's mulligan, rule 15(a) of the Federal Rules of Civil Procedure offers litigants the opportunity to improve their first 'shot' by way of an amended complaint. Amendments (and mulligans), however, are not always permitted."); *Oasis Indus., Inc. v. G.K.L. Corp.*, No. 92 C 4814, 1997 WL 85167, at \*1 (N.D. Ill. Feb. 24, 1997) (explaining, in ruling upon motion filed under FED. R. CIV. P. 60(b): "Unlike elementary playground competitions, federal courts do not have 'do-overs.' . . . This is not golf. There are no motions for 'mulligans.'").

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

Spinks's hole-in-one was actually a hole-in-two, due to his use of a mulligan.<sup>209</sup> In the trial court, Spinks prevailed at summary judgment.<sup>210</sup>

Spinks also prevailed on appeal.<sup>211</sup> Wright's first argument was that no contract had been formed because the parties had not agreed upon the meaning of the term "mulligan."<sup>212</sup> The Indiana Court of Appeals disagreed, ruling that "the term 'mulligan' was not a term of the contract but rather a possible means for meeting the contractual term of a hole-in-one."<sup>213</sup>

Wright's more interesting argument was that no contract could have been formed because

the contractual implications of the only word of importance in the oral contract - "mulligan" - is hotly contested, unknown to the general public, varies from place to place, was never discussed between the parties before litigation ensued, and was only discussed by [Wright] in his deposition after it ensued.<sup>214</sup>

The court of appeals disagreed, and took "judicial[] notice[] of the meaning of mulligan as being a replacement golf shot."<sup>215</sup> Based upon its understanding of the term, the court ruled:

Because it is undisputed that Spinks was not advised that he could not use a mulligan to attempt to make a hole-in-one on the first hole, when he used the mulligan purchased from a tournament organizer and succeeded in making a hole-in-one with it, he met the conditions of Wright's offer. Accordingly, Wright is

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1280.

<sup>212</sup> *Id.* at 1279.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* (citation omitted).

<sup>215</sup> *Id.* at 1279-80. In so ruling, Judge Darden relied upon the fact that "mulligan" is defined in the dictionary, *see supra* note 203, and also cited two cases involving actual mulligans, *Allen v. Donath*, 875 S.W.2d 438, 440 (Tex. Ct. App. 1994), and *Gant v. Hanks*, 614 S.W.2d 740, 741 (Mo. Ct. App. 1981), as well as Judge Young's metaphorical use of the term in *MacNeill Engineering Co. v. Trisport, Ltd.*, 59 F. Supp. 2d 199, 200 (D. Mass. 1999).

The wisdom of Judge Darden's decision to take judicial notice of the term "mulligan" was confirmed in a recent copyright and trade dress infringement case pitting the "creator and manufacturer of the popular coin-operated video golf game 'Golden Tee Fore!,' . . . [against the] makers of the competing 'PGA Tour Golf' arcade game." *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 284 F. Supp. 2d 1069, 1071 (N.D. Ill. 2003). Among the features the plaintiff claims the defendant infringed are a "text prompt[] asking a player . . . if he wants to buy a 'Mulligan' to retake a shot." *Id.* at 1080. Any fact well enough known to be included in a video game must surely be worthy of judicial notice.

obligated to honor the terms of his offer and pay \$10,000 to Spinks.<sup>216</sup>

While the issue that arose in *Wright*, the use of a mulligan in a hole-in-one contest, seems not to have been litigated again, Judge Darden's opinion has lived on in the jurisprudence of judicial notice.<sup>217</sup>

#### HOLE FOURTEEN: NO MULLIGAN FOR THE INSURER

On May 19, 1998, Atlanta Classic Cars, Inc. (hereinafter "Classic Cars") awarded Jeff Wright<sup>218</sup> a new Mercedes Benz 500SL sedan for scoring a hole-in-one on the 184-yard eleventh hole at the Golf Club of Georgia at Creekside, in an annual golf tournament sponsored by Classic Cars.<sup>219</sup> One day after awarding the car, Classic Cars made a claim on its hole-in-one insurance carrier, Golf Marketing, Inc. (hereinafter "Golf Marketing").<sup>220</sup> Approximately ten days later, Classic Cars received a letter from Golf Marketing, dated one day before the tournament, stating: "we are confirming and agreeing to the request to halt all business with Atlanta Classic Cars as of May 18th, 1998, three o'clock p.m., until further notice."<sup>221</sup> On July 31, more than two months after the hole-in-one contest, Golf Marketing returned the \$2,300 premium Classic Cars

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<sup>216</sup> *Wright*, 722 N.E.2d at 1280.

<sup>217</sup> *See, e.g.*, *Campbell v. Shelton*, 727 N.E.2d 495, 500-01 (Ind. Ct. App. 2000) (noting Judge Darden's reliance upon a dictionary definition of "mulligan" in *Wright*, and affirming the trial court's decision to take judicial notice of definitions taken from a medical dictionary).

<sup>218</sup> It is impossible to tell from the opinions whether Jeff Wright is any relation to Indiana mayoral candidate Jimmy K. Wright of 4 person scramble fame.

<sup>219</sup> *Golf Mktg., Inc. v. Atlanta Classic Cars, Inc.*, 538 S.E.2d 809, 809-10 (Ga. Ct. App. 2000). The Mercedes Benz awarded to Wright, valued at \$81,495, *id.* at 810, appears to be the most generous prize offered in any of the hole-in-one contests in this round-up. *Golf Marketing* also stands out as the only case in this round-up in which the judge reported the club used to score a hole-in-one. Wright used a seven iron. *Id.*

<sup>220</sup> *Id.* at 810.

<sup>221</sup> *Id.*

had paid for its insurance coverage.<sup>222</sup>

Classic Cars sued for breach of contract and won, on the strength of the testimony of its sales manager that “he never rescinded the contract and certainly would not have done so via telephone the day before the tournament since ‘[he] wouldn’t have been able to get any other insurance in place, even if [he] had wanted to do something like that.’”<sup>223</sup> The Georgia Court of Appeals affirmed, holding, in the words of Judge Eldridge, that “[t]he testimony by [Classic Cars’] Smith that he never rescinded the contract, as well as substantiating evidence and argument offered by [Classic Cars], supports the trial court’s determination that the contract was valid and enforceable at the time [Classic Cars’] demand for reimbursement on the contract was made.”<sup>224</sup> The court also rejected Golf Marketing’s defense based upon Classic Cars’ failure to provide “attesting statements from two persons, over eighteen years of age and ‘independent in nature,’ who witnessed the ace.”<sup>225</sup> Failure to file the statements was no defense, the court reasoned, because Golf Marketing had refused to provide Classic Cars with blank copies the forms on which such statements were to be made under the terms of the contract.<sup>226</sup> Yet again in the slightly skewed game of hole-in-one rock/paper/scissors, golfer beats sponsor and sponsor beats insurer.

#### HOLE FIFTEEN: AN ACE IN WHICH HOLE?

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<sup>222</sup> *Id.* The cover letter accompanying the check stated, in part, “[a]s per the request of Atlanta Classic Cars, we are enclosing a check in the amount of \$2300 for your return of fees, for your cancellation of Contract.” *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 811.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 811-12.

In a 215-word per curiam opinion, the Florida District Court of Appeal reversed a grant of summary judgment against a golfer who made a hole-in-one on the twelfth hole during a golf tournament that included a hole-in-one contest (with a Dodge Ram pickup truck as its prize), ruling that genuine issues of material fact existed regarding whether plaintiff knew or should have known that the tournament sponsors intended for the prize to be awarded only for a hole-in-one on the ninth hole.<sup>227</sup>

#### HOLE SIXTEEN: ACES IN STRANGE PLACES, PART 1

As the first fifteen holes of this round-up demonstrate, most litigated holes-in-one involve contract claims of some sort. But every once in a while, a perfect tee shot will wind up somewhere altogether different. Take, for example, Joel Matsunaga's ace in a 1998 charity golf tournament.<sup>228</sup> That hole-in-one landed first in Family Court,<sup>229</sup> then bounced up on appeal,<sup>230</sup> and finally came to rest in a footnote in the background section of an opinion by Chief Judge Burns of the Intermediate Court of Appeals of Hawai'i.<sup>231</sup> Matsunaga's ex-wife had gone to Family Court to modify certain provisions of a divorce decree, and she appealed several of the court's findings of fact and conclusions of law.<sup>232</sup> In its opinion, the court of appeals noted that Matsunaga had won a car in a hole-in-one contest and paid income taxes based upon the value of

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<sup>227</sup> Ransom v. Fernandnia Beach Chamber of Commerce, 752 So.2d 118 (Fla. Dist. Ct. App. 2000).

<sup>228</sup> Matsunaga v. Matsunaga, 53 P.3d 296, 299 n.2 (Haw. Ct. App. 2002).

<sup>229</sup> *Id.* at 297.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 299 n.2. Mr. Matsunaga's hole-in-one was apparently so peripheral to the case in which it was mentioned, or Chief Judge Burns was so disinterested in golf, that the opinion does not give the number of the hole Matsunaga aced, the name of the golf course he was playing, or even the name of the tournament in which he was competing.

<sup>232</sup> *Id.* at 297.

the car.<sup>233</sup> Unfortunately for the development of hole-in-one jurisprudence, Matsunaga's prize never made it beyond the background section, and played no part in the resolution of the issues on appeal.

## HOLE SEVENTEEN: ACES IN STRANGE PLACES, PART 2

While Joel Matsunaga's hole-in-one did not figure in the resolution of his Family Court case, Peter Ackhoff's ace played a starring role in a well-litigated adversary action in his bankruptcy proceeding.<sup>234</sup> On September 3, 1999, Ackhoff played "in a golf tournament located at Chandler Park Golf Course and sponsored by 'The Grind,' a bar located in Detroit, Michigan."<sup>235</sup> The tournament had a hole-in-one contest, on the eighth hole.<sup>236</sup> The prize was a new 2000 Cadillac Escalade,<sup>237</sup> which had a manufacturer's suggested retail price of \$43,000.<sup>238</sup> Ackhoff aced number eight.<sup>239</sup> Nineteen days later, before he received his prize, Ackhoff "filed a voluntary petition under Chapter 7 of the U.S. Bankruptcy Code."<sup>240</sup> Ackhoff had not yet received the car because the insurance company providing hole-in-one coverage for the

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<sup>233</sup> *Id.* at 299 n.2 The car Matsunaga won (of a make and model not given in the opinion) was valued at \$33,375. *Id.*

<sup>234</sup> *See Annas v. Allard*, 272 B.R. 633 (E.D. Mich. 2002); *Allard v. Ackhoff (In re Ackhoff)*, 281 B.R. 889 (Bankr. E.D. Mich. 2001); *Allard v. Ackhoff (In re Ackhoff)*, 252 B.R. 396 (Bankr. E.D. Mich. 2000) (denying defendants' request for a jury trial).

<sup>235</sup> *Annas*, 272 B.R. at 634.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* The thirteen automobiles up for grabs in the hole-in-one contests reported here include: three Cadillacs (one Escalade, one vintage Caddy, and one Cadillac of an unspecified make and model), two Dodges (one Colt and one Ram pickup), one Pontiac Catalina, one Chevrolet Beretta, one Ford Explorer, one Buick Regal, one Mercedes Benz 500 SL, and three cars identified only by their values (\$19,736, \$20,000 \$33,375). The cash prizes include one of \$5,000, two of \$10,000, and one of \$40,000.

<sup>238</sup> *Id.* at 635.

<sup>239</sup> *Id.* at 634.

<sup>240</sup> *Id.*

tournament sponsors had not yet completed its investigation.<sup>241</sup>

Here's where things get interesting. It seems that just before he teed off on the day he made his hole-in-one, Ackhoff and his three playing partners "orally agreed that if any one of them made a hole-in-one and won a prize they would equally divide the value of the prize."<sup>242</sup>

Based upon that oral agreement, Ackhoff

listed [on Schedule B of his bankruptcy petition] a "possible hole-in-one contest prize" as property of his estate, which he valued in the amount of \$3,000 [and] [o]n his Schedule C, [he] claimed the "possible hole-in-one contest prize" as exempt in the amount of \$2,500 under Section 522(d)(2) of the Bankruptcy Code.<sup>243</sup>

Subsequently, Ackhoff took possession of the car and, on the same day, sold it to one of his playing partners for \$36,000, without notice to the Trustee.<sup>244</sup> Because of the agreement to share in the value of the prize, the playing partner received a credit toward the purchase price and, therefore, gave Ackhoff a check for \$27,000.<sup>245</sup> Ackhoff, in turn, gave \$9,000 in cash to each of his other two playing partners, keeping the remainder for himself.<sup>246</sup>

The Trustee was not amused, and filed an adversary action against the foursome, seeking to avoid the transfer of the Cadillac and to recover its full manufacturer's suggested retail price of \$43,000.<sup>247</sup> The Trustee prevailed on summary judgment in the bankruptcy court and

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<sup>241</sup> *Id.* at 635.

<sup>242</sup> *Id.* at 634. Judge Roberts, like Justice Delahanty in *Chenard* and Judge Easterbrook in *Krilich* referred to the ace-making litigant and his playing partners as a foursome, *id.* rather than using some more generic non-golfing turn of phrase.

<sup>243</sup> *Id.* at 635.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 636.

ultimately settled with Ackhoff.<sup>248</sup> The other three quarters of the foursome appealed.<sup>249</sup> The district court affirmed, ruling that because the three had no ownership interest in the car, but only an oral agreement to share its value, the car was property of the bankruptcy estate and the playing partners had, “at most . . . an unsecured claim against [Ackhoff] for their one-quarter interests in the Cadillac.”<sup>250</sup>

#### HOLE EIGHTEEN: GOLF IS A GAME OF LUCK<sup>251</sup>

It is probably fitting that the finishing hole in this round-up of golf shots gone wild is also the most exceptional. For one thing, the eighteenth appears to be the only par-four hole on this curious course.<sup>252</sup> But, more significantly, the eighteenth hole-in-one is the only one to end up in the Supreme Court of the United States.

*PGA Tour, Inc. v. Martin* is, without a doubt, the most famous golf case of all time, having generated a small sand trap full of law review articles.<sup>253</sup> In *Martin*, the question

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 643.

<sup>251</sup> Given the events of May 16, 2002, *i.e.*, my judge’s hole-in-one, *see supra* note 2, the “golf as a game of luck” position finds little favor in the chambers in which I toil.

<sup>252</sup> *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 687 n.48 (2001). That fact, alone, may justify one characterization of the Ace referred to in *Martin* as a “freak hole-in-one.” Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 Sup. Ct. Rev. 267, 283 (2001).

<sup>253</sup> *See, e.g.*, Adam Jay Golden, *A Good Walk Spoiled: The Americans With Disabilities Act and the Casey Martin Case*, 7 SPORTS LAW. J. 161 (2000); Stephen J. Lautz, *A Good Walk Spoiled: The ADA’s Intrusion into Professional Athletics*, 10 KAN. J.L. & PUB. POL’Y 238 (2000); Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA’s Reasonable Accommodation Requirement in Competitive Settings*, 77 OR. L. REV. 1337 (1998); Paul M. Anderson, *Spoiling a Good Walk: Does the ADA Change the Rules of Sport?*, 1 VA. J. SPORTS & L. 44 (1999); Ernest A. Phillips, *Casey Martin vs PGA Tour, Inc.: A Good Walk Spoiled by the Cart?*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 351 (1999); Gregory C. Graffman, Comment, *\*Playing With an Asterisk: Casey Martin Shoots a Hole-in-One at the United States Supreme Court*, 41 WASHBURN L.J. 325 (2002); Melissa Ann Ressler, Note, *PGA Tour, Inc. v. Martin: A Hole in One for Casey Martin and the ADA*, 33 LOY. U. CHI. L.J. 631 (2002); Brian Pollock, Note, *The Supreme Court Appeal of the Casey Martin Case: The Court’s Two Options – Martin’s Hole-in-One or*

presented was “whether allowing [Casey] Martin to use a golf cart, despite the walking requirement that applies to the PGA TOUR, the NIKE TOUR, and the third stage of the Q-School, is a modification that would ‘fundamentally alter the nature’ of those events.”<sup>254</sup> According to the PGA Tour, Martin’s use of a cart would be a fundamental alteration because “the goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules.”<sup>255</sup> In the view of the PGA Tour, the no-carts rule was a substantive, “outcome-affecting” rule because “its purpose is to inject the element of fatigue into the skill of shot-making.”<sup>256</sup>

Justice Stevens assessed that argument a two-stroke penalty, noting “the fact that golf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual’s ability will be the sole determinant of the outcome.”<sup>257</sup> After observing that “[a] lucky bounce may save a shot or two,”<sup>258</sup> Justice Stevens illustrated his point:

A drive by Andrew Magee earlier this year produced a result that he neither intended nor expected. While the foursome ahead of him was still on the green, he teed off on a 322-yard par four. To his surprise, the ball not only reached the green, but also bounced off Tom Byrum’s putter and into the hole.<sup>259</sup>

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*Olinger’s Slice into the Bunker*, 10 DEPAUL-LCA J. ART & ENT. L. 391 (2000); Scott A. Weinberg, *Analysis of Martin v. Professional Golfers’ Ass’n, Inc. – Applying the ADA to the PGA is a Hole in One for Disabled Golfer*, 38 BRANDEIS L.J. 757 (2000). Of course, there are plenty of articles about the Casey Martin case that do not use the phrase “good walk spoiled” or “hole-in-one” in the title, but the foregoing citations are enough to make my point.  
<sup>254</sup> *Martin*, 532 U.S. at 682. The “Q-School” is a three-stage tournament through which golfers qualify to compete on the PGA Tour. *Id.* at 665.

<sup>255</sup> *Id.* at 686 (brackets and citation omitted).

<sup>256</sup> *Id.* (internal quotation marks and citation omitted).

<sup>257</sup> *Id.* at 686-87.

<sup>258</sup> *Id.* at 687.

<sup>259</sup> *Id.* at 687 n.48 (citing Davis, *MaGee Gets Ace on Par-4*, ARIZ. REPUBLIC, Jan. 26, 2001, p. C16, 2001 WL 8510792). Professor Schauer has expressed concern over Justice Stevens’s reliance upon “authorities” such as the *Arizona Republic* and various encyclopedias that did not appear in the record below. See Schauer, *supra* note 252, at 283. He went on to characterize the Supreme Court’s fact-finding process as being undertaken by “nine relatively

And so, like any round of golf on a properly designed course, this essay begins and ends at the same point: judicial assessment of the relative contributions of skill and chance to scoring a hole-in-one. While the skill required to score a hole-in-one was the focus of dictum in *Gibson*,<sup>260</sup> and was actually central to the decision in *Burford*,<sup>261</sup> Justice Stevens looked, instead, to the role of luck in making an ace. In his view, differences in weather conditions, lucky bounces, and the like “demonstrate that pure chance may have a greater impact on the outcome of elite golf tournaments than the fatigue resulting from the enforcement of the walking rule,”<sup>262</sup> which, in turn supported his conclusion that “the walking rule is not an indispensable feature of tournament golf.”<sup>263</sup> While Justice Stevens’s opinion may be anomalous in its reliance upon the role of luck in making a hole-in-one,<sup>264</sup> it is consistent with the vast majority of hole-in-one jurisprudence in another way: in *Martin*, as in every hole-in-one case other than *Malone* (where the plaintiff was denied treble damages) and *Burford* (where eight was not seventeen), the golfer won.<sup>265</sup>

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uninformed people assisted by thirty-odd twenty-somethings surfing the Web.” *Id.* at 289.

<sup>260</sup> *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961).

<sup>261</sup> *Burford Distrib. Co. v. Starr*, 20 S.W.3d 363, 366 (Ark. 2000) (“In fact, the hole-in-one competition at issue in this case is a game of skill.”).

<sup>262</sup> *Martin*, 532 U.S. at 687.

<sup>263</sup> *Id.* at 685.

<sup>264</sup> Interestingly, the most recent judicial assessment of the relative contributions of skill and chance to making a hole-in-one also came out on the side of luck. In *Golf Marketing Worldwide, LLC v. State Insurance Department*, No. CV020523382S, 2004 WL 944261 (Conn. Super. Ct. Apr. 5, 2004), Judge Tobin was faced with an administrative appeal from the Connecticut Insurance Department’s decision that Golf Marketing Worldwide, LLC had engaged in unauthorized insurance activities by selling hole-in-one insurance without having a license to sell insurance. The appellants argued that their hole-in-one insurance was not actually insurance because “hole-in-one contests are contests of skill,” *id.* at \*4, which do not create an insurable risk “because insurable risks must be accidental in nature,” *id.* “The court [was] not persuaded by [that] argument” *id.*, explaining that “[t]he issue is not the nature of the risk being assumed, but the fact that it is the plaintiff who is assuming the risk of another party in return for compensation [which] is the essence of an insurance transaction,” *id.*

## OBSERVATIONS FROM THE NINETEENTH HOLE

The nineteenth hole<sup>266</sup> is an ideal spot for tying up one loose end that has run through this

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<sup>265</sup> To be sure, the golfer in *Krilich*, who was set up to serve as the conduit for a bribe intended for his father, did not exactly win anything in his father's criminal case, but then again, he did not make a hole-in-one.

<sup>266</sup> Many golf courses have an eating (or drinking) facility located just off the eighteenth green, and a fair number of those establishments bear the name "nineteenth hole." See *Blount v. San Ramon Royal Vista Golf Courses, Inc.*, No. C 98-0687 VRW, 1999 WL 300684, at \*1 (N.D. Cal. May 7, 1999) ("The golf course has a lounge, the proverbial 19th hole, in which beverages are served from early morning until closing.") (citation omitted); *Willingboro Country Club, Inc. v. Levitt & Sons, Inc.* (In re *Willingboro Country Club, Inc.*), 69 B.R. 414, 417 (Bankr. D.N.J. 1987) ("Unless the owners are prepared to show that a swimming pool constitutes a water hole and a tennis court, a sand trap, it is clear that these are not necessary parts of a golf course. Interestingly enough, the covenant uses the very restrictive term 'golf course' rather than 'country club' or some other designation. Furthermore, the entire use with respect to the bar and restaurant, while arguably adding a nineteenth hole to the golf course, supplements the use of the property beyond any possible definition of the words 'golf course.'"); *Cedar Brook Country Club v. Hostetter*, 271 N.Y.S.2d 537, 538 (N.Y. Spec. Term 1966) ("[T]he nineteenth hole at Cedarbrook is out of bounds [because it was denied a liquor license] and, golf being what it is, the other eighteen are in grave jeopardy. Since the success of a golf club which caters exclusively to teetotaling swingers is at least dubious, it must be concluded that the action of the State Liquor Authority will have economic repercussions somewhat beyond the realm of alcoholic deprivation."); *Riverton Country Club v. Thomas*, 58 A.2d 89, 94 (N.J. Ch. 1948) ("A witness for the complainant, a member of its club, testified that at one time (the exact date was not fixed), Joseph L. Thomas came to know of the then current practice of dispensing alcoholic beverages in the club house to members who purchased coupons. Mr. Thomas, the witness said, was playing a round of golf when one of his foursome remarked that 'the 19th hole' had become popular since inauguration of the system.").

Nineteenth-hole jurisprudence could easily serve as the topic of an entire essay. Several of the more recent traditional nineteenth-hole cases, that is those involving a watering hole at the end of a golf course, include either federal or state claims of gender discrimination. See, e.g., *Albright v. S. Trace Country Club, Inc.*, 859 So.2d 238 (La. Ct. App. 2003) (holding that exclusion of women from Men's Grille violated Louisiana constitution); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 915 (Mass. App. Ct. 2003) (affirming jury verdict for female members of golf club claiming gender discrimination based upon, inter alia, exclusion from 19th Hole grill room, explaining: "Playing golf was not one of the unalienable rights of 1776, but it is naive not to recognize the degree to which golf links and the country club are the locale for developing professional and business contacts. Golf and the country club lubricate the advance of careers. Deals are cut on the fairway and in the clubhouse.") (footnote and citations omitted); *Welsh v. Bd. of Dirs. of Wildwood Golf Club*, 877 F. Supp. 955, 957 (W.D. Pa. 1995) (granting summary judgment to defendant golf club on plaintiff's claim under 42 U.S.C. § 1983 based, inter alia, on exclusion from "'all male' 19th Hole bar and grill at Wildwood.").

There are, however, other sorts of cases that have popped out of the traditional nineteenth hole. See, e.g., *State v. Baker*, 627 A.2d 835, 836 (R.I. 1993) (criminal case arising from a bachelor party mele in the parking lot of Carter's 19th Hole, located adjacent to North Kingston Country Club); *McKenzie v. Estate of Taft*, 450 N.W.2d 266, 267 (Mich. 1990) (Levin, J., dissenting from denial of application for leave to appeal) (dramshop action brought by plaintiffs whose decedent was killed by driver who "had consumed ten beers while playing eighteen holes of golf, drank two mixed drinks on the '19th hole,' and had also imbibed during lunch before the eighteen-hole round began"); *Larson v. Moorhead Country Club*, 395 N.W.2d 448 (Minn. Ct. App. 1986) (reversing jury verdict for defendant country club in dramshop action); *Randall v. Commissioner*, 56 T.C. 869, 875 (T.C. 1972) ("it is our opinion that the circumstances normally attending the '19th hole' and the 'gin rummy table' cannot be regarded as the type of circumstances generally considered as conducive to business discussions within the meaning of [the business meal] exception" in the Internal Revenue Code); *Sanders v. Day*, 468 P.2d 452, 454 (Wash. Ct. App. 1970) (defamation action arising out of statement made by defendant after golf tournament, "while playing the '19th hole'"); *Green v. Riviera Country Club*, 156 So.2d 524, 524 (Fla. Ct. App. 1963) (Pearson, J., dissenting) (tax case

essay: trying to distinguish the judges who play golf from those who do not. As it turns out, I am not the only commentator to wonder about such things. In his critique of the Supreme Court's decision in the Casey Martin case, Frederick Schauer noted that "[b]y all accounts the Supreme Court contains just one serious golfer – Justice O'Connor – although it is highly likely that most of the others have played occasionally and that all of the others have a basic understanding of the idea of the game."<sup>267</sup> Schauer further noted that the opinion's central issue was resolved by

[s]even Justices, only one of whom is a serious golfer, with the assistance of approximately twenty-eight law clerks, no more than four or five of whom are likely to be serious golfers, and the library staff of the Supreme Court library,

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involving gratuities collected at country club's nineteenth hole and used to pay wages of country club's employees); *In re Trombetta*, 156 A.2d 107, 109 (Pa. 1959) (Bell, J., dissenting) (disagreeing with majority's position that pinball machines are gambling devices, per se, and subject to forfeiture and destruction, explaining: "[I]t is a matter of common knowledge that in nearly every golf match the players bet a dollar on the match, or a dollar Nassau, or the drinks, and a few dollars change hands in the Clubhouse on the 19th hole. In am convinced that no one could successfully contend that all . . . all Clubhouses which have a 19th hole, are illegal *per se* and can be seized, confiscated and destroyed by the Commonwealth.") (footnote omitted).

In addition to the nineteenth holes located on golf courses, all manner non-golf-related businesses have also chosen to use the name "nineteenth hole." See, e.g., *Barnes v. State*, Nos. 04-98-00514-CR & 04-98-00515-CR, 1999 WL 623686, at \*1 (Tex. Ct. App. Aug. 18, 1999) ("convenience store and gathering place" where people "talked and played cards and dominoes" and where robbery victims first encountered the man who robbed them); *Guerrina v. Scottsdale Ins. Co.*, No. Civ.A. H-96-3974, 1997 WL 579197, at \*1 (S.D. Tex. June 24, 1997) (bar and grill that served alcoholic beverages to underage decedent in wrongful death action); *Li v. State*, No. 03-95-00560-CR, 1996 WL 515521, at \*1 (Tex. Ct. App. Sept. 11, 1996) (pawn shop where defendant murdered clerk); *Johnson v. Schrunck*, Nos. C5-95-970 & C6-95-959, 1995 WL 747907, at \*3 (Minn. Ct. App. Dec. 19, 1995) (pizza parlor operated by father-in-law of plaintiff, who fired plaintiff when he indicated intent to dissolve his marriage); *Turcio v. Town of Old Saybrook*, No. 30 60 06, 1993 WL 266444, at \*1 (Conn. Super. Ct. July 12, 1993) (snack bar where plaintiff was injured by concrete and/or stone bench that fell on him); *State v. Forister*, 823 S.W.2d 504, 506 (Mo. Ct. App. 1992) (bar robbed by defendant); *United States v. Candito*, 892 F.2d 182, 183 (2d Cir. 1989) (restaurant where cocaine sale was consummated); *Brown v. State*, 664 S.W.2d 783, 783 (Tex. Ct. App. 1983) (liquor store where robbery victim cashed a check just before he was robbed); *State v. Williams*, 634 P.2d 868, 871 (Wash. 1981) (tavern where witness claims to have seen someone other than the defendant, who matched the description of a man who abducted and killed store clerk during robbery); *People v. Versace*, 426 N.Y.S.2d 61, 62 (N.Y. App. Div. 1980) (bar out of which a substantial gambling operation was being conducted); *State v. Weygandt*, 581 P.2d 1376, 1379 (Wash. Ct. App. 1978) (restaurant where murderer ate breakfast); *United States v. Cartano*, 534 F.2d 788, 790 (8th Cir. 1976) (bar that defendant used as mailing address for gambling cards sent to him); *United States v. Wilson*, 1 M.J. 325, 327 (C.M.A. 1976) (pawn shop where defendant allegedly sold stolen stereo equipment); *Johnson v. State*, 266 N.E.2d 57, 58 (Ind. 1971) (bar where burglars met before attempting to break into Marine armory); *Smith v. State*, 473 P.2d 262, 263 (Okla. Crim. App. 1970) (bar where burglars met before breaking into grocery store); *People v. Crisafi*, 10 Cal. Rptr. 155, 156 (Cal. Ct. App. 1961) (bar patronized by victim of kidnap and rape); *Crowell v. State*, 145 N.Y.S.2d 699, 670 (N.Y. Ct. Cl. 1955) (tavern visited by plaintiffs prior to automobile accident).

<sup>267</sup> *Schauer, supra* note 250, at 278.

again unlikely to have a large number of serious golfers in their midst . . . wandering relatively unguided (by golf expertise) through LEXIS, WESTLAW, the Internet, and various other sources of nonlegal information in order to decide which of the contingent features of golf are actually essential features of golf.<sup>268</sup>

The authors of an amicus brief in the Casey Martin case took a more generous view of the Supreme Court’s golfing expertise, reporting that during their research, they “discovered that three of the justices were avid golfers, and two of the three, Justices O’Connor and Stevens had hit holes in one.”<sup>269</sup> They also reported, however, that the questioning during oral argument demonstrated “that some of the justices were not golfers or preferred the sport of baseball to golf.”<sup>270</sup> Justice Kennedy, in fact, admitted from the bench that he was “not very good at golf.”<sup>271</sup>

Not just legal commentators, but even some judges have written about the golfing expertise of their colleagues on the bench. In the words of the inimitable Justice Musmanno of the Pennsylvania Supreme Court:

I am not a golf player, as is the writer of the Majority Opinion who, I am informed, is exceedingly skillful and graceful on the golf links. Thus, I do not know from personal experience what I lose in not having the fun of breathing the refreshing breezes of a country club, enjoying the intoxicating ecstasy of a “double eagle,” and reveling in the salubrious effects of tramping over beautiful

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<sup>268</sup> *Id.* at 283.

<sup>269</sup> Anita M. Moorman & Lisa Pike Masteralexis, *Writing an Amicus Curiae Brief to the United States Supreme Court, PGA Tour, Inc. v. Martin: The Role of the Disability Sport Community in Interpreting the Americans With Disabilities Act*, 11 J. LEGAL ASPECTS OF SPORT 285, 308 (2001).

Justice Stevens has recently been immortalized in the form of a bobblehead doll which depicts him holding a golf club. 7 GREEN BAG 2D 111 (2004). The golf club was explained as follows: “The day after Justice Stevens delivered his opinion for the Court in *PGA Tour v. Martin*, 532 U.S. 661 (2001), Casey Martin signed a product endorsement deal with a prominent but now publicity-shy golf club manufacturer. We have no idea what brand the Justice plays.” *Id.*

While I do not have comprehensive data on the lower federal courts, I do know at least one U.S. District Judge who has scored a hole-in-one. *See supra* note 2.

<sup>270</sup> Moorman & Masteralexis, *supra* note 266, at 308.

<sup>271</sup> *Id.* at 309.

greenswards and by enchanting lakes. But, despite that absence of personal golf experience, I am sufficiently acquainted with the nature of the game, and am helplessly exposed to the enthusiastic garrulity which accompanies all meetings of golfers to such an extent that I must perforce realize that, mixed in with the felicity of the sport, goes considerable hazard apart from the over-indulging temptations of the 19th hole.<sup>272</sup>

While Justice Musmanno commented on – and complimented – the golfing prowess of Chief Justice Bell, other judges have commented on their colleagues’ lack of golfing experience. In his special concurrence in *Crawford*, Chief Justice Ransom pointed out that both the trial judge and his colleagues on the appellate panel were “nongolfers and ordinary persons.”<sup>273</sup>

As for the golfing status of the judges included in this round-up, I do not have the benefit of personal knowledge of their leisure-time activities, nor have I conducted actual research on that topic, but the opinions discussed here do contain some clues as to whether or not their authors were also golfers.

Plainly, Justice Stevens must head the list of judicial golfers; there is no arguing with a *Green Bag* bobblehead. Justice McNamee makes the list as a result of reaching the question he did not have to reach, namely, whether it is a feat of skill or a feat of luck to score a hole in one.<sup>274</sup> Next on the list is Justice Sand, who reported Lloyd Grove’s “front-nine” score on the hole that doubled as eight and seventeen,<sup>275</sup> and who further observed, with the keen eye of a golfer, that

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<sup>272</sup> Taylor v. Churchill Valley Country Club, 228 A.2d 768, 771 (Pa. 1967) (Musmanno, J., dissenting).

<sup>273</sup> Crawford Chevrolet, Inc. v. Nat’l Hole-in-One Ass’n, 828 P.2d 952, 956 (N.M. 1992) (Ransom, C.J., specially concurring). Given Chief Justice Ransom’s phrasing, one is left to wonder whether he intended “ordinary person” to be a synonym for “nongolfer” or, perhaps, entertained the possibility that a golfer could, somehow, also be an ordinary person.

<sup>274</sup> Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 87 (Nev. 1961).

<sup>275</sup> Grove v. Charbonneau Buick-Pontiac, Inc., 240 N.W.2d 853, 855 (N.D. 1976).

the hole in question played longer as number seventeen than it did as number eight.<sup>276</sup> Justice Delahanty, Judge Easterbrook, and Judge Roberts all make the list for correctly using the golfing term “foursome.”<sup>277</sup> Judge Popovich also seems to be a golfer; in his dissent in *Cobaugh v. Klick-Lewis, Inc.*,<sup>278</sup> his impassioned argument, raised sua sponte, that holes-in-one result from the intercession of Lady Luck suggests the frustration of a skilled golfer who has yet to experience the elusive pleasure of watching his tee shot roll into the hole.<sup>279</sup> Chief Justice Ransom makes the list for concluding his special concurrence in *Crawford* as follows: “However, I am persuaded that, as nongolfers and ordinary persons, my colleagues on this panel, along with the trial judge, reasonably could ascribe to and resolve ambiguity in the meaning of ‘shots’ and ‘holes.’ I, therefore, reluctantly concur.”<sup>280</sup> By identifying his fellow panel members as nongolfers, Chief Justice Ransom appeared to imply that, in contrast to his colleagues, he was a golfer. Finally, in *Golf Marketing, Inc. v. Atlanta Classic Cars, Inc.*,<sup>281</sup> Judge Eldridge identified the club that Jeff Wright used to score his hole-in-one.<sup>282</sup> This is not the sort of detail that would have been included by a nongolfer.

My list of suspected nongolfing judges is only slightly shorter than the list of judges who do seem to play the game. At the head of the nongolfing list are Justices Montgomery and Baca,

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<sup>276</sup> *Id.* at 861.

<sup>277</sup> See *Chenard v. Marcel Motors*, 387 A.2d 596, 598 (Me. 1978); *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998); *Annas v. Allard*, 272 B.R. 633, 634 (E.D. Mich. 2002).

While using the term “foursome” was enough to get three judges onto the list, Justice Sand’s decision not to use the term, see *Grove*, 240 N.W.2d at 859, was not enough to get him kicked off the list, due to all the other ways in which his opinion portrayed him as a golfer.

<sup>278</sup> 561 A.2d 1248 (Pa. Super. Ct. 1989) (Popovich, J. dissenting).

<sup>279</sup> *Id.* at 1251 (Popovich, J. dissenting).

<sup>280</sup> *Crawford Chevrolet, Inc. v. Nat’l Hole-in-One Ass’n*, 828 P.2d 952, 956 (N.M. 1992) (Ransom, C.J., specially concurring).

<sup>281</sup> 538 S.E.2d 809 (Ga. Ct. App. 2000).

<sup>282</sup> *Id.* at 810.

who were “outed” by Chief Justice Ransom in his dissent in *Crawford*.<sup>283</sup> Even without the Chief Justice’s help, I probably would have placed Justice Montgomery on the list for failing to appreciate the elegance of Justice Sand’s discussion ambiguity in *Grove* (relying, instead, on his less persuasive attempt to explain how the term “shots” is ambiguous) and for failing to take judicial notice of the fact that most golf courses consist of eighteen holes. Next on the list are Justices Ervin, Booth, and Benton, who issued the per curiam opinion in *Ransom v. Fernandina Beach Chamber of Commerce*.<sup>284</sup> They make the list because their opinion does not list the name of either the golf tournament in which the plaintiff competed or the golf course on which the tournament was held, while it did specifically identify the vehicle offered as a hole-in-one prize. Chief Judge Burns also makes the list for lack of specificity; his opinion in *Matsunaga v. Matsunaga*<sup>285</sup> mentions Joel Matsunaga’s hole-in-one but does not indicate the number of the hole Joel aced, the name of the course he was playing, or the name of the tournament in which he was competing. It is hard to imagine any golfer omitting those details.

The rest of the judges in the round-up are cyphers, including enough detail in their opinions to suggest either a golfer’s eye or a commitment to the factual record, but not so much detail as to allow me to speculate as to the intimacy of their fairway familiarity.

My second topic for nineteenth-hole rumination is the limited appearance of hole-in-one metaphors in reported judicial opinions. Given the frequency with which sports metaphors are used in judicial opinions,<sup>286</sup> a topic of some concern among law review authors sitting up in the

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<sup>283</sup> 828 P.2d at 956.

<sup>284</sup> 752 So.2d 118 (Fla. Dist. Ct. App. 2000) (per curiam).

<sup>285</sup> 53 P.3d 296 (Haw. Ct. App. 2002).

<sup>286</sup> Compare *Mann v. Lima*, No. 02-088S, 2003 WL 22382934 (D.R.I. Oct. 10, 2003) (using baseball terminology

cheap seats (or, as the case may be, in a nicely upholstered endowed chair somewhere. . . ),<sup>287</sup> I had expected to discover a fair number of judicial opinions making metaphorical use of golfing's greatest hit. I was mistaken. While the opinions of American jurists are full of "Monday morning quarterbacks,"<sup>288</sup> "cheap shots,"<sup>289</sup> "hardballs,"<sup>290</sup> "squeeze plays,"<sup>291</sup> things in "left field,"<sup>292</sup> and "pulled punches,"<sup>293</sup> metaphorical uses of the term "hole-in-one" are "hen's teeth rare."<sup>294</sup>

By far the best metaphorical use of the term in a judicial opinion was not even written by the judge who wrote the opinion. Rather, it appeared in a footnote in which Judge Sills of the California Court of Appeals quoted from a local policy of the Orange County Superior Court,

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throughout an order granting defendant's motion for summary judgment in Title VII sexual harassment case) *with Nat'l Football League Players Ass'n v. Pro-Football, Inc.*, 857 F. Supp. 71 (D.D.C. 1994) (using football terminology throughout an order granting summary judgment to defendants in appeal of arbitration award arising out of pro football collective bargaining agreement).

<sup>287</sup> See, e.g., Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17 (1994); Maureen Archer & Ronnie Cohen, *Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions*, 35 AM. BUS. L.J. 225 (1998); but see Michael Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and "The Sex Stuff"*, 28 CONN. L. REV. 813 (1996) (defending judicial use of baseball metaphors).

In a case involving an alleged ambiguity in an insurance policy, Justice Taylor of the Michigan Supreme Court discussed the "tools available to a court in seeking to establish the meaning of [colloquial] phrases", *Henderson v. State Farm Fire & Cas. Co.*, 596 N.W.2d 190, 195 (Mich. 1999), and suggested that "a glossary of idiomatic expressions could in a given case help one understand such sports metaphors as: (1) a 'hail Mary pass,' (2) a 'hat trick,' (3) 'down for the count,' or (4) even the venerable 'home run,'" *id.* at 195 n.8.

<sup>288</sup> Archer & Cohen, *supra* note 287, at 244 (tallying 156 judicial uses of that football metaphor).

<sup>289</sup> *Id.* at 243 (tallying seventy-two judicial uses of that boxing metaphor).

<sup>290</sup> *Id.* (tallying forty-seven judicial uses of that baseball metaphor).

<sup>291</sup> *Id.* (tallying thirty-six judicial uses of that baseball metaphor).

<sup>292</sup> *Id.* (tallying twenty-seven judicial uses of that baseball metaphor).

<sup>293</sup> *Id.* (tallying twenty-seven judicial uses of that boxing metaphor).

<sup>294</sup> *United States v. Perella*, 273 F. Supp. 2d 162, 166 (D. Mass. 2003) (quoting *United States v. Craven*, 239 F.3d 91, 99 (1st Cir. 2001)). In fact, as a metaphor for scarcity or rarity, "hole-in-one" is even more than hen's-teeth rare. A Westlaw search on the term "hen's teeth" revealed that forty judicial opinions use that term to denote scarcity, while only three opinions make any metaphorical use of the phrase "hole-in-one." In addition to its yochicken's service as a metaphor for scarcity, "hen's teeth" has twice been used for other purposes. See *Four Star Capital Corp. v. Nynex Corp.*, 183 F.R.D. 91, 100 (S.D.N.Y. 1997) (quoting the plaintiff's claim that "completing the depositions of [defendant's] witnesses has been 'like pulling hen's teeth'"); *Brookfield Wire Co. v. Commissioner*, 667 F.2d 551, 555 (1st Cir. 1981) (opining that under a construction advocated by one of the parties, a particular statute "would have only hen's teeth").

titled “So You Want to Move for Summary Judgment,”<sup>295</sup> which required litigants to confer with the court prior to filing summary judgment motions. The policy began by stating:

Motions for summary judgment and summary adjudication, generally considered the holes-in-one of pre-trial litigation, invariably require significant labor by both moving and responding parties in their writing and opposition, (presumably at considerable expense to the clients), and commensurate endeavor by the court in reading and analysis. Yet most of this work is wasted, since the overwhelming majority of such motions are denied, either due to flaws in their format or the finding of triable issues of fact. The result? Investment of substantial resources by counsel and the court for naught, since the parties *learn* nothing from the DENIAL of such motions, because their denial *resolves* nothing.<sup>296</sup>

Judge Sills ultimately ruled that the policy impermissibly interfered with the statutory rights of litigants to seek summary judgment.<sup>297</sup>

In his dissent in *Trahan v. City of Oakland*,<sup>298</sup> an excessive force claim brought under 42 U.S.C. § 1983, Judge Kleinfeld of the United States Court of Appeals for the Ninth Circuit discussed the kinds of evidence that may be produced to prove animus on the part of a police officer accused of using excessive force. The first form of evidence is “a desire to hurt the person arrested.”<sup>299</sup> As for the second:

[T]he more times a person claims to have participated in an unlikely event, whether that event is having a tossed coin come down heads twelve times in a row or having suspects shot while trying to escape, the less likely it is that any one claim is true. The statement, “I shot four holes in one in one summer,” is far more likely to be a lie, than the statement, “I shot a single hole in one in 20 years of golf.” The same logic may apply to the statement, “the suspect fell and hit his head on the floor,” if the reported frequency of this event for the individual officer

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<sup>295</sup> *Lokeijak v. City of Irvine*, 76 Cal. Rptr. 2d 429, 430 n.2 (Cal. Ct. App. 1998).

<sup>296</sup> *Id.* (emphasis in the original).

<sup>297</sup> *Id.* at 431.

<sup>298</sup> 960 F.2d 152 (unpublished table decision), No. 89-16573, 1992 WL 78090 (9th Cir. Apr. 20, 1992) (Kleinfeld, J., dissenting).

<sup>299</sup> *Id.* at \*7.

is many times higher than the norm.<sup>300</sup>

Finally, in an appeal of a liquor license revocation, based upon illegal gambling on billiards, Judge Tyack of the Ohio Court of Appeals observed that when a player received a cash prize for pocketing an eight ball on the break, if he or she had previously placed a quarter in a can by the cash register, “the mixture of skill and chance upon which the player bets [is] similar to the mixture of skill and chance encountered when a golfer bets she or he can hit a hole-in-one at a golf outing.”<sup>301</sup>

In the immortal words of Porky Pig, “D-D-Dt D-D-Dt That’s All, Folks.”<sup>302</sup> No other

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<sup>300</sup> *Id.*

<sup>301</sup> *Flamingo Lounge, Inc. v. Ohio Liquor Control Comm’n*, No. 02AP-1079, 2003 WL 21386273, at \*8 (Ohio Ct. App. June 17, 2003) (Tyack, J., concurring).

<sup>302</sup> *Texas Pig Stands, Inc. v. Hard Rock Café Int’l, Inc.*, 951 F.2d 684, 698 (2d Cir. 1992). In *Texas Pig Stands*, a trademark infringement action based upon the mark “pig sandwich,” Judge John R. Brown, a noted judicial wordsmith, see Parker B. Potter, Jr., *Surveying the Serbonian Bog: A Brief History of a Judicial Metaphor*, 28 TUL. MAR. L.J. 519, 529 (2004), used Porky Pig’s catch phrase as a section heading. His other headings include: “This Little Piggy Went to Market,” *Texas Pig Stands*, 951 F.2d at 687, “This Little Piggy Went to See His Lawyer,” *id.* at 688, “Piggish Stands,” *id.* at 689, “Collateral Estoppel – Does the Pork Stop Here?,” *id.* at 690, “A Pig is a Pig is a Pig – Or is it?,” *id.* at 691, “Fraud in the Registration – Did a Greased Pig Slip Past the PTO?,” *id.* at 693, “Unjust Enrichment – Did Hard Rock Bring Home the Bacon?,” *id.* at 694, “Palming Off – A Pork Purveyor Has His Pride,” *id.* at 695, “Did Hard Rock Hog TPS’ Good Will?,” *id.* at 696, “Award of Attorney Fees – Did the Trial Court Go Hog Wild?,” *id.*

Judge Brown’s use of subheadings is not every commentator’s bucket of slop. In a list of ten criteria for evaluating the quality of judicial humor, one writer has stated:

Eighth, subtitles do not count. Perhaps my prejudice is the result of my living in the Fifth Circuit.

Two earlier chroniclers of judicial humor have observed:

The use of cutesy subtitles seems to have originated within the past twenty years in the Fifth Circuit Court of Appeals, where the practice has been followed with distressing frequency. In researching this article we did not find that the disease has seriously infected other appellate courts, though there has been an occasional outbreak in the Eleventh Circuit, which was carved from the Fifth. No effective vaccine has yet been developed.

These subtitles are not very clever. They become tedious in their repetition. Sometimes they give offense to the litigants. If my Fifth Circuit judge friends will call me whenever they get an urge to be too cute, then I will try to talk them out of it.

Thomas E. Baker, *A Review of Corpus Juris Humorous*, 24 TEX. TECH. L. REV. 869, 881 (1993) (quoting George

judicial opinions use the phrase “hole-in-one” as a metaphor. “Ace in the hole” gets plenty of play,<sup>303</sup> but as a metaphor whose primary meaning comes from the green felt realm of poker rather than the grassy greens of golf,<sup>304</sup> that phrase is out of bounds for the purposes of this essay.

While there are few metaphorical uses of the phrase “hole-in-one,” there are a fair number of colorful uses of golf language in general. For example, in the same dissent in which he admitted to not being a golfer (with pride or regret, I cannot tell), Judge Musmanno concluded his opinion with the following characteristically colorful lines:

After being hit by a golf ball on the Churchill Valley Country Club golf course, the plaintiff came into Court and was hit again, this time with the mashie iron of a non-suit, even before he had a chance to drive on to the green of a jury deliberation. Being forced into the sand trap of a non-suit, the plaintiff was denied an opportunity to enter into the fairway of his litigation. I believe this is not a fair way to dispose of a suit in trespass.

Accordingly, I yell ‘Fore!’ and dissent.<sup>305</sup>

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Rose Smith, *A Critique of Judicial Humor*, 43 ARK. L. REV. 1, 18 (1990)) (other citations omitted).

<sup>303</sup> See, e.g., *In re Conservatorship of Groves*, 109 S.W.3d 317, 350 (Tenn. Ct. App. 2003) (“Parties cannot use non-jurisdictional errors committed during a trial as their ‘ace-in-the-hole’ should the trial’s outcome not be to their liking.”) (citations omitted); *Higgs v. Good*, 813 So.2d 178, 179 (Fla. Ct. App. 2002) (“It is inappropriate for a taxpayer to conceal an ace-in-the-hole for subsequent play against an official who is attempting to carry out his duties.”) (citation omitted); *Albin v. Cosmetics Plus, N.Y., Ltd.*, No. 97 CIV. 2670(WK), 1999 WL 111928, at \*2 (S.D.N.Y. March 3, 1999) (“Defendants have attempted to play their tactically withheld ‘ace in the hole’ too late in the game.”). Just one paragraph up from his “ace-in-the-hole” reference, Judge Knapp referred to the “defendant’s . . . ‘no harm, no foul’ reasoning,” *id.*, thus qualifying him for varsity letters in both poker and basketball.

<sup>304</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 14 (unabridged ed. 1993) (defining an “ace in the hole” as “an ace when it is a player’s hole card in stud poker”).

<sup>305</sup> *Taylor v. Churchill Valley Country Club*, 228 A.2d 768, 772 (Pa. 1967) (Musmanno, J., dissenting).

In *Vardon Golf Co. v. BBMG Golf Ltd.*, a patent infringement case, Magistrate Judge Bobrick noted that “mashie” and “niblick” are archaic terms for certain golf clubs. 156 F.R.D. 641, 645 n.1 (N.D. Ill. 1994). In addition to carrying a mashie and a niblick, old-time golfers could also arm themselves with a “mashie niblick,” defined as “an iron club with a loft between those of a mashie and a niblick – also called number six iron.” *Jaworski v. Kiernan*, 696 A.2d 332, 339 n.12 (Conn. 1997) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY). In *Jaworski*, a case involving a knee injury sustained in a recreational soccer game, Chief Justice Callahan also quoted *Walsh v. Machlin*, 23 A.2d 156, 156 (Conn. 1941), in which a golfer was struck in the eye by a ball shanked by his playing partner who was trying to hit the ball with his mashie niblick *id.* at 335.

In an opinion that set out to establish the duty of care owed by a golfer to “persons living in residences immediately adjacent to the golf course,”<sup>306</sup> Justice Flanders of the Rhode Island Supreme Court promised to “try to drive a middle course down a legal fairway strewn with hazards, bunkers, and other assorted obstacles – especially to those who venture aimlessly into the rough.”<sup>307</sup>

Finally, In a suit brought by the trustee of a foreign bankruptcy estate to quiet title to a piece of property subject to tax deeds, Judge Babcock of the United States District Court for the District of Colorado began his opinion by noting:

This is a case about a golf course. Anyone who has taken up the game of golf, seriously or not so seriously, can appreciate the complexity of the game. Anyone who has played the game will acknowledge, sympathetically, the pain and agony that goes with it as the ball is wont to stray frequently from fairway to rough or even from the golf course itself. As will be seen from the tortured and complex history of litigation here, the pain of the game of golf pales in comparison. At least the golfer can eventually expect to hole out on the 18th green and retire to the 19th watering hole to heal wounds. No such certainty attends this litigation. Even so, I’ll tee it up, take a swing and see where the issues now before me land.<sup>308</sup>

And indeed, Judge Babcock kept his head down and his left arm straight, concluding his opinion as follows: “[I]f the tax deeds are held to be valid we likely will have holed out on the 18th and can retire to the 19th hole. If not, we’ll all continue to hack away for some time to come.”<sup>309</sup>

As I have no desire to hack away any longer than necessary, I will move from the nineteenth hole to the pro shop, where this essay concludes.

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<sup>306</sup> Hennessey v. Pyne, 694 A.2d 691, 693 (R.I. 1997).

<sup>307</sup> *Id.*

<sup>308</sup> Kojima v. Grandmote Int’l Ltd. Liability Co. (*In re* Grandote Country Club Co.), 208 B.R. 218, 220 (D. Colo. 1997).

## TIPS FROM THE PRO SHOP

This article has run its course; I have putted my last bon môt through the clown's mouth. (Sadly, there appear to be no reported cases in which a miniature golfer has litigated a hole-in-one on a putt-putt golf course. But that is not to say that the case law is lacking in putt-putt jurisprudence. To the contrary, the term putt-putt has appeared in cases involving criminal charges of child molestation,<sup>310</sup> battles for child custody,<sup>311</sup> grand larceny,<sup>312</sup> armed robbery,<sup>313</sup> tax disputes,<sup>314</sup> condemnation under eminent domain,<sup>315</sup> personal injury,<sup>316</sup> alienation of affection,<sup>317</sup> copyright infringement,<sup>318</sup> and, most onomatopoeically, internal combustion engines.<sup>319</sup>) On the assumption that the primary audience for this article consists of the Golf

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<sup>309</sup> *Id.* at 225.

<sup>310</sup> *See, e.g.*, *State v. Jacobs*, 495 S.E.2d 757, 759 (N.C. Ct. App. 1998); *State v. Speck*, 944 S.W.2d 598, 599 (Tenn. 1997).

<sup>311</sup> *See, e.g.*, *C.B.L. v. K.E.L.*, 937 S.W.2d 734, 736 (Mo. Ct. App. 1996); *Murphy v. Murphy*, 427 So.2d 1278, 1279 (La. Ct. App. 1983).

<sup>312</sup> *See Sprouse v. Commonwealth*, No. 3448-01-2, 2002 WL 31817975, at \*1 (Va. Ct. App. Dec. 17, 2002).

<sup>313</sup> *See State v. Stack*, 659 So.2d 853, 854 (La. Ct. App. 1995); *United States v. Barlow*, 17 F.3d 85, 87 (5th Cir. 1994).

<sup>314</sup> *See Kanakuk-Kanakomo Kamps, Inc. v. Dir. of Revenue*, 8 S.W.3d 94 (Mo. 1999) (sales tax); *Page v. City of Fernandina Beach*, 714 So.2d 1070 (Fla. Dist. Ct. App. 1998) (ad valorem property tax); *Lora v. Dir. of Revenue*, 618 S.W.2d 630 (Mo. 1981) (sales tax).

Remarkably, the Florida city of Fernandina Beach is the setting for both the tax case cited above in the fifteenth case in my hole-in-one round-up, *Ransom v. Fernandina Beach Chamber of Commerce*, 752 So.2d 118 (Fla. Dist. Ct. App. 2000). If I ever had to predict the likeliest location for litigation arising out of a hole-in-one on a putt-putt golf course, I would have to point to Fernandina Beach.

<sup>315</sup> *See State ex rel. Mo. Highway & Transp. Comm'n v. Jim Lynch Toyota, Inc.*, 854 S.W.2d 490 (Mo. Ct. App. 1993).

<sup>316</sup> *See Baker v. Groetz*, No. CA-8845, 1992 WL 330269, at \*1 (Ohio Ct. App. Nov. 9, 1992) (child struck in the eye by a putter swung by a playmate); *Sanders v. Stutes*, 400 So.2d 1159, 1161 (La. Ct. App. 1981) (adult miniature golfer tripped while climbing down steps from the eighteenth green).

<sup>317</sup> *See Hutelmyer v. Cox*, 514 S.E.2d 554, 557 (N.C. Ct. App. 1999) (“During a work-related outing at a Putt-Putt facility, defendant stood very close to Mr. Hutelmyer and ate ice out of his drinking cup.”).

<sup>318</sup> *See Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985). *See also* Paul Warenski, Note, *Copyrights and Background Music: Unplug the Radio Before I Infringe Again*, 15 HASTINGS COMM. & ENT. L.J. 523, 536-37 (1993); David E. Shipley, *Copyright Law and Your Neighborhood Bar and Grill: Recent Developments in Performance Rights and the Section 110(5) Exemption*, 29 ARIZ. L. REV. 475, 504 (1987).

<sup>319</sup> *See, e.g.*, *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 765 (5th Cir. 1989) (quoting the closing argument by defense counsel in a products liability action against an aircraft manufacturer: “we don’t have to have a \$2,000 a day expert to come in here and explain to each of you sensible folks what whoo – putt, putt, putt – whoo – putt, putt, putt

Law section of the ABA, I conclude with several tips from the pro shop.

My first tip for you golf lawyers. Be careful about asking for too much; the courts seem quite eager to award single damages for a singularly sensational golf shot, but in *Malone v. Topsail Area Jaycees, Inc.*, a plaintiff who took aim at treble damages ended up scoring a double bogey.<sup>320</sup> The rest of my tips involve advice that golf lawyers should consider giving their clients.

When advising clients who offer hole-in-one insurance, tell them to write policies that contemplate every conceivable possibility, or get ready to write a check. In a world where the term “shots” can be considered ambiguous, as in *Crawford Chevrolet, Inc. v. National Hole-in-One Ass’n*,<sup>321</sup> only the most precise and detailed policy language will protect an insurer from paying when a golfer has scored a hole-in-one in a covered event.

When advising clients who sponsor hole-in-one contests, tell them to be careful about

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– whoo means. That’s the sound of the airplane running out of gas. Every school child knows that. No city slicker from Connecticut or California earning more money than any of us ever heard of had to come here and tell us that that’s the airplane running out of gas.”); *State v. Miller*, 485 S.W.2d 435, 437 (Mo. 1972) (“A few minutes later he heard an automobile start with a loud ‘putt-putt’ sound, and observed a car having a ‘light-colored canvas top with long fins,’ a dark-colored bottom, ‘an old sports model,’ heading west on Robidoux Street.”); *State v. Heitman*, 473 S.W.2d 722, 723 (Mo. 1971) (“Shortly afterwards (‘a few minutes’ later) he heard an automobile start; the ‘putt-putt’ sound was ‘sick.’ A sporty car drove westward on Robidoux, the street which ran between Balchen’s apartment and the temple, making the same ‘putt-putt’ sound.”); *Township of Hanover v. Town of Morristown*, 261 A.2d 692, 696 (N.J. Super. Ct. Ch. Div. 1969) (“From the ‘putt-putt’ of the single 70 hp. engine on light canvas-covered aircraft, through the era of the piston-engine propellor plane, to today’s shrill whine of heavy, multi-engine jets, civilization advanced over the roof of the house which had reluctantly backed away from the highway.”). Cf. *Delong v. Roeder Cartage Co.*, No. 1-03-44, 2004 WL 720348, at \*1 (Ohio Ct. App. Apr. 5, 2004) (“Upon finding that the pump and motor (a.k.a. putt-putt) did not work properly, he took his truck to the garage to be fixed.”); *Cartanza v. Ward*, No. 111 Civ. A.1965, 1966 WL 86449, at \*1 (Del. Super. Ct. July 18, 1966) (“Cartanza instructed George Ward to start the refrigeration motors (putt putts) on the trucks when the trucks were lined up.”); *Strand v. Great N. Ry. Co.*, 46 N.W.2d 266, 271-72 (Minn. 1951) (“David was only 7 1/2 years old at the time of the accident. He had had only one year [of] schooling. His intelligence quotient is only about 95. Between 90 and 110 is considered Average intelligence. Even at the time of trial, when he was nine, David could not tell the difference between forenoon and afternoon. He did not know directions. He did not know what a semaphore was, and he called a motor patrol car ‘a little putt-putt.’”).

<sup>320</sup> 439 S.E.2d 192, 196 (N.C. Ct. App. 1994).

advertising their contests; if, for example, as in *Cobaugh v. Klick-Lewis, Inc.*,<sup>322</sup> your client forgets to take down the contest signs, the contest keeps on going until the signs come down. Second, Title IX and Michelle Wie make it more important than ever to heed the lesson of *Harms v. Northland Ford Dealers*<sup>323</sup> by planning for the participation of female golfers; in addition to holes-in-one by golfers named Lloyd, Jeff, and John, this round-up includes aces by golfers named Lois, Jennifer, and Jeri. Third, you should advise your clients to try as hard as they can to find eighteen-hole courses for their eighteen-hole tournaments,<sup>324</sup> or to be sure that they only offer prizes for holes-in-one on the “back” nine if they are compelled to use a nine-hole layout.<sup>325</sup> Fourth, and this should go without saying, your client must remember to pay the premiums for its hole-in-one insurance; even if client is the most sympathetic charity in the world, the goodness of its cause will not protect it when a golfer has made an ace for which a prize has been promised.<sup>326</sup>

When advising clients who play golf, tell them to stay away from Maine; even accounting for inflation, the Dodge Colt up for grabs in *Chenard v. Marcel Motors*<sup>327</sup> is, by a significant margin, the least valuable hole-in-one prize reported in this round-up. Second, if you have clients playing in eighteen-hole tournaments on nine-hole courses, tell them to score their holes-in-one on the second nine rather than the first; seventeen can sometimes be eight, but eight can never be seventeen.

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<sup>321</sup> 828 P.2d 952, 954 (N.M. 1992).

<sup>322</sup> 561 A.2d 1248, 1249 (Pa. Super. Ct. 1989).

<sup>323</sup> 602 N.W.2d 58 (S.D. 1999).

<sup>324</sup> See *Grove v. Charbonneau Buick-Pontiac, Inc.*, 240 N.W.2d 853 (N.D. 1976); *Crawford*, 828 P.2d 952.

<sup>325</sup> *Burford Distrib., Inc. v. Starr*, 20 S.W.3d 363 (Ark. 2000).

<sup>326</sup> *Malone v. Topsail Area Jaycees, Inc.*, 439 S.E.2d 192 (N.C. Ct. App. 1994).

<sup>327</sup> 387 A.2d 596 (Me. 1978).

On that note, it is time to take my ball and go home.