Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 1 *Volume I*
Number 1 *Volume I Book 1*

Article 5

1990

Antitrust & Professional Sports' Eligibility Rules: The Past, the Present, and the Future

Cathy E. Shore

ANTITRUST & PROFESSIONAL SPORTS' ELIGIBILITY RULES: THE PAST, THE PRESENT, AND THE FUTURE

I. INTRODUCTION

Sports leagues and associations establish guidelines to retain control over who is eligible to compete,[1] and what type of equipment is allowed or required. Over the years, the courts have analyzed various professional sports eligibility rules to determine whether they violate the antitrust laws. Usually the rule is challenged under Section 1 of the Sherman Antitrust Act.[2] If the league and its clubs apply an exclusionary rule, and thus refuse to deal with a player, in essence, they may deprive a professional athlete of the opportunity to pursue his livelihood.[3] Similarly, product specifications may deprive a manufacturer of the opportunity to market his product if the product does not comply with such specifications.[4] The courts have not delineated clear standards to determine whether such rules violate federal antitrust laws, for the most part because whether a rule is to be seen as violative or not depends largely on the circumstances.[5] In most of the cases which have been brought, the plaintiff was excluded from participating in a sport and challenged the league's rule by characterizing its enactment as a group boycott or concerted refusal to deal.

The courts have held that the antitrust laws are applicable to all professional sports leagues and associations[6] except for professional

---

1. *See, e.g.*, R. Berry and G. Wong, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 349 (Vol. I 1986). The authors identify two categories for exclusion: (1) status - age, education, attainment, physical condition, objectified standard of skill; and (2) activities — gambling, cheating.

2. Section 1 of the Sherman Antitrust Act states "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982). A "combination", according to BLACK'S LAW DICTIONARY (5th ed. 1979), is "[a]n agreement or understanding between two or more persons, in the form of a contract. . .or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution, and price, or otherwise interfering with freedom of trade without statutory authority." (*citing* Northern Securities Co. v. United States, 193 U.S. 197 (1904)).

3. *See, e.g.*, G. Schubert, R. Smith, and J. Trentadue, SPORTS LAW 59 (1986) [Hereinafter SPORTS LAW].

4. *See infra* notes 123-42 and accompanying text.

5. SPORTS LAW, *supra* note 3, at 60.

6. *See, e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957) (volume of interstate business sufficient to place organized professional football within the provisions of the Antitrust Acts); Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972) (hockey); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) (basketball).

baseball,[7] and have applied two tests in reviewing sports rules: the "per se" illegality rule[8] and the "rule of reason."[9] The specific test applied by a court relates more to the jurisdiction and date of the decision than to the particular sport scrutinized. If the per se rule applies in a particular situation, then the rule will be struck down as illegal, usually without any further analysis. If the per se rule does not apply, the court must determine under the rule of reason, whether or not the rule unreasonably restrains trade.

This note first gives a brief overview of the general Supreme Court developments in antitrust law relating to group boycotts and concerted refusals to deal.[10] Since few sports cases have been actively reviewed by the Supreme Court, the district and appellate courts have had to speculate, often relying on non-sports cases to guide them in applying antitrust laws in sports cases. Secondly, this note outlines the development of the "rule of reason" as applied to sports eligibility rules.[11] Although the trend has been towards the application of such an analysis, various district and appellate courts have either attempted to distinguish their cases from Supreme Court precedent, or have simply ignored prior rulings to avoid its application. Thirdly, this note discusses various eligibility rules which have been challenged, as well as the outcome of such litigation.[12] Lastly, this note concludes with the prediction that the future of sports antitrust litigation[13] will reflect the Chicago School approach; that is, since there must be proof of an effect on prices or output to strike a rule,[14] it is unlikely that players will ever successfully challenge a particular eligibility requirement.

---

7. *See, e.g.*, Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922) (baseball immune from antitrust laws); Toolson v. New York Yankees, 346 U.S. 356 (1953) (more harm from overruling *Federal Baseball* than in upholding a ruling, which although of dubious validity, has not been changed by Congress. Note that Congress did consider the extension of the baseball rule to other sports. In 1951 four separate bills were introduced to exempt organized professional sports from the antitrust laws. None of them were enacted. *See* H.R. Rep. No. 4229, 4230, 4231, and S. Rep. No. 1526, 82d Cong., 1st Sess. (1951).

8. *See, e.g.*, Robertson v. National Basketball Association, 389 F. Supp. at 893.

9. *See, e.g.*, United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

10. *See infra* notes 17-39 and accompanying text.

11. *See infra* notes 40-84 and accompanying text.

12. *See infra* notes 85-192 and accompanying text.

13. *See infra* notes 193-202 and accompanying text.

14. This note excludes analysis of the labor law exemption as applied to sports eligibility cases. Analysis of the player draft and the reserve clause has been minimized due to their interdependence with the labor law.

II. HISTORY OF ANTITRUST LAW: SUPREME COURT DECISIONS

When the Sherman Act[15] incorporated the common-law principles on restraint of trade into federal statutory law, it imported both the principle that restrictions on competition are illegal, and the exception that a showing of reasonableness will, in some circumstances, "legalize" restrictions on competition.[16] In 1911,[17] the Supreme Court established the "rule of reason" when it held that not all restraints of interstate commerce fell within the scope of the Sherman Act. Only those contracts and combinations which "unreasonably" or "unduly" restrained trade were prohibited. In 1918, the Court further delineated the rule of reason test, by differentiating between a restraint which "merely regulates" and that which may "suppress or even destroy competition."[18]

However, in response to attempts by antitrust defendants to justify every restrictive combination as reasonable, the courts developed the doctrine of "per se" violations,[19] i.e., acts which were held to violate the antitrust laws regardless of any asserted justifications or alleged reasonableness.[20] This per se classification encompassed certain practices seen by the Court as eliminating competition. In 1958, the Court stated:

> the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . .[21] How-

---

15. *See supra* note 2.

16. *See* People v. Santa Clara Valley Bowling Proprietors' Ass'n, 238 Cal. App. 2d 225, 47 Cal. Rptr. 570 (Dist. Ct. App., 1st Dist. 1965).

17. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

18. In Chicago Board of Trade v. United States, 246 U.S. 231 (1918), the Court stated:

> [t]he true test of legality is whether the restraint imposed is such as merely regulates and thereby perhaps promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

19. *See, e.g.*, Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

20. Some of the practices which the courts have deemed to be unlawful per se are price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); division of markets, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); group boycotts, Fashion Originators' Guild v. F.T.C., 312 U.S. 457 (1941); and tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947).

21. Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

> ever, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[22]

The principle of per se unreasonableness avoids the requirement of a complicated economic investigation.

In 1959, the Supreme Court held that group boycotts were within the per se category.[23] This was true regardless of whether the elimination of the plaintiff would have any significant economic effect.[24] The innate illegality of a boycott sprung from the combination - the agreement to do collectively that which any one acting alone and independently could do without violating the law.[25]

The possibility that all group boycotts were not per se illegal was given considerable impetus in 1963.[26] The Court stated that "absent any justification derived from the policy of another statute or otherwise," a boycott was a per se violation of the antitrust laws.[27] Thus, the Court recognized that a justification derived from another statute "or otherwise" might save a collective refusal to deal from per se illegality. This implied that a rule of reason analysis would then be appropriate.[28]

More recently, in 1977,[29] the Court has reiterated that "*[p]er se* rules of illegality are appropriate only when they relate to conduct

---

22. *Id.* at 5 (emphasis added).

23. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Plaintiff, an appliance dealer, alleged that a conspiracy not to sell to plaintiff existed between a number of suppliers and a retail competitor.

24. *Id.* at 213. A group boycott which has "monopolistic tendency" can not "be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." Also, the boycott could not be saved by allegations that it was reasonable in the specific circumstances. *Id.* at 212.

25. *Id.* at 212-13. Group boycotts may take the form of vertical or horizontal combinations. A horizontal combination exists when companies at one level of distribution combine to exclude a direct competitor from the market. 2 Von Kalinowski, Antitrust Laws and Trade Regulation § 6.02(1)(c) (1990). A vertical combination exists when companies at different marketing levels combine to exclude competitors of some members of the combination from the market. *Id.*

26. *See* Silver v. New York Stock Exchange, 373 U.S. 341 (1963). Silver, a non-member of the Exchange, had been allowed to maintain direct telephone and tickertape connections with Exchange members. The Exchange directed these members to discontinue this service, and the members filed an antitrust suit alleging illegal group boycott.

27. *Id.* at 348-49.

28. *See, e.g.*, M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973, 980 (1st Cir. 1984). The *Silver* Court found no justification for the termination because Silver was not given notice or an opportunity to be heard, and thus the Exchange was acting beyond its self-regulatory ends. *Silver*, 373 U.S. at 364-65.

29. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

that is *manifestly anticompetitive.*"[30]

In its only recent sports antitrust case,[31] the Supreme Court held that it was inappropriate to apply a per se rule. The Court so reasoned because the industry involved was college football, therefore horizontal restraints on competition were required if the product was to be available at all.[32] The Court stated that the "hypothesis that legitimizes the maintenance of competitive balance as a procompetitive justification under the rule of reason is that equal competition will maximize consumer demand for the product."[33]

The Supreme Court, in 1985,[34] interpreted *Silver v. New York Stock Exchange* ("*Silver*") and the application of the per se rule.[35]

---

30. *Id.* at 49-50 (first emphasis in original, second emphasis added). The *Continental T.V.* Court held that vertical restraints were not necessarily illegal per se, but were to be evaluated under the rule of reason, since vertical restrictions possess "redeeming virtue[s]" in their stimulation of inter-brand competition. *Id.* at 49-50. If a restraint is found to have legitimate business purposes which promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. *Id.* at 57. This is as opposed to horizontal restraints, which have been labeled " 'naked restraints of trade with no purpose except stifling competition,' " and are therefore treated as per se violations of the Sherman Act. Vertical restraints, because they allow each individual in the combination to become more efficient in the distribution of his products, have been seen as promoting interbrand competition and are examined under the rule of reason standard. Apparently this enhancement of interbrand competition more than makes up for the possibility that vertical restraints may also reduce intrabrand competition by decreasing the number of sellers competing for a set number of buyers. M & H Tire Co., 733 F.2d at 978 (*citing* Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978)(en banc), *cert. denied*, 439 U.S. 946, *reh'g denied*, 439 U.S. 1104 (1979)).

31. *See* NCAA v. Board of Regents, 468 U.S. 85 (1984).

32. *Id.* at 100-01. The industry was intercollegiate athletics. The NCAA markets competition; it would be completely ineffective if there were no agreed upon rules. *Id.* at 101. "A myriad of rules affecting such matters as the size of the field, the number of players on a team . . . all must be agreed upon, and all restrain the manner in which institutions compete." *Id.* Although it was reasonable to assume that most of the regulatory controls of the NCAA were justifiable and procompetitive, because they enhance public interest, this particular regulation was not. *Id.* at 117. The restraints on football telecasts did not fit into the same mold as did the rules defining the conditions of the contest, the *eligibility of participants*, or the manner in which members of a joint enterprise share the responsibilities. *Id.* at 117 (emphasis added). The NCAA did not claim that its television plan was intended to equalize competition within any one league. The plan was nationwide and there was no single league or tournament in which all college football teams competed. There was no evidence of any intent to equalize the strength of teams in different divisions. *Id.* at 117-18.

33. *Id.* at 119-120. *Id.* at 120. *See also* Continental T.V., 433 U.S. at 54.

34. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

35. Specifically, the Court stated that absence of procedural safeguards did not determine the antitrust analysis; the antitrust laws did not themselves impose a requirement of process on joint ventures. *Id.* at 293. The absence of procedural safe-

It held that the per se rule did not apply, absent a showing that the challenged activity fell into a category likely to have predominantly anticompetitive effects, such as an effort to disadvantage competitors, that was not justified by efficiency.[36] However, since the Court found that consumption would actually increase if the controls were removed, the Court concluded that the controls did not serve any such legitimate purpose.

In 1986,[37] the Supreme Court declined to apply the per se rule to what appeared to be a group boycott.[38] After applying the rule of reason, the Court concluded that the restriction of consumer choice, absent procompetitive justification, violated the Sherman Act.[39]

III. "PER SE" ILLEGALITY OR "RULE OF REASON" AS APPLIED TO PROFESSIONAL SPORTS

Sports eligibility rules require the players to meet certain requirements, such as attain a certain age, before they can compete. Since the league, the teams, and the players' associations agree on these rules, to those excluded, it seems like a group boycott. Initially, the courts frequently applied the per se rule to sports eligibility rules, labeling them per se illegal group boycotts and performing no further analysis.

However, the recent trend has been to assume that the rule of reason applies, and then determine whether the particular restraint is reasonable. Most courts now recognize that some rules are necessary for teams or individuals to compete in a league or association. In addition, usually the league or team challenged for applying the rule is not strictly a "competitor," and thus the refusal to deal would constitute at most a vertical boycott. Vertical restraints have been given the benefit of the doubt much more so than horizontal restraints, since the pro-competitive justifications are more easily understood, and usually more valid.

The courts' fluctuation between applying the per se rule and the rule of reason in sports eligibility rule cases is evident from the fol-

---

guards could be used to determine if the regulatory body had exceeded the scope of its authority.

36. *Id.* at 298. The mere allegation of a concerted refusal to deal was not enough.

37. *See* F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447 (1986).

38. The Court noted that the group boycott category was not to be indiscriminately expanded, and was limited to the situation where a firm with market power boycotts suppliers or customers to discourage them from doing business with a competitor. *Id.* at 458. *See also Northwest Wholesale Stationers,* 472 U.S. 285.

39. *Indiana Federation of Dentists,* 476 U.S. at 466. *See also,* notes 16 and 30, *supra.* A procompetitive justification is one which overcomes the anticompetitive effect of the group boycott; e.g. the creation of efficiencies in the operation of the market. *Id.* at 459.

lowing analysis.[40]

As early as 1953, the Eastern District of Pennsylvania[41] recognized that professional teams in a league should not be permitted to compete too strenuously with each other in a business way. If all the teams were to do so, the strongest teams would likely drive the weaker ones into financial failure, and eventually the whole league would fail. Without the league no team could operate profitably.[42] Thus acknowledging the unique nature and purpose of sports league activities, the court held the per se rule inappropriate and inapplicable to sports league activities.[43] However, not many other courts were quick to follow.

In two bowling association cases, both the 9th Circuit[44] and a California district court[45] applied the per se rule. The California district court stated that the eligibility rule had as one of its purposes inducement of a concerted refusal to deal, and as such, was an illegal boycott.[46] Citing *Klor's*, the court found that it was not relevant that the eligibility rule had no effect on competition. The particular practice, by its nature, tended to lessen competition and create a monopoly, and it was enough to show that either the purpose *or* the means was unlawful.[47] The circuit court also cited *Klor's*, and rejected defendant's claim that it had the right to impose restrictions to prevent cheating and other abuses, even though such restrictions might incidentally constrict commerce.[48] The court also cited *Fashion Originators' Guild*, stating that a private association could not pass regulations to deal with abuses when the effect was to restrain interstate commerce.[49]

However, less than one month later, the same circuit applied the

40. The cases are presented in the order they were decided to illustrate the state of confusion between the different districts.

41. United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953).

42. *Id.* at 323.

43. *Id.* at 322.

44. *See* Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966).

45. *See* People v. Santa Clara Valley Bowling Proprietors' Ass'n, 238 Cal. App. 2d 225, 47 Cal. Rptr. 570 (Cal. Dist. Ct. App., 1st Dist. 1965).

46. *Santa Clara Valley*, 238 Cal. App. 2d at 238-40, 47 Cal. Rptr. at 579-80. It induced league bowlers bowling in non-member alleys to bowl in member alleys by requiring such as a precondition for tournament eligibility. 238 Cal. App.2d at 288, 47 Cal. Rptr. at 572.

47. *Id.* at 240, 47 Cal. Rptr. at 579.

48. *Washington*, 356 F.2d at 376. This argument has been accepted in subsequent cases to justify the use of the rule of reason. It is possible that these particular restraints would have failed a rule of reason analysis, so the court did not want to be bothered.

49. *Id.* (*citing* Fashion Originators' Guild of America v. F.T.C., 312 U.S. 459 (1941)). This argument has also subsequently been rejected.

rule of reason.[50] Although not stating the rule by name, the court looked at the basic purpose of the eligibility rules and determined that they were reasonable.[51]

Similarly, the rule of reason was applied by the Southern District of Indiana,[52] when it acknowledged the right and power of the United States Auto Club (USAC), as a sanctioning organization, to adopt rules and regulations for its membership club.[53] This reasoning seemed to set the stage for future challenges to sports association self-regulation.

In contrast, the Central District of California[54] started its analysis by assuming that the per se rule applied and then used *Silver* to determine if the regulation could escape per se treatment.[55] The court developed a test based on *Silver* that has been adopted by many other courts.[56] To qualify for this exception to the per se rule, several prerequisites must be met:

> (1) There must be a legislative mandate for self-regulation or otherwise;
> (2) There must be collective action that is (a) intended to accomplish an end consistent with the policy justifying self-regulation, (b) reasonably related to that goal, and (c) no more extensive than necessary;
> (3) The association must provide procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review;[57]

---

50. *See* Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966), *reh'g denied*, 385 U.S.1032 (1967). *Washington* was decided on Feb. 2, 1966; *Deesen* was decided on Feb. 23, 1966. However, all of the judges hearing the cases were different. *Washington* was before Judges Barnes, Koelsch and Browning. *Deesen* was before Judges Chambers, Hamley and Ely.

51. *Deesen*, 358 F.2d at 170.

52. *See* STP Corp. v. United States Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968).

53. *Id.* at 151. The court stated that "a court should interfere only if it finds that the powers were exercised in an unlawful, arbitrary or malicious fashion and in such a manner as to affect the property rights of the one who complains. . ." *Id.* The court recognized that the USAC had the right to legislate to perpetuate its existence, and provide for competitive equivalency. Moreover, no court had the right to step in and dictate to the sophisticated group of elected officials who sanction sports. *Id.*

54. *See* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

55. *Id.* at 1066. By this route, if it was determined that the regulation could escape per se treatment, then procompetitive justifications would be considered before the regulation could be struck down.

56. *See*, e.g., Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc., 511 F. Supp. 1103, 1116 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1321 (D. Conn. 1977).

57. *Denver Rockets*, 325 F. Supp. at 1064-65. Since there was no provision in the NBA by-laws for even the most rudimentary hearing before the four-year col-

After holding that the *Silver* exception did not apply,[58] the court considered the justifications for the rules[59] and determined that they were invalid. Although the court stated otherwise,[60] it appears to have gone through a rule of reason analysis.[61]

The Northern District of California[62] further analyzed the rationale for the rule of reason. The court suggested that the field of sports league activities was unique in that, in order to achieve evenly matched teams on the field,[63] there must be some restrictions on the rights of the clubs to hire players and on the rights of the players to sign with the teams of their choice. The application of an absolute per se rule to all league restrictions precluded players and clubs from negotiating for rules of mutual interest. Such restrictions were just as well, if not better, evaluated under the rule of reason.[64]

In contrast, the Southern District of New York[65] chose to apply the per se rule to a similar eligibility provision.[66] The court acknowledged that some degree of economic cooperation, which is inherently noncompetitive, might be essential for the survival of competitive professional sports leagues.[67] However, this rationale did not insulate the leagues from the antitrust laws, since less drastic protective measures were available.[68]

The court for the District of Connecticut applied the per se rule to an age eligibility rule.[69] Although the court labeled the practice

---

lege rule was applied to exclude an individual player, the *Silver* exception did not apply. In addition, the rules were overly broad. *Id.* at 1066.

58. *Id.*

59. *Id.* at 1066.

60. *Id.* The court stated that it could determine the case without a lengthy factual inquiry and complex balancing of values, since it did not fall within the narrow *Silver* exception which dictated a rule of reason analysis.

61. The purpose of the per se rule is to avoid this type of in-depth analysis.

62. *See* Kapp v. National Football League, 390 F. Supp. 73 (N.D. Ca. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

63. *Id.* at 81.

64. *Id.* at 82.

65. Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975).

66. *Id.* at 893. Citing *Klor's*, the court struck down the NBA player draft and perpetual reserve system. The court found the two control mechanisms analogous to price-fixing devices, long ago deemed per se violative of the Sherman Act. The measures allowed competing teams to eliminate competition when hiring players and invariably lowered the cost of doing business. *See also* United States v. Sealy, Inc., 388 U.S. 350 (1967). The Robertson court stated that the restrictions could be viewed as devices creating illegal horizontal territorial allocations and product market divisions.

67. *Id.* at 892.

68. *Id.* The court cited to S. REP. No. 92-1151 92d Cong., 2d Sess. (1972) as an example of less restrictive alternatives. Section 4 of that report deals with players' freedom to contract and imposes a $50,000 fine, imprisonment up to one year, or both for violating or conspiring to violate the prohibitions against restricting a player's freedom after a particular contract has expired.

69. *See* Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977).

per se illegal, it then analyzed the *Denver Rockets* exception factors and considered the alleged justifications.[70] The court distinguished the case from rule of reason cases upholding a rule as justified. The court found the age eligibility rule to be arbitrary, since there was no valid purpose or justification for it.[71]

On the other hand, the District of Columbia[72] held that the draft was not a group boycott or, if it was, it was not the type of boycott that traditionally had been held illegal per se and therefore it would be more appropriate to test it under the rule of reason.[73] The court stated that the group boycott designation, which elicits invocation of the per se rule, "should not be applied . . . to concerted refusals that are not designed to drive out competitors, but to achieve some other goal,"[74] since "the need for cooperation among participants necessitates some type of concerted refusal to deal."[75] In addition, because the rule was not "without any redeeming virtue" and the courts have had little experience with this type of restraint, the court decided that a rule of reason analysis should be performed before declaring the provision illegal.[76]

Similarly, the Ninth Circuit[77] held that an exclusivity by-law was not per se illegal since it was not motivated by anticompetitiveness. Any anticompetitive effect was at most *de minimis* and incidental to the primary purpose of promoting safety.[78]

The Eastern District of Pennsylvania[79] has continued to apply the

---

The World Hockey Association (WHA) had required players to be at least 20 years old before they could play professional hockey for any team in the WHA. This effectively made them ineligible for the WHA draft.

70. *Id.* at 1322.

71. *Id.* at 1321. For example, in *Deesen*, it was held legitimate to restrict the number of participants in a golf tournament in order that all the entrants could complete the course in daylight hours. *See Deesen* at 170.

72. *See* Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978).

73. *Id.* at 1178-79. The court stated that the NFL player draft differed from the classic group boycott in two significant respects. First, the NFL clubs which had combined to implement the draft were not competitors in an economic sense. The clubs operate basically as a joint venture in producing football games, and no NFL club could produce this product without agreements with other teams. Secondly, the NFL draft differs because the NFL clubs have not combined to exclude competitors or potential competitors from their level of the market. The draft was designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive equality.

74. *Id.* at 1180.

75. *Id.* at 1180. To this end, the NFL not only determines playing schedules and broadcast terms, but also ensures that the clubs receive equal shares of broadcast and ticket revenues.

76. *Id.* at 1182.

77. *See* Neeld v. National Hockey League, 594 F.2d 1297 (9th Cir. 1979).

78. *Id.* at 1300.

79. *See* Nilon v. Philadelphia Section Professional Golfers' Ass'n., 1979-2 Trade Cas. (CCH) P62,961 (E.D. Pa. 1979).

rule of reason, despite a defendant's intent to restrict the level of competition, because it is "proper" to protect fair competition in sports. The Seventh,[80] Eighth,[81] and First[82] Circuits have also applied the rule of reason after stating that the *Silver* exception applied.

Thus, the trend in federal district and appellate courts is toward a rule of reason analysis, based on the Supreme Court's use of "or other" in *Silver*, and the courts' reasoning that in the sports context, various agreed-upon, seemingly anticompetitive, procedures may be essential. However, as recently as 1984, the per se rule was still applied.[83]

While a number of courts have "refused to employ a rule of reason analysis in a sports context unless first convinced that the sports regulation 'passes' [the] three-part [per se] test articulated in *Denver Rockets*," other courts have used the *Denver* test as a part of the rule of reason analysis, and still others have said that it does not matter which way the test is applied as long as it is applied in some way.[84] Based on the Supreme Court's decision in *Northwest Wholesale*, it appears that too much dependence has been placed on the *Silver* exception. However, as long as a rule of reason analysis is performed, the same party will most likely prevail with or without *Silver*.

IV. SPECIFIC ELIGIBILITY RULES CHALLENGED

Over the years various types of rules have been challenged. A sample of these rules as well as the decisions regarding them follows.[85]

---

80. *See* United States Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781 (7th Cir. 1981).

81. *See* Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc., 665 F.2d 222 (8th Cir. 1981).

82. *See* M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984).

83. *See* Boris v. United States Football League, 1984-1 Trade Cas. (CCH) P66,012 (C.D. Cal. 1984) (court held USFL Four/Five Year Rule as per se illegal group boycott, but action was dismissed pursuant to agreement between parties).

84. *See* M & H Tire Co., 733 F.2d at 980-81. *See also* note 54, *supra*.

85. Due to the different effects of each rule, and the different justifications, it is difficult to generalize about all of them. However, it appears that they can be grouped by the type of restraint, as opposed to the sport involved (except for baseball, which is almost always exempt). Thus the four-year rule will be treated the same, whether the league being challenged is the NFL, NBA or defunct ABA. Similarly, restraints on products used in a sport, i.e., a tennis racket, an engine, a tire, etc., have been treated the same. Lastly, sports that require exclusion for a particular event, i.e., a specific golf or tennis tournament, have been treated differently than a permanent exclusion from a league (4-year college rule and 20-year-old rule), due to the difference in justifications raised. However, it is important to note the date that the rule was challenged, since the thrust of the enforcement of the

A. *Billiards: Endorsement of Sponsor's Equipment Required*

The defendant in *Greenleaf v. Brunswick-Balke-Collender Co.*[86] was a manufacturer of billiards equipment. Defendant created the Billiards Association of America as a promotion vehicle to conduct tournaments.[87] Plaintiff alleged that, to be eligible to play in the tournament, the association required players to use defendant's equipment, as well as grant the association permission to use their names for testimonial purposes related to the defendant's business activities.[88] Plaintiff, a professional billiards player, claimed that he was denied entry because he had played exhibition matches arranged by a wholesaler who did not sell defendant's products.[89] The court stated that defendant could not legally discriminate against or refuse to deal with plaintiff without sufficient cause.[90]

B. *Bowling: Bowling Alley Membership Requirement*

In both *Washington State Bowling Proprietors*[91] and *Santa Clara Valley Bowling Proprietors'*,[92] the courts held that a rule requiring league bowlers to bowl in membership alleys was a group boycott which violated the antitrust laws.

In *Washington*, the defendants conducted, sponsored and sanctioned bowling tournaments whereby the only persons eligible to participate were those who restricted their league bowling and tournament bowling entirely to establishments which were members of three specific associations.[93] These eligibility rules deprived non-member establishments of the patronage of persons who wished to engage in organized bowling, enforced a boycott against non-member establishments, suppressed competition and monopolized the bowling industry, all in violation of the Sherman Act.[94]

In *Santa Clara Valley*, the association's rule required that tournament participants bowl regularly in at least one league in a member-

---

antitrust laws has changed over the years. This is further developed in section V of this paper.

86. Greenleaf v. Brunswick-Balke-Collender Co., 79 F. Supp. 362 (E.D. Pa. 1947).

87. *Id.* at 363.

88. *Id.* at 363-64.

89. *Id.* at 364.

90. *Id.* at 365. And because "the plaintiff should not be prevented from proffering evidence to establish a fact which the jury may infer from the circumstances," namely, that the defendant was "unjustified in barring [plaintiff] from the tournament," the court denied defendant's motion for summary judgment. *Id.* The case is unreported.

91. *Washington*, 356 F.2d at 371.

92. *Santa Clara Valley*, 238 Cal. App. 2d at 239-40, 47 Cal. Rptr. at 579-80.

93. *Washington*, 356 F.2d at 374.

94. *Id.* at 374 (quoting from the appellee's Brief at pp. 3-4).

ship house.[95] The fact that the bowler was not required to bowl all of his league games in a member establishment did not exempt the eligibility rule from condemnation.[96]

C. *Golf: Tournament Entry Eligibility Rules*

In *Deesen v. Professional Golfers' Ass'n of America*[97] a professional golfer claimed that the Professional Golfers' Association's (PGA) rules for entry into PGA sponsored tournaments violated the antitrust laws. In order to compete in PGA golf tournaments, a player had to either be a member of the PGA[98] or an approved tournament player.[99]

The court found reasonable the PGA's requirement that persons who seek approved tournament standing must meet certain standards and obtain committee approval.[100] The court was persuaded that the differentiation between PGA members and nonmembers regarding the automatic right to participate in tournaments did not have the purpose or effect of suppressing competition.[101] The PGA's creation of the category of approved tournament player promoted competition by facilitating participation by proficient younger players who might not be eligible to join for PGA membership.[102] Deesen's recent tournament record provided ample basis for striking him from the approved tournament players, as did his

95. *Santa Clara Valley*, 238 Cal. App. 2d at 229, 47 Cal. Rptr. at 573.

96. *Id.* at 238-39, 47 Cal. Rptr. at 579. Although the result would probably have been the same, it is important to note that in both of these cases, the court applied the per se rule. Both courts did, to some extent, evaluate and then reject the justifications raised by the defendant.

97. 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966). The PGA sponsors or co-sponsors substantially all professional golf tournaments in the United States. *Id.* at 166.

98. *Id.* at 166. To become a PGA member a person must have five years of experience, either in the employ of a golf club as a professional or assistant, or as a tournament player under an agreement with the PGA, playing in a minimum of 25 tournaments per year. The plaintiff refused to work as a golf club professional. *Id.* at 167.

99. *Id.* at 166. To be an approved tournament player requires that the applicant has, in the opinion of committee: 1) the ability to play golf and finish in the money in tournaments in which he competes, 2) the financial responsibility to undertake the golf tours, and 3) moral character and integrity. *Id.* at 167. Plaintiff had been an approved tournament player, but was terminated for poor performance. *Id.* at 168.

100. *Id.* at 170. The PGA determined it was necessary to limit tournament entry because only a maximum of 160 golfers could compete in a tournament during daylight hours. *Id.* at 167.

101. *Id.* at 170-71. The fact that members are entitled to play in the PGA sponsored tournaments without qualifications was not discrimination since membership in the PGA was open to all persons on the same conditions. *Id.* at 168.

102. *Id.* at 171.

performance during test rounds set up for his benefit.[103] The court held that the PGA was entitled to adopt reasonable measures for confining its tournament enrollment to a manageable number.[104]

In *Nilon v. Philadelphia Section Professional Golfers' Ass'n*,[105] a professional golfer claimed that the Professional Golfers' Association's (PGA) regulation, which excluded him from competing in 75% of the PGA's sectional events, violated the Sherman Act.[106] The plaintiff was ineligible because he had participated in greater than 12 National Tournament events.[107] The court upheld the rule as reasonable, despite the PGA's intent to restrict the level of competition, because the restriction was based on a legitimate distinction between the professional golfer and the club professional.[108] The plaintiff could have elected not to compete on the national tour and only in sectional tournaments.[109]

D. *Tennis: Tournament Eligibility*

Heldman v. United States Lawn Tennis Ass'n[110] involved the United States Lawn Tennis Association's (USLTA) promulgation of rules and regulations for approving tennis tournaments.[111] The plaintiffs in the case claimed that the USLTA's rules violated the antitrust laws by threatening to bar professional female tennis players who participated in events which were not sanctioned by the USLTA.[112] The court held that there were sound reasons for the

103. *Id.* at 172. Also, he could still engage in such tournaments if he chose to become a golf teacher at a golf club. *Id.*

104. *Id.*

105. 1979-2 Trade Cas. (CCH) P62,961 at 79,482 (E.D. Pa. 1979).

106. *Id.* at 79,484. The exclusionary regulation provided that "[a]ny PGA Tour Member who has played in more than 12 PGA Tour events in the preceding 12 months is ONLY eligible for Philadelphia Section Championship events . . ." *Id.* at 79,483 (emphasis in original). The PGA sponsored approximately 40 sectional events; only nine were championships in which plaintiff was eligible to play, due to the exclusionary rule. *Id.*

107. *Id.* at 79,483.

108. *Id.* at 79,485. The professional golfer generally competed in national tournaments. The club professional generally taught golf at a club, and only played in local tournaments. Since the caliber of play was higher for professional golfers, the exclusion of professional golfers from local tournaments made the tournaments more evenly matched.

109. *Id.* at 79,486.

110. 354 F. Supp. 1241 (S.D.N.Y. 1973).

111. *Id.* at 1244.

112. *Id.* at 1243. According to the USLTA rules, "a Professional Player is eligible to participate in sanctioned USLTA tournaments if that player has played only in tournaments sanctioned by the USLTA. Should that player participate in a 'non-sanctioned' event, in which prize money is awarded, that player *may* be assigned the status of a contract pro, in which event he or she may participate only in those USLTA tournaments which are designated 'open for all categories' of players." (emphasis in original). *Id.* at 1244.

USLTA's rules which were not anticompetitive.[113] These included the uniformity of playing rules so that players could be ranked, the orderly scheduling of tournaments to accommodate players' needs, and the provision of high caliber tennis competition for public enjoyment.[114] Although broad, the regulation was upheld as reasonable[115] because the evidence was insufficient to prove that the USLTA would not allow these players to participate in open tournaments,[116] and because the USLTA's prestige and operation would have been unduly damaged if it was enjoined from regulating players in this manner.[117]

E. *Horse Racing: Eligibility Rule*

The United States Trotting Association's (USTA) rules were upheld by a district court in *United States v. United States Trotting Ass'n*[118] The purpose of the rules was to regulate and standardize harness racing and promote competition in the sport.[119] The court found that any restraint was incidental to the USTA's reasonable activities.[120] These rules were questioned again by the Seventh Circuit in *United States Trotting Ass'n v. Chicago Downs Ass'n,*[121] but no final decision was reached on the merits because the court found that the district court had incorrectly applied the per se rule.[122]

F. *Automobile Racing: Engine Restrictions*

In *STP Corp. v. United States Auto Club, Inc.,*[123] the plaintiff claimed, *inter alia*, that the United States Auto Club (USAC) had violated the Sherman Act by (1) adopting unreasonable rules through the use of its monopoly power, and (2) by discriminating

113. *Id.* at 1244.
114. *Id.*
115. *Id.* at 1252.
116. *Id.* at 1250. The opinion was written upon plaintiff's motion for summary judgment.
117. *Id.* at 1252-53. However, the court stated that it would take note of future decisions of the USLTA, scrutinizing the rules and procedures, should any players be ruled ineligible for USLTA events. Although reasonable rules are vital to the orderly preservation of tournament tennis, rules defeating competition cross the line of legality. *Id.* at 1252.
118. 1960 Trade Cas. (CCH) P69,761, 76,954 (S.D. Ohio 1960). The United States Trotting Association should not be confused with the United States Tennis Association, both abbreviated USTA.
119. *Id.* at 76,957.
120. *Id.*
121. 665 F.2d 781 (7th Cir. 1981). The USTA eligibility certificate application states under Rule 5, section 1, that members are prohibited from racing horses at meets not affiliated with the USTA. Members who violate this prohibition are subject to revocation of their eligibility. *Id.* at 785.
122. *Id.* at 790. The case was remanded and no subsequent opinion is reported.
123. 286 F. Supp. 146 (S.D. Ind. 1968).

against plaintiff when applying its rules.[124] The USAC imposed safety regulations not only with respect to the running of racing events, but also with respect to cars, engines, drivers and equipment.[125] For instance, the USAC Board adopted a rule restricting the size of certain component parts for turbine engines, in order to decrease the "power potential" of the engine, and thus ensure competitive equivalency between turbine powered cars and piston powered cars.[126] The district court, in upholding the Board's rule, found that the USAC acted reasonably as it aimed merely to perpetuate racing as a competitive sport.[127]

G. *Car Racing: Single-Tire Rule*

In *M & H Tire Co. v. Hoosier Racing Tire Corp.*,[128] the court upheld the "single tire rule," under which only one manufacturer's model of tire could be used at a particular track during the racing season.[129] The plaintiff, a manufacturer of racing tires, had been excluded from selling tires at four race tracks, after the tracks adopted the single tire rule.

The court found that the single tire rule was not adopted for any anticompetitive purpose.[130] The "exclusion" was "a by-product of a sports-oriented decision to have all drivers at th[e] tracks race on a single compound[131] in order to insure greater equality between race participants," and, as well, reduce the expense of participating in the sport.[132]

The restraint was questionable not because a single type of tire had been selected, but because a single *brand* had been se-

---

124. *Id.* at 148.

125. *Id.* at 163. In its membership rules, the USAC reserved the right to revise its rules, and to establish standards of eligibility for participation in competitions and "to do any and all things which, in its judgment, are consistent with the enhancement of automotive competitions." *Id.* at 156.

126. *Id.* at 157, 167. Apparently, when a turbine powered race car with a 21.9 square inch annulus was raced with other piston engine cars, "[i]t demonstrated such superior performance that the piston engine cars could not compete with it and 'could not race with it.' " *Id.* at 158. The court acknowledged that the USAC, as sanctioning organization, had the right to legislate, and a court should not interfere unless the powers have been exercised in an unlawful, arbitrary or malicious fashion, none of which the court found. *Id.* at 151.

127. *Id.* "The quickest way to bring about the demise of racing would be to permit . . . one car with superior qualities . . . to eliminate competition." *Id.* at 151.

128. 733 F.2d at 973 (1st Cir. 1984).

129. *Id.* at 987. The tracks jointly engaged in a competitive bidding and testing process, whereby one manufacturer was chosen to supply tires for all four tracks, for the season. *Id.*

130. *Id.* at 980.

131. *Id.* Evidence indicated that "specifying a single brand was the only feasible method to insure that a single rubber compound was being raced on." Id.

132. *Id.* This cost savings goal was achieved by specifying a low cost 13-inch "budget" tire. *Id.* at 981.

lected.[133] However, the court stated that this was a reasonable control, since there seemed to be no conceivable alternative scheme to achieve the same goal of promoting participation parity which would have a lesser effect on the market.[134] The court found that the agreement only foreclosed manufacturers from a minor portion of the market, and only for one year at a time.[135] In addition, the regulation enabled drivers to obtain lower prices in a legitimate fashion.[136]

H. *Tennis: Double-Strung Racket Rule*

In *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*,[137] the court upheld the United States Tennis Association's (USTA) rule prohibiting the use of a certain double-strung tennis racket in sanctioned tournaments.[138] The defendant manufactured a prohibited racket. The court held that the USTA legitimately functioned as a regulating body to ensure that competitive tennis was conducted in an orderly fashion, and to preserve the essential character of the game as played in organized competition.[139] Furthermore, the court found the USTA's racket regulation rationally related to these goals, noting that it did not extend beyond what was necessary, and provided adequate procedural safeguards to protect against arbitrary

133. *Id.* at 984.

134. *Id.* at 984-85. The tracks and drivers are empowered to establish the parameters within which the racing competition will take place, including the permissible range of gear ratios, allowable engine sizes, etc. *Id.* at 985. As the court noted, standardizing the equipment would elevate the value of good driving skills over that of equipment — a legitimate goal. *Id.*

135. *Id.* at 982.

136. *Id.* at 989.

137. 665 F.2d 222 (8th Cir. 1981).

138. Rule 4 stated:

> The Racket
> The racket shall consist of a frame and a stringing.
> The Frame
> The frame may be of any material, weight, size or shape.
> The Stringing
> The strings must be alternately interlaced or bonded where they cross and each string must be connected to the frame.
> If there are attachments, they must be used only to prevent wear and tear and must not alter the flight of the ball.
> The density in the centre must be at least equal to the average density of the stringing.
> Note to the Rule: The spirit of this rule is to prevent undue spin on the ball that would result in a change in the character of the game.
> The stringing must be made so that the moves between the strings will not exceed what is possible, for instance with 18 mains and 18 crosses uniformly spaced interlaced in a stringing area of 75 square inches.

Gunter Harz Sports v. United States Tennis Ass'n, 511 F. Supp 1103, 1111 (D. Neb.), *aff'd*, 665 F.2d 222 (8th Cir. 1981).

139. *Gunter Harz*, 665 F.2d at 223.

enforcement.[140] Testing had shown that the new double-strung racket significantly altered the spin on the ball, which changed the way the game was played.[141] The rule provided that a party could obtain approval of his/her racket if he could show that the use of the instrument did not "significantly change the character of the game."[142]

I. *Basketball, Football and Hockey Eligibility: The Draft, the Reserve Clause, the Four-Year College Rule, the Twenty-Year Rule*

In the first of these cases, *Denver Rockets v. All-Pro Management, Inc.*,[143] plaintiff Haywood challenged the eligibility rules for the National Basketball Association (NBA) draft, claiming they effectuated a group boycott.[144] After playing college basketball for two years, and professional basketball in the American Basketball Association (ABA) for one year,[145] plaintiff signed a contract to play basketball with an NBA team.[146] However, the Commissioner of the NBA disapproved the contract on the ground that Haywood was not eligible under the four-year college rule.[147] Section 2.05,[148] in conjunction with Section 6.03,[149] provided that no person was eligi-

---

140. *Id.*

141. *Gunter Harz*, 511 F. Supp. at 1118.

142. *Gunter Harz*, 665 F.2d at 223.

143. 325 F. Supp. 1049 (C.D. Ca. 1971).

144. *Id.* at 1060-61. The draft is the NBA player selection system.

145. He entered a contract with the Denver Rockets, a professional basketball team in the American Basketball Association (ABA), pursuant to a "hardship" exemption from the ABA's four-year college rule. *Id.*

146. *Id.* at 1060. The team was the Seattle Supersonics.

147. *Id.*

148. At the time, Section 2.05 of the by-laws of the NBA provided: "High School Graduate, etc. A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights whatsoever; nor shall a Member violating the provisions of this paragraph be permitted to acquire the rights to the services of such person at any time thereafter." *Id.* at 1059.

149. Section 6.03 further defined eligibility for the NBA, and: "*Persons Eligible for Draft.* The following classes of persons shall be eligible for the annual draft:

(a) Students in four year colleges whose classes are to be graduated during the June following the holding of the draft;

(b) Students in four year colleges whose original classes have already been graduated, and who do not choose to exercise remaining collegiate basketball eligibility;

ble as a player, under any circumstances, until four years after his original high school class had graduated.[150] Haywood was not eligible, since only three years had transpired since his high school graduation.[151]

Since the NBA and its teams refused to deal with those players ineligible under the NBA's four-year college rule, the application of the four-year college rule constituted a primary concerted refusal to deal.[152]

The court considered and rejected the justifications suggested by the NBA for the four-year college rule.[153] The court concluded that the member teams had conspired not to deal with persons whose high school classes were not four years beyond graduation; that the NBA applied Sections 2.05 and 6.03 of its by-laws so as to render Haywood ineligible to play in the NBA; and that the NBA had not provided procedural safeguards whereby an individual might contest his exclusion.[154] Thus, the court held that the NBA's four-year college rule violated the Sherman Act.[155]

(c) Students in four year colleges whose original classes have already been graduated if such students have no remaining collegiate basketball eligibility;

(d) Persons who become eligible pursuant to the provisions of Section 2.05 of these By-laws." *Id.*

150. *Id.* Haywood had graduated from high school in 1967, and would not be eligible to play in the NBA until the 1971-1972 season. *Id.* at 1060.

151. *Id.* at 1060.

152. *Id.* at 1061. The court delineated three harms resulting from such a boycott.

First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government.

Id.

The court further explained that "the rules . . . are absolute and prohibit the signing of not only college basketball players but also those who do not desire to attend college, and even those who lack the mental and financial ability to do so. As such, they are overly broad and thus improper under *Silver*." *Id.* at 1066.

153. *Id.* at 1066. First, the NBA suggested that the rule was financially necessary. The court stated that, following Klor's, financial necessity did not provide a basis for exemption from the antitrust laws. Second, the NBA claimed the regulation was "necessary to guarantee that each prospective professional basketball player [would] be given the opportunity to complete four years of college prior to beginning his professional basketball career." The court stated that "[h]owever commendable this desire may be," it was not in a position to override the antitrust laws. Third, Haywood admitted that "collegiate athletics provide[d] a more efficient and less expensive way of training young professional basketball players than the 'farm team' system, which is the primary alternative. However, even if this were true, it would not . . . provide a basis for antitrust exemption." *Id.*

154. *Id.*

155. *Id.* at 1067.

Similarly, in *Boris v. United States Football League*,[156] the court held the United States Football League's (USFL) eligibility rule violated the Sherman Act. This rule also left potential players ineligible to play professionally until all of their college football eligibility had expired.[157]

In *Kapp v. National Football League*,[158] the district court held that several National Football League (NFL) rules, including the Rozelle rule,[159] the draft rule,[160] the tampering rule,[161] and the Standard Player Contract[162] were all unreasonable restraints of trade.[163] However, on appeal the entire antitrust issue was rendered moot and thus not reviewed.[164]

Not unexpectedly, the National Basketball Association's draft and reserve clauses were the next to be challenged. In *Robertson v. Na-*

156. 1984-1 Trade Cas. (CCH) P 66,012, P 68,463 (C.D. Cal. 1984).

157. The Eligibility Rule of the United States Football League (USFL), as it existed in 1983, and which provided as follows: "No person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired, or (2) at least [five] years shall have elapsed since the player first entered or attended a recognized junior college, college or university or (3) such player received a diploma from a recognized college or university." *Id.* at 68,461-62.

158. 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

159. *Kapp*, 586 F.2d at 646. Even after a player becomes a free agent, another club could not employ him until it made satisfactory arrangements with the former employer club.

160. The draft rule in Article 14 of the NFL Constitution required that "at an annual meeting the member clubs would select prospective players, principally from the ranks of the outstanding college graduates." The rule had the effect of precluding other teams from entering into negotiations with a particular player, even if the selecting club and the player could not agree on a contract. *Id.* at 646.

161. "To prevent interference with the selecting club's right to its draft choices and active players, the tampering rule of Article 9.2 provides that a club may not negotiate with, or make an offer to, another team's player." *Id.* at 646.

162. "Before a player can participate in the NFL, he must sign a Standard Player Contract. This was part of the 1968 and 1970 collective bargaining agreements, and appeared in Article 15 of the 1971 NFL Constitution. The Contract provides that the player becomes bound by the Constitution and By-Laws, the Rules of the League, of the Club, and the decisions of the Commissioner of the League." No collective bargaining agreement was in effect when plaintiff's cause of action arose, so that the labor exemption did not apply. This could have placed the rules outside the coverage of the antitrust laws. *Id.* at 646.

163. The court concluded that the option rule could not be found unreasonable on partial summary judgment. The option rule gave the employing club a unilateral right to renew a player's expired contract for an additional year at a reduced rate of compensation, as low as 90% of his previous year's compensation. This rule was intended to induce a player to renew his contract, and not play out his option so as to be free to negotiate with other clubs. *Id.* at 646.

164. The NFL's cross-appeal was rendered moot by plaintiff's failure to prove he was injured. *Id.* at 649-50.

tional Basketball Ass'n,[165] the plaintiff charged that the NBA rules prevented any player from playing professional basketball for any NBA club other than the team assigned exclusive rights to his services for his lifetime.[166] The court opined, albeit in dictum,[167] that practically all of the intra- and inter-league restraints were per se violations of the Sherman Act.[168]

The perpetual reserve clause in the National Hockey League (NHL) was also held in violation of the Sherman Act. In *Boston Professional Hockey Ass'n v. Cheevers*,[169] the court shot down the reserve clause which would have prevented a player from switching to the World Hockey League. The plaintiff team had "not shown a probability that these Standard Player's Contracts [would] be found to be legally valid and enforceable in the face of the serious threat to their legality posed by the provisions of the Sherman Act."[170]

Similarly, in *Nassau Sports v. Hampson*,[171] the court ruled that the reserve clause "seems, plausibly, one aspect of a contractual scheme constituting a violation of . . . the Sherman Antitrust Act."[172] In a third case, *Philadelphia World Hockey Club v. Philadelphia Hockey Club*,[173] the court concluded that, as a matter of law, both a perpetual reserve system and one limited to three years' duration violated the Sherman Act.

The World Hockey Association's (WHA) regulation prohibiting persons under the age of twenty from playing professional hockey was challenged in *Linseman v. World Hockey Ass'n*.[174] Plaintiff, a nineteen-year-old amateur hockey player, had signed a contract to play professional hockey for a WHA team, but the WHA claimed that the contract was void under the "twenty year old rule."[175]

---

165. 389 F. Supp. 867 (S.D.N.Y. 1975).

166. *Id.* at 874-75. "Whereas the reserve clause prevents teams from competing for veteran players, the draft prevents bidding for rookies." The net effect is to force a player to deal only with the NBA club which "owns" the rights to him, or not play basketball in the NBA. *Id.* at 892. When a player signs the Uniform Contract, he agrees to play ball only "for his Club or its assignees exclusively until 'sold' or 'traded'," the club is given the right to assign the contract, and the player agrees to report to his new club within a specified period of time. *Id.* at 874. In addition, the reserve clause binds the player to negotiate and deal only with the club which contracted with the player. *Id.* at 874. After the contract's termination, the club may unilaterally renew the player's obligation to play for that team for an additional year. *Id.* at 874.

167. The court had not yet heard a full trial on the merits. The opinion was written denying defendant's motion for summary judgment.

168. 389 F. Supp. at 890-91.

169. 348 F. Supp. 261 (D. Mass. 1972).

170. *Id.* at 268.

171. 355 F. Supp. 733 (D. Minn. 1972).

172. *Id.* at 735.

173. 351 F. Supp. 462 (E.D. Pa. 1972).

174. *Linseman*, 439 F. Supp. 1315 (D.Conn. 1977).

175. *Id.* at 1318. Operating Regulation 17.2(a) reads: "(a) Each Member Club

The court stated that enforcement of the rule constituted a group boycott, since the rule had no valid purpose.[176] The court noted that many teenagers have played in the professional ranks with distinction, and concluded that the rule was arbitrary.[177] The court rejected the WHA's justifications.[178] In addition, the court commented that there were no procedural safeguards[179] inherent in the rule. The court concluded that the WHA's regulation appeared to violate the antitrust laws.[180]

The National Football League draft was again challenged in *Smith v. Pro Football, Inc.*[181] Plaintiff claimed that the 1968 draft was an unreasonable restraint of trade, and that but for the draft, he would have negotiated a far more lucrative contract.[182] The court held that the draft was anticompetitive both in its purpose and in its effect, because it restricted competition among the NFL clubs for services of graduating college players.[183] It forced players to deal with only one team, robbing them of any real bargaining power, and

---

shall make its selections from among the players who attain their twentieth (20th) birthdays between January 1st, next preceding the conduct of the draft, and December 21st, next following the conduct of the draft both dates included." The team was the Birmingham Bulls. *Id.* at 1318 n.3.

176. *Id.* at 1321. The individual teams could and should be left to determine whom they desire, under the free market system. *Id.*

177. *Id.* at 1323.

178. First, the WHA claimed that it was forced to adopt the rule on the threat that foreign teams would not play against its teams otherwise. The court held that this did not justify an antitrust violation. *Id.* at 1321. The Supreme Court has held that "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." United States v. Paramount Pictures, 334 U.S. 131 (1948)(*cited in Linseman* at 1322). Second, the WHA's suggested the rule was necessary to foster the Canadian junior hockey league, from which the WHA and NHL drew much of their talent. This was invalid too, since the antitrust laws did not admit exceptions for economic necessity. "Exclusion of traders from the market by means of combination . . . is not to be saved by reference to the need to preserve the collaborators' profit margins." United States v. General Motors Corp., 384 U.S. 127, 146 (1966)(*cited in Linseman* at 1322). But if the WHA needed a training ground for its prospective players, it should bear the cost and establish its own farm system. 439 F. Supp. at 1322.

179. 439 F.Supp. at 1322. The WHA By-Laws provided a procedure whereby a player may submit any contract objection to the Executive Committee, but since the by-laws had no exception provision (like the ABA hardship exception), the board was powerless to alter the rule. *Id.*

180. *Id.* at 1325. The preliminary injunction for the plaintiff was granted.

181. 593 F.2d 1173 (D.C. Cir. 1978).

182. *Id.* at 1174. Smith had only signed a one year contract, before he was injured; he claimed that in a free market he could have negotiated a three-year contract with an injury protection clause, guaranteeing him payment for the full contract term. *Id.* at 1177.

183. *Id.* at 1185. Under the draft, the right to negotiate with any given player is exclusively held by one team at any given time. If the college player cannot reach a satisfactory agreement with that team, he cannot play in the NFL. *Id.* at 1176.

lowering salary levels of the best college players.[184] The court rejected the defendant's justifications.[185] The NFL's argument was essentially that competition in the market would not serve the best interests of the public, the clubs, or the players themselves.[186] The court concluded that the present restriction was a total ban on competition which could not be justified, since there were significantly less anticompetitive alternatives.[187]

J. *Hockey: Two-Eye Rule*

In *Neeld v. National Hockey League*,[188] the court upheld a National Hockey League (NHL) by-law[189] which prohibited the plaintiff, a one-eyed hockey player, from participating.[190] The court was convinced that the by-law was not motivated by anticompetitiveness; rather, the primary purpose was to promote safety, both to the plaintiff and his fellow players.[191] The court noted that ice hockey was a very rough, physical contact sport, and that there was bound to be danger to players who were on Neeld's blind side.[192] The court also acknowledged potential personal injury suits as a legitimate concern.

V. FUTURE IMPLICATIONS

The Chicago School philosophy is that the antitrust laws concern only allocative and productive efficiency.[193] Under its analysis, a court balances the output-restricting effects of the league's regula-

184. *Id.* at 1185.

185. The justifications asserted for the draft were that it had the legitimate business purposes of promoting "competitive balance" and playing field equality among the teams, producing better entertainment for the public, producing higher salaries for the players, and increasing financial security for the clubs. *Id.* at 1186. But the draft was not "procompetitive" in an economic sense; it did not encourage others to enter the market or offer the product at a lower cost. Thus, the procompetitive effects were nil regarding economic antitrust considerations. *Id.*

186. *Id.* at 1186. This is precisely the type of argument that the Supreme Court rejected in National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978), stating that it is "nothing less than a frontal assault on the basic policy of the Sherman Act."

187. *Id.* at 1187. Interestingly, the court did not foreclose the possibility that some type of player selection system might be defended as regulating and promoting competition in the market for players' services, given the joint-venture status of the NFL clubs. *Id.*

188. 594 F.2d 1298 (9th Cir. 1979).

189. The NHL's by-law 12.6 provided: "A player with only one eye, or one of whose eyes has a vision of only three-sixtieths or under, shall not be eligible to play for a Member Club."

190. Neeld, 594 F.2d at 1298.

191. *Id.* at 1300.

192. *Id.*

193. Heidt, *Don't Talk Fairness: The Chicago School's Approach Toward Disciplining Professional Athletes*, 61 IND. L.J. 53 (1985) [Hereinafter Heidt]. Although

tion (the harm to allocative efficiency) against the efficiency enhancing effects (the gain to production efficiency). The Chicago School tends to see little harm to allocative efficiency and substantial gain to productive efficiency, regardless of whether a restraint would be characterized as a horizontal or vertical boycott.[194]

The association of teams and players produces a product, the sporting event, which competes with other forms of entertainment. Thus, the formation of the league increases competition in the entertainment industry. Forming a league also enhances efficiency, since the product, the particular professional sports event, probably would not exist absent such combination. Although this association also increases the league's ability to restrict output, doing so would usually be seen as detrimental to its interest.[195] In addition, this ability might be viewed as ancillary, since it is incidental to the main purpose of the integration. The Chicago School does not imply harm to efficiency merely from the league's power, nor from the arbitrariness, unreasonableness or unfairness of its actions.[196]

Unless an exclusion affects a substantial number of potential players, it will have a minimal effect on output and price, the key criteria used by the Chicago School.[197] The league hurts itself if it excludes highly demanded players, since it reduces the demand for its product. Thus, if it excludes a player, the league will probably have some efficiency-enhancing reason for doing so, which more than offsets the welfare loss from the slight reduction in output.[198] More importantly, the harm to output must be gauged with reference to the market in which the league's product is consumed, not with reference to the players themselves.[199]

Ironically, since a sports league's action would be efficiency-enhancing whenever it lowers the cost or increases the demand for the products of the league or of its members, this implies that the league could exclude any player whenever it thought the exclusion would help to increase the marketability of the product.[200]

The player will only be able to prevail when the league has no

---

this article discusses disciplinary rules, the principles are equally applicable to eligibility rules.

194. *Id.* at 55.

195. This would be true unless it had no competition and could operate as a monopoly.

196. Heidt, *supra* note 193, at 56.

197. This sharply contrasts the analysis and reasoning in Klor's, where the Court stated the elimination of even one competitor was enough to prove a violation of the Sherman Act, even without any effect on the market. 359 U.S. at 213.

198. Heidt at 56.

199. *Id.* at 57.

200. *Id.* at 58. Thus, if a sport was dominated by one player or team, the league could exclude this player or team, on the ground that better competition would increase consumer demand.

plausible efficiency justification. For example, a rule that required bowlers to bowl all their games in membership alleys to be eligible to participate in a tournament might still be held violative, since it would reduce output with no conceivable efficiency gain.[201] Similarly, player challenges to the four-year college rule applied in basketball and football, and the 20-year old rule applied in hockey, might still be successful if the leagues are not creative enough to concoct an efficiency-enhancing justification, i.e., how the rule lowered cost, increased demand, etc.

However, a court faced with a league rule which is clearly arbitrary and unfair may feel obligated to help the player(s). Thus, the Chicago School approach may lead to many cases, which previously would have been decided on antitrust grounds, now being decided under tort, property, or contract law, where "fairness" is an appropriate objective.[202]

VI. CONCLUSION

A player challenging a professional sports league or association regulation will likely have no problem convincing a court that an antitrust issue exists, since both concerted conduct and an effect on interstate commerce are easily proven. The court should apply the rule of reason, since the "case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[203]

However, with the recent impact of the Chicago School approach, the concerns that the courts have addressed in the past may be irrelevant.[204] These concerns, which included whether the league's action was "arbitrary", "unreasonable", or "unnecessary" in light of alternative actions available, usually led to a victory for the plaintiff. Under the Chicago School approach, the player is very likely to lose.[205]

Cathy E. Shore

201. The output, the number of games bowled, is not necessarily decreased because the games are bowled in member versus non-member houses. However, if a bowler would normally bowl in a non-member house since it is convenient, and does not because of the eligibility rule, output is reduced.

202. Heidt at 64.

203. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101 (1984).

204. Heidt at 54.

205. *Id.* at 55.