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Marc P. Schwartz*

J.D. candidate, Fordham University School of Law, 2002; B.A., cum laude, University of Pennsylvania, 1998

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Start-Up Sports Leagues: Why These Leagues Are Entitled to Use the Ruinous Competition Defense to Justify Anticompetitive Restraints

Marc P. Schwartz*

INTRODUCTION

Antitrust law does not yield a consistent principle about the proper characterization of sports leagues.¹ A league's teams are considered to be a joint venture of independent teams for most purposes,² and in rare instances, may be characterized as a single entity³ for other purposes.⁴ This characterization of a league as a single entity has traditionally been extremely important because the Sherman Act contains an important distinction between concerted and independent action.⁵ Section 1 of the Sherman Act does not apply to true single

* J.D. candidate, Fordham University School of Law, 2002; B.A., *cum laude*, University of Pennsylvania, 1998. I would like to thank Professor Mark Patterson for his invaluable guidance and advice, and my family and friends for their patience and support.

¹ Robert E. Freitas, *Overview: Looking Ahead at Sports and the Antitrust Law, ANTITRUST* (2000). There has been a great deal of litigation about whether sports leagues should be considered single entities by the courts. See *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593 (7th Cir. 1996) (holding that some aspects of a league could be characterized as a single entity, while others may not).

² See *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 874 F. Supp. 844 (N.D. Ill. 1995).

³ In the sports context, a single entity is a single economic unit that is centrally controlled and whose actors perform as one. The teams within a single-entity league are not "owned" by any one person or entity. See Heike K. Sullivan, Comment, *Fraser v. Major League Soccer: The MLS's Single-Entity Structure Is a "Sham"*, 73 TEMP. L. REV. 865, n.7 (2000). All of the investors in the League contribute to the League as a whole. *Id.*

⁴ For example, the NBA is considered a single entity solely for the purpose of negotiating its national television contract. *Chi. Prof'l*, 95 F.3d at 600.

⁵ See Freitas, *supra* note 1, at 16 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984))).

entities, but does apply to any “combination” in restraint of trade.⁶ A league is thus immune from antitrust scrutiny under section 1 of the Sherman Act if it is characterized as a single entity.

New sports leagues have recently emerged in men’s and women’s soccer, women’s basketball, and men’s football.⁷ These leagues were specifically formed as single entities to take advantage of the supposed economic benefits,⁸ and perhaps more importantly, to avoid antitrust scrutiny.⁹ Regardless of whether the new leagues are true single entities, however, I will argue in this Note that antitrust scrutiny of these new leagues should be relaxed while they are in their beginning stages of development.

This relaxed antitrust scrutiny is necessary because start-up professional sports leagues are more risky than other industries and have staggering start-up costs. This Note argues that new leagues, in their initial development (regardless of whether they are a true single entity), should be permitted to behave in ways that would otherwise be considered anticompetitive, in order to create some level of comfort for league owners and investors that heavy start-up costs can be recouped. Without the ability to impose regulations that reduce competition among the member teams, it is likely that the new leagues will fail. They would likely fail because vigorous

⁶ Section 1 of the Sherman Act states in relevant part: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is hereby declared illegal.” 15 U.S.C. § 1 (2001).

⁷ The men’s soccer league, Major League Soccer [hereinafter MLS], played its inaugural season in 1996. The women’s professional soccer league, the Women’s United Soccer Association [hereinafter WUSA], played its inaugural season in 2001. Two women’s basketball leagues, the Women’s National Basketball Association [hereinafter WNBA] and the American Basketball League, played their inaugural seasons in 1997. The new men’s football league, the XFL, played its first and only season in 2001.

⁸ Preventing skyrocketing salaries, maintaining competitive balance, and enhancing advertising revenue are all thought to be easier under this league structure.

⁹ See Rob Atherton, Note, *Fraser v. Major League Soccer (MLS): The Future of the Single-Entity League and the International Transfer System*, 66 U.M.K.C. L. REV. 887, 889-90 (1998) (describing how new sports leagues have been formed as single entities). The single-entity structure adopted by MLS, however, has been termed a “sham” and charged with violating both section 1 and section 2 of the Sherman Act. *Fraser v. Major League Soccer, L.L.C.*, 7 F. Supp. 2d 73 (D. Mass. 1998). The court in *Fraser* ruled in favor of MLS, holding that the league is a single entity and thus ruling out any possibility of a section 1 violation. *Id.* This decision is currently on appeal.

competition among a league's teams would drive costs to prohibitively high levels, and consequently, no league would be able to exist.

The history of sports leagues in America confirms that consumers benefit from the emergence of new, financially sound leagues.¹⁰ There are significant benefits that a city can realize from having a successful professional franchise. These benefits include an increase in jobs, an increase in tax revenues for the city, urban redevelopment surrounding the arena or stadium, and an increase in civic pride.¹¹ These benefits, however, are not likely to accrue to the new leagues that have started in the past decade. This is because the new leagues are so concerned about the possibility of failure that they are unlikely to make risky, large capital investments that could increase the likelihood of long-term success.

The Supreme Court typically rejects the argument that "ruinous competition"¹² among competitors warrants agreements among those competitors to restrict competition.¹³ Courts, however, have embraced a modified form of the ruinous competition defense in some cases involving the National Collegiate Athletic Association (hereinafter "NCAA").¹⁴ Over the past two decades, courts have permitted the NCAA to justify restrictions that would traditionally be deemed anticompetitive by allowing the NCAA to argue that particular restraints are necessary to preserve amateurism and maintain competitive balance among its member schools.¹⁵ The

¹⁰ See Christian M. McBurney, Note, *The Legality of Sports Leagues' Restrictive Admissions Practices*, 60 N.Y.U. L. REV. 925, 941 (1985).

¹¹ See *infra* notes 108-13 and accompanying text.

¹² The term "ruinous competition" refers to industry competitors competing so vigorously that they ultimately drive each other out of business. See Herbert Hovenkamp, Essay, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105, 123 (1989).

¹³ See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689-90 (1978); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-24 (1940).

¹⁴ The NCAA is a private, nonprofit association consisting of approximately 1,000 academically accredited universities in the United States. Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 30 (1996). The NCAA is divided into three divisions based upon the size and competitive level of the athletic programs. *Id.*

¹⁵ See, e.g., *Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n*, 64 F. Supp. 2d 1097

NCAA argues that without rules that preserve amateurism and maintain competitive balance, member schools would drive each other out of business. The NCAA reasons that the high costs associated with attracting labor inputs (the student-athletes) in a free market will reduce parity because so few schools would be able to pay marquee student-athletes their market value. Thus, these high costs would significantly diminish consumer demand for NCAA sports, consequently eliminating the NCAA as we know it.

Courts continue to accept the NCAA's arguments that its anticompetitive restraints are necessary to preserve amateurism and competitive balance among member institutions despite the rampant commercialization and professionalization of "big-time" college athletics. In light of holdings with regard to cases involving the NCAA, it is appropriate that courts assess the evolving characteristics of professional sports leagues, particularly start-up leagues, in deciding the appropriate applicability of the antitrust laws.¹⁶

This Note will argue that courts should provide treatment to start-up sports leagues that is similar to their treatment of the NCAA. Part I will explain how the NCAA has justified its restrictions by arguing that they are needed to preserve amateurism and competitive balance among member schools. Part I will also prove that courts implicitly allow use of the ruinous competition argument by accepting the NCAA's arguments. Part II will discuss courts' treatment of the ruinous competition argument in a non-sports context. Part III will argue that similar to how courts have treated some of the restraints of the NCAA, courts should permit a start-up sports league's restraints to exist because of the unique, risky nature of sports and the procompetitive benefits that sports leagues generate.

(D. Kan. 1999); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988); *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977).

¹⁶ Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 760 (1987).

I. THE NCAA'S ARGUMENTS TO JUSTIFY THEIR RESTRICTIONS

In challenges to its restrictions, the NCAA usually argues that its restraints are justified for two reasons. The first justification is that its restrictions are necessary to preserve amateurism. The second justification is that its restrictions are necessary to maintain competitive balance among member schools. Embedded in these two arguments is the underlying defense that the restrictions are necessary to preserve the current product of intercollegiate sports by enabling member schools to refrain from competing with each other off the field for labor inputs (student-athletes). Indeed, in some cases the NCAA has expressly stated that without its restrictions, the product of college sports would fail.¹⁷ The NCAA has thus used a modified version of the ruinous competition defense to justify its conduct.

Ruinous competition typically refers to a situation where in the absence of an agreement, firms in a particular industry drive themselves out of business because of vigorous competition.¹⁸ This competition leads either to the end of the industry or the survival of one competitor that is then able to demand monopoly prices.¹⁹ This typical ruinous competition defense focuses on what will happen to the supply of firms in a particular industry when the firms compete with each other.

In cases challenging its restrictions, the NCAA has used the ruinous competition defense by suggesting that in the absence of its rules, the product of intercollegiate sports would be destroyed because of fierce competition among member schools.²⁰ In these NCAA cases, however, the NCAA seems to use a modified form of the traditional ruinous competition defense because it addresses both the supply and demand side of its industry.

¹⁷ *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998) ("The NCAA argues that reducing costs can be considered a procompetitive justification because doing so is necessary to maintain the existence of competitive intercollegiate sports.").

¹⁸ See Hovenkamp, *supra* note 12, at 127.

¹⁹ *Id.*

²⁰ See *Law*, 134 F.3d at 1023; *Hennessey*, 564 F.2d at 1153.

The NCAA's ruinous competition defense is based on the premise that any reduction in the supply of teams could lead to the destruction of its organization. In the absence of its rules the NCAA seems to fear that: a) the costs of maintaining a competitive athletic program would be so high that many schools would abandon their programs, thus destroying the NCAA as we know it because of a huge reduction in the supply of schools fielding teams; and b) competitive balance, or parity, among member schools would disappear, thus reducing consumers' demand to see NCAA sports because of a lack of close contests, and thus also leading to the destruction of the NCAA as we know it.

Section A of this Part defines and explains the importance of amateurism to the NCAA, and explains how the notion of amateurism has been used by the NCAA to justify restrictions that reduce competition among member schools. Section B of this Part explains how the NCAA's argument that its rules are necessary to maintain competitive balance is tantamount to arguing that the rules are necessary to prevent ruinous competition among member schools. Section C analyzes the courts' treatment of such arguments.

A. The Significance and Meaning of Amateurism to the NCAA

The NCAA was founded upon the ideal of amateurism.²¹ To maintain amateurism in intercollegiate sports, the NCAA has created an extensive set of rules that identifies permissible conduct by student-athletes enabling them to retain their eligibility.²² Student-athletes are prohibited from participating in intercollegiate sports if they sign a contract with an agent, declare themselves eligible for a

²¹ See *infra* notes 22-28 and accompanying text.

²² The NCAA Constitution is a manual that defines, inter alia, the purpose of the NCAA and numerous eligibility requirements that its member institutions must follow. *NCAA Constitution*, available at <http://www.ncaa.org> (last visited Oct. 1, 2001) [hereinafter *Const.*]. One of the purposes of the NCAA is, "[t]o encourage its members to adopt eligibility rules to comply with . . . standards of scholarship, sportsmanship and amateurism." *Id.* at art. 1.2(c).

professional draft in the sport in which they participate, or receive any type of payment based upon their athletic skill.²³

Amateurism has many meanings to the NCAA. It would be too narrow a definition to say that amateurism simply means that student-athletes should play for the love of the game,²⁴ or that amateurism is strictly about prohibiting student-athletes from receiving any form of payment based upon their skill in a particular sport.²⁵ Amateurism is an ideal that the NCAA relies upon because it believes that the amateurism of the players and member schools (for not paying their players) differentiates collegiate athletics from their professional counterparts, and has enabled college sports to flourish.²⁶

The NCAA believes that the amateur nature of intercollegiate sports creates a unique product that holds a special appeal for consumers.²⁷ The NCAA also believes that preserving amateurism enables student-athletes to be protected from exploitation by commercial enterprises, such as shoe manufacturers and unscrupulous agents.²⁸

More importantly for the NCAA, though, maintaining amateurism helps the organization keep costs down by permitting schools to field athletic programs without competing for players by paying them to come to a particular school. The relatively low cost of funding teams (compared to a situation in which schools actually paid players their market value) enables all schools to continue to field athletic programs, and consequently preserves the existence of college sports.

²³ *Id.* at art. 12.

²⁴ See Schott, *supra* note 14, at 31 (stating that amateurism means that student-athletes play for the love of the game).

²⁵ See *Const.*, *supra* note 12, at art. 12.

²⁶ See Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 *HAMLIN L. REV.* 24, 28 (2000) (noting that the NCAA has successfully convinced the public that paying college athletes is a bad idea).

²⁷ *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) ("In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like.").

²⁸ See *Const.*, *supra* note 22, at art. 2.9.

In *Law v. NCAA*, the NCAA defended a rule that limited the salary of a restricted-earnings basketball coach by explicitly justifying it as a cost-cutting measure.²⁹ The court, however, was “dubious” that the goal of cost reduction was a sufficient legal justification, and ultimately rejected the rule on different grounds.³⁰ As a result of the dicta in *Law*, however, the NCAA is forced to use euphemisms like “preserving amateurism,” as a means to justify cost-cutting rules that maintain the number of schools fielding athletic teams.

In several cases challenging particular NCAA restrictions, the NCAA justifies its rules by arguing that they are necessary to “preserve amateurism.”³¹ The NCAA argues that preserving amateurism is important because it enables fair competition and a level playing field among its member schools. “Fair competition” and “level playing field” function as euphemisms for the NCAA. These are code words that the NCAA uses when it fears that the product of intercollegiate sports is at risk of self-destructing because of rising costs or disparate revenue streams among member schools.

Arguing that its rules preserve amateurism is an implicit use of the ruinous competition defense by the NCAA. This is because the NCAA fears that in the absence of many of its rules, competition among member schools would cause the end of intercollegiate athletics because of schools’ abandonment of their athletic programs due to either high costs or low levels of consumer interest.³²

²⁹ *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1023 (10th Cir. 1998).

³⁰ *Id.*

³¹ See *Adidas Am., Inc. v. Nat’l Collegiate Athletic Ass’n*, 64 F. Supp. 2d 1097 (D. Kan. 1999) (arguing that a rule limiting the size of corporate logos permissible on a jersey and other uniform-related apparel was necessary to maintain amateurism); *Justice v. Nat’l Collegiate Athletic Ass’n*, 577 F. Supp. 356 (D. Ariz. 1983) (arguing that the imposition of penalties against a member school that violated NCAA rules were necessary to preserve amateurism and enhance fair competition among the member schools); *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081 (7th Cir. 1992) (arguing that the NCAA’s rule prohibiting a player from signing with an agent and declaring himself eligible for a professional draft was necessary to preserve the amateurism of college sports); *Gaines v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 738 (M.D. Tenn. 1990) (arguing that the no-draft rule was necessary to preserve amateurism among member schools).

³² See *Justice*, 577 F. Supp. at 383 (“The NCAA sanction program was designed to prevent intercollegiate athletic programs from being driven by the pressures to ‘remain competitive’ into committing practices that threaten both the competitive and amateur

In its cases, arguing about the importance of preserving amateurism is important because it allows the NCAA to prevent member schools from paying players, and thus competing with each other on the basis of price. The NCAA fears that if amateurism disappears, the cost of having a competitive athletic program will be prohibitive and destroy collegiate sports.³³ Of course the big programs would likely survive, but apparently the NCAA does not believe that the product of college sports could thrive under this scenario.

Commentators have suggested that the NCAA divide itself into new divisions based on the level of funding and competitiveness of a program.³⁴ The NCAA has never responded to these proposals, presumably because they fear that a new version of the NCAA featuring only the Top Twenty teams, or the Top Forty teams, lacks the same allure as the current configuration. A significant modification to the NCAA, like having an organization with only twenty teams, would create an entirely new product.

The NCAA wants to maintain the status quo because of the huge financial success that the organization has enjoyed. To maintain the status quo, the NCAA has justified its numerous regulations on the basis that they preserve amateurism. Embedded in this argument is the use of a modified version of the ruinous competition argument. The NCAA believes that without these restrictions, vigorous competition between member schools would cause the product of college sports to be destroyed because many schools would not have the financial wherewithal to maintain an athletic program.

nature of the programs.”) (citing *Hennessey v. Nat’l Collegiate Athletic Ass’n*, 564 F.2d 1136, 1153 (5th Cir. 1977); *Law*, 134 F.3d at 1023 (“The NCAA argues that reducing costs . . . is necessary to maintain the existence of competitive intercollegiate sports.”)).

³³ See *Hennessey*, 564 F.2d at 1153; *Justice*, 577 F. Supp. at 382.

³⁴ Schott, *supra* note 14, at 43.

B. The Restrictions Are Intended to Maintain Competition among Member Schools

The preservation of competitive balance among member schools is also frequently cited as a justification for NCAA restrictions.³⁵ The maintenance of competitive balance refers to maintaining parity among the member schools' athletic programs. This desire for competitive balance is unique to the sports industry because teams need close games for a compelling product to exist and for consumers to remain interested in the product.³⁶ This, of course, is untrue in other industries.

In several cases challenging NCAA restrictions, the NCAA has justified rules on the grounds that they maintain competitive balance among member schools.³⁷ The NCAA made this argument in one case because, "[f]inancial pressures upon many members, not merely to 'catch up,' but to 'keep up,' were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many."³⁸ Abandonment of athletic programs by member schools would obviously threaten the very existence of the NCAA.

The preservation of competition argument is thus also tied to the NCAA's use of the ruinous competition defense because the NCAA fears that in the absence of its rules, schools will cease fielding athletic programs and balanced competition among the remaining schools will disappear.³⁹ In the absence of legitimate competition

³⁵ *Hennessey*, 564 F.2d at 1153; *Law*, 134 F.3d at 1023; *Justice*, 577 F. Supp. at 383; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1345 (5th Cir. 1988); *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998).

³⁶ Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219, 231 (1984).

³⁷ See *supra* note 33 and accompanying text.

³⁸ *Hennessey*, 564 F.2d at 1153.

³⁹ See *Law*, 134 F.3d at 1022 (contending that limiting one of the four available coaching positions on a Division I basketball team to an entry-level position will create more balanced competition by barring some teams from hiring four experienced coaches rather than three).

among its schools, the NCAA worries that demand for its product will cease, leading to the destruction of the NCAA (if it even existed after some schools abandoned their athletic programs).

The maintenance of competitive balance is thus necessary to preserve the existence of the NCAA, because the organization fears that in the absence of its rules, a larger chasm than already exists (financially and qualitatively) among member schools' athletic programs would develop. Only a limited number of schools would be able to afford to fund a competitive athletic program, leading to a wider disparity in the quality of teams. This, in turn, would lead to reduced consumer demand for NCAA sports and consequently, the demise of the NCAA.

Although ruinous competition usually relates to the supply of an industry being harmed, the situations presented in the NCAA cases are different. The NCAA's justifications aim to preserve both the supply and demand of their product, because if both the supply and the demand do not remain high, the NCAA believes that college sports will be unable to exist. This is because the supply of teams has a significant impact on the demand for the product. Without a large number of member schools fielding athletic teams, consumer interest would significantly diminish, and the NCAA would likely no longer exist as we know it.

C. Courts' Treatment of NCAA Justifications

The Supreme Court strongly suggested in *NCAA v. Board of Regents*⁴⁰ that NCAA rules designed to preserve amateurism and competitive balance do not violate the antitrust laws.⁴¹ While the Court has rejected a blanket exemption for all NCAA restrictions, it has still shown great deference in permitting the NCAA to enact restrictions that would typically be classified as unreasonable

⁴⁰ 468 U.S. 85 (1984).

⁴¹ Mathew J. Mitten, *Applying Antitrust Law to NCAA Regulation of "Big-Time" College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L.J. 1, 4 (2000) (citing *Board of Regents*, 468 U.S. at 101-02).

restraints of trade in other industries.⁴² Indeed, one NCAA rule was upheld by the Court, despite the acknowledged effect that the rule reduced competition among member institutions.⁴³

In *Law*, the court was dubious, however, about accepting an explicit defense from the NCAA that one of its rules was a cost-cutting measure.⁴⁴ As a result the NCAA is forced to disguise the purpose behind some of its rules. Consequently, NCAA arguments proffered to courts focus on the preservation of amateurism and the maintenance of competitive balance among member schools. It is clear, though, that underlying the justifications offered by the NCAA is a belief that without the restrictions the NCAA would collapse because of the vigorous competition that would ensue among member schools for student-athletes (the inputs into the labor market), and the resulting lack of consumer demand for its product. Perhaps the NCAA would be viable in a different form with fewer members. Courts, however, have not suggested this alternative, despite the relative obviousness of this idea. This indicates that courts recognize that the NCAA is a unique product that may only be sustainable in something close to its existing form.

The courts accept the NCAA's argument that in the absence of its rules, the product of college sports would be destroyed. Indeed, one court stated, "in general, the NCAA's eligibility rules allow for the survival of the product, and allow for an even playing field."⁴⁵ By embracing the NCAA's arguments that restrictions aimed to preserve amateurism and competitive balance are justified, courts accept the NCAA's modified version of the ruinous competition defense. The

⁴² *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1345 (5th Cir. 1988) ("The eligibility rules create the product and allow its survival in the face of commercializing pressures.").

⁴³ *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 187 (3d Cir. 1998) (analyzing a rule that prevents an athlete from participating in intercollegiate athletics as a graduate student at a different university from where the athlete did their undergraduate work). The court stated, "[c]learly, the rule discourages institutions with graduate or professional schools from inducing undergraduates at other institutions to forgo participating in the athletic programs at their undergraduate institutions in order to preserve eligibility to participate in intercollegiate athletics on a postbaccalaureate basis." *Id.*

⁴⁴ *Law*, 134 F.3d at 1023.

⁴⁵ *Smith*, 139 F.3d at 187.

courts have probably not commented on the NCAA's unorthodox application of the ruinous competition defense because the NCAA has not explicitly argued that they are actually using this defense.

Perhaps courts have accepted the NCAA's version of the ruinous competition defense because they recognize that the sports industry differs from other industries where the ruinous competition defense has been rejected, because teams within a league are not true economic competitors.⁴⁶ Teams within a league need competitive balance to ensure consumer interest in the product. Agreements among teams in the same league are therefore not analogous to agreements among competitors in the same industry. In non-sports industries, agreements are more harmful because they restrict competition within an industry. In sports leagues, however, agreements among teams may actually enhance the development of the league.

Having thus accepted the ruinous competition justification with regards to the NCAA, courts should feel comfortable permitting a new sports league to use this defense to justify its restrictions. If start-up sports leagues are unable to justify their conduct on the basis of preventing ruinous competition, they will likely fail and many procompetitive benefits will not accrue.

II. ANALYSIS OF THE RUINOUS COMPETITION ARGUMENT BY THE COURT IN A NON-SPORTS CONTEXT

The ruinous competition defense is usually proffered by competitors attempting to justify anticompetitive agreements. Typically, parties to an agreement argue that in the absence of such agreement, competition would drive firms in a particular industry into bankruptcy, eventually leaving consumers at the mercy of a monopolist.⁴⁷ The Supreme Court, however, has almost uniformly rejected the ruinous competition defense.⁴⁸ Indeed, the Court has

⁴⁶ See Roberts, *supra* note 36, at 231.

⁴⁷ Hovenkamp, *supra* note 12, at 127.

⁴⁸ See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (rejecting the ruinous competition defense because of its controversial nature, and because the Court did

rejected this defense in cases involving naked price-fixing agreements,⁴⁹ cartels, and resale-price-maintenance agreements.⁵⁰

The Court in these cases has rejected the defense for various reasons. Courts typically do not want to condone price-fixing, and economic scholars often believe that agreements among competitors are ineffective.⁵¹ Another reason the Court has rejected the ruinous competition defense is that it believes that it is inappropriate for a court to determine a reasonable rate of return for an industry.⁵²

It is clear that excluding NCAA cases, the Court has typically refused to allow firms to justify anticompetitive restrictions on the grounds that requiring industry members to compete with each other would lead to ruinous competition.⁵³ The various NCAA cases discussed above, however, show an implied acceptance by courts of the NCAA's version of the ruinous competition defense and would enable the Court to allow start-up sports leagues to also use the ruinous competition defense.

not want to be forced to determine a reasonable rate of profit for an industry); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (holding that fear of "ruinous competition" is not a justification for price-fixing); *Fashion Originators' Guild of Am. v. Fed. Trade Comm'n*, 312 U.S. 457 (1941) (holding that dress designers were prevented from acting in collusion to ensure that their investment in original clothing designs be recouped); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 689-90 (1978) (rejecting a professional association's canon of ethics because it illegally fixed prices). *But see* *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (holding that competing coal producers could form an agreement for the purpose of promoting efficiency, provided that the intent was not to unreasonably restrain trade).

⁴⁹ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211, 273 (1899) (rejecting a naked price-fixing agreement among steel pipe manufacturers created for the purpose of avoiding huge losses that might result because of competition between the companies).

⁵⁰ Hovenkamp, *supra* note 12, at 134.

⁵¹ *Id.* at 138.

⁵² *Trans-Missouri*, 166 U.S. at 331-32.

⁵³ See Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 544 (1997); see also *Mackey v. Nat'l Football League*, 543 F.2d 606, 621 (8th Cir. 1976).

III. THE COURTS' TREATMENT OF NCAA JUSTIFICATIONS WARRANTS REDUCED ANTITRUST SCRUTINY OF START-UP SPORTS LEAGUES

In today's world, new professional sports leagues face an extremely competitive and crowded marketplace. In an effort to limit costs, each new league has been formed as a single entity.⁵⁴ In addition to the perceived cost-effectiveness of the league structure, the single entity offers protection from the antitrust laws because there can be no agreement that violates section 1 of the Sherman Act if there is only one actor making decisions.⁵⁵ There have been challenges, however, to the validity of the single-entity structure.⁵⁶ In *Fraser*, the players have alleged that the single-entity structure of MLS is a sham, and charged the league with antitrust violations.⁵⁷

Regardless of whether start-up leagues are true single entities, the conduct of these start-up sports leagues should be subject to less strict antitrust scrutiny than is applied to other industries. A professional sports league is in a unique industry that deserves special protection because of the extraordinarily high start-up costs.⁵⁸ These leagues should be able to employ restrictions that enable a league to limit labor costs and recoup other heavy start-up costs. As discussed above, courts have demonstrated great deference towards the NCAA's alleged anticompetitive conduct, and have permitted use of the NCAA's version of the ruinous competition argument by often upholding NCAA restrictions on the grounds that the rules are necessary to preserve amateurism and to maintain competitive balance among member schools.

The NCAA's amateurism argument is a sham, however, and start-up sports leagues can readily be compared to the NCAA. Start-up sports leagues, like the NCAA, also need the ability to create

⁵⁴ This includes MLS, WUSA, the WNBA, and the XFL.

⁵⁵ A single firm is not subject to liability under section 1 of the Sherman Act, because a combination restraining trade requires the presence of at least two independent actors. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

⁵⁶ See *Fraser v. Major League Soccer, L.L.C.*, 7 F. Supp. 2d 73 (D. Mass. 1998).

⁵⁷ *Id.*

⁵⁸ These include very high labor and operation costs, such as building new stadiums. It is necessary to incur these costs because they lend an element of legitimacy to new leagues.

restrictions that maintain competitive balance. Because of the similarities between new sports leagues and the NCAA, and start-up leagues' corresponding need for protection, the Court should permit start-up professional sports leagues to employ necessary restrictions. If the Court fails to permit these necessary restrictions, new leagues will be unsustainable and will collapse.

In Section A of this Part, several comparisons will be drawn revealing the similarities between start-up sports leagues and the NCAA. Section B will examine how the NCAA's commercialization, and its departure from the amateur ideals upon which it was founded, make start-up sports leagues indistinguishable from the NCAA. Section C will discuss the unique nature of sports leagues relative to other industries. It will also discuss the procompetitive benefits that teams in start-up leagues generate, and argue that start-ups, like the NCAA, should be able to use the ruinous competition argument as grounds for reduced antitrust scrutiny. Without reduced antitrust scrutiny, these new leagues will fail and various procompetitive benefits will be sacrificed. Section D will briefly propose that a few restraints that are typically challenged should be permitted in a start-up league to ensure its long-term viability.

A. Comparison of Start-Up Sports Leagues to the NCAA

The NCAA was founded upon ideals of amateurism.⁵⁹ This idealism has disappeared from the NCAA, however, and been replaced by a multi-billion-dollar industry and, consequently, the commercialization of NCAA student-athletes.⁶⁰ Despite the pervasive commercialism and subsequent shift away from the basis upon which the NCAA was founded, one of the main reasons why

⁵⁹ See *Const.*, *supra* note 22, at art. 1.2(c). One of the purposes of the NCAA is "[t]o encourage its members to adopt eligibility rules to comply with . . . standards of scholarship, sportsmanship and amateurism." *Id.*

⁶⁰ Pekron, *supra* note 26, at 27 n.15 (citing Mike McGraw et al., *Money Games Inside the NCAA: Revenues Dominate College Sports World*, KAN. CITY STAR, Oct. 5, 1997, at A1 (noting that college athletics generates almost two billion dollars in annual revenue for the 305 schools in Division I athletics)).

the courts have allowed NCAA restrictions that would otherwise be deemed anticompetitive to stand, is the belief that the restrictions somehow preserve this “amateur” tradition.⁶¹ In many respects, though, a start-up sports league is indistinguishable from the NCAA.

1. Start-Up Sports Leagues, Like the NCAA, Have Power to Determine their Labor Costs

The NCAA has complete power over the amount of money that it spends on labor, which limits both the salary and the number of athletes that any member school can employ.⁶² The NCAA limits the “salary” that its athletes receive to the cost of attending the respective member institution, plus money for room and board. The NCAA also limits the number of players that are permitted on each team’s roster. Former Executive Director of the NCAA, Richard Schultz, conceded that a primary reason stipends (beyond the value of tuition, room and board) are not paid to student-athletes is to lower costs.⁶³ This is comparable to professional sports in that many start-up leagues have low salary caps that limit the amount of money that a team can spend on its athletes, as well as strict roster restrictions that limit the number of players on each team. These rules are used to lower costs and maintain competitive balance among the teams by suppressing wages to a level that is beneath market value and is affordable for all teams.

The NCAA has complete power over the marketplace because any athlete who desires to play college (or most professional) sports has no choice but to accept the NCAA’s restrictions.⁶⁴ This is analogous to professional sports, where there is only one “major” league in each sport.⁶⁵ For example, if an athlete wants to play professional

⁶¹ *Id.* at 28.

⁶² *Id.* at 27.

⁶³ Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 217 (1990).

⁶⁴ See Pekron, *supra* note 26, at 27. An athlete has the option to bypass college and play professional sports immediately, but only Major League Baseball has an organized minor league for players that are unable to play at the highest level.

⁶⁵ Of course minor leagues exist in every sport. But in each sport there is one established league where the best players participate. For a discussion and history of the

baseball in the United States he must submit to the rules created by Major League Baseball.

2. Start-Up Sports Leagues, Like the NCAA, Have Power to Sanction Members

Also comparable to professional sports leagues, the NCAA functions as a governing body that employs strict enforcement procedures for rules violations, and the guilty must comply with any sanctions imposed for violations of NCAA rules.⁶⁶ Violation of rules in either professional leagues or the NCAA can subject a team or member institution to harsh penalties.⁶⁷ The NCAA has a committee that makes recommendations regarding penalties for rules violations, while professional sports leagues have a commissioner that is responsible for doling out punishment when rules violations occur.

3. Start-Up Sports Leagues, Like the NCAA, Crown a Single Champion

For years the NCAA resisted the lure of trying to crown a champion in college football. In recent years, however, the NCAA has created a system designed to determine an overall champion in college football. The creation of the Bowl Championship Series by the NCAA enables the two highest rated teams in college football to play in a game to crown a national champion. More importantly, perhaps, the new system creates enormous revenues for the teams and closely resembles the Super Bowl.⁶⁸ This is yet another

notion that only one "major" league of each sport can flourish, *see* Part III. C., *infra*.

⁶⁶ Pekron, *supra* note 26, at 27; *see also* McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988); Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356 (D. Ariz. 1983).

⁶⁷ *See McCormack*, 845 F.2d 1338. In the NBA, the Minnesota Timberwolves recently received a harsh punishment from the Commissioner's office for trying to circumvent the salary cap.

⁶⁸ *See* Goldman, *supra* note 63, at 217 (noting that member institutions are constantly seeking new ways to maximize revenues, and suggesting that the playoff system is not motivated by a desire to determine the number one school, or even to enhance amateurism, but rather to increase revenues).

similarity between college sports and their professional counterparts, as all professional leagues are designed to determine a champion of the respective leagues through an extensive playoff system that generates huge television-rights fees.

B. The Professionalization of College Sports Has Pierced the NCAA's Veil of Amateurism and Makes the NCAA and Professional Sports Indistinguishable

Although the NCAA was founded upon ideals of amateurism, collegiate sports are now thoroughly commercialized. Indeed, one court acknowledged, "College [sports are] a terrific American institution that generates nonpecuniary benefits for players and fans, but it is also a vast commercial venture that yields substantial profits for colleges both on and off the field."⁶⁹

At the highest level of the NCAA, athletes are at least semiprofessionals, as they receive several thousand dollars per year (in the form of a scholarship) for playing sports, often with the goal of playing professional sports for much more money.⁷⁰ In fact, at some schools, college football players receive a wage of approximately nine dollars per hour for their work in football and football-related activities.⁷¹ Some coaches make salaries well in excess of any other university employee.⁷² A university certainly

⁶⁹ Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part); Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 743 (M.D. Tenn. 1990) ("[W]hile organized as a non-profit organization, the NCAA—and its member institutions—are . . . engaged in a business venture of far greater magnitude than the vast majority of 'profit-making' enterprises.") (citing Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136, 1149 (5th Cir. 1977)).

⁷⁰ Pekron, *supra* note 26, at 56; Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2658 (1996); *see also* Goldman, *supra* note 63, at 234 ("Athletes are often motivated by a desire to reap the rewards of a professional career."). If on scholarship, the athlete receives free tuition, books, and room and board, a salary that totals several thousand dollars per year. *Id.* Indeed, a student-athlete's relationship with its member school has been compared to that of an employer-employee relationship. Schott, *supra* note 14, at 34-35.

⁷¹ Pekron, *supra* note 26 (citing RICHARD G. SHEEHAN, KEEPING SCORE: THE ECONOMICS OF BIG-TIME SPORTS 296-98 (1996)).

⁷² Pekron, *supra* note 26, at 57. The average college football coach makes at least four

would not subsidize athletes and pay coaches large amounts of money unless the school realized a financial reward. The cost-benefit analysis for many schools is simple, as the sports programs often generate millions of dollars for their university.⁷³

In football bowl games,⁷⁴ the NCAA permits oversized corporate logos to be sewn on to jerseys of the participating teams.⁷⁵ These patches identifying the bowl game sponsors are not subject to the size limits created in the rule that was challenged in *Adidas*.⁷⁶ Not coincidentally, these sponsors pay the NCAA a tremendous amount of money to earn this sponsorship right. This blatant hypocrisy by the NCAA reveals that if the price is right, the players can become walking billboards.⁷⁷

Total revenues in the NCAA have increased 8000% in the last quarter century.⁷⁸ The NCAA has increased these revenues with little concern for how the athletes are affected, either physically or in the classroom.⁷⁹ Some players cannot even choose what shoes they will wear, as some athletes are forced to wear athletic shoes designated by the terms of their coach's large contract with a shoe manufacturer.⁸⁰

As part of the amateur foundation of the NCAA, it was also thought that each student-athlete's primary reason to be in college

times as much as the average professor at the same institution. See FRANCIS X. DEALY, JR., WIN AT ANY COST: THE SELL OUT OF COLLEGE ATHLETICS 165 (1990).

⁷³ See NAND HART-NIBBRIG & CLEMENT COTTINGHAM, THE POLITICAL ECONOMY OF COLLEGE SPORTS 3 (1986).

⁷⁴ Bowl games are postseason games that serve as a reward to college football teams that have had a successful season.

⁷⁵ See Mitten, *supra* note 41, at 6.

⁷⁶ *Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n*, 64 F. Supp. 2d 1097 (D. Kan. 1999).

⁷⁷ Teams participating in the Bowl Championship Series may each receive over \$10 million per school. Apparently, this is enough revenue for the NCAA to discard its moral high ground.

⁷⁸ Pekron, *supra* note 26 (citing McGraw, *supra* note 60, at A1). In the 1990s corporate sponsorships increased sevenfold. *Id.*

⁷⁹ See Goldman, *supra* note 63, at 241 (noting how lengthy basketball and football seasons and late night game times to increase television exposure represent commercial concerns prevailing over educational interests).

⁸⁰ *Id.* at 241 n.265 (citing Brown, *Rubber Sole: Should College Basketball Coaches Accept Sneaker Money?*, 7 ENT. & SPORTS L. 3 (1989)).

was to get an education.⁸¹ The professionalization of college sports, however, has contributed to a reduced emphasis on the pursuit of an education. Indeed, at many of the schools with premier athletic programs, a student-athlete's education is less important than the team for which they play.⁸² The lack of emphasis on a student-athlete's education is further evidence of the NCAA's increasing professionalization.

The NCAA has clearly deviated from its purely amateur origins and become professionalized.⁸³ While some remnants of amateurism certainly remain, the receipt of scholarships and stipends, the sponsorships on the uniforms, the shoe deals, and the lack of emphasis on education all evidence how the NCAA has become increasingly commercialized. Indeed, the NCAA does not even require that athletes truly receive no payments for their athletic skills, as it permits athletes to participate in one NCAA sport even if they are professionals in a different sport.⁸⁴

C. Start-Up Sports Leagues, Like the NCAA, Should Enjoy Reduced Antitrust Scrutiny

Courts have chosen to overlook the commercialization of the NCAA and continue to show great deference to that organization in an effort to preserve college sports. Start-up sports leagues are comparable to the NCAA and should also be subject to reduced antitrust scrutiny. This would enable the new leagues to use the NCAA's version of the ruinous competition defense to ensure their survival in today's crowded sports and entertainment marketplace.

⁸¹ See Pekron, *supra* note 26, at 55-56.

⁸² *Id.* at 58. Only a minimum level of proficiency is required of an athlete once in college. *Id.* (reciting story of player at Ohio State University who took classes in AIDS awareness, golf, and music appreciation to maintain his eligibility).

⁸³ Bill Russell, former star basketball player for the Boston Celtics observed, "[t]o me, being an amateur is like being a virgin. It is an old idea that has some innocence and charm, celebrated mostly by people to whom it does not apply." Goldman, *supra* note 63, at 234.

⁸⁴ Pekron, *supra* note 26, at 60.

The balancing test a court employs in a rule of reason analysis⁸⁵ typically has limited appreciation for noncommercial or noneconomic motives that may underlie a particular industry practice.⁸⁶ The Court in *Goldfarb v. Virginia State Bar*,⁸⁷ however, implied that noncommercial factors may be considered in the antitrust calculus.⁸⁸ In *United States v. Brown University*,⁸⁹ the court also held that noncommercial justifications should be considered.⁹⁰ This is important because a start-up sports league generates many noneconomic benefits that should be considered when evaluating the legality of a particular restraint by a new league.

Courts need to recognize and appreciate that a sports league is different from other industries because cooperation among member teams is necessary, as sports teams are incapable of producing anything of value independently.⁹¹ Although a start-up league's conduct may restrain trade to some degree, these industry restraints are not so harmful that they lack any redeeming value.⁹² Certain conduct that start-up sports leagues engage in may not have the overall effect of enhancing intraleague competition, but it may

⁸⁵ Under the rule of reason, an antitrust defendant has the opportunity to provide evidence of procompetitive justifications in support of a challenged activity. These procompetitive features are then balanced against any discoverable anticompetitive effects to determine the net competitive significance of the challenged industry practice. See Rosenbaum, *supra* note 16, at 746 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 690 (1978)).

⁸⁶ Rosenbaum, *supra* note 16, at 746 (noting that while certain noneconomic, noncommercial league restraints are anticompetitive in the sense that they do nothing to enhance or promote competition off the field, these rules are uniquely procompetitive because they ultimately make for a better league product on the field).

⁸⁷ 421 U.S. 773 (1975).

⁸⁸ *Goldfarb v. Va. State Bar*, 421 U.S. 771, 787 (1975); see also Lee Goldman, *The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications under Section 1 of the Sherman Act*, 13 YALE L. & POL'Y REV. 137, 164 (1995) (noting that the language in *Goldfarb* suggests that courts may factor noneconomic considerations into a substantive antitrust analysis).

⁸⁹ 5 F.3d 658 (3d Cir. 1993).

⁹⁰ *Id.* ("We conclude that the district court was obliged to more fully investigate the procompetitive and noneconomic justifications proffered by MIT than it did when it performed the truncated rule of reason analysis.").

⁹¹ Roberts, *supra* note 36, at 227-28.

⁹² Rosenbaum, *supra* note 16, at 746; see also Louis B. Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979) (commenting that the goals of justice and the antitrust law demand protection of competitors).

nonetheless possess redeeming virtues from a noncommercial standpoint that should withstand a reduced level of antitrust scrutiny, and also enable the league to survive.⁹³ One commentator noted, “[t]o be sure, [teams] are vigorous athletic competitors, for that is the very essence of the product which they jointly sell. In no meaningful way, however, are the clubs natural economic competitors.”⁹⁴

1. Sports Leagues Are Extremely Risky and Few Are Economically Viable

The economic health of teams in new leagues is tenuous.⁹⁵ Creating a professional sports league is extremely expensive, as there are massive labor and operational costs. New leagues need time to develop competitive teams, attract a loyal fan following, and recoup heavy start-up costs.⁹⁶ Accomplishing these tasks is nearly impossible if start-up leagues are subject to the same antitrust scrutiny as other industries because parity, and thus consumer interest, would be difficult to maintain with little centralized control. Without centralized control, it is likely that a dominant team or two would emerge because of their relative financial strength to other teams in the league, and too little interest in the league would be developed in the markets with unsuccessful teams. Start-up sports leagues should therefore be permitted to engage in conduct that is subject to less strict antitrust scrutiny.

Sports leagues present a unique form of industrial organization that bears little resemblance to other industries, particularly those that are more frequently the target of antitrust review.⁹⁷ In contrast to other industries, league teams do not attempt, nor do they desire, to drive one another out of the market.⁹⁸ Courts long ago recognized this,

⁹³ Rosenbaum, *supra* note 16, at 746.

⁹⁴ Roberts, *supra* note 36, at 231.

⁹⁵ See McBurney, *supra* note 10, at 950.

⁹⁶ *Id.*

⁹⁷ See Rosenbaum, *supra* note 16, at 744.

⁹⁸ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978). If stronger teams were to drive weaker teams out of the market, there would eventually be too few teams to operate the league. See McBurney, *supra* note 10, at 932 (citing *United States v. Nat'l Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953)). Although some leagues, like

and consequently, the unique nature of professional sports.⁹⁹ This recognition of the unique nature of sports has not translated, however, into judicial deference when analyzing professional leagues' restraints. This lack of deference persists despite the treatment courts have afforded the NCAA in implicitly permitting use of the ruinous competition argument.

In professional sports, it has been proved through the success and failures of various leagues that the sports industry is extremely risky and costly.¹⁰⁰ In almost all of the current "major" sports, rival leagues have emerged over the years only to quickly merge with the existing league or disappear altogether.¹⁰¹ This is because high costs

Major League Baseball, are currently considering contraction, a league would certainly prefer to not be forced to contract.

⁹⁹ See *NFL*, 116 F. Supp. at 323.

The ordinary business makes every effort to sell as much of its products or services as it can. In the course of doing this it may and often does put many of its competitors out of the business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business. Professional teams in a league, however, must not compete too well with each other in a business way. . . . If all teams should compete as hard as they can in a business way, the stronger teams would likely drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably. *Id.*

¹⁰⁰ See Roberts, *supra* note 36, at 257.

¹⁰¹ *Id.* The American Football League formed in 1960. Six years later, after both the AFL and the NFL experienced financial difficulties as a result of frequent bidding wars for players, Congress authorized a merger between the two leagues that bypassed antitrust scrutiny and avoided financial ruin of the two leagues. Rosenbaum, *supra* note 16, at 771 n.180 (citing 15 U.S.C. § 1291 (1982)). In 1974, the World Football League [hereinafter WFL] emerged as a challenger to the NFL. The WFL never became a legitimate threat and went bankrupt approximately one year after its formation. *Id.* (citing *Mid-South Grizzlies v. Nat'l Football League*, 550 F. Supp. 558, 562 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772, 776 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984)). The United States Football League [hereinafter USFL] emerged as yet another challenger to the NFL in the 1980s. The USFL charged the NFL with monopolistic conduct in violation of section 2 of the Sherman Act, and after being awarded nominal damages, the league disappeared as a threat to the NFL. See *United States Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986). The XFL was the last challenger to the NFL. This League shut down operations after only one season, despite the financial backing of the NBC network. From 1949 to 1959, the NBA served as the only professional league until the American Basketball League began play. The League fell apart, but only after one-and-one-half years due to mounting financial losses. Rosenbaum, *supra* note 16, at 771 n.180. In 1966 another challenger to the NBA emerged, the American Basketball Association, which operated for

involved with the sports industry, such as signing players and building stadiums, make running a successful league particularly risky. Subjecting a new league to reduced antitrust scrutiny will therefore provide start-up leagues with the assurance that they will be able to create restraints to enhance parity and consumer interest in their product, in much the same way as the NCAA has done.

2. Procompetitive Benefits of Sports

As part of the balancing test used by a court in the rule of reason, the procompetitive benefits of a particular restraint are weighed against the anticompetitive effects of the restraint.¹⁰² This Note argues that as a general rule, start-up sports leagues should not be subject to the same level of antitrust scrutiny that established leagues and industries are, because new leagues are subject to much greater risks than either existing leagues or different industries. Without such heightened protection from antitrust scrutiny, any new league will surely fail. It is important for new leagues to flourish because of the procompetitive economic benefits that successful leagues create, as well as important noneconomic benefits that leagues also tend to generate. It is therefore important to identify and discuss the procompetitive benefits (both economic and noneconomic) that sports leagues usually produce.

There are significant economic benefits that accrue from a sports league. One of these benefits is downtown urban renewal.¹⁰³ A new stadium is likely to spur economic development in the area surrounding the stadium because of the development of many mid-

ten years, only to merge some of its franchises with the NBA. *Id.* From 1917 to 1971, the National Hockey League [hereinafter NHL] operated alone until the World Hockey Association emerged, only to partly disband and merge with the NHL eight years later. *Id.* In women's basketball, two leagues began simultaneously in 1997, yet within three years one of the leagues folded. See Elizabeth Clarke, *WNBA Has Next and Beyond; League Building Quickly With Passionate Following*, PALM BEACH POST, June 20, 1999, at 1C.

¹⁰² See Rosenbaum, *supra* note 16, at 746 (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689-90 (1978)).

¹⁰³ See John R. Dorocak, *Tax Advantages of Sports Franchises: Part I—The Stadium*, 1999 L. REV. M.S.U.-D.C.L. 579 (1999).

size businesses that relocate near the stadium.¹⁰⁴ This is a benefit that is unique to professional sports leagues because in the absence of such a team, newly created businesses and jobs surrounding the new stadium would go undeveloped.

Another benefit of start-up sports leagues is that teams have the ability to significantly impact a city's local economy. One study revealed that the annual local economic impact of one NFL team was \$120 million.¹⁰⁵ While start-up sports leagues' teams would certainly not be able to generate that amount of revenue for a city in its initial stages, there would definitely be some positive economic impact in the form of construction jobs created, new spending in the community by people who attend games, and the attraction of tourists to a city with a new sports facility.¹⁰⁶ These procompetitive benefits only have the opportunity to accrue if start-up sports leagues are subject to less strict antitrust scrutiny. In the absence of reduced scrutiny the new leagues are unlikely to make large capital investments in things like a new stadium or arena because of a league's potential for quick failure.

Historically, under rule of reason analysis, courts have primarily analyzed allegedly anticompetitive conduct in terms of their economic effects, judging the reasonableness of a restraint by its effect on the commercial marketplace.¹⁰⁷ The Court in *Goldfarb*, however, implied that noncommercial factors may be applied in the antitrust calculus.¹⁰⁸ In the context of new sports leagues there are many intangible noneconomic benefits generated that should be weighed when determining the legality of any restraints.

¹⁰⁴ *Id.*

¹⁰⁵ See Robert Taylor Bowling, *Sports Aggravated: The Fan's Guide to the Franchise Relocation Problem in Professional Sports*, 28 STETSON L. REV. 645, 652 (1999).

¹⁰⁶ See Roger G. Noll & Andrew Zimbalist, *Sports, Jobs, and Taxes: Are Stadiums Worth the Cost?*, 1997 BROOKINGS REV. 35 (1997), available at 1997 WL 10193568. There is also a multiplier effect, as increased local income causes further new spending and job creation. *Id.* The multiplier effect is the amplified effect of newly generated money that is used to indicate how an increase in spending causes an increase in income. See Bowling, *supra* note 105, at 652.

¹⁰⁷ See Wendy T. Kirby & T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L.J. 31 (1985).

¹⁰⁸ See *Goldfarb v. Va. State Bar*, 421 U.S. 771, 787 (1975).

Teams in professional sports leagues are considered unique cultural assets.¹⁰⁹ Economists and other commentators have acknowledged that sports teams, and thus sports leagues, can spark a city's economy and confer on a locality intangible benefits such as entertainment, civic pride, and national television exposure.¹¹⁰ Indeed, sports teams also have the ability to create a cultural identity that crosses race, ethnic and class lines.¹¹¹

Sports teams also provide local communities with "consumption benefits," which are comparable to benefits provided by parks, golf courses, swimming pools, and concert halls.¹¹² Different from these other forms of entertainment, however, sports teams' consumption benefits have unique economic characteristics because local residents benefit from the mere presence of a professional team in the community.¹¹³ Indeed, sports teams capture public attention far out of proportion to their economic significance, as the media provides attention to the teams because of how passionate fans are.¹¹⁴ None of these intangible benefits can accrue to a community that hosts a team in a start-up league unless such a league is provided protection from the antitrust laws, because new leagues will fail if subject to strict antitrust scrutiny, due to an inability to ensure parity and to maintain low labor costs.

D. Restraints that Should Be Permissible by a Start-Up Sports League

Certainly, a start-up sports league should not have a blanket exemption from antitrust law. Rather, only restraints that permit a start-up league to begin to recoup some of its investment and reduce

¹⁰⁹ See Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 913 (1999).

¹¹⁰ See Dorocak, *supra* note 102; see also John Riley, *Fields of Green*, NEWSDAY, Aug. 18, 1996, at A04.

¹¹¹ See Bowling, *supra* note 105, at 649.

¹¹² See Kevin Green, et al., *Using Tax-Exempt Bonds to Finance Professional Sports Stadiums*, 78 TAX NOTES 1663, 1672 (1998).

¹¹³ *Id.* at 1666; see also Noll & Zimbalist, *supra* note 106 (acknowledging that a team's new stadium generates more local consumer satisfaction than alternative investments).

¹¹⁴ Noll & Zimbalist, *supra* note 106.

some of the risks associated with beginning a new league should be permissible. A complete discussion of the specific impact of each restraint is beyond the scope of this paper, but some restraints that a league should be allowed to employ include a salary cap, a rule limiting player mobility that resembles baseball's old "reserve clause,"¹¹⁵ and a rule limiting a team's ability to relocate. These rules would generally enable a league to keep costs low in the beginning stages of a league's existence, create parity among the teams, and enable teams to develop roots in markets that the league feels are best for the overall good of the league.

CONCLUSION

Start-up sports leagues should be entitled to use the NCAA's version of the ruinous competition defense to justify reduced antitrust scrutiny. Courts have permitted this defense to be used by the NCAA to justify restrictions that reduce competition among member schools off the field and increase parity on the field, thus enabling the product of NCAA sports to continue to exist. Start-up sports leagues are comparable to the NCAA because of the extensive commercialization of the organization in recent years. Sports leagues are extremely risky investments that generate significant procompetitive economic and intangible benefits for society. Consequently, permitting new leagues to be subject to reduced antitrust scrutiny would enable the survival of new sports leagues and the accrual of accompanying procompetitive benefits.

¹¹⁵ The reserve clause was a device used in professional baseball that enabled a team to reserve the rights to a player's services even after expiration of a player's contract. Rosenbaum, *supra* note 16. It was used as a way to create parity in a league. *Id.*