Brooklyn Law Review

Volume 70 | Issue 2 Article 5

2005

Stay Out For Three Years After High School Or Play In Canada - And For Good Reason: An Antitrust Look at *Clarett v. National Football League*

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NOTES

Stay Out For Three Years After High School Or Play In Canada—And For Good Reason

AN ANTITRUST LOOK AT *CLARETT V. NATIONAL FOOTBALL LEAGUE*

I. INTRODUCTION

In 1990, the National Football League (NFL) changed a long-standing league policy by allowing any player who was more than three years out of high school to apply for "special eligibility" and gain entry into its amateur draft.[1] The

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[1] *See* Tim Layden, *Leap of Faith*, SPORTS ILLUSTRATED, Aug. 28, 1995, at 104. In conjunction with its stated eligibility rules, found in the league's Constitution & Bylaws, the NFL has an application for players who have not completed their college eligibility and are seeking "special eligibility" for the NFL Draft. The petition for "special eligibility" states: "Applications [for special eligibility] will be accepted only for college players for whom at least three full college seasons have elapsed since their high school graduation." (hereinafter "three-year rule"). NFL Eligibility Rules and Petition for Special Eligibility and Renunciation of College Eligibility (1991), *reprinted in* Leigh Steinberg, *Representing the Professional Football Player*, *in* 1 LAW OF PROFESSIONAL AND AMATEUR SPORTS 6-1, app. 6D (Gary A. Uberstine ed., 2002). It is the three-year rule that is the subject of this Note.

The official rule of the NFL's Constitution & Bylaws states:

> 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 (5) years shall have elapsed since the player first entered or attended a recognized junior college, college, or university; or (3) such player receives a diploma from a

modification in the league's guidelines came as a result of overwhelming pressure from college underclassmen that the NFL relax its strict standards on eligibility.[2] Previously, aside from a few rare exceptions, the NFL denied eligibility to anyone who had not completed at least four years of college.[3] Since the alteration in the league's policy, scores of underclassmen have entered the NFL Draft "early," usually after playing college football for three years.[4] Despite this growing trend, the NFL strictly enforces its three-year rule to prevent abuse of the policy by underclassmen who have been out of high school for less than three years.[5] Indeed, the NFL "vigorously defend[s]" its policy.[6] The league publicly states that any underclassman less than three years removed from high school should contract with a team in the Canadian Football League (CFL) if he wishes to play professional football.[7] The NFL stands on its own in comparison to other major professional sports leagues in the United States,[8] all of which have far less rigid policies on draft eligibility.[9]

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recognized college or university prior to September 1st of the next football season of the League.

CONST. & BYLAWS OF THE NAT'L FOOTBALL LEAGUE, art. XII, § 12.1 (A) (1999).

[2] Steinberg, *supra* note 1, at 6-32.

[3] Robert C. Berry, *Collective Bargaining in Professional Sports*, *in* 1 LAW OF PROFESSIONAL AND AMATEUR SPORTS 4-1, 4-25 (Gary A. Uberstine ed., 2002). For example, in 1989, NFL commissioner Paul Tagliabue granted twenty-five underclassmen a "special hardship exemption," allowing them to enter the draft. *See* Layden, *supra* note 1.

[4] From 1998 to January 2003, 213 underclassmen declared themselves eligible for the NFL Draft. *See* CBS.Sportsline.com, *2003 NFL Draft Underclassmen*, *at* http://cbs.sportsline.com/nfl/story/6097636 (last visited Sept. 2, 2004). In fact, between 1992 and 1997, five of the six number one overall selections in the NFL Draft were underclassmen. Steinberg, *supra* note 1, at 6-32.

[5] The NFL's justifications for why the three-year rule is appropriate are discussed *infra*. *See* Mike Freeman, *College Football: Clarett Has Probably Played His Last Game for Ohio State*, N.Y. TIMES, Sept. 4, 2003, at D2. In 1994, Tamarick Vanover, a sophomore at Florida State University, applied for the NFL Draft. Since he was only two years out of high school, the NFL denied Vanover's application. *See* Timothy W. Smith, *Football: Notebook: N.F.L.'s Garage Sale Returns in New Form for Expansion Teams*, N.Y. TIMES, Jan. 22, 1995, § 8, at 2. Vanover played one year for the Las Vegas Posse of the Canadian Football League. Vanover reapplied for the NFL Draft in 1995 and was selected by the Kansas City Chiefs. *See* Peter King, *Cornerstones of the Future; The NFL is Looking to a New Generation of Marquee Players to Lead the Game into the Next Century*, SPORTS ILLUSTRATED, July 16, 1997, at 42.

[6] Len Pasquarelli, *Road to NFL a Long One if Clarett Leaves Early*, ESPN.com (Aug. 6, 2003), *at* http://espn.go.com/ncf/s/2003/0801/1588490.html.

[7] Star News Services, *Tagliabue: Clarett Must Wait for His Turn* (Aug. 7, 2003), *at* http://www.kansascity.com/mld/kansascity/sports/6475207.htm.

[8] For purposes of this Note, these leagues include the National Basketball Association (NBA), National Hockey League (NHL), and Major League Baseball (MLB). From 1997 to 2003, 239 college underclassmen and high school seniors declared

Discussion on this issue arose in the fall of 2002, when freshman Maurice Clarett (Clarett), a star running back for The Ohio State University, declared he was interested in challenging the NFL's restrictions on early entry into its draft.[10] Under the current rule, Clarett would not be eligible to apply for entry to the NFL Draft until 2005. In August of 2003, with his college eligibility in doubt for unrelated reasons, Clarett requested that the NFL grant him a hardship exemption and entry into the 2004 Draft via the "special eligibility" application,[11] one year before he would be eligible under the three-year rule.[12] The NFL denied Clarett's application, and Clarett subsequently filed suit in federal court.[13]

In *Clarett v. National Football League*, a district court granted Clarett summary judgment, thereby prohibiting the NFL from barring his entry into the 2004 Draft.[14] After the

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themselves for the NBA Draft. *See* USATODAY.com, *Sportsticker Pro Basketball Note: 2003 NBA Draft Underclassmen*, *available at* http://www.usatoday.com/sports/basketball/nba/draftunderclassmen2003.htm (last visited Sept. 2, 2004). The NBA allows anyone to enter its amateur draft so long as that person's high school class has graduated.

[9] *See generally*, Scott R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts*, 8 SETON HALL J. SPORT L. 539 (1998). The NBA and NHL have the most notably different eligibility policies from the NFL. The NBA accepts any person whose high school class has graduated, while the NHL accepts anyone who is at least 19 years old. *Id.* at 553-54.

[10] Gene Wojciechowski, *Good to Go*, ESPN THE MAGAZINE, Oct. 16, 2002, *available at* http://espn.go.com/magazine/vol5no22clarett.html. Clarett's possible challenge received enormous media attention, largely because of his exceptional performance as a true freshman on Ohio State's national championship football team. In college football, players have four years of eligibility. A true freshman is a player who begins his eligibility the first year he begins college. A red-shirt freshman is a player who begins his eligibility during his second year of college. Many red-shirt freshman, in turn, stay in college for five years, and are called "fifth-year seniors" for their last year of eligibility.

[11] *See supra* note 1 for the text for the "special eligibility" form.

[12] Associated Press, *Lawyers Expected to Discuss Case*, Sept. 14, 2003, *available at* http://sports.espn.go.com/ncf/news/story?id=1615847.

[13] In mid-December, 2004, Clarett filed papers with a district court in New York, stating that the rule, as found in the Constitution & Bylaws, differs from that found in the Special Eligibility Petition. Specifically, Clarett points out that §12.1 (E) states: "For college football players seeking special eligibility, at least three NFL seasons must have elapsed since the player was graduated from high school." Tom Farrey, *Clarett to Use NFL Rule Against League*, ESPN.com (Dec. 13, 2003), *at* http://sports.espn.go.com/nfl/news/story?id=1684775. Since Clarett graduated from high school in December, 2001, he argued that three NFL seasons have technically elapsed (or, under his interpretation, finished) since then (the 2001, 2002, and 2003 seasons). The NFL countered by stating that it is allowed to interpret its own rules however it likes. Thus, the League argued the rule actually means three seasons must have commenced and finished after the player's graduation. *Id.*

[14] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

Second Circuit stayed the lower court's ruling,[15] the Supreme Court rejected two of Clarett's "emergency" appeals.[16] Finally, on remand from the Supreme Court, the Second Circuit ruled on the merits of Clarett's claim and found that the three-year rule was compatible with applicable federal law.[17] As a result, Clarett was barred from entering the 2004 Draft.

This Note seeks to supplement the Second Circuit's ruling by offering an alternative legal rationale. It argues that under applicable antitrust case law, the NFL's three-year rule qualifies as a reasonable restraint on trade and comports with the purpose of the Sherman Antitrust Act.[18] Essentially, the pro-competitive effects of the three-year rule outweigh the potentially negative effects. Recent federal appeals courts' decisions on issues of sports law buttress this argument. As a result, this Note takes an additional step and suggests that the Second Circuit could have validated the three-year rule under a functional, "hybrid" antitrust-labor law rule. Such an approach would consider, in analyzing the reasonableness of the restraint, both the unique aspects of major professional sports in the United States, and the expansive reading of the labor exemption as utilized by many sports associations and upheld by the federal courts.

Part II of this Note will present an overview of the facts and legal components in *Clarett*. Part III will discuss how federal antitrust law applies to the world of major professional team sports. Part IV will examine several other professional sports eligibility cases. Part V will outline sports law cases decided under the non-statutory labor exemption and cases generally relevant to the disposition in *Clarett*. Part VI will argue that the NFL's three-year rule is distinguishable from similar policies previously invalidated by federal courts and is therefore justified under this "hybrid" antitrust analysis: the Rule of Reason, taking into account recent sports law cases decided under a labor law framework.[19]

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[15] Lynn Zinser, *Court Bars Clarett From Draft for Now*, N.Y. TIMES, Apr. 20, 2004, at D1.

[16] Judy Battista, *Supreme Court Rejects Appeals by Clarett*, N.Y. Times, Apr. 23, 2004, at D4. The exigency of Clarett's appeals came from the fact that the NFL Draft was scheduled to occur four days after the Second Circuit's decision to stay the injunction. *Id.*

[17] Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004); *see also* Lynn Zinser, *Federal Appeals Court Denies Clarett's Bid for the N.F.L.*, N.Y. Times, May 25, 2004, at D2.

[18] 15 U.S.C. §§ 1-7 (2000) (Sherman Act).

[19] *See infra* notes 58-62 and accompanying text. The Rule of Reason examines

II. OVERVIEW OF *CLARETT V. NATIONAL FOOTBALL LEAGUE*

Undoubtedly, Maurice Clarett enjoyed one of the finest freshman seasons in the history of college football, amassing over 1,200 rushing yards in only ten games for the national champion Ohio State Buckeyes.[20] Clarett's success,[21] apparent lack of interest in obtaining an education before earning millions of dollars in the NFL,[22] and off-the-field troubles with the law[23] led to his decision to file suit against the NFL in the fall of 2003. From the outset, Clarett argued that although he had only one season of college football experience, he was physically prepared to compete at the professional level.[24]

In his complaint, Clarett requested that the federal judge declare the NFL's three-year rule a violation of antitrust law and grant an injunction[25] to prevent the NFL from blocking

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allegedly illegal restraints on trade and competition by examining the totality of the circumstances surrounding the practice and determines whether the practice promotes or restricts competition. *Id.*

[20] *Ohio State Clubhouse*, ESPN.com, *at* http://sports.espn.go.com/ncf/player/profile?playerId=133626 (last visited Aug. 27, 2004).

[21] *See id.*

[22] *See* Wojciechowski, *supra* note 10.

[23] ESPN.com News Services, *Suspended Tailback Facing Criminal Charge* (Sept. 9, 2003), *at* http://sports.espn.go.com/ncf/news/story?id=1612236.

[24] *See* Farrey, *supra* note 13. All along, Clarett's lawyers argued that college experience, and not age, was the real issue at hand:

> Clarett's lawyers note[d] that Clarett will be eight weeks shy of his 21st birthday at the start of the 2004 NFL season, and that at the start of last season there were eight players in the league who were 20 years old. Emmitt Smith, the NFL's all-time leading rusher, was 20 when he was drafted in 1990 and 'weighs less and is shorter than Clarett,' they wrote. At six-feet and 230 pounds, Clarett already is as large or larger than Hall of Famers Walter Payton, Barry Sanders and Gale Sayers were as NFL players. Compared to the top 20 rushing leaders after the fifth week of the 2003 NFL season, Clarett weighed as much as or more than 17 of them and was as tall or taller than 15 of them.

Id. Nonetheless, Clarett publicly acknowledged that even if he succeeded in his battle with the NFL, he wanted to return to Ohio State and play one more year at the college level. Associated Press, *Even if NFL Eligible, RB Wants to be a Buckeye* (Jan. 16, 2004), *available at* http://sports.espn.go.com/ncf/news/story?id=1710469. This announcement may have ultimately proved to negatively affect Clarett's argument that the NFL forced him to endure an economic loss, as he appeared to voluntarily want to play college football. *Id.*

[25] Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247, 250 (2d Cir. 1973).

> The settled rule is that a preliminary injunction should issue only upon a clear showing of either 1) probable success on the merits *and* possible irreparable injury, *or* 2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Id. at 250 (emphasis in original); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1318-19 (D. Conn. 1977) ("[C]ourts have added a third requirement to the showing of

his entry into the 2004 Draft.[26] Although Clarett succeeded in his request for injunctive relief, he was ultimately unable to overcome the full strength of the NFL's legal arsenal. The Second Circuit agreed with the NFL's argument that the three-year rule complies with federal labor law.[27]

The NFL proved its case without the full help of the "non-statutory labor exemption" rule, which is more lenient of agreements reached through collective bargaining.[28] Although the most recent Collective Bargaining Agreement (CBA) between the NFL and the player's association (NFLPA) did not include a section specifically detailing the three-year rule, the union's executive director endorsed the draft rules, and the Second Circuit recognized this endorsement under the labor exemption,[29] finding no considerable difference between a "tacit agreement" of this kind and a statement memorialized in a CBA.[30] Since draft eligibility has a "tangible effect" on hours, wages, working conditions, and terms of employment, the court deferred to the NFL's judgment.[31] As the Second Circuit found that the three-year rule was valid under labor law, the court had no reason to address the application of antitrust law.[32] This Note contends that the NFL could have prevailed, alternatively, under an antitrust analysis that takes into account recent federal case law dealing with sports labor issues. Under such an analysis, the NFL would have the

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irreparable injury and probable success, the 'balancing of equities' . . . consistent with the teaching of the Supreme Court . . . .") (citations omitted).

[26] *See* Plaintiff's Complaint ¶¶ 19-23, Clarett v. Nat'l Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03-CV-7441), *available at* http://news.findlaw.com/hdocs/docs/nfl/clarettnfl92303cmp.pdf (last visited Aug. 24, 2004).

[27] *Clarett*, 369 F.3d at 130.

[28] "Draft eligibility has been consistently retained as a management prerogative in the NFL." Berry, *supra* note 3, at 4-29. The issue of management's complete retention of the rules on NFL eligibility and the corresponding absence of any regulations on eligibility in the collective bargaining agreement between the league owners and players is discussed *infra* Part V, § 1.

[29] Len Pasquarelli, *Missing Rule in CBA Could Hurt NFL's Case*, ESPN.com (Sept. 12, 2003), *at* http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=1614334. *See also* Associated Press, *Lawyers Expected to Discuss Case*, *supra* note 12 (discussing the NFLPA's endorsement of the original implementation of the rule in 1990).

[30] *See* Associated Press, *Lawyers Expected to Discuss Case*, *supra* note 12; *Clarett*, 369 F.3d at 142-43.

[31] *Clarett*, 369 F.3d at 140 ("[T]he eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players."); *see also* Nat'l Labor Relations Bd. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958).

[32] *Clarett*, 369 F.3d at 130 ("[T]he NFL argues that federal labor law favoring and governing the collective bargaining process precludes the application of the antitrust laws to its eligibility rules. We agree.").

burden of proving that its policy does not violate section 1 of the Sherman Act as a combination or conspiracy in restraint of trade and economic competition.[33] Clarett argued that the NFL's policy constituted a "group boycott,"[34] prohibited under the Sherman Act. A group boycott occurs, basically, when one group of people (NFL team owners) refuses to contract with another group of people (ineligible players under the three-year rule).[35]

In *Clarett*, the NFL demonstrated that the three-year rule has a pro-competitive purpose and effect, thereby falling outside the purview of the restrictions outlawed by the Sherman Act.[36] The NFL succeeded in the difficult task of distinguishing its policy from similar rules adopted by other professional sports leagues, nearly all of which were declared invalid under the Sherman Act.[37] In doing so, the NFL dispelled the argument that the three-year rule unreasonably and arbitrarily prevents those who fall outside the policy's requirements from reaping the economic benefits that accompany playing in the most successful and prominent professional football league in the world.

III. FEDERAL ANTITRUST LAW AND PROFESSIONAL SPORTS

Before turning to a discussion of the professional sports eligibility cases that preceded *Clarett*, it is important to have a basic understanding of the evolution of federal antitrust law

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[33] 15 U.S.C. § 1 (2000) ("Every 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.").

[34] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (citation omitted).

[35] Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1062 (C.D. Cal. 1971).

[36] Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

[37] The first challenge to a draft eligibility rule came in 1971 when Spencer Haywood prevailed in a lawsuit against the NBA's requirement that players must be four years out of high school. *Denver Rockets*, 325 F. Supp. at 1049. The NBA's rule is discussed *infra* Part IV, § 1. Six years later, Kenneth Linseman successfully challenged the World Hockey Association's (WHA) rule prohibiting players under the age of 20 from entering its amateur draft. *Linseman*, 439 F. Supp. at 1315. The WHA would later shut down, and the NHL adopted an eligibility rule, discussed *infra* Part IV, § 2, consistent with *Linseman*. Rosner, *supra* note 11, at 554 (citation omitted). In 1984, Robert Boris won a case against the United States Football League (USFL), with the court declaring invalid the League's requirement that a player graduate from college, exhaust all of his college eligibility, or be at least five years out of high school. Boris v. United States Football League, No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at *8 (C.D. Cal. Feb. 28, 1984). The USFL's policy is also discussed *infra* Part IV, § 3.

over the past century. A survey of the case law in this area indicates that the three-year rule would be evaluated under a reasonableness balancing test rather than found to constitute a *per se* violation.

As an initial matter, it should be noted that professional sports are subject to antitrust laws. The only sporting institution that is exempt from federal antitrust law is Major League Baseball.[38] This exemption, first recognized by the Supreme Court in 1911, was based on the belief at the time that professional baseball was not a part of interstate commerce, and thus should not be regulated by federal law.[39] Although the Court later changed its view and recognized baseball's involvement in the national economy, the league's six decades of reliance on the exemption persuaded the Court to affirm its initial ruling.[40] In finding baseball different from all other forms of interstate business, therefore, federal courts have long distinguished it from other professional sports in the United States.[41] Since 1955, federal courts have consistently declined to extend baseball's antitrust exemption to any other professional sport, including basketball, football, boxing, soccer, tennis, horse racing, bowling, golf, and hockey.[42] As a result,

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[38] In *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953), the Supreme Court held that the business of professional baseball is exempt from federal antitrust law, reaffirming the principle laid down thirty-one years earlier in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208-09 (1922).

[39] *Fed. Baseball*, 259 U.S. at 208-09. In *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court identified professional baseball as "an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball." *Id.* at 282. Further, "Congress had no intention of including the business of baseball within the scope of federal antitrust laws." *Id.* at 285 (quoting *Toolson*, 346 U.S. at 357).

[40] *Flood*, 407 U.S. at 282. ("[B]aseball's exemption is an aberration that has been with us now for half a century, one . . . fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs . . . .").

[41] *See* United States v. Int'l Boxing Club of N.Y., 348 U.S. 236 (1955) ("*Federal Baseball* could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise."). In *Flood*, the Court stated "*Federal Baseball* and *Toolson* have become an aberration confined to baseball." *Flood*, 407 U.S. at 282.

[42] *See* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1203, 1204 (1971) (basketball); Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (football); Int'l Boxing, 348 U.S. at 236 (boxing); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249 (2d Cir. 1982) (soccer); Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc., 665 F.2d 222 (8th Cir. 1981) (tennis); United States Trotting Ass'n, Inc. v. Chicago Downs Ass'n, Inc., 665 F.2d 781 (7th Cir. 1981) (horse racing); Wash. State Bowling Proprietors Ass'n v. Pac. Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) (bowling); Deesen v. Prof'l Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966) (golf); and Boston Prof'l Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 265 (D. Mass. 1972) (hockey).

these sports must comply with the mandates of the Sherman Act and the vast array of federal antitrust decisions.

The Sherman Act, enacted by Congress in 1890[43] under its enumerated power to regulate interstate commerce,[44] outlaws all unreasonable restraints of trade and economic competition.[45] In *Standard Oil Company of New Jersey v. United States*, also a 1911 decision, the Supreme Court recognized the need to evaluate claims of antitrust violations under a standard of reasonableness, since not all restraints on trade would be equally harmful to competition.[46] In this way, "the Court undertook to regulate rather than prohibit private combinations."[47] Building on this foundation, the Court established a formal Rule of Reason analysis seven years later, emphasizing the importance of a thorough inspection of the restraint and the intent behind the regulation before passing judgment.[48] Thus, the Rule of Reason examines all of the circumstances involved in the disputed practice, both justifications for and arguments against the alleged restriction.[49]

Despite an early preference for a reasonableness balancing test in *Board of Trade of City of Chicago v. United States*, the Court concluded nearly forty years later that certain

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[43] *See* 15 U.S.C. § 1 (2000).

[44] U.S. CONST. art. I, § 8, cl. 3 (Congress has the power "[t]o regulate Commerce . . . among the several States . . . .").

[45] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911) ("[T]he dread of . . . wrongs which it was thought would flow from the undue limitation on competitive conditions . . . led, as a matter of public policy, to *the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions*. . . .") (emphasis added).

[46] *Id.* at 60 ("[I]t was intended that the *standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.") (emphasis added).

[47] *Denver Rockets*, 325 F. Supp. at 1063.

[48] Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918). The Supreme Court delineated the test for the Rule of Reason in rather broad terms:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby 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.

[49] *See infra* notes 58-62 and accompanying text for a more thorough discussion of the Rule of Reason.

types of business agreements or practices have a "pernicious effect on competition and lack . . . any redeeming virtue," and thus warrant a conclusive finding of *per se* illegality.[50] In *Northern Pacific Railway Company v. United States*, the Court identified group boycotts, or concerted refusals by one group of people to deal with another group of people,[51] along with price fixing, division of markets, and tying arrangements, as unreasonable *per se*.[52] By 1960, *Fashion Originators' Guild of America v. Federal Trade Commission*, which originally laid down the broad prohibition on "organized" boycotts,[53] and *Klor's, Inc. v. Broadway-Hale Stores*, a case that built on *Fashion Originators*, had established "the proposition that a concerted refusal to deal cannot be justified by any motive or ultimate goal, however reasonable."[54]

Nonetheless, within a few years of *Fashion Originators* and *Klor's*, the Court relaxed its demanding stance on group boycotts in *Silver v. New York Stock Exchange*.[55] The *Silver* Court recognized that a concerted refusal to deal is not *per se* illegal when there is an adequate "justification derived from the policy of another statute or otherwise."[56] The *Silver* "exception" examines whether collective action is "required" by the industry structure, whether the restraint is reasonably implemented, and whether procedural safeguards (namely notice and a hearing) are in place to prevent unnecessary and arbitrary application.[57] Consequently, if a group boycott, or

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[50] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1957) ("This principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.")

[51] *Klor's*, 359 U.S. at 212.

[52] *See* Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457 (1941) (group boycotts); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899) (division of markets); Int'l Salt Co. v. United States, 332 U.S. 392 (1947) (tying agreements).

[53] *See Fashion Originators*, 312 U.S. at 465; *see also* Thomas Lombardi, *Can't We Play Too? The Legality of Excluding Preparatory Players from the NBA*, 5 VAND. J. ENT. L. & PRAC. 32, 34 (2002). ("A group boycott claim arises when a party is injured due to exclusion from a market in which it seeks entry and when, in turn, the competition within that market is injured by that exclusion.").

[54] *Denver Rockets*, 325 F. Supp. at 1064.

[55] 373 U.S. 341 (1963).

[56] *Id.* at 348-49.

[57] *See* Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1504-05 (1966). The *Silver* exception requires courts to consider three questions:

concerted refusal to deal, can meet the standards outlined in *Silver*, it will not be labeled *per se* unreasonable and, instead, will be subject to the Rule of Reason analysis.

The Rule of Reason approach provides the tools necessary to more efficiently and fairly evaluate a restriction alleged to violate the Sherman Act. Despite the progression of Supreme Court decisions regarding *per se* violations, the Court has consistently "adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."[58] In short, the Rule of Reason's focus on viewing the totality of circumstances[59] behind the disputed business agreement or practice does not detract from the power of the Sherman Act, but more accurately gives the statute "flexibility and definition."[60] Furthermore, the Rule of Reason relies on a determination of the "competitive impact" and on an "economic analysis" of the situation.[61] Courts continue to rely on the standards set forth in *Board of Trade* nearly 85 years ago, including the unique qualities of the business, and the extent, rationale, and effects of the restraint.[62]

Since *Silver*, courts have reserved the *per se* approach for "naked restraints of trade with no purpose except stifling of competition."[63] The Supreme Court has emphasized that "formalistic line drawing," or blindly declaring group boycotts *per se* invalid despite the lack of a "demonstrable economic effect," is impermissible.[64] As a result, since "by its very nature

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> (a) Was the association's action intended to accomplish an end which was within the contemplation of the policy justifying self-regulation or consistent with the necessities of industry structure? (b) Was the restraint imposed by the association reasonably related to achieving this goal, and no more extensive than necessary to do so? (c) Did the association provide procedural safeguards which assured that the restraint was not arbitrary and which furnished a basis for judicial review?

Id. at 1504-05 (footnote omitted).

[58] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978) (citing Bd. of Trade of City of Chicago v. United States, 246 U.S. 231 (1918) and Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).

[59] *Cont'l T.V.*, 433 U.S. at 49 ("Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

[60] *Nat'l Soc'y*, 435 U.S. at 688.

[61] *Id.* at 691 n.17 (discussing *Cont'l T.V.*, 433 U.S. 36). "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Id.* at 692.

[62] *Bd. of Trade*, 246 U.S. at 238.

[63] White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

[64] *Cont'l T.V.*, 433 U.S. at 58-59.

the *per se* approach paints with a very broad brush and eliminates economic cooperation which may be both necessary and desirable," federal courts now generally favor Rule of Reason analysis.[65] In addition, and more importantly for the purposes of this Note, federal courts appreciate "the unique characteristics of professional sports competition" and understand the need to flexibly apply a reasonableness balancing test to disputed practices.[66] Despite today's preference for the Rule of Reason, however, the majority of courts deciding eligibility cases from professional sports over the past thirty years have refused to embark on detailed and factually-based reasonableness balancing tests.

IV. ELIGIBILITY CASES IN OTHER PROFESSIONAL SPORTS

Clarett's challenge to the NFL's three-year rule followed a host of federal court cases in which aspiring athletes took on large professional sports organizations in an effort to change league rules. A discussion of professional sports draft eligibility cannot begin without a thorough analysis of *Denver Rockets v. All-Pro Management*,[67] the case that secured Spencer Haywood's spot in the National Basketball Association (NBA) and opened the door to an era of antitrust challenges to professional sports league practices. In addition, three other eligibility cases, *Linseman v. World Hockey Association*,[68] *Boris v. United States Football League*,[69] and *Bowman v. National Football League*,[70] provide useful background to an antitrust view of *Clarett*.

A. *Spencer Haywood Paves the Way*

For Clarett, Haywood's historic battle against the NBA provided the main precedent for an attack on the NFL's three-year rule, as Haywood sustained his claim all the way through a Supreme Court ruling on the validity of the NBA's draft eligibility rule.[71] For the NFL, *Denver Rockets* revealed the

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[65] *Denver Rockets*, 325 F. Supp. at 1064.

[66] Samuel M. Chambliss, III, *Professional Football's Four-Or-Five-Year Eligibility Rule: High Time to Punt*, 14 MEM. ST. U. L. REV. 517, 524-527 (1984) (outlining the "uniqueness of the business of competitive team sports").

[67] 325 F. Supp. 1049 (C.D. Cal. 1971).

[68] 439 F. Supp. 1315 (D. Conn. 1977).

[69] No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at *1 (C.D. Cal. Feb. 28, 1984).

[70] 402 F. Supp. 754 (D. Minn. 1975).

[71] *See* Luke Cyphers, *Haywood's been in Clarett's shoe*, ESPN.com (Sept. 5,

deficiencies in the NBA's justifications for its hard-and-fast rule restricting the entry of amateur athletes into the NBA—and what the NFL could do to avoid similar deficiencies. As the seminal case for sports eligibility litigation pre-*Clarett*, *Denver Rockets* provides an important indicator of the Second Circuit's subsequent decision in *Clarett*.

In 1971, Haywood successfully challenged the NBA's requirement that a player could not enter the league's amateur draft until four years after the date of his high school graduation.[72] Prior to his legal efforts, Haywood enjoyed extraordinary success as both an amateur and professional basketball player, winning "All-American" honors in high school, junior college, and college, as well as an Olympic medal in the 1968 Summer Games.[73] After spending one season at the University of Detroit, Haywood signed a contract with the Denver Rockets (Rockets), a team in the American Basketball Association (ABA), where he earned "Rookie of the Year" honors.[74] During November of the following season, Haywood

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2003), *at* http://sports.espn.go.com/ncf/news/story?id=1609921.

[72] *See Denver Rockets*, 325 F. Supp. at 1059. Section 2.05 of the bylaws of the NBA provides as follows:

> *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. (emphasis in original) (quoting NBA Bylaws in effect during the 1970-71 season). Section 6.03 provides as follows:

> *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;
>
> (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. (emphasis in original) (quoting NBA Bylaws in effect during the 1970-71 season).

[73] *Id.* at 1052.

[74] *Id.* at 1060 (noting Haywood was granted eligibility from the ABA, a

and the Rockets had a dispute over the terms of Haywood's contract, ultimately resulting in Haywood's departure from the team.[75] Shortly thereafter, in late December, Haywood agreed to a six-year contract with the Seattle Supersonics (Sonics), an NBA team, despite the fact that both Haywood and the Sonics were well aware of the league's bylaws and that Haywood was not yet eligible under the four-year rule.[76] Not surprisingly, then-NBA Commissioner Walter Kennedy immediately "disapproved" the contract between Haywood and the Sonics on the basis of Haywood's ineligibility, and threatened sanctions against the team for its unlawful conduct.[77] Two days later, Haywood petitioned a California district court for a preliminary injunction, asking the court to secure his right to play in the NBA until the conclusion of a thorough hearing on the merits of his contention that the NBA's four-year rule constituted a "group boycott" in violation of the Sherman Act.[78]

The injunction was initially granted on February 2, 1971, with District Judge Ferguson finding that the NBA's rule was likely a *per se* violation of the Sherman Act, since group boycotts are *per se* illegal.[79] Judge Ferguson supported his grant of the preliminary injunction by stating that: (1) the NBA's rule was in furtherance of an alleged violation of federal antitrust law; (2) there was a substantial likelihood that Haywood would succeed on the merits at trial; (3) Haywood would suffer irreparable harm if the injunction were denied; and (4) the NBA did not deserve equitable relief on the matter.[80]

The Ninth Circuit stayed the injunction, and the case was argued shortly thereafter before Justice Douglas of the

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league no longer in operation, pursuant to a "hardship exemption" from that league's four-year college rule, one similar to the NBA's rule).

[75] *Id.* at 1054 ("On November 23, 1970, Haywood gave written notice to Denver that he considered his contract with Denver to be invalid by reason of fraudulent misrepresentations made by Denver to him, and that he disavowed and rescinded said contract.").

[76] *Denver Rockets*, 325 F.Supp. at 1054.

[77] *Id.* at 1060. On January 12, 1971, fifteen days after Haywood signed his contract with the Sonics, the Commissioner stated: "The Board of Governors . . . have passed a resolution directing the Commissioner . . . to consider bringing charges against Seattle . . . in connection with the Spencer Haywood matter and to advise the Board of the most drastic penalties lawfully at its command if such charges should be sustained." *Id.* at 1060. "This means expulsion of the franchise through various other levels, including fines, suspending draft choices." *Id.* at 1057.

[78] *Id.* at 1054.

[79] *Id.* at 1058 (noting that District Judge Ferguson stated that the reasonableness of the rule is no defense to its illegality).

[80] *Denver Rockets*, 325 F. Supp. at 1058; *see also* Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2d Cir. 1969).

Supreme Court,[81] who reinstated the injunction and sent the case back to the district court for fact-finding.[82] Justice Douglas cited the district court's conclusion that the injunction would prevent the NBA from inflicting "irreparable harm" on Haywood, who only had a limited window of time to play professional basketball.[83] Although Justice Douglas alluded to applicable antitrust law, his decision rested largely on equitable considerations and an interest in maintaining the status quo (as it stood after Haywood signed with the Sonics).[84] The district court issued its opinion on the merits little more than two months after Haywood's initial application for relief.[85] Undoubtedly, Judge Ferguson[86] relied a good deal on the conclusions he reached in his initial grant of the injunction—namely a concern for Haywood's career[87] and the lack of substantive harm the NBA would endure from Haywood's entrance into the league.[88]

In many ways, Haywood was a perfect candidate to challenge the four-year rule. The court continually emphasized his impressive credentials, and how it was "uncontested" that Haywood was "qualified to play basketball at the high level of

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[81] *Id.* at 1060.

[82] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1206 (1971) ("[The] group boycott issue in professional sports is a significant one.").

[83] *Id.* at 1205 (citing *Denver Rockets*, 325 F. Supp. at 1057). The court in *Denver Rockets* was moved by a concern for Haywood suffering "irreparable injury in that a substantial part of his playing career will have been dissipated, . . . his public acceptance as a super star will diminish to the detriment of his career, and a great injustice will be perpetrated on him." *Denver Rockets*, 325 F. Supp. at 1057.

[84] *See Haywood*, 401 U.S. at 1206-07. Justice Douglas issued his opinion on March 1, shortly before the NBA Playoffs were to commence. "The matter is of some urgency because the athletic contests are under way and the playoffs between the various clubs will begin on March 23. To dissolve the stay would preserve the interest and integrity of the playoff system, as I have indicated." *Id.* The Supreme Court, sitting *en banc*, later affirmed Justice Douglas' opinion. *Denver Rockets*, 325 F. Supp. at 1060.

[85] *Denver Rockets*, 325 F. Supp. at 1049.

[86] *Id.* at 1051. Judge Ferguson's opinion on the "Motion for Preliminary Injunction Against Cross-Defendant National Basketball Association," decided Feb. 2, 1971, and his "Opinion Granting Partial Summary Judgment," decided Mar. 22, 1971, are both embodied in 325 F. Supp. 1049.

[87] *Id.* at 1057 ("Participating in professional basketball as a player against the best competition which the sport has to offer is as necessary to the mental and physical well being of Haywood as is breathing, eating and sleeping.").

[88] *Id.* at 1058 ("There is no evidence that the granting of the relief requested by [Haywood] will open the door to other allegedly ineligible college basketball players being recruited by NBA teams. . . . No monetary injury will result to the NBA by reason of the granting on the Preliminary Injunction."). The strength of these arguments, especially with regard to whether the granting of an exemption or changing of the rule has a long-term effect, is discussed *infra* in terms of the NFL's three-year rule.

competency required of NBA players."[89] In this regard, Haywood's exemplary professional skills may have made him a more sympathetic plaintiff, thereby providing an additional justification for ultimately finding the NBA's four-year rule in violation of the Sherman Act.

In any event, the district court granted Haywood partial summary judgment, firmly holding the four-year rule *per se* illegal as a "group boycott" prohibited by the Sherman Act.[90] The court held that this "primary concerted refusal to deal"[91] prevented people like Haywood, or those otherwise qualified to play in the NBA, "but for"[92] their ineligibility under the four-year rule, from contracting with NBA team owners.[93] As a result, Haywood and other similarly situated players suffered three harms: (1) the boycott victimized the excluded player by not allowing him to enter a desired market; (2) the boycott injured competition within that market since the excluded player could not sell his services; and (3) the boycott allowed NBA team owners to pool their economic power and collectively establish their own "private government."[94] These initial observations lay the foundation for Judge Ferguson's ultimate finding that the NBA's four-year rule was *per se* illegal under the Sherman Act and need not be examined under the Rule of Reason.

In reaching this conclusion, the court made two determinations regarding the Rule of Reason and the NBA's four-year rule. First, the court articulated its hesitation in employing the Rule of Reason over a *per se* approach because "it requires difficult and lengthy factual inquiries and very subjective policy decisions which are in many ways essentially legislative and ill-suited to the judicial process."[95] The court was simply unwilling to make judgments on the value of the rule to the NBA or the rationale behind the four-year requirement.

Second, the court examined *Silver*, ruling that the NBA could not satisfy any of the Supreme Court's requirements to qualify for an exception to the general rule of *per se* illegality

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[89] *Id.* at 1061.

[90] *Denver Rockets*, 325 F. Supp. at 1066-67.

[91] *Id.* at 1061 (internal quotation omitted).

[92] *Id.* at 1056.

[93] *Id.* at 1061.

[94] *Id.* (noting that with regard to the third harm, "[o]f course, this is true only where members of the combination possess market power in a degree approaching a shared monopoly. This is uncontested in the present case").

[95] *Denver Rockets*, 325 F. Supp. at 1063.

for group boycotts.[96] As with other lower federal court judges, Judge Ferguson evaluated *Silver* with caution, trying to correctly apply the three standards within the Court's intended boundaries.[97] In examining prongs two and three,[98] Judge Ferguson identified the *Silver* Court's emphasis on notice and a hearing as effective tools to "determine whether the self-regulation is justified, necessary and sufficiently limited."[99] Under this framework, the court found that the four-year rule could not escape *per se* invalidity.[100] The NBA did not employ any "procedural safeguards"[101] to guard against arbitrary and overly broad application of the rule.[102] Specifically, the league provided no means for a player like Haywood to file a "rudimentary" petition, or special application for eligibility, based on his own individual circumstances.[103]

With regard to the first prong of the *Silver* test,[104] Judge Ferguson only briefly mentioned the merits behind the NBA's attempt to self-regulate, and did not fully explore the necessity for doing so in the world of professional sports.[105] The court's superficial analysis of the first prong may well have come in reaction to the weak arguments set forth by the NBA in support of their four-year rule. The court balked at the NBA's

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[96] *Id.* at 1066.

[97] *See* Rosner, *supra* note 9 at 544 ("Though determining the precise scope of the so-called *Silver* exception has been a somewhat difficult task for lower courts, three requirements have generally been espoused. . . .").

[98] *Denver Rockets*, 325 F. Supp. at 1065. The second and third prongs required under the *Silver* exception read as follows:

> (2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.
>
> (3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.

Id. at 1065.

[99] *Id.* (citing *Silver*, 373 U.S. at 363).

[100] *Id.* at 1066.

[101] *Silver*, 373 U.S. at 363.

[102] *Denver Rockets*, 325 F. Supp. at 1066.

[103] *Id.* ("It is clear from the constitution and by-laws of the NBA that there is no provision for even the most rudimentary hearing before the four-year college rule is applied to exclude an individual player.").

[104] *Id.* at 1064-65. The first prong required under the *Silver* exception reads as follows:

> (1) There is a legislative mandate for self-regulation "or otherwise." In discussing the history of the New York Stock Exchange in *Silver*, the Court suggests that self-regulation is inherently required by the market's structure. From this basis, it has been argued that where collective action is required by the industry structure, it falls within the 'or otherwise' provision of *Silver*.

Id. (citations omitted).

[105] *See* Rosner, *supra* note 9 at 552.

arguments concerning financial necessity, the rule's indirect promotion of obtaining a college education, and the use of college basketball as a "more efficient and less expensive way of training young professional basketball players than the so-called 'farm team' system."[106] In short, the court held that the NBA's four-year rule was "overly broad," "improper," and unnecessarily "absolute."[107]

The importance of *Denver Rockets* continued for many years to come. Shortly after the case, the NBA established a financial "hardship rule" for players like Haywood, and eventually changed its rule entirely to allow anyone whose high school class has graduated to enter the league's amateur draft.[108] Haywood cleared the way for some of today's NBA superstars, like Kobe Bryant, Kevin Garnett, Tracy McGrady, and Jermaine O'Neal, to forgo college entirely and enter the NBA draft, often within weeks of high school graduation.[109] More importantly for the purposes of this Note, *Denver Rockets* provided a "legal manual" for Clarett in his battle against the NFL.

In an effort to draw parallels between himself and Haywood, Clarett's complaint detailed his many accomplishments.[110] Clarett received numerous "player of the year" honors after his senior season of high school and was largely regarded as the best freshman running back in all of college football after his first year at Ohio State.[111] Despite these achievements, the Second Circuit likely viewed Clarett as strikingly different from Haywood in one key regard. While Clarett challenged the three-year rule as an amateur, Haywood challenged the NBA's four-year rule as a professional basketball player. This fact may have made Clarett a far less sympathetic plaintiff than Haywood, since Clarett did not choose to file suit against the NFL until after he lost his eligibility to play college football at Ohio State during his sophomore year. As a result, while Haywood was already making a living playing professional basketball, Clarett was a scholarship athlete at a prestigious national university whose

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[106] *Denver Rockets*, 325 F. Supp. at 1066.

[107] *Id.* ("[I]t is uncontested that the rules in question 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.").

[108] *See* Rosner, *supra* note 9 at 553.

[109] *See* Lombardi, *supra* note 53 at 39.

[110] *See* Plaintiff's Complaint, *supra note* 26.

[111] *Id.*

off-the-field improprieties led to his removal from the Buckeye football team.[112] While this distinction may have had no legal ramifications, the *Denver Rockets* court could very well have been partially motivated by sympathy for Haywood.

B. *Kenneth Linseman Sets the Eligibility Standard for Professional Hockey*

Six years after Haywood's successful claim, Kenneth Linseman, a 19 year-old Canadian amateur hockey player, challenged the validity of the World Hockey Association's (WHA) rule that no person under the age of 20 could play in the league.[113] Although *Denver Rockets* was the predominant authority Clarett relied on in his challenge to the NFL's three-year rule, *Linseman*, a Second Circuit case, explicitly outlined the deficiencies in the WHA's rule and the appropriateness of relief for a plaintiff in a similar situation.

In *Linseman*, the Birmingham Bulls, a WHA team, selected the plaintiff in the annual league amateur draft, only to be informed by the league office that the selection was "null and void" under the so-called "twenty year old rule."[114] Linseman petitioned a federal court for injunctive relief, and District Judge Clarie found that the practice constituted a *per se* illegal group boycott under the Sherman Act.[115] Although Judge Clarie largely relied on *Denver Rockets* as a basis for the opinion, *Linseman* provides a useful application of the *Silver* exception.

Judge Clarie held that irreparable injury was essentially unavoidable without a preliminary injunction, since Linseman would lose a professional salary and exposure to a high level of competition if blocked from the WHA—thereby injuring a career that already has only a limited window for growth and opportunity.[116] Furthermore, Judge Clarie compared Linseman's case to Haywood, suggesting Linseman could lose the chance to achieve "superstar" status if he had to remain at the amateur level for another year.[117] Clarett set

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[112] *See supra* note 23 and accompanying text.

[113] *Linseman*, 439 F. Supp. 1315.

[114] *Id.* at 1317-18.

[115] *Id.* at 1320-21.

[116] *Id.* at 1319 ("The career of a professional athlete is more limited than that of persons engaged in almost any other occupation. Consequently the loss of even one year of playing time is very detrimental.").

[117] *Id.* at 1319 ("By playing in the WHA, Linseman may achieve the status of a

forth similar and, in many ways, equally compelling arguments to those advanced by Linseman, as it is indisputable that professional athletes only have a certain amount of time that they may make use of their athletic skills.[118] However, unlike Clarett, who could make a significant salary and sign endorsement contracts if he played in the CFL for one year before becoming eligible for the NFL, Linseman did not have another way to play professional hockey outside of the WHA.

Linseman also details why the WHA's "twenty year old rule" does not qualify for the *Silver* exception. Judge Clarie refused to apply the Rule of Reason, since the WHA could likely not demonstrate that even one of the requirements of *Silver* applied to its eligibility rule. First, Judge Clarie held that the free market should dictate who is and who is not fit to play professional hockey.[119] Second, the court dismissed the WHA's argument that the restrictive eligibility rule was necessary to facilitate the growth of talent in the Canadian junior hockey league.[120] The court bluntly stated that economic necessity does not permit violations of federal antitrust law.[121] Third, Judge Clarie held that the WHA provided none of the procedural safeguards envisioned by the *Silver* court, namely the opportunity for a hearing to ask for a "hardship exemption."[122]

The court asserted that should the preliminary injunction not issue, Linseman would suffer a far greater harm than the WHA.[123] Consequently, Judge Clarie ruled in favor of Linseman, as his probability of success at trial was overwhelming.[124] In doing so, the court reaffirmed many of the principles laid down in *Denver Rockets*, including the federal system's disinclination to uphold restrictive trade practices.

'superstar' which would bring him financial and emotional rewards in excess of his salary from [his amateur team]. Such rewards are not available to . . . [amateur players since they do] not receive the same notoriety . . . as . . . WHA [players].").

[118] *See Linseman*, 439 F. Supp. at 1319-20.

[119] *Id.* at 1321.

[120] *Id.* at 1322.

[121] *Id.* ("If the WHA needs a training ground for its prospective players, the principles of the free market system dictate that it bear the cost of that need by establishing its own farm system.").

[122] *Id.* The court concluded its discussion of the *Silver* exception by stating that the WHA's rule "is a blanket restriction as to age without any consideration of talent." *Id.* at 1323.

[123] *Linseman*, 439 F. Supp. at 1325.

[124] *Id.* at 1325-26.

C. *Robert Boris Challenges the USFL*

Another draft eligibility case, *Boris v. United States Football League*, decided in 1984, struck down a rule that prevented players from joining the USFL until expiration of the player's college eligibility or five years after the player started college.[125] In a factual setting quite similar to that of *Clarett*, Robert Boris, a varsity football player who voluntarily withdrew from the University of Arizona in the middle of his third season of college eligibility, brought a challenge to the rule on the basis that it constituted an illegal group boycott.[126] The rule was nearly identical, word for word, to the one found in the present version of the NFL's Constitution & Bylaws.[127] At the time, however, the USFL did not have the same type of "Special Eligibility Rule" that the NFL maintains today.[128]

A district court in California, the same court which found for Spencer Haywood more than a decade earlier, agreed with Boris, holding that the USFL's rule was a *per se* violation of the Sherman Act.[129] In a relatively short opinion, District Judge Waters refused to consider the potential reasonableness of the rule, other than to list the USFL's creative, yet ultimately unsustainable, justifications.[130] Judge Waters'

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[125] 1984 WL 894 at *1. The USFL launched in 1984 and lasted for three seasons. The games were played in the spring in an effort to attract fans who wanted to watch football on a year-round basis (the NFL's season runs from August until February). *See also* Rosner, *supra* note 9 at 555-56.

[126] *Id.* at *1-2.

[127] *See supra* note 1 and accompanying text. "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 (5) 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." USFL CONST. & BYLAWS (*reprinted in* 1984 WL 894 at *1).

[128] *See supra* note 1 and accompanying text.

[129] 1984 WL 894 at *1.

[130] *Id.* at *2. The USFL offered a host of justifications for its Rule:

> The reasons advanced by the defendants in support of the Eligibility Rule . . . are (in summary): The Eligibility Rule promotes on-field competitive balance among USFL teams; very few college athletes are physically, mentally, or emotionally mature enough for professional football; abolition of the Eligibility Rule will not benefit the college athlete; the Eligibility Rule promotes the concept of the importance of a college education; the Eligibility Rule promotes the efficient operation of the USFL by strengthening the sport at the college level so that the USFL does not have to develop players at that level; the Eligibility Rule is not inflexible; since 1983 was the USFL's first season of play, competitive conditions required it to adopt and enforce the same Eligibility Rule previously adopted and enforced by the two powerful and established major professional football leagues [the NFL and the CFL], if it cannot enforce the Eligibility Rule, its very existence will be threatened,

opinion addressed two important points for the purposes of *Clarett*. First, part of the court's rationale for its holding in *Boris* undoubtedly came from the USFL's grant of eligibility to Herschel Walker one year earlier. Walker, winner of the 1982 Heisman Trophy Award, given annually to the top player in college football, left the University of Georgia after his junior year and played one season with the New Jersey Generals, a USFL team, in 1983.[131] Consequently, the court struck down the rule, in part because the USFL did not provide Boris with a procedural device to "contest his exclusion" under the rule.[132] In *Clarett*, the Second Circuit's endorsement of the NFL's procedural protections of applicants for eligibility not only affected Clarett, but also affected a future crop of players wishing to forgo three or more years of college eligibility for the NFL. In other words, *Clarett* effectively cemented the NFL's three-year rule for the foreseeable future.

In addition, the *Boris* court did not address the specific merit of each justification set forth by the USFL, instead opting to identify "the principal reason for . . . the Eligibility Rule" as a response "to apparent demands made by college football programs ... [to] thereby gain better access to these programs towards the end of selecting the best college players available."[133] This finding, in all likelihood, had little effect on the NFL's defense in *Clarett*, since the NFL has clearly established itself as the predominant professional football league in the world. In this regard, the NFL does not have to worry about maintaining a good reputation with college football programs, since the league consistently attracts the best amateur football players.[134]

Moreover, Clarett's case turned on a federal court's evaluation of the same types of arguments the USFL set forth in support of its Eligibility Rule, including whether someone like Clarett, having only played one (incomplete) year of college football, is physically ready for the rigors of a 16 game NFL

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and the best chance that college football players have for increased renumeration (viz, interleague economic competition) will be gone.

Id.

[131] *See* Rosner, *supra* note 9 at 555 n.124.

[132] 1984 WL 894 at *3; *see also* Chambliss, *supra* note 66, at 518. In response to the ruling, the USFL granted eligibility to Marcus Dupree, a sophomore from the University of Oklahoma. *Id.*

[133] *See* 1984 WL 894 at *3.

[134] While the CFL has proven to be a successful league, its prestige is far below that of the NFL's.

season.[135] According to Clarett and numerous sports analysts, however, the NFL uses this justification merely as a mask for its real motivation for the three-year rule, that college football essentially trains players for the NFL on a variety of levels.[136] In fact, the issue of Clarett's preparedness (or lack thereof) for the NFL related to one of his chief complaints, specifically that the NFL discreetly uses college football as an "efficient and free farm system . . . [that prevents] players from selling their services to the NFL until they have completed three college seasons."[137] This was the most challenging argument for the NFL to overcome, since the league clearly benefits from players competing at a relatively high level of competition, albeit not professional, in college football for three seasons.[138] In other words, college football helps to perfect the finely-tuned product that the NFL sells in the stadiums of its 32 member teams, on the four television stations it contracts with, and through numerous other commercial outlets: well-played and entertaining professional football. While this argument appears to have merit, Clarett was unable to garner enough legal support for the proposition.

The NFL counteracted Clarett's claim of a quasi-conspiracy between professional and college football by citing one of the central components of the *Silver* exception: public policy. Specifically, the league argued that one of the strongest justifications for the three-year rule was the likelihood that a player like Clarett would be prone to serious injury since he would not have enough experience to play professional football.[139] Despite the difficulty the NFL encountered in

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[135] Tom Farrey, *Legal analysis thinks Clarett has case*, ESPN.com (Sept. 25, 2003), *at* http://sports.espn.go.com/ncf/columns/story?columnist=farrey_tom&id=16237 66.

[136] Darrell Trimble, *NFL's argument against Clarett is weak*, ESPN.com (Sept. 25, 2003), *at* http://insider.espn.go.com/insider/story?id=1623318 (suggesting that Clarett is more than ready for the NFL, pointing out that the rule has nothing to do with age and everything to with college experience. "As far as the issue of Clarett not being physically ready, the average size of the NFL starting tailback is 5-foot-11 and 216 pounds. At 6-0 and 230, Clarett is bigger than all but six of the 32 starters in the league.").

[137] *See* Plaintiff's Complaint, *supra note* 26.

[138] The quality of play in the NFL undoubtedly benefits from many aspects of college football, including the high level of public exposure that athletes are subjected to at "big time" programs, like University of Michigan, University of Oklahoma, University of Tennessee, or University of Southern California, as well as the physical and emotional development college football players generally experience while playing in a highly-competitive and pressure-filled atmosphere. Of note, many college football stadiums around the country far exceed the attendance capacity of every NFL stadium, including some that accommodate over 100,000 spectators.

[139] *See* Farrey, *supra* note 13. A sports doctor submitted an affidavit on behalf

downplaying Clarett's arguments about a "free farm system," there is no denying the fact that football is the most violent and physically rigorous major professional sport. While players coming right out of high school into the NBA often sync flawlessly with the speed and level of professional play, it is hard to imagine someone coming right out of high school playing in the NFL. Consequently, the pool of amateur players seeking entry into the NFL is best served by each player spending several years playing college or CFL football.[140]

D. *Ken Bowman Leads an Attack on Another NFL Group Boycott*

Another injunction case, while by no means controlling in *Clarett*, suggests that a court could ultimately find the NFL's three-year rule incompatible with federal antitrust law. In *Bowman v. National Football League*, a federal court granted injunctive relief to a group of professional football players, unemployed after the folding of the World Football League (WFL).[141] The NFL, in the middle of its season at the time of the folding, basically tried to boycott the hiring of any player from the WFL until the end of the season.[142] District Judge Devitt ruled that if the former WFL players could not play in the NFL that season, they would likely suffer irreparable harm and damage far greater than the NFL might endure should the injunction not issue.[143] Most importantly, the court held that "[t]he public interest is not harmed, and well may be advanced, by the grant of a preliminary injunction. Professional sports and the public are better served by open unfettered competition for playing positions."[144] This kind of language clearly sides with Clarett, and suggests that a federal judge might be hesitant to rule in favor of a large organization

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of the league suggesting "that a less restrictive eligibility rule would promote steroid use and other 'risky behavior' among young athletes who lack the strength and speed to compete against older, NFL players." *Id.*

[140] *Id.* (The NFL admits "[u]nlike top baseball or hockey prospects in a professional minor-league system, college football players rarely have financial assurances that if they suffer career-ending injuries—the exception being those players with special insurance policies.").

[141] 402 F. Supp. 754, 755 (D. Minn. 1975).

[142] *Id.*

[143] *Id.* at 756 ("Plaintiffs are unemployed but qualified professional football players who are prevented from seeking and obtaining employment in their chosen field by the concerted action of [the NFL], to their financial, physical and professional detriment.").

[144] *Id.*

like the NFL if it appears that an individual plaintiff could be seriously harmed by the continued vitality of an questionably legal restraint on commerce.

However, as was the case with Haywood, Clarett was a very different kind of plaintiff than those in *Bowman*. In that case, when the NFL learned that the WFL was on the verge of collapse, league officials and team owners decided that an unrestricted flow of ex-WFL players into the NFL might lead to a chaotic and unfair free agency, in which one team could, in theory, sign all of the best WFL players.[145] In granting the injunction, Judge Devitt found that the plaintiffs would likely prevail on the merits, since the NFL was essentially "combining and conspiring to restrain competition for the services" of the ex-WFL players, a practice prohibited under the Sherman Act.[146]

The NFL could distinguish the facts of *Clarett* from *Bowman* on several levels. First, the ex-WFL players, many of whom had previously played in the NFL, were already professional football players.[147] Second, in Bowman, the NFL had claimed that the boycott was initiated to prevent possible lawsuits from WFL owners with whom the ex-WFL players had contractual obligations.[148] In such a case then, Bowman, along with the other plaintiffs in the suit, would have been irreparably harmed had the federal courts not intervened and allowed them to play in the NFL. Clarett, on the other hand, was not a professional, and had no outstanding contractual obligations. In fact, he was, and will remain, an amateur athlete until his eligibility is extinguished or he contracts to play with a professional football league, like the CFL.

Although these eligibility cases are helpful in illustrating the types of arguments that Clarett and the NFL employed, none carry the persuasive strength they once did. Federal courts now tend to favor the Rule of Reason in cases concerning allegedly restrictive trade practices. Furthermore, in sports cases that deal with labor issues, federal courts tend to recognize the unique characteristics of major professional

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[145] *Id.* at 755. The NFL's resolution of September 16, 1975 provided that anyone "under a 1975 contract as a player . . . in another major professional football league may not sign with an NFL club for 1975. The foregoing provision shall not apply to players who are without any further contractual obligation within such league and whose club or league ceases to operate." *Id.*

[146] *Bowman*, 402 F. Supp. at 756.

[147] *Id.* at 755.

[148] *Id.*

sports leagues and liberally apply relevant antitrust and labor law. This recent trend toward allowing professional sports leagues to make rules that might otherwise offend antitrust and labor law moved the *Clarett* court to sympathize with the unique business demands of professional football (including the need for the three-year rule).

V. SPORTS LAW AND THE NON-STATUTORY LABOR EXEMPTION

In *Clarett*, the Second Circuit found that the three-year rule, although not explicitly included,[149] was included by implication in the CBA between the owners and the players. This finding was fortunate for the NFL as it allowed the League to utilize the non-statutory labor exemption, a judicially created protection for rules and regulations found in collective bargaining agreements that would otherwise violate federal antitrust law. [150] It is the contention of this Note that, since the NFL's draft eligibility rule is solely a League policy, and not expressly memorialized in the CBA, the non-statutory labor exemption should not have been dispositive in *Clarett*. That being said, the NFL's argument that there is an implicit agreement between the league and the player's association over any practice not explicitly found in the CBA is relevant.[151]

Clarett and the NFL disagreed as to whether the draft eligibility rule was a "mandatory subject of bargaining" and whether Clarett, a stranger to the bargaining process between the league and the NFLPA, was even entitled to protection from such allegedly illegal labor practices.[152] From the NFL's perspective, since draft eligibility falls within the CBA's zone of influence, even though the rule is not actually an agreed-upon component of the CBA, federal case law suggests that the league has a fair amount of latitude in enforcing such a practice.[153]

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[149] *See supra* notes 1 & 29 and accompanying text.

[150] *See generally* Mackey v. Nat'l Football League, 543 F.2d 606, 611-12 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

[151] Len Pasquarelli, *Guidelines lacking in CBA*, ESPN.com (Sept. 23, 2003), *at* http://sports.espn.go.com/nfl/columns/story?id=1621876.

[152] *See* Plaintiff's Complaint, *supra note* 26, at ¶¶ 40-41; Darren Rovell, *Legal eagles explain what's next*, ESPN.com (Sept. 24, 2003), *at* http://sports.espn.go.com/nfl/news/story?id=1622080.

[153] Brown v. Pro Football, Inc., 518 U.S. 231, 243 (1996).

Consequently, under the "hybridized" antitrust-labor law perspective that this Note endorses, a court could examine the antitrust principles involved in Clarett under the holdings of a series of decisions dealing with challenges to provisions in professional sports leagues' collective bargaining agreements and the non-statutory labor exemption. The following cases represent the Court of Appeals' and Supreme Court's preference for examining antitrust and labor cases from the world of professional sports at a slightly different angle than that taken for traditional employment situations.

A. Brown v. Pro Football: *Does the Three Year Rule Have to be in the CBA?*

In the 1996 case of *Brown v. Pro Football, Inc.*, the Supreme Court held that the NFL could unilaterally impose a fixed weekly salary for developmental squad players after the league and player's association failed to agree upon a dollar figure at the bargaining table.[154] While the facts of *Brown* are markedly different from those in *Clarett*, the principle announced by the Supreme Court is very important. The *Brown* plaintiffs argued that the imposition of the fixed salary was not covered by the non-statutory labor exemption since the labor and management had not actually *agreed* on the players' salaries.[155] The Court rejected this argument, focusing more on the *process* of collective bargaining rather than the ultimate agreement that may or may not have been reached.[156] In other words, since labor and management had attempted to come to an agreement on a subject unquestionably mandatory to bargaining (labor's salary), the Court was not willing to step in

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[154] *Id.* at 234-35. A provision in the 1989 CBA between the NFL and the NFLPA permits each team to establish and maintain a developmental squad of as many as six rookie players who had gone undrafted and did not make any regular team roster. These players earned weekly salaries and were used as in practice and added to the regular roster in the case of an injury. *Id.* at 234.

[155] *Id.* at 238.

[156] *Id.* at 243. The Court envisioned broad powers for a CBA.

> One cannot mean the principle literally—that the exemption applies only to understandings embodied in a collective-bargaining agreement—for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired. Yet a multiemployer bargaining process itself necessarily involves many procedural and substantive understandings among participating employers as well as with the union.

Id.

and create its own solution.[157] The spirit of the non-statutory labor exemption serves to insulate certain management practices from judicial review. For the NFL in its battle against Clarett, *Brown* represented a chance for the league to utilize the protections of the exception, since the Court suggests that an explicit provision in the CBA is not always necessary.

B. *The "Mackey Test": A Standard for Application of the Non-Statutory Labor Exemption*

Twenty years earlier, the Eighth Circuit decided *Mackey v. National Football League*, creating a three-part test for determining whether a labor practice, otherwise violative of federal antitrust law, was protected under the non-statutory labor exemption.[158] Mackey and others sued the NFL, claiming league owners violated federal antitrust law by restricting the right of players to sign with other teams as free agents.[159] On appeal, the NFL team owners argued that since the restraint, often referred to as the "Rozelle Rule," was part of the CBA between the league and the player's association, it was effectively immune from antitrust challenge under the principle of the non-statutory labor exception.[160] In an effort to ease the difficulty of applying the exception to cases like this, the Court of Appeals stated that the practice is in concert with federal antitrust law if: (1) the restraint on trade primarily affects only the parties to the collective bargaining relationship; (2) the disputed agreement concerns a mandatory subject of collective bargaining; and (3) the arrangement is the product of bona fide arm's-length bargaining.[161] While the court found that the practice satisfied the first two parts of the so-called "Mackey Test," it concluded that the rule was not the product of fair negotiations, and thereby failed the test's ultimate requirement.[162]

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[157] *Brown*, 518 U.S. at 250.

[158] *Mackey*, 543 F.2d at 606.

[159] *Id.* at 609.

[160] *Id.* at 609-10, 612. "The Rozelle Rule essentially provides that when a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team." *Id.* at 609 n.1.

[161] *Id.* at 614.

[162] *Id.* at 616. As for the first two requirements, the agreement clearly only affected the players and owners (the parties to the CBA) and the restriction concerned player's salaries (a traditional, mandatory subject of bargaining). However, in reference to the third component, the district court noted "that the parties' collective bargaining history reflected nothing which could be legitimately characterized as bargaining over the Rozelle Rule; that, . . . the NFLPA, . . . [before] 1974, stood in a relatively weak

Unfortunately for Clarett, the Second Circuit did not view *Mackey* as controlling,[163] and provided the league with even more room to argue for the validity of the three-year rule. The *Mackey* court's preference for the Rule of Reason over a *per se* approach with regard to the Rozelle Rule was also a positive for the NFL in *Clarett*.[164] By referring to the unique nature of professional sports leagues, the *Mackey* court correctly identified that antitrust cases in this arena of the law are difficult to line up with cases from traditional business environments.[165] By emphasizing this special status, the NFL enjoyed extensive leeway in arguing its case for the validity and necessity of the three-year rule in *Clarett*.[166] In addition, the NFL owners and players' well-documented, tacit agreement over the validity and purpose of the three-year rule aided the league.[167] This consensus, combined with the *Mackey* court's belief that the owners and players of professional sports leagues, not the courts, are the parties best suited to creating rules that govern their establishment, strengthened the NFL's position in *Clarett*. Thus, although the *Mackey* court ultimately found against the NFL, the foundation it used to reach the

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bargaining position vis-à-vis the clubs; and that 'the Rozelle Rule was unilaterally imposed by the NFL . . . .'" *Id.* at 615-16.

[163] *Clarett*, 369 F.3d at 133-34.

[164] *Mackey*, 543 F.2d at 619. While agreeing with the district court's finding that the Rozelle Rule constituted a group boycott and concerted refusal to deal, the *Mackey* court refused to label this NFL's restrictions on free agency as *per se* violative of federal antitrust law. *Id.* at 618-19.

[165] *Id.* at 619. The *Mackey* court envisioned greater deference for decisions made by the NFL's member clubs which allegedly restrain competition.

> [T]he line of cases which has given rise to *per se* illegality for the type of agreements involved here generally concerned agreements between business competitors in the traditional sense. Here, however . . . , the NFL assumes *some* of the characteristics of a joint venture in that each member club has a stake in the success of the other teams. No one club is interested in driving another team out of business, since if the League fails, no one team can survive. Although businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules here, fashioned in a different context. This is particularly true where, as here, the alleged restraint does not completely eliminate competition for players' services.

Id.

[166] *Clarett*, 369 F.3d at 141-42. In *Mackey*, the court concludes that: "We encourage the parties to [fashion reasonable restrictions on player transfers via] collective bargaining. *The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts.*" 543 F.2d at 623 (emphasis added).

[167] *Clarett*, 369 F.3d at 141; *see also supra* note 29 and accompanying text.

decision helped the league form compelling policy arguments in *Clarett*.

C. *Leon Wood's Challenge of the NBA Draft and Salary Cap: The Grand Reach of the CBA*

The Second Circuit's 1987 holding in *Wood v. National Basketball Association*[168] also helped the NFL under the "Mackey Test." *Wood* implies that Clarett, a stranger to the bargaining process between the NFL and NFLPA, is still subject to the CBA between the owners and the players. Wood was drafted by the Philadelphia 76ers, an NBA team, and subsequently rejected the one-year contract they offered him.[169] The contract offer constituted the maximum allowable rookie salary under the CBA between the NBA's owners and players.[170] Wood turned down the offer and filed suit in federal court, claiming that the college draft and salary cap terms of the CBA violated the Sherman Act as unlawful restraints on trade, and on Wood's ability to earn his (theoretical) market value.[171] The Court of Appeals rejected Wood's claim, finding that the non-statutory labor exemption, as well as the unique nature of professional sports, allowed the NBA and the NBA Player's Association (NBPA) to draft a CBA that would help the league function as efficiently as possible.[172]

The Second Circuit's reasoning in *Wood* served as a central component of the NFL's argument in *Clarett*. The *Wood* court recognized the potentially destructive consequences of finding for Wood. Such a decision would undermine the motivation to draft a CBA, not to mention reduce the overall effectiveness of national labor law policy.[173] Affirming the district court's conclusions of law, the Second Circuit found that the NBA's rules regarding the salary cap and college draft met all three requirements of the "Mackey Test," or that: (1)

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[168] *Wood*, 809 F.2d 954 (2d Cir. 1987).

[169] *Id.* at 958.

[170] *Id.*

[171] *Id.* at 956, 959.

[172] *Id.* at 961 ("The issues of free agency and entry draft are at the center of collective bargaining in much of the professional sports industry. It is to be expected that the parties will arrive at unique solutions to these problems . . . because . . . each sport has its own peculiar economic imperatives.").

[173] *Wood*, 809 F.2d at 961 ("If Wood's antitrust claim were to succeed, all of these commonplace arrangements would be subject to similar challenges, and federal labor policy would essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes.").

the rules only affected parties to the CBA; (2) the rules dealt with mandatory subjects of collective bargaining; and (3) the rules were the product of bona fide, fair bargaining.[174]

The *Wood* court concluded that although Wood was a stranger to the collective bargaining process, the CBA will always "affect employees outside the bargaining unit."[175] In the same way, although Clarett was not a party to the most recent collective bargaining between the NFL and NFLPA, under *Wood*, the CBA did affect him. *Wood* applied the standard practices of unions in traditional employment settings to the unique, multi-employer world of professional sports, and permitted leagues like the NFL to construct numerous restrictions on the entry of new employees.[176] Thus, *Wood* provided a critical legal foundation for the Second Circuit's recognition of the implicit inclusion of the three-year rule in the CBA.[177] In this way, the non-statutory labor exemption provided near-iron clad support for the NFL's rule.[178] *Clarett*, *Brown*, *Mackey*, and *Wood* all suggest that many Courts of Appeal and the Supreme Court are willing to broadly apply the non-statutory labor exemption to professional sports. Thus, although the three-year rule is not in the NFL-NFLPA CBA, the development of sports case law since *Denver Rockets* predicted that the *Clarett* court would liberally apply labor law in its adjudication of the dispute. Consequently, under the framework set forth in this Note, the Second Circuit could have

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[174] *Id.* at 958.

[175] *Id.* at 960. Unquestionably, this ruling is critical for the NFL in its case against Clarett. The *Wood* court responded to Wood's argument by asserting that the league has no way to foresee the interests of future players or those outside of the bargaining unit at the time of negotiations. The court stated that this is "a commonplace consequence of collective agreements. Seniority clauses may thus prevent outsiders from bidding for particular jobs, and other provisions may regulate the allocation or subcontracting of work to other groups of workers." *Id.*

[176] *See* Lewis Kurlantzick, *An NFL Policy Is Challenged as a Matter of Labor Law*, N.Y.L.J., Jan. 22, 2004, at 47 ("[Clarett] is no different than a prospective auto worker who, once employed, is subject to the hiring and compensation practices contained in the existing collective bargaining agreement between the [United Auto Workers] and [General Motors], practices which may disadvantage new employees.").

[177] The *Wood* court clearly displayed a preference for collectively bargained-for agreements between labor and management. Fortunately for the NFL, in *Clarett*, the Second Circuit accepted the argument that the three-year rule was implicitly included in the CBA. *See id.* at 959 ("The nature of professional sports as a business and professional sports teams as employers call for contractual arrangements suited to that unusual commercial context.").

[178] *Clarett*, 369 F.3d at 140-41; *see also* Lombardi, *supra* note 53, at 39. The NBA's CBA sets up a similar situation. "The non-statutory [sic] labor exemption presents a formidable obstacle to any preparatory player seeking entry into the [NBA], lending credibility to the NBA's description of the [CBA] . . . as an 'iron-clad rule.'" *Id.*

employed a hybridized antitrust-labor law analysis and still found in the NFL's favor. In other words, the court could have relied on the Rule of Reason and considered *Brown*, *Mackey*, *Wood* and the importance of the non-statutory labor exemption in professional sports cases in balancing the parties' interests. Such an approach recognizes the need for flexible adjudication of sports cases which, by their nature, cut across multiple areas of law.

VI. THE THREE YEAR RULE AND *CLARETT* UNDER A HYBRIDIZED ANTITRUST-LABOR LAW APPROACH

Despite the importance of the non-statutory labor exemption to upholding the validity of professional sports leagues' various membership restrictions, the NFL could have successfully defeated Clarett's challenge by relying on antitrust principles and recent sports league cases to establish the validity of the three-year rule. As such, the arguments set forth in this section assume that a court would not consider the three-year rule as implicitly incorporated into the CBA, thereby requiring the NFL to defend the three-year rule on antitrust grounds. As previously discussed, the evolution of case law in the area of professional sports draft eligibility[179] suggests that today a court would not automatically label a group boycott like the three-year rule as *per se* illegal. Instead, because of the complexities and uniqueness of professional sports, a court would utilize the Rule of Reason test set forth in *Silver*.[180]

The *Silver* exception first requires that an actor trying to defend a restraint on trade demonstrate an adequate policy justification for the practice.[181] As discussed above, the broad, overarching reason for the three-year rule is quite simple: regardless of their age, players who are less than three-years removed from high school are not prepared to confront the rigors of a 16-game NFL season. Although Clarett tried to spin the rationale behind this rule, arguing that the NFL in fact uses college football as an "efficient and free farm system" for the professional ranks, the bottom line remains that league owners and players support the rule.

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[179] *See supra* Part IV.

[180] *See supra* notes 58-62 and accompanying text.

[181] *Silver*, 373 U.S. at 348-49.

Provided that an adequate policy justification is deemed to exist, the *Silver* exception next requires that three determinations be made: (1) whether the restraint is required by the nature of the industry; (2) whether the restraint is reasonably imposed; and (3) whether there are procedural safeguards in place to prevent arbitrary application of the rule.[182] Under the first prong, and in light of the lineage of federal courts of appeal cases applying the non-statutory labor exemption mentioned above, a court would provide the NFL with much more room to explain the need for the rule than was provided to the defendants in cases like *Denver Rockets* and *Linseman*. Thus, whereas the *Denver Rockets* court balked at the NBA's purported need to self-regulate, a court today would allow this justification much more flexibility.[183] Indeed, the *Clarett* court accepted the NFL's arguments about the far greater level of violence in professional football than in professional basketball and the league's responsibility to set a reasonable restraint on the level of experience required for entry into its amateur draft. As the Second Circuit articulated in *Wood*, professional sports leagues are unique combinations of individual businesses that require unique rules of collective governance.[184] Under this approach, a court would find that the disputed restraint on trade, the three-year rule, is required by the NFL's structure. Alternatively stated, a court would defer to the NFL to make a reasonable judgment on the need to self-regulate.

With regard to the second prong, the principles outlined in *Brown*, *Mackey*, and *Wood* should once again come into consideration, since if a court ruled the three-year rule is unreasonable, just what then would be reasonable? In other words, if the NFL cannot set a reasonable limitation on the level of experience that it requires for players seeking entry to the league, can it set any limitation at all? If the NFL loses under an antitrust analysis, is it then reasonable for a court to say that anyone who graduates from high school should be eligible for the NFL Draft? This conclusion logically begs the question of whether it is reasonable to prevent preparatory stars from entering the NFL Draft before their high school graduation. The court would be hard-pressed to justify such a decision, since there would be no more basis for that ruling

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[182] *See supra* note 57 and accompanying text.
[183] *See supra* note 106 and accompanying text.
[184] *See supra* note 175 and accompanying text.

than for a simple affirmation of the validity and necessity of the NFL's three-year rule. Take Freddy Adu, the 14-year old soccer phenomenon who recently signed with D.C. United, a team in Major League Soccer (MLS), a United States' professional soccer league, for example.[185] Few would argue that Adu, largely considered one, if not the most gifted young soccer talents in the world, should not be allowed to play in the MLS. After all, soccer is not a contact sport, or at least not nearly as violent as football. However, would anyone argue with the NFL's right (and responsibility) to prevent a 14-year old football star from playing professionally with grown men? Generally speaking, the line of what is and what is not reasonable is always up for debate. The federal courts in 2004 are in no better position to figure out what the baseline for draft eligibility should be than the NFL was in 1990. Consequently, a court should look at the three-year rule as reasonably implemented under the second prong of the *Silver* exception.

As for the third prong, the NFL would likely struggle to show that it has an adequate procedure for dealing with applications for special eligibility from someone who, on paper, does not meet the three-year rule's requirements. However, it is important to remember that the NBA in *Denver Rockets*, the WHA in *Linseman*, and the USFL in *Boris* had no hardship exemption or any kind of special entry rule for anyone who did not meet the league's respective eligibility rule.[186] The NFL did meet with Clarett to discuss his eligibility (or lack thereof) before formally denying his application.[187] Although a court could view this meeting as a mere formality and a disingenuous attempt by the NFL to demonstrate the flexibility of its rule, under the traditional interpretation of the *Silver* exception, this meeting would constitute notice and a hearing. Thus, Clarett had notice of the three-year rule and was afforded a hearing to discuss his specific situation.[188]

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[185] *See* Darren Rovell, *Adu could grow soccer's popularity and Nike's wallet*, ESPN.com (Nov. 20, 2003), *at* http://espn.go.com/sportsbusiness/s/2003/1119/1665998.html; Associated Press, *Phenom will play for D.C. United* (Nov. 19, 2003), *available at* http://soccernet.espn.go.com/headlinenews?id=283610&cc=5901.

[186] *See supra* notes 102-03, 122, and 132 and accompanying text.

[187] *See supra* note 12 and accompanying text.

[188] *See id.* In *Denver Rockets*, the court looked down upon the NBA's inability to furnish the plaintiff with the means to file even a "rudimentary" petition. *See supra* notes 102-03.

Assuming a court applies the *Silver* exception in a manner favorable to the NFL, it would then employ the Rule of Reason to examine the pro-competitiveness of the three-year rule. If the three-year rule can pass the requirements of the *Silver* exception, a court would likely find in favor of the NFL's right to place reasonable restraints on the structure and rules of professional football.

The Supreme Court mandates that a court applying such a reasonableness balancing test must view all of the circumstances surrounding the restriction on trade in order to determine the competitive significance of the restraint.[189] In *National Society of Professional Engineers*, the Court stated that the Rule of Reason does not include an examination of whether the rule is in the public's best interest or even against the interest of the "members of an industry."[190] Under these guidelines, a court would find that it does not matter if Clarett was harmed by the three-year rule. Instead, the Rule of Reason focuses on whether competition as a whole is injured.[191]

Considering the unique nature of professional sports,[192] the league's eligibility rule, designed to keep the level of play in the NFL at a premium, does not harm competition.[193] Competition is best served by the NFL and the NFLPA agreeing to place reasonable restrictions on competition for the limited number of jobs available on the league's 32 member teams. Federal antitrust law allows the NFL to preserve jobs of current union members and maintain the high level of skill in the incoming talent pool – two entirely reasonable and permissive objectives.[194] By fostering the skills of incoming rookies, the NFL permissibly secures the highest level of on-

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[189] *See supra* notes 58-62 and accompanying text.

[190] *Nat'l Soc'y*, 435 U.S. at 691 n.17.

[191] *See supra* notes 57 and 61 and accompanying text.

[192] *Id.* at 692 (Under the Rule of Reason, a court must analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.").

[193] The Supreme Court's holding in *Board of Trade of the City of Chicago* mandates that a court consider the unique qualities of the business along with the extent, rationale, and effects of the restraint. *Bd. of Trade*, 246 U.S. at 238.

[194] *Clarett*, 369 F.3d at 140 (citing Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n, 426 F.2d 884, 887-88 (2d Cir. 1970)).

> [P]reservation of jobs . . . for union members is not violative of the anti-trust [sic] laws. Because the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft and, though not drafted, is then hired as a rookie free agent.

Id. (internal quotations omitted).

field competition and promotes a longer period of amateur player development. Even though Clarett is ostensibly "harmed" by three-year rule, competition as a whole is best served by the NFL's decision to reasonably restrict the flow of amateur talent in the world of professional football. Thus, the three-year rule promotes competition and future players' preparation for entry in the most physically rigorous and financially successful professional sports league in the United States.[195]

VII. CONCLUSION

Although the Second Circuit dismissed outright the vitality of an antitrust attack on the three-year rule, the NFL should be able to successfully defend against such a claim. In light of recent treatment of sports labor law issues by federal courts of appeal, the NFL's three-year rule is a valid practice. The unique characteristics of professional football require the NFL to implement rules that protect both the players on the field and the high level of competition that the paying public has come to enjoy. The NFL's Player's Association and owners stand behind the three-year rule. The NFL rightfully enjoys a large amount of latitude in placing restraints on the business of professional football. The rule serves the best interests of economic stability and competition as envisioned by the Sherman Act. Indeed, the *Clarett* court properly cemented the future of a well-founded and intelligent restriction on free competition. As a result, Maurice Clarett should have heeded the NFL's warning: stay out for three years after high school or play in Canada.

Peter Altman[†]

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[195] *Clarett*, 369 F.3d at 141 ("Clarett is . . . no different from the typical worker who is confident that he . . . has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set.").

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