

**THE LEGALITY OF AN AGE-REQUIREMENT IN THE NATIONAL BASKETBALL
LEAGUE AFTER THE SECOND CIRCUIT'S DECISION IN CLARETT v. NFL**

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INTRODUCTION

Greg Oden has quite the future in front of him. As a high school junior he is already predicted by many to be chosen in the first round of the 2006 NBA draft; with some even predicting he will be the first pick overall, if he chooses to skip college and enter the NBA draft out of high school.¹ If Oden were to choose to skip college and make himself eligible for the NBA draft, he would be joining the ever increasing exodus of high school basketball players forgoing college to join the professional ranks.² Since Kevin Garnet became the first high school player in over twenty years to be selected in the 1995 NBA draft,³ thirty-four high school seniors have entered the NBA draft, highlighted by 2004's class record of nine.⁴ As a result of this youth movement, many analysts and insiders have debated the pros and cons of drafting players straight out of high school. While many believe that the best interests of the athletes are not

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¹ See 2006 NBA Mock Draft http://probasketball.about.com/od/nbadraft/l/bl_mockdraft_c.htm (11/16/04), predicting Oden to be the first overall pick in the 2006 Draft; see also, David Hughes, Center of Attention, Tribune Star Nov. 14, 2004. <http://www.tribstar.com/articles/2004/11/15/sports/features/sfeature01.txt>

² Last years draft included nine high school seniors, including number one overall draft pick Dwight Howard of SW Atlanta Christian Academy. Four high school players withdrew their name from consideration after declaring for the draft. See, Fifty-Three Early Entry Candidates Withdraw, http://www.nba.com/draft2004/early_040618.html.

³ See NBA Draft: Complete First Round Results B 1990-99, http://www.nba.com/history/draft_round1_1990s.html

⁴ See 2004 NBA Draft Board, <http://www.nba.com/draft2004/board.html>

being protected because of the pressures of money and fame that the NBA brings,⁵ others believe that allowing underclassmen to enter the draft is not only beneficial to the player, but to the league as well.⁶ All of these arguments may become irrelevant with the approval of a new collective bargaining agreement. With the current NBA collective bargaining agreement between the league and the NBA Players Association (NBAPA) expiring after the 2004-2005 season, the League and the NBAPA, through its President Billy Hunter, are already in the midst of negotiating a new collective bargaining agreement. If Commissioner Stern has his way, that new agreement will contain a provision requiring all players to be 20 years old or older in order to be eligible for the draft.⁷ While Hunter has publicly stated that the union will not agree to such a provision,⁸ Commissioner Stern does have bargaining chips which could induce the union to change its stance.⁹ The largest concession and perhaps most enticing for the players' union, is the expansion of the NBA Development League.

The likelihood of such a provision being included is also a hot topic of debate. Many believe that capping the age-requirement at 20 years when there are already 18 and 19 year olds

⁵ See David Moore, Potential for Failure: More High school Players Make NBA Draft a Futures Market, Dallas Morning News, June 22, 2004, at 7C.

⁶ See Michael McCann, Illegal Defense: The Law and Economics of Banning High School Players from the NBA Draft, 1 Va. Sports & Ent. L.J. 295 (2002). In a separate interview, McCann summarized his article's view as follows: ABanning premiere high school players from the NBA Draft would be irrational, both for those players and for the NBA, since those players are self-selected and almost always exceptionally talented, and since the NBA's economic system provides incentives for them to seek entrance into the NBA as soon as possible. In turn, since those players are often the most talented, they tend to develop at a higher and faster rate than other NBA players, and thus their earlier arrival - and longer stay - ultimately benefits the NBA and its fans. At the same time, those high school players better off going to college tend to go to college because the NBA's economic system provides incentives for them to do so. In short, then, high school players have proven to be the best group of players entering the NBA because the NBA's economic system dictates that very outcome. See, <http://nbadraft.net/mccanninterview.asp>

⁷ See Greg Sandoval, NBA Wants a Minimum Age of 20, Washington Post, March 26, 2004, at D04.

⁸ *Id.* Hunter is quoted as stating, "What they are trying to do with an age requirement is reduce the number of bites at the apple that a player can take.... [t]he owner's negotiating committee is about money. Their stance that an age requirement helps [players get an education] is a charade."

⁹ *Id.* One proposed concession the League could make in return for an age requirement is to reduce the number of years a player is obligated to play under a rookie contract for every year he attends college.

in the league is simply impossible. As one commentator noted, “the toothpaste is out of the tube, and can’t be put back in.”¹⁰ However, for every naysayer, the Commissioner seems to also have his supporters, none more so than NBA general managers and team executives.¹¹ In addition, recent legal developments in this area may also affect Commissioner Stern’s push for inclusion of this provision.

Last year’s Second Circuit Court of Appeals decision in the highly publicized Maurice Clarett case¹² is likely to strengthen Stern’s resolve in pursuing a similar, if not more legally secure age-requirement provision in the upcoming collective bargaining agreement. If such a provision were agreed to it would likely be challenged on antitrust grounds by most under-20 college and high school players wishing to enter the NBA before their 20th birthday.

This article will analyze the legality of Stern’s proposed age requirement, and the likely outcome of any legal challenge if the provision is indeed implemented in the upcoming collective bargaining agreement. The analysis will first look at the history and application of antitrust scrutiny to professional sports leagues. Next, the article will focus on the relevant labor law analysis that the courts will likely apply to challenges of the rule. Finally, the article will apply the relevant antitrust and labor laws in an attempt to analyze the legality of a collectively-bargained 20 year old age requirement for the NBA draft. An application of the relevant laws will show that a collectively-bargained age requirement would likely withstand an anti-trust challenge.

¹⁰ See Kevin Brewer, Stern Ready to Agree on Minor Concession, *The Washington Times*, April 6, 2004, at C02.

¹¹ See David Moore, *supra* note 5. Dallas Maverick President of Basketball Operations, Donnie Nelson, has called the influx of youth “a troublesome trend,” and noted that “it depletes the pro game.”

¹² *Clarett v. NFL*, 369 F.3d 124 (2nd Cir. 2004)

II. ANTITRUST ANALYSIS

A. Background

All antitrust claims challenging restrictions on trade or commerce are brought under the Sherman Act.¹³ Two threshold elements must be present in order for an act to be declared illegal under the Sherman Act: (1) There must be some effect on “trade or commerce among the several states,” and (2) there must be sufficient agreement to constitute a “contract, combination...or conspiracy.”¹⁴ In addition, the Supreme Court has long held that not every act that is a restraint on trade will be held to be unlawful under the Sherman Act.¹⁵ As a result, the Sherman Act prohibits only those contracts or combinations in trade that amount to unreasonable restraints on trade or commerce.¹⁶ As a basis for determining the unreasonableness of a restraint, what came to be known as “rule of reason” analysis emerged as the dominant tool for determining the legality of restraints on trade under the Sherman Act. Due to the difficulty in conducting factual inquiries and making subjective policy judgments under the rule of reason, the Supreme Court has carved out certain restraints that do not warrant a rule of reason analysis.¹⁷ These restraints have such a “pernicious” effect on competition that they are deemed per se illegal without any inquiry into their justifications.¹⁸ As a result, there are two forms of scrutiny the court will apply in determining whether or not a restraint is in violation of the Sherman Act: per se illegality and

¹³ 15 U.S.C 1 (1997).

¹⁴ *Denver Rockets v. All-Pro Management*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971), quoting 15 U.S.C. 1.

¹⁵ *See Standard Oil v. U.S.*, 221 U.S. 1 (1911), and *U.S. v. American Tobacco Co.*, 221 U.S. 106 (1911)

¹⁶ *See Standard Oil*, 221 U.S. at 60. In determining the appropriate application of the Sherman Act, the court stated, “it 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.”

¹⁷ *Linesman v. World Hockey Association*, 439 F. Supp. 1315, 1320 (D. Conn. 1977)

¹⁸ *See 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. Sports L.* 539, footnote 24 (quoting *Northern Pacific Railway v. U.S.* 356 U.S. 1, 5 (1957))

rule of reason analysis.

Per se illegality exists if a restraint of trade is illegal on its face. Such restraints include, price-fixing, division of markets, group boycotts, and tying arrangements.¹⁹ The most frequent per se challenges concerning restrictions imposed by professional sports leagues involve claims that the restrictions act as group boycotts.²⁰ A group boycott results when actors at one level of trade refuse to deal with an actor or actors at another level. There are three basic harms that result from a group boycott.²¹ First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, members of the sports league, have in effect, established their own monopoly. In order to make out a group boycott claim the plaintiff must allege that the defendant's purpose was to exclude a person or group from the market or accomplish some other anti-competitive objective.²² The court must find that the association was designed to exclude outsiders from participation in the marketplace in order for a plaintiff to succeed on a group boycott claim.²³

In Jones v. NCAA, the court rejected the plaintiff's claim that the NCAA's intercollegiate athletic eligibility standards constituted a group boycott and, as a result, held that the standards were not per se illegal under the Section 1 of the Sherman Act.²⁴ In so holding, the court found that because the eligibility rules were directly related to the NCAA's legitimate goal of implementing the basic principles of amateurism, any limitation on access is merely incidental

19 Northern Pacific Railway, 356 U.S. at 5

20 See e.g., Linesman, 439 F. Supp. 1315 (holding WHA regulation prohibiting players under the age of 20 from playing professional hockey to be a per se illegal group boycott); Mackey v. NFL 543 F.2d 606 (8th Cir. 1976) (finding that the NFL's "Rozelle Rule" was a per se illegal group boycott).

21 Denver Rockets, 325 F. Supp. at 1061

22 Jones v. NCAA, 392 F. Supp. 295, 304 (D. Mass. 1975)

23 *Id.*

24 *Id.*

and does not rise to the level of a per se violation of the Sherman Act.²⁵ However, in Linesman v. WHA, the court found that a World Hockey Association (WHA) rule that “prohibited persons under the age of twenty from playing professional hockey with any team within their association” to be an impermissible group boycott, and thus, per se unlawful.²⁶ In support of its holding, the court found that the arbitrary basis of basing a restriction completely on age without regard to talent was a factor in determining its illegality as a group boycott.²⁷ Linesman is discussed in greater detail below.

While the court in Linesman did ultimately invalidate the WHA’s age restriction provision, it also recognized a narrow exception the court in Silver v. New York Stock Exchange²⁸ gave to group boycotts that demonstrated three separate elements.²⁹ In order for a group boycott to be declared not per se unlawful under the Silver exception, the following elements must be present: (1) a legislative mandate for self-regulation ‘or otherwise,’ (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 review.³⁰ If all three elements are present, the court will then analyze the challenged group boycott under a rule of reason analysis.

Rule of reason and per se analysis of antitrust claims constitute “polar opposites on the spectrum of possible approaches.”³¹ Originally, the courts applied the per se analysis when

²⁵ *Id.*

²⁶ Linesman, 439 F. Supp. at 1317

²⁷ See Robert D. Koch, 4th and Goal: Maurice Claret Tackles the NFL Eligibility Rule, 24 Loy. L.A. Ent. L.J. 291

²⁸ 373 U.S. 341 (1963)

²⁹ Linesman, 439 F. Supp. at 1321

³⁰ Denver Rockets, 325 F. Supp. at 1064-1065

³¹ *Id.* at 1065

dealing with sports industries, however, the rule of reason analysis has become the favored form of scrutiny used by courts deciding antitrust claims involving the sports profession.³² The focus of an inquiry under the rule of reason is whether the restraint imposed is justified by a legitimate business purpose, and is no more restrictive than necessary.³³ The goal of the rule of reason 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.”³⁴ When applying the rule of reason, the court is limited to analyzing an agreement’s effects on economic competition only, and should not consider alternative effects.³⁵ A look at how the courts have applied antitrust analysis to entry restrictions in professional sports leagues will help illustrate the current state of the law.

B. Relevant Antitrust analysis in Professional Sports League Cases

*1. Denver Rockets v. All-Pro Management*³⁶

In Denver Rockets, the court invalidated two NBA draft eligibility provisions that required all players to be four years out of high school in order to be eligible for the draft.³⁷ The claim was brought by Spencer Haywood, a professional basketball player who graduated from

³² See Michael Tannenbaum, Article: A Comprehensive Analysis of Recent Anti-trust and Labor Litigation Affecting the NBA and NFL, 3 Sports Law. J. 205, 209.

³³ Mackey, 534 F.2d at 620

³⁴ National Society of Professional Engineers v. U.S., 435 U.S. 679, 692 (1978)

³⁵ Rosner, *supra* note 18, at 546 (citing Professional Engineers, 435 U.S. at 690)

³⁶ 325 F. Supp. 1049

³⁷ The first invalidated provision was section 6.03 which provides in relevant part as follows: “*Persons Eligible for the 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 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 provisions of Section 2.05 of these By-laws.” The second invalidated provision was section 2.05, which stated in relevant part that any person could not be eligible for the draft until “four years after he has been graduated or four years after his original high school class has been graduated.” *Id.* at 1059.

high school but never graduated from college. Haywood was an “All-American” during the two years he played college basketball, and he even helped the United States Olympic basketball team win a gold medal at the 1968 games.³⁸ However, after his second year of college Haywood entered into a contract with the Denver Rockets, a professional basketball team in the American Basketball Association (ABA). Haywood was able to enter the league through an exemption the league gave to the four year requirement known as a “hardship” exemption.³⁹ As a rookie in the ABA, Haywood won awards for “Most Valuable Player,” scoring champion, and “Rookie of the Year.”⁴⁰ After his first season, Haywood and the Rockets had a dispute concerning Haywood’s contract, and Haywood stopped playing with the team and signed a contract with the Seattle SuperSonics of the NBA. The Commissioner of the NBA invalidated the contract on the grounds that Haywood was not eligible because he was not yet four years out of high school. As a result, Haywood filed suit against the NBA alleging that the rule constituted a group boycott of players not yet four years out of high school and, thus, was a per se violation of the Sherman Act.⁴¹ The court agreed with Haywood and found the eligibility requirements to be per se illegal concerted refusals to deal.⁴² The court found that the provision affected trade and commerce in the several states and that by passing the provisions the members of the NBA agreed to not deal with persons in that class. Therefore, the two threshold elements of an antitrust claim were present, making the provisions susceptible to antitrust scrutiny. The court rejected the NBA’s argument that the provisions should be scrutinized under the rule of reason analysis because the provisions

³⁸ *Id.* at 1060

³⁹ *Id.* Haywood qualified for the hardship exemption due in large part to the fact that he was one of ten children from a very poor family living in Mississippi. *See, McCann, supra* note *** at 361.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1066

were so overly broad, absolute, and arbitrary.⁴³ The court went on to hold that provisions did not fall under the previously discussed Silver exception. Again, due to the fact that there is “no provision for even the most rudimentary hearing before the four-year college rule is applied to exclude an individual player,” the rule falls outside of the Silver exception.⁴⁴ As a result of this case, the NBA instituted a hardship provision that was similar to the one Haywood used to gain entrance into the ABA. Due to the liberal application of the rule, the NBA ultimately replaced it in 1976 with the declaration procedure that remains in place today.⁴⁵ Interestingly enough, today Haywood is remorseful that this decision paved the way for high school athletes to jump straight to the NBA, and he even supports Commissioner Stern’s proposed 20 year age requirement.⁴⁶

2. Linesman v. World Hockey Association⁴⁷

In Linesman, a nineteen year old amateur Canadian hockey player challenged the validity of a World Hockey Association (WHA) regulation that prohibited persons under the age of 20 from playing professional hockey. The regulation was challenged on the ground that the restriction constituted an unreasonable restraint of trade in violation of the Sherman Act.⁴⁸ The plaintiff, Linesman, was selected by the Birmingham Bulls in the annual amateur draft. The commissioner nullified the selection because Linesman did not turn 20 in the calendar year the draft was held, pursuant to the age requirement restriction.⁴⁹ After a finding that the WHA’s regulation could be challenged under the Sherman Act, the court found that the regulation was a

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See McCann, *supra* note 6 at 363, Art. X(5)(a) of the 1999 Collective Bargaining Agreement provides that any amateur player may declare his intention to be eligible for the NBA draft, provided both his high school class has graduated and he has made his declaration within 45 days of the NBA draft.

⁴⁶ See KRT, ASpencer Haywood on Clarett: “Stick it out’ at Ohio State,” The East Carolinian September 23, 2003. <http://www.theeastcarolinian.com/vnews/display.v/ART/2003/09/23/3f6f445a65041>

⁴⁷ 439 F. Supp. 1315

⁴⁸ *Id.* at 1317

⁴⁹ *Id.* at 1318

per se unlawful group boycott. The court struck down the defendant's argument that the rule fell under the narrow Silver exception and should be afforded rule of reason analysis. Here again the court, citing Denver Rockets, found that the lack of any exceptions to the rule, coupled with the apparent arbitrariness of its application, kept the age limitation provision out of the Silver exception and is per se illegal.⁵⁰ The court refused to distinguish the case from Denver Rockets despite multiple claims by the defendant about the differences between the two. The fact that Haywood already played a year of professional basketball and Linesman was a true amateur had no affect on the court's finding that a per se violation existed; namely that the teams agreed not to deal with certain persons based on the arbitrary factor of age.⁵¹

III. LABOR LAW ANALYSIS

A. Background

Historically, in professional sports leagues, disputes between the players or their union and the ownership involve "the competing goals" of antitrust and labor law.⁵² As a result of this apparent struggle between the two bodies of law, the Court has found certain antitrust exemptions for claims arising under federal labor law. The first such exemption was a judicially created exemption that the Supreme Court found applicable to Major League Baseball.⁵³ Due to its intrastate nature, the court found professional baseball to be exempt from federal antitrust

⁵⁰ *Id.* at 1322

⁵¹ For an example of a court applying the Silver exception in upholding a regulation alleged to be a group boycott, see *Deesen v. Professional Golfer's Ass'n of America*, 358 F. 2d. 165 (9th Cir. 1966). In *Deesen*, the plaintiff's ability to participate in PGA events was revoked, along with a number of other players, after the PGA determined that their skill level was not high enough, pursuant to PGA rules. The court found that because the player's skill level was assessed before the rule applied, the rule was not arbitrary or overly broad, and thus not per se illegal as a group boycott.

⁵² See Tannenbaum, *supra* note 32

⁵³ See *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922)

law.⁵⁴ The Court has refused to apply this exemption to any professional sports league other than baseball. However, two other labor exemptions exist. There is also a statutory exemption that protects acts specifically identified in the Clayton Act⁵⁵ and its progeny.⁵⁶ However, the most widely applied exemptions are known as non-statutory exemptions. Courts have long held that labor law needs protection from antitrust scrutiny, and as a result they have created an implied non-statutory exemption.⁵⁷ The Supreme Court implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining.⁵⁸ Historically, Congress intended for the labor statutes to prevent the courts from using antitrust law to resolve labor disputes.⁵⁹ This implied exemption recognizes that some restraints on competition imposed through the bargaining process must be shielded from antitrust scrutiny.⁶⁰ As a result, some provisions that may otherwise be held in violation of antitrust law, if collectively-bargained, will be found valid under a non-statutory labor exemption.

B. The Mackey Test

In Mackey v. NFL⁶¹, the Eighth Circuit comprised a three-part test to determine whether or not a collectively-bargained provision would be afforded a non-statutory labor exemption from antitrust law. This test has been used by a number of courts in determining whether a non-statutory labor exemption applies to a restraint in a professional sports league. If all three factors are present, the exemption will apply, however, if one of the factors is absent, the restraint may

⁵⁴ *Id.* See also *Toolson v. New York Yankees, Inc.* 346 U.S. 356 (1953); and *Flood v. Kuhn*, 407 U.S. 258 (1972)

⁵⁵ 15 U.S.C. 17 (1982)

⁵⁶ Subsequent Labor Legislation supporting the statutory labor exemptions include the Norris-La Guardia Act 29 U.S.C 101 (1970), the National Labor Relations Act 29 U.S.C. 157 (1976), and the Taft-Hartley Act 29 U.S.C. 151 (1976). Examples of statutorily protected acts include picketing, striking, and other forms of economic warfare.

⁵⁷ See e.g., *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975)

⁵⁸ See *Brown v. Pro Football*, 518 U.S. 231, 236 (1996) (citing 29 U.S.C. ' 151)

⁵⁹ *Id.*

⁶⁰ *Id.* at 237 (citing *Connell Constr. Co. v. Plumbers* at 622)

⁶¹ 543 F.2d 606 (8th Cir.1976)

be analyzed under antitrust scrutiny.⁶² The exemption will apply if: “[1]the restraint on trade primarily affects only parties to the collective bargaining relationship; [2]the agreement sought to be exempted concerns a mandatory subject of collective bargaining; [3] the agreement sought to be exempted is the subject of bona fide arm’s-length bargaining.”⁶³

As a result of this opinion, the first step in analyzing whether a restraint on trade falls under a non-statutory labor exemption is to determine whether the rule primarily affects only parties to the collective bargaining relationship. It is usually conceded that the collective bargaining agreement concerns the explicit parties in the agreement, namely the employees and the employer.⁶⁴ However, numerous claims have been brought by potential or future employees not yet covered by the collective bargaining agreement.⁶⁵ In such cases, the court has held that “not only present but potential future players for a professional sports league are parties to the bargaining relationship.”⁶⁶ In Wood v. NBA,⁶⁷ the Second Circuit found that the National Labor Relations Act’s (NLRA) definition of “employee” includes workers outside of the bargaining unit.⁶⁸ The court went on to reason that if a potential employee was able to insist on individual bargaining, “federal labor policy would essentially collapse.”⁶⁹ As a result, current and future employees are all considered parties to the collective bargaining relationship.

The second prong of the Mackey test is to determine whether or not the agreement concerns a mandatory subject of collective bargaining. According to the NLRA, a mandatory

⁶² See Koch, *supra* note 27

⁶³ *Id.* (citing Mackey, 543 F.2d 606)

⁶⁴ See Mackey, 543 F.2d at 615

⁶⁵ See e.g., Zimmerman v. NFL, 632 F. Supp. 398 (D. D.C. 1986).

⁶⁶ *Id.* at 405

⁶⁷ 809 F.2d 954 (2nd Cir. 1987)

⁶⁸ See Koch, *supra* note 27. The NLRA definition provides, that “the term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise.” 29 U.S.C. § 152 (3)

⁶⁹ Wood v. NBA, 809 F.2d 954, 961 (2nd Cir. 1987)

subject of collective bargaining includes all subjects concerning “wages, hours, and other terms and conditions of employment.”⁷⁰ While wages and hours are easily identified, the majority of challenges deal with what constitutes “terms and conditions of employment.” The Supreme Court has found that a subject is a term or condition of employment if it settles an aspect of the relationship between the employer and employees in the bargaining unit,⁷¹ if it “vitaly affects” employees in the unit,⁷² and if it is of “deep concern” to the employees in the unit.⁷³ In regards to matters concerning hiring practices used by the employer, the Third Circuit has held that “a hiring practice is a mandatory subject of collective bargaining where there is an objective basis for believing it to be discriminatory.”⁷⁴ While there continues to be no explicit list of matters that are found to be mandatory subjects based on terms and conditions of employment, it follows that the more the matter is directly linked to employment, the more likely it will be found to be a mandatory subject of bargaining.

The third and final prong of the Mackey test is to determine whether or not the agreement is a product of bona fide arm’s-length bargaining. According to the NLRA, this requirement is based on the “mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”⁷⁵ If a matter is included in the collective bargaining relationship, it is presumed to have been the product of bona fide arm’s-length bargaining because it was negotiated by both parties, however, when a provision is unilaterally implemented it is likely that

⁷⁰ 29 U.S.C. § 158d

⁷¹ See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958)

⁷² See *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971)

⁷³ See *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 498 (1979).

⁷⁴ See *NLRB v. USPS*, 18 F.3d 1089, 1096 (3rd Cir. 1994)

⁷⁵ 29 U.S.C. § 158(d)

it was not the product of bona fide arm's-length bargaining.⁷⁶

C. Cases Applying the Mackey Test to Restraints in Professional Sports Leagues

1. Mackey v. NFL

In Mackey, a group of present and former NFL players asserted that NFL's the "Rozelle Rule" was a violation of section 1 of the Sherman Act.⁷⁷ The players challenged the rule on the grounds that it constituted an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services.⁷⁸ After a district court found that the rule constituted a concerted refusal to deal and a group boycott, it was deemed per se illegal and judgment was entered for the plaintiffs.⁷⁹ On appeal, the court of appeals found that the rule was not a per se violation, but did find the rule to be a violation of the Sherman Act under a rule of reason analysis.⁸⁰ In support of its decision, the court of appeals laid out the three-part test discussed above to determine whether or not the non-statutory labor exemption applied. In so doing, the court found that the Rozelle Rule satisfied the first two prongs of the test, but failed the third.⁸¹ The rule primarily affected only the parties in the collective bargaining relationship because it affected the league owners as employers and the players as employees.⁸² The Rule was also found to be a mandatory subject of bargaining. The court found that while the Rozelle Rule did not deal with wages, hours, or other terms and conditions of employment on its face, the rule was a mandatory subject because it operated to "restrict a player's ability to move

⁷⁶ Mackey, 543 F.2d at 616

⁷⁷ *Id.* at 609. The Rozelle Rule essentially provided 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. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable." *Id.* n1.

⁷⁸ *Id.*

⁷⁹ *Id.* The district court opinion is Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975)

⁸⁰ *Id.*

⁸¹ *Id.* at 623

⁸² *Id.* at 615

from one team to another and depresses player salaries.”⁸³ The court then found that the rule was not subject to bona fide arm’s-length bargaining because it was negotiated by “a new and relatively weak player’s union.”⁸⁴ The rule was originally implemented unilaterally by the owners and then subsequently incorporated into the 1968 and 1970 bargaining agreements. The court found that this did not constitute bona fide arm’s-length bargaining, and as such, the Rule was not exempt from antitrust analysis.⁸⁵

2. McCourt v. California Sports, Inc.⁸⁶

McCourt involves a claim very similar to the one brought by the plaintiffs in Mackey. Here, the plaintiff was a hockey player who signed a contract with the Detroit Red Wings. After playing one season with the Red Wings, plaintiff’s contract was assigned to the L.A. Kings pursuant to an NHL bylaw that operated much like the Rozelle Rule.⁸⁷ Rather than report to the Kings, the plaintiff brought this action alleging that the assignment of his contract violated section 1 of the Sherman Act. After the district court found the rule to be a violation of the Sherman Act, the court of appeals reversed applying the Mackey three-prong test.⁸⁸ After briefly finding that the rule both primarily concerned the parties to the collective bargaining agreement and involved a mandatory subject of bargaining, the court focused its analysis on whether the

⁸³ *Id.*

⁸⁴ *See* Rosner, *supra* note 18, at 560

⁸⁵ Mackey, 543 F.2d at 616

⁸⁶ 600 F.2d 1193 (6th Cir. 1979)

⁸⁷ *Id.* at 1195 n.3. NHL By-Law 9A. 6: “Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract, as prescribed by subsection 8 of this By-Law. Each Member Club may acquire the right to the services of as many free agents as it wishes, subject to the provisions of subsection 9 of this By-Law.” *Id.* at 1204.

⁸⁸ *Id.* at 1198

rule was subject to bona fide arm's-length bargaining.⁸⁹ The court then went on to reverse the district court's finding that there was no bona fide arm's-length bargaining. In support of its conclusion, the court stated that the NHL's failure to change its position on the rule did not constitute bad faith, as the district court had found.⁹⁰ The fact that the NHL was unwilling to budge on this issue meant it allowed for significant other player benefits to be incorporated into the collective bargaining agreement, thus establishing the presence of bona fide arm's-length bargaining. As a result, the statutory labor exemption applied and the rule was upheld as valid.

3. The Second Circuit's Application of the Non-statutory Labor Exemption

Recently, the Second Circuit, in Clarett v. NFL,⁹¹ ruled on the validity of an NFL rule that requires players to be three years out of high school before they may become eligible for the NFL draft. In a highly publicized case, the Second Circuit Court of Appeals reversed a district court's ruling that invalidated the NFL's eligibility rule and allowed Clarett, a year shy of the three-year requirement, to enter the draft.⁹² In support of its reversal, the court of appeals refuted the district court's claim that none of the three prongs of the Mackey test were met and went on to state that the Mackey test was no longer necessary in determining whether a non-statutory labor exemption was present in regard to a player's challenge of a collectively-bargained restraint in a professional sports league.⁹³ The court distinguished the Clarett case from those that followed Mackey on the basis that the Mackey test was not applicable in cases where "the plaintiff complains of a restraint upon a unionized labor market characterized by a collective

⁸⁹ *Id.*

⁹⁰ *Id.* at 1203

⁹¹ 369 F.3d 124 (2nd Cir. 2004)

⁹² *See* Clarett v. NFL 306 F. Supp. 2d. 379 (S.D.N.Y. 2004)

⁹³ Clarett, 369 F.3d at 133

bargaining relationship with a multi-employer bargaining unit.”⁹⁴ In addition, the court found that the Mackey test was not in accord with the Supreme Court’s decision in Brown v. Pro Football,⁹⁵ where the court last dealt with the application of non-statutory labor exemptions to professional sports leagues.⁹⁶ The court went on to distinguish Mackey on the fact that the four Supreme Court cases that Mackey relied heavily on in articulating its test all involved cases in which an *employer* was injured by the anti-competitive effect of a challenged restraint.⁹⁷ This factor alone makes Mackey “of limited assistance in determining whether an athlete can challenge restraints on the market for professional sports players imposed through a collective bargaining process.”⁹⁸

The Court then proceeded to lay out the appropriate process for determining whether such a rule challenged by a player not yet in the league should be subject to antitrust scrutiny or be given a non-statutory labor exemption. The Clarett Court determined that the most relevant issue in such a case was whether subjecting the challenged rule to antitrust scrutiny would subvert fundamental principles of federal labor policy.⁹⁹ In order to make its determination on the matter, the court identified the relevant labor law policies involved. The first labor policy that prevented Clarett from making a valid antitrust claim was that the collective bargaining agreement prevents prospective players from negotiating directly with the NFL teams over the

⁹⁴ *Id.* at 134

⁹⁵ 518 U.S. 231 (1996)

⁹⁶ Clarett, 369 F.3d at 134

⁹⁷ *Id.* The four cases the court is referring to are *Connell Construction Co. v. Plumbers*, *supra* note 69, *Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945)

⁹⁸ Clarett, 369 F.3d at 134

⁹⁹ *Id.* at 138 (quoting *Wood v. NBA*, 809 F.2d at 959)

terms and conditions of their employment.¹⁰⁰ Because the NFL players have unionized and selected the NFL Player’s Association as its exclusive bargaining representative, Clarett is not able to bargain directly with any NFL club.¹⁰¹ The court went on to assert that the presence of a collective bargaining agreement also allows the NFL teams to “engage in joint conduct with respect to the terms and conditions of players’ employment as a multi-employer bargaining unit without risking antitrust liability.”¹⁰² To allow Clarett to enter the draft and invalidate the eligibility rule would “run counter to each of these basic principles of labor law.”¹⁰³

After establishing that invalidating the rule would subvert the fundamental principles of labor policy, the court went on to address and refute several arguments asserted by Clarett in support of his antitrust charges against the NFL. The first of these complaints was that he should be able to circumvent the labor law exemption because the eligibility rules were not a mandatory subject of collective bargaining.¹⁰⁴ The court applied the same definition of “mandatory subject” those courts used when applying the second prong of the Mackey test.¹⁰⁵ The court dismissed this argument finding that “the eligibility rules for the draft represent a quite literal condition of initial employment and for that reason alone might constitute a mandatory bargaining subject.”¹⁰⁶ The court went on to discuss the “unusual economic imperatives” of professional sports that make rules that would otherwise not appear to deal with wages or working conditions, but in context are in fact mandatory subjects of bargaining. Due to the complex scheme by which individual salaries are set (which was based around the restraint on entry into the market

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967))

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 139

¹⁰⁵ *See* 29 U.S.C. § 158d *supra* note 82, mandatory subjects of bargaining include, “wages, hours, and other terms and conditions of employment.”

¹⁰⁶ *Clarett*, 369 F.3d at 139 (citing *Caldwell v. Am. Basketball Ass’n*, 66 F.3d 523 (2nd Cir. 1995))

imposed by the eligibility rules of the league) those rules cannot be viewed alone, but rather must be viewed in conjunction with other aspects of the collective bargaining agreement.¹⁰⁷ For these reasons, Clarett's assertion that the eligibility rule was not a mandatory subject of bargaining was struck down by the court.

The next argument asserted by Clarett was that the eligibility rules should be invalidated because they affect players outside of the collective bargaining arrangement. The court summarily dismissed this argument as well. Simply because the rules "work a hardship on prospective rather than current employees does not render them impermissible."¹⁰⁸ The court then addressed Clarett's claim that the rules should be invalidated because they are arbitrary since they are not related to his qualification or ability to play.¹⁰⁹ The court compared Clarett to any other worker "who is confident that he or she has the skills to fill a job vacancy but does not ... meet the requisite criteria set," and dismissed the argument.¹¹⁰

After dismissing Clarett's contention that the NFL teams subjected themselves to antitrust liability when they agreed to impose the same criteria on every player,¹¹¹ the court went on to discuss the assertion that the eligibility rule should not be given a non-statutory labor exemption because the rule was not collectively-bargained. The district court found that the eligibility rule was not collectively-bargained on because the NFL did not offer any proof that

¹⁰⁷ *Id.* at 140

¹⁰⁸ *Id.* (citing *Wood*, 809 F.2d at 960)

¹⁰⁹ *Id.* at 141

¹¹⁰ *Id.* The court went on to assert that "the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices or discrimination." Furthermore, even if a violation was present, it must be brought under a labor law claim, and not under antitrust law.

¹¹¹ *Id.* (citing *NBA v. Williams*, 45 F.3d 684 (2nd Cir. 1995), the court dismissed the argument on the grounds that federal labor policy permits the NFL teams to act collectively as a multi-employer bargaining unit and that federal labor policy encourages such concerted action.)

the rule evolved from the process of arm's-length bargaining.¹¹² The NFL showed that the collective bargaining agreement states that the NFLPA "waives...its right to bargain over any provision of the Constitution and Bylaws;"¹¹³ however, this proof was not enough to establish good faith, arm's-length bargaining over the rule, and as a result the district court found the rule excused from the non-statutory labor exemption.¹¹⁴

The court of appeals reversed this finding on multiple grounds. First, the court asserted that the eligibility rule included in the Constitution and Bylaws was well known to the union. Therefore, because the rule was a mandatory subject of bargaining the union could have forced the NFL to bargain over the eligibility rule if it wanted to change the rule.¹¹⁵ In addition, because the union agreed to waive any challenge to the Constitution and Bylaws they agreed to abide by all the rules contained therein for the remainder of the collective bargaining agreement.¹¹⁶ As a result, even though the rule may not have been the product of bona fide arm's-length bargaining, the union was aware of the rule and had the ability to bargain over the rule if necessary, thus protecting the rule from antitrust scrutiny.

The Clarett court concluded its analysis of Clarett's claim by reaffirming its holding that, because the possible disruptions to federal labor policy outweigh any antitrust implications, the non-statutory labor exemption must apply.¹¹⁷ As such, any remedy that Clarett seeks must come under labor law policies and not an antitrust claim. Allowing an antitrust remedy to a player challenging a collectively-bargained eligibility rule would "subvert principles that have been

¹¹² See Clarett, 306 F. Supp. 2d. at 396

¹¹³ *Id.* The eligibility rule was not contained directly in the collective bargaining agreement, but was rather adopted in the NFL Constitution and Bylaws. For a history of the rule and how it was incorporated into the collective bargaining agreement see generally, Clarett, F. Supp. 2d. at 385-387.

¹¹⁴ *Id.*

¹¹⁵ Clarett, 369 F.3d at 142

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 143

familiar to, and accepted by, the nation’s workers for all of the NLRA’s [sixty years] in every industry except professional sports.”¹¹⁸ As a result of the court’s holding in Clarett, the Second Circuit has provided a balancing test to be used in determining the validity of a player’s challenge against a collectively-bargained rule of a professional sports league. This ruling, in effect, limits the Mackey Test to be used in cases that deal with injuries to employers who assert they are being excluded from competition in a product market.

IV. APPLICATION OF ESTABLISHED LEGAL PRINCIPLES TO STERN’S PROPOSED ELIGIBILITY REQUIREMENT

After discussing all of the possible paths the court may take in analyzing an antitrust challenge brought by a player concerning an eligibility rule, we will now apply the case law to Commissioner Stern’s proposed rule. When applying the relevant labor and antitrust laws to Stern’s proposed 20-year age requirement rule, it is assumed that the rule will be implemented in the negotiation of the upcoming collective bargaining agreement between the NBA and the NBAPA.¹¹⁹ The rule’s validity will first be analyzed strictly under per se and rule of reason antitrust scrutiny. Following will be an analysis of whether the non-statutory labor exemption will remove the rule from antitrust scrutiny.

A. Antitrust Analysis

As discussed above, if Commissioner Stern’s proposed 20-year age requirement rule is indeed implemented into the upcoming collective bargaining agreement, it is likely to be almost immediately challenged by a prospective player under the age of 20. Based on past claims

¹¹⁸ *Id.* (quoting Caldwell, 66 F.3d at 530)

¹¹⁹ For a concise discussion of the effects and consequences of a unilateral implementation of a NBA draft eligibility restriction, see Rosner, *supra* note 18, at 570-572.

dealing with the issue of restrictions imposed on entry into a professional sports leagues it is also likely that the challenging player will assert that the rule is invalid under antitrust law. While unlikely, it is possible that a court may find that the non-statutory labor exemption may not apply, thus subjecting the eligibility rule to antitrust scrutiny.¹²⁰ In discussing the antitrust implications, it is helpful to draw comparisons to the court's decision in Denver Rockets, which struck down a similar NBA draft eligibility rule using antitrust analysis.¹²¹

In Denver Rockets, the court held that a rule that limited eligibility for the NBA draft to those players that were not yet four years out of college was a group boycott and concerted refusal to deal, and thus per se illegal. For similar reasons a court may find that Stern's 20-year requirement will be a similar group boycott. The rule in Denver Rockets was invalidated due to its inflexible nature and its failure to provide any exceptions for unique circumstances.¹²² Similarly here, a court may determine that the proposed rule is equally arbitrary. A 20-year age requirement does not factor any other circumstances other than age into its requirement. Thus, the rule operates on the same arbitrariness that was present in the rule in Denver Rockets. It follows that a player who may have graduated high school and college early, if still under the age of twenty, will not be able to enter the NBA draft. Without any procedural safeguards or hearing procedures that could deal with these possible exceptions or extraordinary circumstances, it is likely that a court will find the proposed rule to be a per se illegal group boycott. If, however, such safeguards are put in place, a rule of reason analysis will be applied.

As discussed above, there is a growing trend in courts to apply the rule of reason analysis rather than a per se analysis. If a rule of reason analysis were applied, the League would have to

¹²⁰ See e.g., *Clarett v. NFL*, 306 F. Supp. 2d. 379

¹²¹ See *Denver Rockets*, 325 F. Supp. 1049

¹²² *Id.* at 1066

convince the court that the rule is justified by a legitimate business purpose and is no more restrictive than necessary.¹²³ Some likely reasons the NBA would give in support of the rule would be that it encourages athletes to get an education, it protects the health and safety of younger athletes, it will save the league money by preserving intercollegiate athletics as a developmental system, and it promotes competitive balance.¹²⁴ Unfortunately, even if these justifications were found to be true, they may not be asserted in a claim supporting a valid business purpose for a rule analyzed under the rule of reason. Only factors that affect *economic* competition may be considered in determining the legality of a restrictive practice under antitrust laws.¹²⁵ As a result the NBA would have to argue that their product's value would decline if the rule was not implemented. This argument, though possible, is not likely, especially after the financial gains the NBA has recently experienced as a result of the under 20 years old Lebron James and Carmelo Anthony joining the league.¹²⁶ Without a finding that there is a legitimate business justification for the rule, it is unnecessary to discuss whether the rule is overly broad. However, courts have been unwilling to find similar rules invalid under the rule of reason based on the fact that they are overly broad.¹²⁷ As a result, if a court finds that the proposed rule is subject to antitrust scrutiny, it is likely that the rule be held to be invalid. Due to the fact that the rule restricts all people under the age of twenty with no regard to any other factor, the rule is a *per se* illegal group boycott. In addition, without any valid economic business justification for the rule, the rule would not pass a rule of reason analysis if a court chose to apply it.

¹²³ Mackey, 543 F.2d at 620

¹²⁴ See Rosner, *supra* note 18, at 570

¹²⁵ National Society of Professional Engineers v. U.S., 435 U.S. at 690 (emphasis added)

¹²⁶ See John Dempsey, "Hoops Droop at ABC," Daily Variety, April 12, 2004. The article claims that one of the two major reasons the NBA received a \$106.5 million dollar increase in its television contract with ESPN and Turner Broadcasting is because of "the star power of Lebron James and Carmelo Anthony."

¹²⁷ See Mackey, 543 F.2d at 620

B. Non-statutory Labor Exemption

While it has been shown that it is likely that the proposed rule would not pass antitrust scrutiny, regardless of the analysis applied, it is even more likely that the rule will be protected from antitrust scrutiny by the non-statutory labor exemption because the rule is presumed to be collectively-bargained. We will first analyze the likelihood the rule will receive an exemption from a court applying the Mackey test, then the analysis will explore the success of a challenge to the proposed rule brought in a court applying the Second Circuit's analysis.

Under the test set out by the court in Mackey,¹²⁸ the proposed rule must concern a mandatory subject of collective bargaining, primarily affect only the parties of the collective bargaining relationship, and be the subject of bona fide arm's-length bargaining.¹²⁹ It is likely that the plaintiff challenging the proposed rule will argue that he is not yet a member of the collective bargaining relationship. The plaintiff would then go on to argue that because he, and others in his position, are negatively affected by the rule, the age restriction affects more than those primarily in the bargaining relationship. This is an argument that has been refuted on numerous occasions.¹³⁰ It is nearly incontrovertible that all future players in a professional sports league are considered parties to the collective bargaining relationship. As a result, Stern's proposed rule would pass the first prong of the Mackey test.

The next prong of the Mackey test is that the rule must concern a mandatory subject of collective bargaining. Rules governing drafts have been held to be to mandatory subjects because

¹²⁸ *Id.*

¹²⁹ *Id.* at 614

¹³⁰ See *Clarett v. NFL* (discussed *supra*); *Mackey v. NFL* (discussed *supra*); and *Zimmerman v. NFL*, 632 F. Supp. 398 (finding that not only present but future players for a professional sports league are parties to the bargaining relationship).

they dictate conditions of employment such as location;¹³¹ likewise, rules restricting the eligibility of players wishing to enter the draft have also been held to be mandatory subjects.¹³² As a result, because the proposed rule deals with the eligibility of players wishing to enter the league through the draft, the court will find that the rule is a mandatory subject of collective bargaining.

The final prong of the Mackey test is the requirement that the challenged rule be the subject of bona fide arm's-length bargaining. Any rule that is present in a collective bargaining relationship is presumed to be the product of good faith bargaining absent a showing that the rule was somehow incorporated after being unilaterally implemented.¹³³ This particular rule was not in past collective bargaining agreements. Therefore, it stands to follow that its implementation in the agreement must come from bargaining rather than incorporation. The presence of the NBA's current eligibility rule signifies the NBAPA's willingness to bargain on the topic, and, because the matter is a mandatory subject of bargaining, either side may force the other to bargain on the provision before it is implemented. As a result, if the proposed rule is contained in the upcoming collective bargaining agreement, it will be presumed to have been the product of bona fide arm's-length bargaining. The proposed rule will pass all three aspects of the Mackey test, and, as a result, any antitrust challenge brought in a court applying the test will fail because the rule will enjoy the non-statutory labor exemption.

A court applying the Second Circuit approach to non-statutory labor exemptions will also conclude that the proposed eligibility rule enjoys the exemption. In Wood, the Second Circuit applied its analysis to reject a player's claim that rules governing the NBA draft were per se

¹³¹ See Wood, 809 F.2d at 962

¹³² See Clarett, 369 F.3d 124

¹³³ See Mackey, 543 F.2d 606

violations of the Sherman Act.¹³⁴ The court applied a similar balancing test applied in Clarett to support its decision, focusing on whether finding an antitrust violation would subvert fundamental principles of labor policy.¹³⁵ The fundamental principles of labor law that the court found would be disturbed by allowing an antitrust analysis include: the legal rule that employees may eliminate competition among themselves through selecting a collective bargaining representative, the fact that a collective bargaining agreement may provide for the exclusive assignment of an employee to work only for a certain employer, and that agreements may subject those not yet employees under the agreement to adverse circumstances.¹³⁶ The same arguments can be made in support of the proposed age requirement. If collectively-bargained, the implications of allowing an antitrust claim far outweigh any restraint on trade that may occur as a result of the rule. Allowing an antitrust challenge to a collectively-bargained rule such as this “would essentially collapse [federal labor policy].”¹³⁷ As a result, the proposed rule would also stand up to an antitrust charge brought in a court applying the Second Circuit balancing test.

V. ANALYSIS OF ARGUMENTS MADE AGAINST IMPLEMENTATION OF AN AGE-REQUIREMENT

While it is now clear that the implementation of an age requirement into the upcoming NBA Collective Bargaining Agreement is legally possible, the question remains as to whether or not the implementation of such a provision is in the best interest of the league and its players. Of the parties affected by this decision, all seem to have a differing view as to whether or not such a requirement should be imposed and for what reasons. Some NBA coaches believe that an age-

¹³⁴ Wood, 809 F.2d 954

¹³⁵ *Id.*

¹³⁶ *Id.* at 960

¹³⁷ *Id.*

requirement is necessary because most high school players are not ready for the NBA, and the few that are usually take two to three years to develop into complete players.¹³⁸ Other coaches believe that if a player is good enough to get drafted, they are good enough to play for their team.¹³⁹ Current NBA players are equally split on the issue. Many older players believe that two years in college would benefit most young players.¹⁴⁰ However, the league's contingent of young players do not want to see the door that allowed them to enter the NBA slammed shut.¹⁴¹ With every differing opinion on the issue there seems to be a different reason given for reaching a conclusion. Reasons given for allowing players to enter the draft out of high school include the need to make money for their family, the right to earn a paycheck, and the need to avoid risking an injury in college.¹⁴² Reasons given for excluding high school players from the NBA range from the valid intent to provide an education for these athletes,¹⁴³ to the absurd desire to keep gifted athletes in college in order to solidify otherwise unpredictable results in the annual "March Madness" basketball tournament.¹⁴⁴ No matter the opinion or the reasoning, it is clear that there

¹³⁸ See, Greg Sandoval, *The Washington Post*, February 14, 2004 Saturday, Ex-Laker and Bulls coach Phil Jackson says that the NBA is turning into a "service for growth."

¹³⁹ *Id.* Ex-Timberwolves Coach Flip Saunders has likened high school basketball players entering into the NBA to "freaks" and labeled their talent "unique."

¹⁴⁰ See, *The Washington Post*, April 20, 2004 Tuesday, Michael Wilbon, "union activist Antonio Davis of the Chicago Bulls told the Chicago Sun-Times he is in favor of an age restriction that would keep high school players, at the very least, from entering the NBA. What makes Davis's voice even more credible is that he's playing every day with two teammates who skipped college, Tyson Chandler and Eddy Curry." See also, Liz Robbins, *The New York Times*, "Age Limit: One Player's Path Is Another Player's Roadblock," March 27, 2005, quoting NBA player Grant Hill as saying, "I'm all for an age limit because although there are guys like LeBron and Dwight Howard, there are examples of guys where it would help them develop if they had a year or two... I played with Korleone Young, and he's not in the league now. I think of him more than LeBron."

¹⁴¹ See, Robbins *supra* at note 3, quoting Indiana Pacer Jermaine O'Neal, who also made the jump to the NBA out of high school, as saying, "At the All-Star Game, there were seven legitimate [players straight out of high school]...at what point are high school players hurting the game? [The league is] saying that, but they're still selling jerseys. So, if they don't like it, stop selling the product. That's definitely hypocritical."

¹⁴² McCann, *supra* at note 6, at 312

¹⁴³ Drew Sharp, *Detroit Free Press*. April 21, 2004. According to Joe Dumars, the Detroit Pistons president of basketball operations, high school athletes who went to college would be better prepared for the NBA.

¹⁴⁴ See, Jemele Hill, "NCAA Tourney Could Benefit from Star Power." *Orlando Sentinel* (Florida) March 22, 2005, p. D1.

is a sharp divide as to whether or not an age requirement should be imposed, however, a closer look at the issue will show that the reasons for implementing the age requirement outweigh any possible argument against it.

In his recent article addressing the topic, Michael McCann outlined the player and league interests that would be affected by a mandatory age requirement.¹⁴⁵ McCann's article, which ultimately concludes that an age requirement should not be implemented, provides a useful starting point for discussing the arguments both for and against limiting access into the NBA to athletes over twenty years old. In his article, McCann discusses a variety of reasons why high school basketball players should not be excluded from playing in the NBA.¹⁴⁶ The focus of the article is on the economic factors that support a player's decision to leave high school for the NBA, however, they do not provide a sufficiently valid basis as to why the NBA should not implement an age requirement.

A. High school players have an unusually successful track record in the NBA

At the time of McCann's article,¹⁴⁷ twenty-nine high school players declared to enter the NBA draft out of high school.¹⁴⁸ Since that time, the NBA conducted its 2004 draft in which nine high school players declared for the draft and a record eight were drafted in the first round.¹⁴⁹ Of those drafted, all eight were taken in the first round,¹⁵⁰ including number one overall draft pick

¹⁴⁵ See, McCann, *supra* at note 6

¹⁴⁶ *Id.*

¹⁴⁷ The original article was published in the Spring of 2002 and an amended version was republished in 2004. For purposes of this article, the amended version is the one that is referred to.

¹⁴⁸ McCann, at 138. This number includes only those players who actually declared and entered the NBA draft out of high school after they signed with an agent making them ineligible to return to college or withdraw from the draft.

¹⁴⁹ See, Kirk, Otis, "Recruiting No Surprise as Jefferson Chooses NBA over Hogs" Arkansas Democrat Gazette. 6/27/04. See also, Andy Katz, Time is Right for Juniors in NBA

http://sports.espn.com/nba/draft2004/columns/story?columnist=katz_andy&id=1829041

¹⁵⁰ *Id.*

Dwight Howard selected by the Orlando Magic.¹⁵¹ McCann's first argument for the success of these high school players is that because a high percentage of high school players entering the draft are actually drafted indicates those players' ability to reach success in the NBA. Before 2004, 83% of all high school players who entered the draft were drafted.¹⁵² McCann then compares this rate of success to the rate of college underclassmen who have declared for the draft between the years of 2001-2003. The result is that the overall rate of high school success is significantly higher than the 46% of underclassmen that were drafted between the years of 2001-2003.¹⁵³ The conclusion drawn from this analysis is that because a higher percentage of high school players are drafted, they are more successful in the NBA draft than underclassmen. While this may logically be true, the author concedes that penalty schemes imposed by the NCAA are likely to have contributed to the disparity of the success rate between the two groups.¹⁵⁴

In addition, the success rate of a high school player getting *drafted* does not directly correspond to that high school player's success in the NBA. A comparison of the 2003 high school draft picks with the most recent college player drafted with the same pick will show that high school draft picks are not as successful as college players in their rookie seasons. In 2003 there were four high school players taken in the first round, including number one overall draft

¹⁵¹ See, <http://www.nba.com/draft2004/board.html>. The other draft picks include 4th overall pick Shaun Livingston by the LA Clippers, 12th pick Robert Smith by the Seattle SuperSonics, 13th pick Sebastian Telfair by the Portland Trailblazers, 15th pick Al Jefferson by the Boston Celtics, 17th pick Josh Smith by the Atlanta Hawks, 18th pick J.R. Smith by the New Orleans Hornets, and 19th pick Dorell Wright by the Miami Heat. The only un-drafted high school player was Jackie Butler.

¹⁵² McCann, at 148.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 149. Before 2002, underclassmen were allowed to declare for the draft and then reverse their decision later as long as they did not sign with an agent. The idea is that the percentage of underclassmen who declare could be higher than actual rate of success because they withdraw their name from consideration rather than not getting drafted at all. For example, if five underclassmen declare for the draft, two withdraw, and two others are drafted, the percentage of players that DECLARED who are actually drafted is 40% whereas the percentage of players drafted who ENTERED the draft is 67%.

pick LeBron James.¹⁵⁵ The other three picks were Travis Outlaw with the 23rd pick, Ndudi Ebi with the 26th pick, and Kendrick Perkins with the 27th pick.¹⁵⁶ In 2002, there were four non-high school players drafted at the same spots.¹⁵⁷ A comparison of the non-high school players' first year averages with those averages of the high-school players in their rookie seasons indicates that high school players do not have the same impact as other players do.¹⁵⁸ In whole, the 2002 class of seniors had better statistics in virtually every category. Throwing out the statistics of the two number one overall picks further spoils the contention that high school players are successful merely because they are drafted.

B. High school players have enormous financial incentives to enter the NBA at an early age

McCann's next argument is that high school players have enormous financial incentives to enter the NBA at an early age.¹⁵⁹ In an excellent economic analysis and comparison of all NBA players, the article concludes that players that enter the NBA out of high school "earn more money, and at a faster rate" than other NBA players.¹⁶⁰ The article goes on to explain how under the current salary guidelines, a player entering the league out of high school puts himself in a position to potentially make much more money than he would have if he had went to college for four years before entering the league.¹⁶¹ While the economic statistics cannot be refuted, the fact that a high school player will make more money than any other player in the league is not necessarily a valid argument against a rule that would restrict a player from doing so. It is true that in almost every profession a person who begins earlier will earn more money at a higher rate

¹⁵⁵ See, 2003 NBA draft Board, <http://www.nba.com/draft2003/board.html>.

¹⁵⁶ *Id.*

¹⁵⁷ See, 2002 NBA draft Board, <http://www.nba.com/draft2002/board/index.html>. With 1st, 23rd, 26th, and 27th picks overall, Yao Ming, Tayshaun Prince, John Salmons, and Jared Jeffries were taken, respectively.

¹⁵⁸ All of players' statistics were pulled from their first year stats at, <http://www.nba.com/players/>

¹⁵⁹ McCann at 155

¹⁶⁰ *Id.* at 156

¹⁶¹ *Id.* at 157

sooner than someone who begins the profession four years later. If an NBA team hypothetically wished to draft a 10-year old with the hopes of securing the next great basketball talent, there is no doubt that if the phenom lives up to his potential he will earn more money than another person his age that waits until he graduates high school before he is drafted. The mere fact that it is possible, and indeed likely, that a player will earn more entering the league out of high school does not mean that the player necessarily should do so or that the league should refrain from allowing them to do so.

C. A high school player can only hurt his “stock” by attending college

A final argument asserted by the article is that if a “draftable” high school player is forced to attend college, that player’s value to NBA teams can only decline.¹⁶² McCann argues that the longer a player spends in college, the less margin of error that player will have when he enters the draft because college players are expected to make more of an immediate impact than high school players.¹⁶³ Again this argument may very well be true, however, an age limit would dispel of this issue by leveling the playing field of all players entering the league. NBA teams will no longer be making a choice between drafting for an immediate impact player or drafting for a “work-in-progress.” It can be presumed that all future basketball stars that are affected by the age limit will all have and equal amount of experience when they enter the draft. While some players may choose to stay in college for all four years, it is more than likely that the majority of future drafts under this rule will be permeated by players who have recently turned 20-years old.

It is clear that an NBA age requirement will financially affect those players that are unable to enter the draft that would otherwise have been drafted. The fact that a minute

¹⁶² McCann at 162

¹⁶³ *Id.*

percentage of high school players must wait two years before they are able to begin earning a lucrative income is an insufficient reason to prevent the league from collectively bargaining for an age requirement. The risk that a young player may ruin his life by forgoing college and declaring for the draft far outweighs the chance that a relative few young stars may make \$50 million in their career when they otherwise may have made \$70 million. In addition, any age requirement that is implemented into the collective bargaining agreement will almost assuredly be accompanied by significant concessions made by the league to the benefit of current and future NBA players. An age requirement may negatively affect a few players, while it definitely will benefit the league, and thus, a much larger group of players in the long run.

VI. CONCLUSION

The success of Commissioner Stern's proposed 20 year age requirement for players to become eligible for the NBA draft relies almost completely on whether or not it is implemented into the upcoming collective bargaining agreement. Many believe the success of the league, both financially and competitively, relies on whether or not a rule restricting those who can enter the draft is able to be implemented. While there are valid arguments both for and against the implementation of such a rule, it is clear that if the rule is collectively-bargained it will withstand any antitrust claim brought against it. While it is possible for courts to find a valid basis for an antitrust claim against such a rule, the vast amount of recent precedent regarding challenges brought by players against collectively-bargained rules indicates that the non-statutory labor exemption will apply to the rule. As a result, if implemented, the rule will delay the hyped

ascension of Greg Oden as the “Next One”¹⁶⁴ until his 20th birthday, four years from now. By implementing the rule at such a time, Stern may essentially transform Oden from the next LeBron James to the poster-child for the success of the 20-year old age requirement.

¹⁶⁴ Tim Layden, “Way Ahead of Schedule”, Sports Illustrated, December 6, 2004, p. 90