Loyola of Los Angeles
Entertainment Law Review

Volume 24 | Number 2 Article 3

3-1-2004

4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule

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4TH AND GOAL: MAURICE CLARETT TACKLES THE NFL ELIGIBILITY RULE

*Written December 3, 2003**

I. INTRODUCTION

Maurice Clarett wants to play professional football. During his freshman season at Ohio State University, Clarett rushed for 1,237 yards and eighteen touchdowns while leading the Buckeyes to the 2002 National Championship.[1] Following his first college football season, Clarett was voted the number one running back in college football by *The Sporting News*, was awarded Big Ten Freshman of the Year, and was named to the All-Big Ten first-team.[2] His performance had National Football League ("NFL") scouts salivating over his talents, each wishing they could draft him onto their team.[3] Former Heisman Trophy winner Eddie George, now a running back with the NFL's Tennessee Titans, commented that Clarett is "the total package."[4] Although Clarett's dream is to enter the upcoming NFL draft and play with the best, there is a major roadblock standing in his way.

That roadblock is a buried paragraph in the NFL's constitution and by-laws.[5] The paragraph, entitled "Special Eligibility" ("Eligibility Rule"),

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* This Comment was written prior to the decision of the Southern District Court of New York handed down on February 5, 2004. All arguments and analysis were constructed with no knowledge of how the court had ruled. A Postscript is included at the end of this Comment to breakdown Judge Shira A. Scheindlin's ruling and evaluate the NFL's possible arguments on appeal.

1. Jay Glazer, *Game-day Notebook: Ball Gets Rolling on Clarett Challenge*, CBS.SPORTSLINE.COM (Sept. 14, 2003), *at* http://www.cbs.sportsline.com/nfl/story/6639875.

2. *The Suit: Clarett v. NFL*, ESPN.COM (Sept. 23, 2003), *at* http://sports.espn.go.com/espn/print?id=1621954&type=story [hereinafter ESPN.COM].

3. *See* Dennis Dodd, *Young Stars Make (Under)class Battle with NFL Inevitable*, CBS.SPORTSLINE.COM (Sept. 1, 2003), *at* http://cbs.sportsline.com/collegefootball/story/6609164 [hereinafter Dodd 1].

4. Gene Wojciechowski, *Good to Go*, ESPNMAG.COM (Oct. 16, 2002), *at* http://sports.espn.go.com/magazine/vol5no22clarett.html [hereinafter Wojciechowski 1].

5. Dodd 1, *supra* note 3.

states, "*[a]pplications (for the draft) will be accepted for college players for who at least three full college seasons have elapsed since their high-school graduation.*"[6] Under this rule, Clarett is ineligible to enter the NFL draft until 2005 because he is less than two years removed from high-school graduation.[7]

Clarett and his family believe that the Eligibility Rule not only keeps him from realizing his dream, but that it also severely impedes his ability to profit from his talent.[8] On September 23, 2003, after months of debate, media pressure, and meetings with NFL executives, Clarett filed suit against the NFL in the Southern District of New York asking a federal judge to abolish the league's Eligibility Rule.[9] The suit contends that the NFL Eligibility Rule constitutes a group boycott and a concerted refusal to deal, thus harming competition[10] and violating antitrust law under section 1 of the Sherman Act ("section 1" or "the Act").[11]

In all section 1 cases that contest sports league labor market restraints, there are four basic questions:

> (1) Does the challenged league rule or practice qualify for either the statutory or nonstatutory labor exemption from Sherman Act coverage?
>
> (2) Is a league, at least in this particular case, a single economic firm whose internal management practices and rules lack the necessary plurality of actors for a section 1 violation?
>
> (3) Is the challenged player practice or rule inherent in or ancillary to the formation and existence of a lawful joint venture and thus per se lawful under section 1?
>
> (4) Is the challenged player practice or rule reasonable under the Rule of Reason?[12]

If the district court answers *any* of these questions in the affirmative, Clarett's section 1 claim will fail.[13] However, if the district court finds *all* of these questions to be answered in the negative, a section 1 violation will be found and Clarett will likely get the chance to play professional football

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6. *Id.*

7. *See* Glazer, *supra* note 1.

8. ESPN.COM, *supra* note 2.

9. Associated Press, *Suit Claims NFL Rules Restrain Amateurs*, ESPN.COM, *at* http://sports.espn.go.com/espn/print?id=1621822&type=story (last visited Sept. 23, 2003).

10. *Id.*

11. 15 U.S.C. § 1 (2003).

12. Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 340 (1986).

13. *Id.* at 341.

at the age of nineteen.[14]

This Comment explores both sides of this historic debate, which involves the question of whether a teenager has the right to play professional football in the NFL. Part II presents a detailed discussion of the parties involved and examines the governing law and 'player restraint' case precedents. Part III analyzes how the four fundamental questions presented above might be argued if this case were to reach the merits. Part IV explores the policy debate surrounding the Eligibility Rule. Part V concludes with guiding solutions on how the court can resolve this matter. Finally, Part VI breaks down Judge Scheindlin's ruling and evaluates the possible arguments the NFL may make on appeal.

II. BACKGROUND

A. Why Clarett is Challenging the NFL Rule?

If not for Clarett's tainted background, his challenge of this rule probably would not have occurred. His first disciplinary problem was exposed on July 13, 2003, when a teaching assistant at Ohio State admitted that Clarett had received "preferential treatment" in passing a class.[15] Then on July 29, the National Collegiate Athletic Association ("NCAA") began investigating Clarett's claim that more than $10,000 in cash and goods, an amount surprisingly high for a scholarship athlete, were stolen from his car.[16] Later, on September 9, university police charged Clarett with a first-degree misdemeanor for falsely reporting the value of items stolen from his car.[17] Clarett was then suspended from college football for a year for violating NCAA rules concerning extra benefits and not being forthright with investigators.[18] However, even before his suspension, Clarett admitted that he had considered challenging the NFL Eligibility Rule when he realized his dream and his ability to profit from his talents were being restrained.[19]

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14. *See id.*

15. Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES, July 13, 2003, § 8, at 1.

16. *List of Clarett Woes Is Long*, USATODAY.COM (Sept. 23, 2003), *at* http://www.usatoday.com/sports/college/football/bigten/2003-09-10-clarett-woes-timeline_x.htm.

17. *Id.*

18. *Id.*

19. *See* Gene Wojciechowski, *Excerpts from Interview with Maurice Clarett*, ESPN.COM (Oct. 26, 2002), *at* http://espn.go.com/ncf/s/2002/1026/1451354.html [hereinafter Wojciechowski 2].

B. The NFL and the Eligibility Rule

The NFL is a group of separately incorporated football clubs with teams in thirty-two cities across the United States.[20] Prior to 1990, college football players were prevented from entering the NFL draft until they had been out of high school for four years.[21] However, during that time players who were "non-seniors who wanted to enter the draft were granted permission on a case-by-case basis."[22] In 1990, Paul Tagliabue, during his first year as the commissioner of the NFL, altered the league's eligibility requirements to allow college juniors to enter the draft.[23] The Sports Law Journal notes that the league "had little choice but to change the rule . . . [i]t was simply a matter of time before a junior would have sued the league for not allowing him to enter the draft."[24] Though the rule became more flexible, Tagliabue and the league refused to implement the kind of "open door" policy used in the NBA where anyone over eighteen can enter the draft.[25]

Despite the significance of the Eligibility Rule, the collective bargaining agreement ("CBA") between the league and the NFL Player's Association ("NFLPA") lacks any mention of it.[26] The CBA covers 292 pages, beginning with a five-paragraph preamble and concluding with a "workers compensation" listing in the index.[27] The agreement contains "61 articles, appendices from 'A' through 'N' and 357 sections. There is an introduction, countless subsections, [and] tens of thousands of words. There are painstakingly minute details about the salary cap, precise guidelines on severance pay, huge sections on arbitration, collusion, injury grievance procedures, moving expenses, and fringe benefits."[28] There is even a specific section of the CBA that addresses the draft, its annual timing, and when workouts for players should be scheduled.[29] Despite all

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20. *See NFL History: 2001-*, NFL.COM, *at* http://www.nfl.com/history/chronology/2001- (last visited Oct. 8, 2003) [hereinafter NFL.COM].

21. *See* Liz Clarke, *Boys to Men: NFL Continues to Block Young Ones*, WASH. POST, Nov. 8, 2002, at D01.

22. *Id.*

23. Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS LAW J. 205, 214 (1996).

24. *Id.*

25. *Id.*

26. *See* Len Pasquarelli, *Guidelines Lacking in CBA*, ESPN.COM (Sept. 23, 2003), *at* http://sports.espn.go.com/espn/print?id=1621876&type=story [hereinafter Pasquarelli 1].

27. *Id.*

28. *Id.*

29. *Collective Bargaining Agreement Between the NFL Management Council and the NFL*

of this, the agreement contains no explicit language defining the league's guidelines on draft eligibility.[30]

C. The Governing Law

As in previous player restraint cases, Clarett's September 23 filing states that the NFL Eligibility Rule reflects a concerted refusal to deal that violates section 1 of the Sherman Act.[31] The purpose of the Act is to generally prohibit any means of restraining trade or commerce.[32] Despite the literal language of the Sherman Act, the Supreme Court has noted that not *every* form of conspiracy or contract in restraint of trade is illegal.[33] Thus, the Act should be analyzed under a reasonableness standard and should prohibit "only contracts and combinations which amount to an unreasonable or undue restraint of trade in interstate commerce."[34] This has been referred to as the "rule of reason" analysis.[35] In determining whether a restraint is reasonable under this analysis, courts should look to see (1) if the restraint imposed is justified by a legitimate business purpose and (2) whether the restraint is more restrictive than necessary to satisfy that purpose.[36]

Due to the lengthy and difficult factual inquiries necessary under the rule of reason analysis, courts have presumed certain agreements and practices to be conclusively unreasonable and therefore per se illegal under the Act.[37] By denoting certain actions as per se antitrust violations, courts avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort

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Players Association 2002-2008, NFLPA.ORG, *at* http://www.nflpd.org/Media/main.asp?subPage=CBA+Complete (last visited Oct. 8, 2003) [hereinafter NFLPA.ORG]. CBA includes provisions such as Article XVI "College Draft" and Article XXXV "Off-season Workouts." *Id.*

30. *See id.*

31. ESPN.COM, *supra* note 2.

32. Thomas R. Kobin, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORTS L. 483, 488 (1994) (citing 15 U.S.C. § 1 (2003)). The Sherman Act provides in part that "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." 15 U.S.C. § 1 (2003).

33. Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (Mass. Dist. Ct. 1975) (citing Standard Oil Co. v. United States, 221 U.S. 1, 59–60 (1911)).

34. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1063 (C.D. Cal. 1971) (citing Standard Oil Co. v. United States, 221 U.S. 1 (1911)).

35. *Id.*

36. Tannenbaum, *supra* note 23, at 209.

37. *Denver Rockets*, 325 F. Supp. at 1063.

to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."[38] Originally, in player restraint cases involving sports leagues, courts consistently applied the per se rule.[39] Recently however, courts have questioned these restraints under the rule of reason analysis.[40]

Before a court can question these restraints under the rule of reason or per se approach, it is required to first address the threshold issues of single entity status and nonstatutory labor exemptions.[41] Due to the fact that section 1 prevents only contracts, combinations, or conspiracies in restraint of trade,[42] application of the Sherman Act is dependent on the existence of concerted action.[43] No matter how unreasonable or anticompetitive an action may be, in order for there to be a violation of section 1 of the Act, multiple parties must be involved—unilateral action will not suffice.[44] If a sports league can successfully argue that its structure is in essence a single entity, similar to a joint venture or partnership, section 1 of the Sherman Act will not apply.[45]

Additionally, in several decisions, certain league practices of professional leages have been insulated from section 1 scrutiny due to nonstatutory exemptions.[46] The first such exemption was judicially created by the Supreme Court in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[47] There, the Court decided that as a result of its intrastate nature, professional baseball was exempt from federal antitrust law.[48] Though the nature of baseball continued to change over time with the expansion of teams and media outlets, the Supreme Court in both *Toolson v. New York Yankees, Inc.*[49] and *Flood v. Kuhn*[50] maintained its original position that certain aspects of baseball are and will continue to be invisible from antitrust litigation,

38. *Id.*

39. *Id.*

40. Tannenbaum, *supra* note 23, at 209.

41. Roberts, *supra* note 12, at 342–46.

42. 15 U.S.C. § 1 (2003).

43. *See* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387 (9th Cir. 1984).

44. *Id.* at 1388–90.

45. *Id.* at 1387.

46. *See* Roberts, *supra* note 12, at 343–44.

47. 259 U.S. 200 (1922).

48. *Id.* at 209.

49. 346 U.S. 356 (1953).

50. 407 U.S. 258 (1972).

despite the fact that Congress has remained silent.[51] Furthermore, courts have acknowledged that when a collective bargaining relationship exists between competitors, national labor law will preempt the application of antitrust scrutiny.[52] In *Mackey v. NFL*, the Eighth Circuit concluded that provisions agreed to in a CBA would be immune from challenge by employees under antitrust law where: "[(1)] the restraint on trade primarily affects only the 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."[53] However, if none of these factors are present, an exemption will not apply and the court will proceed to analyze the restraint under section 1.[54]

D. History of Player Restraint Cases

1. *Neeld v. National Hockey League*[55]

In *Neeld*, a one-eyed hockey player presented a section 1 challenge against the National Hockey League ("NHL") in response to a safety provision in its by-laws.[56] The suit claimed that the provision, which banned players with sight in only one eye from participating, was a group boycott and thus should be presumed to be per se illegal.[57] The Ninth Circuit affirmed a district court's summary judgment ruling for the league, noting that not all concerted action should be seen as per se illegal.[58] After rejecting the per se approach, the court found that the provision was reasonable because the ban's purpose and effect was not anticompetitive, rather it promoted player safety.[59] Though this court failed to explicitly address the single entity or labor exemption issues, the fact that the court reached the rule of reason analysis suggests neither exemption applied.[60]

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51. *See Toolson*, 346 U.S. at 357; *see also Flood*, 407 U.S. at 283.

52. Michael S. Kagnoff, *While Free Agents Reap Benefits of NFL Labor Settlement Agreement, Rookies Get Set for Further Legal Battles*, 1 SPORTS LAW. J. 109, 109–10 (1994).

53. *Id.* at 118 (citing Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976)).

54. *See id.* at 109–10.

55. Neeld v. NHL, 594 F.2d 1297 (9th Cir. 1979).

56. Roberts, *supra* note 12, at 360 (citing *Neeld*, 594 F.2d 1297).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 360–61.

2. *Denver Rockets v. All-Pro Management, Inc.*[61]

In *Denver Rockets*,[62] Spencer Haywood, a highly touted college basketball player, challenged a National Basketball Association ("NBA") league rule that set a minimum age requirement for its players ("NBA Rule").[63] The NBA Rule, present only in the league's by-laws, stated, "A person . . . shall not be eligible to be drafted or to be a Player until four years after . . . his original high school class has been graduated."[64] As a result, NBA Commissioner Walter Kennedy rescinded Haywood's contract with the Seattle Supersonics, a professional team in the NBA.[65] This action spawned Haywood's suit alleging that the NBA's Rule was illegal under section 1 of the Sherman Act as it constituted a group boycott.[66]

The court first noted that basketball, unlike baseball, "does not enjoy exemption from the antitrust laws."[67] Next, the court explained that, in this case the NBA's uncontested engagement in interstate business coupled with the concerted refusal to deal was a sufficient combination to prove the NBA was not a single entity.[68] Due to the fact that this rule was not collectively bargained for and there was no nonstatutory exemption present, the court passed through those obstacles and moved directly to a section 1 analysis of the rule.[69] Within their examination of the rule, the court agreed with Haywood in finding that the provision constituted a "primary" group boycott, "wherein the actors at one level of a trade pattern (NBA team members) refuse to deal with an actor at another level (those ineligible under the NBA's four-year college rule)."[70] The harm resulting from this type of a boycott is felt not only by the athlete, who is injured by being banned from the market he seeks to enter, but also by the league, whose competition is damaged by excluding those players who could increase the talent level of the league.[71] Furthermore, this boycott allowed NBA teams to pool their financial power and establish their own private government, thus monopolizing professional basketball in America.[72]

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61. 325 F. Supp. at 1049.
62. *Id.*
63. *Id.* at 1059.
64. *Id.*
65. *Id.* at 1060.
66. *Id.*
67. 325 F. Supp. At 1060.
68. *Denver Rockets*, 325 F. Supp. at 1062.
69. *See* Roberts, *supra* note 12, at 363.
70. *Denver Rockets*, 325 F. Supp. at 1061.
71. *Id.*
72. *Id.*

Though the court acknowledged that a rule of reason approach was the standard in section 1 cases,[73] it observed that:

> [t]he Supreme Court has on numerous occasions recognized [the] difficulties [of the rule of reason analysis] and has declared that with regard to certain practices the problems of making adequate economic determinations and setting appropriate guidelines are so complex that they simply outweigh the very limited benefits deriving from those practices and have declared them to be illegal *per se*.[74]

In bypassing the rule of reason analysis, the court deemed a group boycott to be one such practice and struck down the NBA rule as per se illegal under section 1 of the Sherman Act.[75]

3. *Linseman v. World Hockey Association*[76]

Kenneth Linseman, a nineteen year old hockey player, raised a similar antitrust challenge in this case as was presented in *Denver Rockets*.[77] Here, Linseman challenged the validity of a World Hockey Association ("WHA") rule "prohibiting persons under the age of twenty from playing professional hockey for any team within their association."[78] Though he had already been drafted and signed by the Birmingham Bulls of the WHA for the 1977–1978 season, Linseman's contract was nullified by the league in light of the league's eligibility rule.[79] As a result, Linesman challenged the rule on the grounds that it was an unreasonable restraint of trade in violation of section 1 of the Sherman Act, the same claim previously made by Haywood.[80]

Following in the footsteps of the *Haywood* court, and heavily citing that decision, the *Linseman* court concluded that the WHA rule constituted a primary group boycott and thus was illegal per se under section 1.[81] The court's discussion of the per se nature of the boycott was quite concise, it noted that the rule "will be held illegal without regard to any claimed

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73. *See id.* at 1062–63 (citing Standard Oil Co. v. United States, 221 U.S. 1, 31 (1911)).

74. *Id.* at 1063.

75. *Id.* at 1067.

76. 439 F. Supp. 1315 (D. Conn. 1977).

77. Roberts, *supra* note 12, at 364 (citing *Linseman*, 439 F. Supp. 1315).

78. *Linseman*, 439 F. Supp. at 1317.

79. Roberts, *supra* note 12, at 364.

80. *Linseman*, 439 F. Supp. at 1317.

81. *Id.* at 1320–21.

justification for the restraint."[82] The court, however, did stress its dislike for the WHA eligibility rule in that the rule's restrictions were "completely arbitrary."[83] In contrast with *Deesen v. Professional Golfers' Ass'n of America*,[84] where a court approved a league rule that permitted only those golfers approved by the PGA to compete in sponsored matches,[85] the *Linseman* court felt this rule was "a blanket restriction as to age without any consideration of talent. The court [took] judicial notice of the fact that many teenagers have played in the professional ranks with distinction."[86]

4. *Boris v. United States Football League*[87]

Boris v. United States Football League presented another section 1 challenge to the eligibility rule of a league, this time concerning the then one-year-old United States Football League ("USFL").[88] The rule in question in *Boris* stated

> no person could play in the USFL or be drafted by a USFL team unless: (1) the player had exhausted all of his four years of college eligibility; (2) at least five full years had elapsed since his first enrollment in a post-high school educational institution; or (3) he had graduated from a recognized four year college.[89]

Boris, a varsity football player at the University of Arizona who sought to play in the USFL, was excluded from participating because he failed to meet any of the three requirements of the league rule.[90] After determining that the USFL teams were economic competitors, thus restricted by section 1, the court plainly stated that the rule constituted a group boycott and thus was a per se violation of the Sherman Act.[91]

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82. *Id.* at 1320 (citing N. Pac. v. United States, 356 U.S. 1, 5 (1957)).

83. *Id.* at 1323.

84. 358 F.2d 165 (9th Cir. 1966).

85. *See id.* at 171.

86. *Linseman*, 439 F. Supp. at 1323.

87. Boris v. United States Football League, No. CV 83 4980, 1984 U.S. Dist. LEXIS 19061, at *1 (C.D. Cal. Feb. 28, 1984).

88. Roberts, *supra* note 12 at 364 (citing *Boris*, 1984 U.S. Dist. LEXIS 19061, at *1).

89. *Id.* at 365.

90. *Id.*

91. *Boris*, 1984 U.S. Dist. LEXIS 19061, at *8.

III. ANALYSIS

A. Does the Challenged League Rule or Practice Qualify for the Nonstatutory Labor Exemption?

In analyzing the NFL Eligibility Rule, the first step is to determine whether the rule is protected by an exemption. As noted earlier, there are a number of nonstatutory exemptions that have been created to shield league practices from being examined under section 1 of the Sherman Act.[92] These exemptions limit an antitrust court's ability to ever reach the merits to determine whether the challenged practice is reasonable under the Sherman Act.[93] Regardless of whether a rule or agreement is anticompetitive, such as a price fixing plan or a boycott, if the conditions for an exemption are met, the court will never analyze the merits of the case.[94]

In order to force the court to ignore the merits of the Clarett challenge, the NFL could argue that the judicially created exemption provided to Major League Baseball should be extended to cover the NFL.[95] This line of reasoning was previously analyzed by the Supreme Court in *Radovich v. National Football League*.[96] In response to a section 1 challenge to the league's apparent boycott of players associated with a competitor league, the NFL asserted that "professional football [had] embraced the same techniques" which existed in baseball at the time of *Federal Baseball*[97] and *Toolson*.[98] Thus, the NFL contended that *stare decisis* should compel the court to provide them with a similar exemption.[99] In spite of this, the Supreme Court rejected the NFL's arguments and noted that the nonstatutory exemption judicially created in those cases is specifically limited to "the business of organized professional baseball" and did not control that case.[100] In discussing the impact of *Federal Baseball*,

92. *See discussion supra* Part II.C.

93. Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996); *see also* Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 709–10 (1965).

94. *See* Mackey v. NFL, 543 F.2d 606, 611 (8th Cir. 1976).

95. *See supra* Part II.C.

96. *See* Radovich v. NFL, 352 U.S. 445 (1957).

97. 259 U.S. 200 (1922).

98. *Id.* at 450.

99. *Id.*

100. *Id.* at 451.

the court noted that baseball was the lone beneficiary of that exception and that decision should "not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise . . . ."[101]

In light of this Supreme Court decision, it is clear that whatever the scope of baseball's judicially created exemption, no other sports businesses can effectively utilize it to shield them from an antitrust challenge.[102] Thus, the New York District Court should reject such an argument if presented by the NFL.

The NFL's next logical step might involve presenting to the court the idea that the nonstatutory labor exemption immunizes the Commissioner and the NFL clubs from liability under Clarett's section 1 attack.[103] A fundamental principal of federal labor policy is the notion that employees have the right to collectively bargain in order to eliminate competition.[104] By endorsing collective bargaining rather than individual bargaining, federal labor policy "allows employees to seek [and negotiate] the best deal for the greatest number."[105] This freedom to contract collectively is especially important in the context of bargaining between sports leagues and professional athletes because of the "unfamiliar or strange agreements" often reached.[106] If courts intruded and outlawed such agreements, "leagues and their player unions would have to arrange their affairs in a less efficient way."[107] In response to this concern, the Eighth Circuit in *Mackey* noted that if there has been a mature collective bargaining relationship, an exemption will be created whereby labor policy may be given "pre-eminence over the antitrust laws," thus insulating league practices.[108]

1. Does the NFL's Eligibility Rule Primarily Affect Only the Parties to the Collective Bargaining Relationship?

According to *Mackey*, the first threshold requirement to obtaining this nonstatutory labor exemption is that the league must show that the "restraint on trade primarily affects only the parties to the collective bargaining relationship."[109] In terms of the rule at issue, the parties

101. *Id.*
102. Roberts, *supra* note 12, at 356.
103. *See Mackey*, 543 F.2d at 611.
104. *See* Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).
105. *Id.*
106. *Id.* at 961.
107. *Id.*
108. *Mackey*, 543 F.2d at 614.
109. *Id.*

involved in the NFL's collective bargaining process are the team owners and the National Football League Players Association ("NFLPA"), the union which represents current NFL players.[110] It is obvious that the league's Eligibility Rule has an affect on owners in that it restricts who they can draft and sign to play on their team.[111] Additionally, this restraint affects those players already in the league in that the fewer athletes eligible for the league, the less competition players have for slots on teams, salaries, and playing time. In his complaint, however, Clarett claims that the Eligibility Rule does not affect *only* the team owners and current NFL players (the parties to the collective bargaining relationship) but also prospective employees of the league.[112] Section 41 of count one of Clarett's complaint states, "[T]he direct effect of the Rule is a restraint of amateur athletes who were strangers to the collective bargaining process between the NFL and NFLPA."[113] Due to the broad restraint of the Eligibility Rule, Clarett believes this rule is "not subject to the nonstatutory labor exemption."[114] This argument is similar to the ones presented and ruled on in both *Zimmerman v. NFL*[115] and *Wood v. NBA*.[116]

In *Zimmerman*, the district court for the District of Columbia ruled that a USFL player's section 1 challenge to the NFL's supplemental draft should be denied.[117] The court came to that conclusion not based on the merits, but rather because the labor exemption removed the draft from Sherman Act scrutiny.[118] During the analysis of the first prong of the labor exemption, Zimmerman contended that though the supplemental draft was contained in the league's collective bargaining agreement, "the primary impact of the draft was upon USFL players who are not members of the NFLPA."[119] This argument, analogous to the one presented in Clarett's claim, was discarded by that district court.[120] There, the court explicitly noted that "[n]ot only present but potential future players for a professional sports league are parties to the bargaining relationship."[121] The court further explained that when the bargaining agreement is signed between the NFL

110. *See* Pasquarelli 1, *supra* note 26.
111. *See* Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1318 (D. Conn. 1977).
112. ESPN.COM, *supra* note 2.
113. *Id.*
114. *Id.*
115. *See* 632 F. Supp. 398 (D. D.C. 1986).
116. *See* 809 F.2d 954 (2d Cir. 1987).
117. *Zimmerman*, 632 F. Supp. at 401.
118. *Id.* at 401, 409.
119. *Id.* at 405.
120. *Id.*
121. *Id.*

and the NFLPA, players within the bargaining unit *and* those who enter the unit at a later time are bound by its terms.[122] Therefore, because Zimmerman was a potential NFL player, he was characterized as part of the collective bargaining relationship between the teams and the union and the first prong of the labor exemption was satisfied.[123]

Similarly, in *Wood*, a rookie basketball player brought forth a section 1 challenge to the NBA's salary cap and draft provisions that were stipulated in the league's collective bargaining agreement.[124] Once again, though a cap and draft seem to be highly anticompetitive, the court never reached the merits of Wood's claim due to the court's application of the nonstatutory labor exemption.[125] In defending his case against this first prong of the labor exemption, Wood argued that the draft and salary cap forced him to play for a specific employer at a lower wage, both working conditions for which he could have individually bargained.[126] Because Wood was not a member of the NBA Players Association at the time the league's collective bargaining agreement was signed, he maintained that these provisions were illegal because they affected employees outside of the bargaining relationship.[127] In striking down Wood's argument, the Second Circuit Court pointed to the fact that the National Labor Relations Act's ("NLRA") definition of "employee" includes workers outside the bargaining unit.[128] The NLRA states, "the term 'employee' shall include any employee, *and shall not be limited to the employees of a particular employer.*"[129] The court explained that if Wood's argument were to succeed, any employee dissatisfied with his salary relative to those of other workers could insist on individual bargaining.[130] As a result, every collective bargaining agreement "would be subject to similar challenges, and federal labor policy would essentially collapse. . . . [Additionally, e]mployers would have no assurance that they could enter into any collective agreement without exposing themselves to an action for treble damages."[131]

In light of these case precedents, Clarett's argument that the league

122. *Id.*
123. *Zimmerman*, 632 F. Supp. at 405.
124. *Wood*, 809 F.2d at 956.
125. *See id.* at 956–57.
126. *See id.* at 960.
127. *Id.*
128. *Id.*
129. *Id.* (quoting 29 U.S.C. § 153(3) (2003)).
130. *Wood*, 809 F.2d at 961.
131. *Id.*

Eligibility Rule affects those amateur athletes outside of the bargaining process should fail. Although neither Clarett nor any other college or high school football player received direct representation by the player's union,[132] both the district court and Second Circuit Court have made it clear that they are "potential future players" of the league and therefore seen as "employees" who are parties to the collective bargaining relationship; essentially receiving indirect representation.[133] This view was explicitly embodied in the preamble of the NFL's collective bargaining agreement which states that the NFLPA is the sole bargaining representative for present and future player employees of the NFL, including "3. All rookie players once they are selected in the current year's NFL College Draft; and 4. All undrafted rookie players once they commence negotiation with an NFL Club concerning employment as a player."[134] Thus, the first prong of this nonstatutory labor exemption should be ruled in favor of the NFL and the analysis of this immunity should continue.

2. Does the NFL's Eligibility Rule Concern a Mandatory Subject of Collective Bargaining?

As articulated in *Mackey*, the second requirement the NFL must satisfy to be protected under the labor exemption is to show that "the agreement sought to be exempted concerns a mandatory subject of collective bargaining."[135] The NLRA provides that mandatory subjects of bargaining include "wages, hours and other terms and conditions of employment."[136] In previous player restraint cases, courts have been able to easily single out whether the challenged term is a mandatory subject.[137] In *Mackey*, the court found that a league rule restricting player movement constituted a mandatory bargaining subject due to its effect on player wages.[138] Similarly, in *Wood* the court found that a salary cap had an obvious effect on wages and that a draft dictated the conditions, specifically location of a player's employment.[139] As a result, both terms were seen as mandatory subjects.[140]

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132. *See generally Zimmerman*, 632 F. Supp. 398; *Wood*, 809 F.2d 954.
133. *See Zimmerman*, 632 F. Supp. at 405; *see also Wood*, 809 F.2d at 960.
134. NFLPA.ORG, *supra* note 29.
135. *Mackey*, 543 F.2d at 614.
136. 29 U.S.C. § 158(d) (2003).
137. *See Mackey*, 543 F.2d at 615.
138. *Id.*
139. *Wood*, 809 F.2d at 962.
140. *See id.* at 961–62.

Despite the fact that courts have had little difficulty determining what is a mandatory subject of bargaining when faced with a discussion concerning wages or hours,[141] the issue of an age restriction is a topic that has escaped the courts. In Clarett's case, it is obvious that the league age restriction has nothing to do with the working hours or wages in the NFL.[142] Letting younger athletes compete will neither force NFL teams to practice or schedule games at different times nor will it affect league-wide wages—the same number of players will be drafted and on team rosters. The success of this prong of the exemption will turn on how the New York court will characterize "terms and conditions of employment."[143] Though the NLRA does not immutably enumerate a list of which abstract employment conditions will constitute mandatory subjects of bargaining, many courts agree that the condition must have a material affect.[144] In *Seattle First National Bank v. NLRB*, the Ninth Circuit noted that

> the phrase 'terms and conditions of employment' is to be interpreted in a limited sense which does not include every issue that might be of interest to unions or employers. . . . A mere remote, indirect or incidental impact is not sufficient. In order for a matter to be subject to mandatory collective bargaining it must *materially* or *significantly* affect the terms or conditions of employment.[145]

Likewise, the Third Circuit held that only matters which "vitally affect" terms and conditions of employment are mandatory subjects of bargaining.[146] If the New York court decides to follow the lead of these cases, Clarett's objection to this second prong of the exemption should be denied and the court should continue with its exemption analysis. An age restriction significantly affects the terms of employment in any business, especially the NFL. The Eligibility Rule is essentially a restriction on the hiring practices of teams. In no way is this remote or incidental, but rather it has a direct and material affect on the talent and makeup of players that can be drafted into the NFL. There are a number of college players who undoubtedly have the talent to participate in the NFL, but this hiring restriction affects those who can be employed by the league. In *NLRB v*

141. *See Mackey*, 543 F.2d at 615; *see also Wood*, 543 F.2d at 962.

142. ESPN.COM, *supra* note 2.

143. *See* Kagnoff, *supra* note 52, at 11; *see also* ESPN.COM, *supra* note 2.

144. *See* Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971); *see also* Seattle First Nat'l Bank v. NLRB, 444 F.2d 30, 33 (9th Cir. 1971); *see also* NLRB v. USPS, 18 F.3d 1089, 1096 (3d Cir. 1994).

145. *Seattle First Nat'l Bank*, 444 F.2d at 32–33.

146. *NLRB*, 18 F.3d at 1100.

USPS, the court noted that "a hiring practice is a mandatory subject of collective bargaining where there is an objective basis for believing it to be discriminatory."[147] The Eligibility Rule is no doubt a hiring practice that discriminates on the basis of age, and thus under this reasoning should be viewed as a mandatory subject of collective bargaining.

3. Is the NFL's Eligibility Rule the Result of Bona Fide Arm's-Length Bargaining?

The final prong of the nonstatutory labor exemption favoring collective bargaining will only override the antitrust laws "where the agreement sought to be exempted is the product of bona fide arm's-length bargaining."[148] The NLRA describes this prerequisite as "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 . . . and the execution of a written contract incorporating any agreement reached if requested by either party[.]"[149]

Despite the fact that a provision in the NFL's collective bargaining agreement was donated to the explanation of the challenged "Rozelle Rule,"[150] the Eighth Circuit in *Mackey* held that the absence of this third requirement meant the exemption should not apply.[151] The court pointed to the testimony of the player's bargaining representative, who stated that during the process the rule was a "side discussion rather than a focal point of the negotiations."[152] Noticing that the rule was not only not a major topic of discussion, but additionally, that the representative had little recollection of the issue even coming up,[153] the court held that no bona fide arm's-length bargaining of the rule existed.[154] Thus, the Rozelle Rule was not granted immunity from Sherman Act scrutiny.[155] In contrast, extensive bargaining over a similar National Hockey League rule embodied in the league's CBA led the Sixth Circuit in *McCourt v. California Sports, Inc.* to grant it protection.[156] In spite of the fact the NHL's position on the rule

147. *Id.* at 1099.
148. *Mackey*, 543 F.2d at 614.
149. 29 U.S.C. § 158(d).
150. *See Mackey*, 543 F.2d at 616.
151. *Id.*
152. *Id.* at 616 n.17.
153. *Id.*
154. *Id.* at 616.
155. *Id.*
156. *See* McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979).

remained unchanged throughout the bargaining process and that the NHL ultimately prevailed,[157] the court stated this did "not mandate the conclusion that there was no collective bargaining over the issue."[158] Rather, the lengthy sessions in which each side's proposals were discussed demonstrated that regardless of the outcome, the term was a subject of good faith bargaining.[159]

The NFL's task of defending itself on this issue will be considerably more difficult than with the prior two requirements. Unlike the rules advocated for in *Mackey* and *McCourt*, the Eligibility Rule is not located within the 292 pages, 61 articles, and 357 sections of the league's collective bargaining agreement.[160] Though the CBA contains "Article XVI: College Draft" and "Article XVII: Entering Player Pool," what is noticeably absent is explicit language concerning the eligibility requirement.[161] In an interview with ESPN.com, Harold Henderson, the NFL's Vice President of Labor Relations, admitted to this major foul up stating, "[w]hy it didn't get into the CBA, well, I don't know. I certainly wish it was in there."[162] The league plans to argue that though there is no definitive language about the Eligibility Rule, it is implicitly covered or agreed to by reference in the agreement.[163] Stated another way, "[t]he CBA stipulates that, if the league and NFLPA executive director Gene Upshaw are in tacit agreement, that item is, rather flimsily it seems, essentially covered."[164] This argument is weak in comparison to the one presented in *Zimmerman*, where the court accepted that there was bona fide arm's-length bargaining only because the "record show[ed] that a fair amount of give and take took place between Upshaw" and the league representative.[165] If there really was good faith back-and-forth bargaining between the league and the NFLPA over the Eligibility Rule, it makes one marvel at how negotiators failed to include the guidelines in the agreement when every word is closely scrutinized and every punctuation is pored over during the negotiation of other provisions.[166] The fact that the Eligibility Rule only

157. *See id.* at 1200.
158. *Id.*
159. *Id.* at 1200–01.
160. Pasquarelli 1, *supra* note 26 (describing the NFL's CBA).
161. *See id.*; *see also* NFLPA.org, *supra* note 29.
162. Pasquarelli 1, *supra* note 26.
163. *Id.*
164. *Id.*
165. *Zimmerman*, 632 F. Supp. at 407.
166. Pasquarelli 1, *supra* note 26.

appears in the league bylaws,[167] outside the breadth of the CBA, furthers the assumption that it was not bargained for at arm's-length, but rather was unilaterally imposed by the NFL and its member clubs upon the players. Having failed to deal with a key element of the collective bargaining process, the league should not be granted immunity from a section 1 challenge under the nonstatutory labor exemption, and thus, will be vulnerable to defeat under the merits of the case.

B. Is the NFL, at Least in the Particular Case, a Single Economic Firm Whose Internal Management Practices and Rules Lack the Necessary Plurality of Actors for a Section 1 Violation?

If the court decides to move onto the merits of the Clarett case, it is necessary to determine whether the NFL itself is subject to scrutiny under section 1 of the Sherman Act. As noted before, to prevail in a section 1 suit, the plaintiff must prove that two threshold elements are present: "(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.'"[168]

In analyzing the NBA's Eligibility Rule, the *Denver Rockets* court found that it was indisputable that the first of these threshold elements was met.[169] Due to the fact that the NBA operated teams in seventeen major cities across the United States and that games involving those teams produced significant revenue from nationwide television and radio broadcasts, it was clear "that the NBA conduct[ed] its business in such a manner as to constitute interstate commerce."[170]

Similar reasoning was applied in *Linseman* where the court also concluded the WHA was engaged in interstate commerce.[171] That court determined that the plaintiff would likely be able to establish an effect on interstate commerce "[s]ince the WHA operates in eight different cities, schedules games in different states and in Canada, and derives substantial revenue from broadcasts of league contests."[172]

Though the NFL has had to defend itself in numerous antitrust suits, no court has ever conducted a thorough analysis of the NFL's place in

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167. *See* Dodd 1, *supra* note 3.

168. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1062 (C.D. Cal. 1971) (quoting 15 U.S.C. § 1 (2003)).

169. *Id.*

170. *Id.*

171. *See Linseman*, 439 F. Supp. at 1320.

172. *Id.*

interstate commerce.[173] It seems, however, that this lack of analysis is the courts' way of concluding that as the NFL is so obviously engaged in interstate commerce, any judicial pronouncement on this matter would be a waste of time. This idea is exemplified in *Mackey*, where the court limited this discussion to a mere footnote stating, "[i]t is undisputed that the NFL operates in interstate commerce."[174] Similar to the NBA and the now defunct WHA, the NFL has teams operating in thirty-two cities across the United States, scheduling regular season games in those cities as well as exhibition games abroad in places such as Tokyo and Mexico City.[175] In addition, NFL revenues from television contracts exceed those of any sports league in existence, as their current deals with CBS, Fox, ABC, and ESPN total $17.6 billion.[176] It is very hard to imagine the NFL debating with Clarett about this threshold requirement of the section 1 analysis.

In considering whether there is a sufficient agreement between parties to form a conspiracy, the court must determine whether the NFL should be viewed as a single entity or as separate competing entities. As previously noted, in order to violate section 1 there must always be multiple parties involved in some type of concerted action which restrains trade—a unilateral action will not suffice.[177] No matter how anticompetitive a provision might be, if the league is seen as a single entity the analysis will cease.[178] This issue has been previously raised and adjudicated in both *North American Soccer League v. NFL*[179] and *Los Angeles Memorial Coliseum Commission v. NFL*.[180]

In *North American Soccer League*, the NASL claimed that the NFL was engaging in a concerted refusal to deal, a section 1 violation, by prohibiting NFL team owners from having pecuniary interests in teams within competing professional sports leagues.[181] In analyzing this rule, it

173. *See* N. Am. Soccer League v. NFL, 670 F.2d 1249, 1256–58 (2d Cir. 1982); *see also* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387–90 (9th Cir. 1984); Kapp v. NFL, 390 F. Supp. 73, 80 (N.D. Cal. 1974); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976). All cases involve antitrust suits against the NFL and examine the league's status as a single entity or engage in a rule of reason analysis without ever discussing the league's effect on interstate commerce.

174. *Mackey*, 543 F.2d at 616 n.19.

175. ESPN.COM, *supra* note 2; *see also* NFL.COM, *supra* note 20.

176. Associated Press, *New Subscription Package Worth $2 Billion*, ESPN.COM (Dec. 11, 2002), *at* http://espn.go.com/nfl/news/2002/1211/1475429.html.

177. *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1387–90.

178. *Id.*

179. 670 F.2d 1249 (2d Cir. 1982).

180. 726 F.2d at 1387.

181. *N. Am. Soccer League*, 670 F.2d at 1250.

was necessary for the Second Circuit to perform an in-depth examination of the structure of the NFL to determine if the league was susceptible to an antitrust suit.[182] The court acknowledged that the success of professional football depends on its ability to attract as many fans as possible to attend and watch games.[183] This inducing advertisers to sponsor television and radio broadcasts of the games.[184] In order to achieve this goal there must be a number of separate competing professional football teams in varying locations with sufficient fan bases and skilled players.[185] This unique characteristic of the sport makes "some sort of an economic joint venture essential."[186] However, this necessity to cooperate amongst NFL teams does not automatically transform the league into a single entity.[187] To tolerate such a line of reasoning "would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects."[188] Therefore, the court explained that "[a]lthough NFL members thus participate jointly in many operations conducted by it on their behalf, each member is a separately owned, discrete legal entity which does not share its expenses, capital expenditures or profits with other members."[189] After acknowledging that the NFL is comprised of separate economic entities, and thus able to engage in a combination or conspiracy, the Second Circuit allowed the NASL to move forward with its section 1 challenge.[190]

The Ninth Circuit conducted a similar analysis and reached a consistent conclusion in *Los Angeles Memorial Coliseum Commission* ("LAMCC").[191] In that case, the LAMCC and the Oakland Raiders brought suit against the NFL alleging that the league's rules regarding team relocation were in restraint of trade.[192] Once again, before the court could proceed with its section 1 analysis, it had to determine whether the NFL rule was created through concerted action.[193] Despite the NFL's contention

182. *Id.*
183. *Id.* at 1251.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1252.
188. *N. Am. Soccer League*, 670 F.2d at 1257.
189. *Id.* at 1252.
190. *Id.* at 1255–56.
191. *See Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1387.
192. *Id.* at 1384–85.
193. *See id.* at 1387.

that the league structure is akin to a single entity, thus precluding application of the Sherman Act, the court deemed that premise to be false, citing the fact that each team is a separate business entity with independent value.[194] According to the Ninth Circuit, though the NFL clubs need to cooperate and have "certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly."[195] Several factors contributed to the court's conclusion that the league is not a single entity. Some of these factors included the fact that teams are independently owned, do not share profits or losses, and compete for players, management, and fan and media revenue.[196] Consequently, the court rejected the NFL's single entity defense and moved on with its antitrust analysis.[197]

These cases serve to contradict any claim that could be made by the NFL in the Clarett suit that they are incapable of conspiring because they function as a single economic entity. Though the league will once again attempt to show that the member clubs are engaged in a common business enterprise, the current structure of the NFL has not materially deviated "from that which existed when the identical 'single economic entity' argument was raised by the NFL defendants and rejected by the Ninth and Second Circuits."[198] In the NFL today, as was present during previous decisions, teams continue to be independently managed and owned, they each derive separate revenues that vary widely from team to team, and the ongoing expansion of teams has heightened the direct competition for media exposure and fan support.[199] Therefore, it is appropriate for the *Clarett* district court to remain consistent and rule that the NFL is a combination of separate economic entities for purposes of liability under section 1 of the Sherman Act and allow Clarett's case to continue.

C. Is the Challenged NFL Eligibility Rule Inherent in or Ancillary to the Formation and Existence of a Lawful Joint Venture and Thus Per Se Lawful Under Section 1?

Case precedent has held certain agreements or practices to be

194. *Id.* at 1388–89.
195. *Id.* at 1389.
196. *Id.* at 1390.
197. *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1391.
198. McNeil v. NFL, 790 F. Supp. 871, 879 (D. Minn. 1992).
199. *Id.* at 879 n.10.

presumptively unreasonable and thus illegal because of their harmful effect on competition and lack of redeeming value.[200] Such arguments do not require further examination into the exact harm they have caused or the justifications for their creation.[201] When a court determines that a restraint is illegal on its face, it may completely skip the nebulous, fact specific analysis of the restraint's effect on competition, conducted under the rule of reason.[202] A group boycott—"a concerted effort by a group of competitors whose 'purpose [is] to exclude a person or group from the market or accomplish some other anti-competitive objective'—is an example of conduct that is per se illegal under the Sherman Act."[203]

In *Denver Rockets*, a case comparable to *Clarett*, the court applied this per se rule against an eligibility requirement.[204] In that case, Spencer Haywood claimed that member teams of the NBA had conspired to avoid dealing with athletes who were less than four years beyond their high school graduation.[205] Haywood alleged that "the effect of [that] provision [was] a group boycott on the part of the NBA and its teams against himself and other qualified players who come within those terms."[206] The *Denver Rockets* court agreed with Haywood, noting that this rule constituted a primary boycott since NBA team owners were refusing to deal with those athletes ineligible under the league's four-year college rule.[207] The pernicious effects of the rule—the NBA operated as private government excluding qualified players from the market, hindering competition—forced the court to subject the provision "to the per se rule normally applicable to group boycotts."[208] Although the court declined to analyze the rule's effect on competition and did not mention the relevant market or find that any interest protected by the antitrust laws was offended, the district court declared the NBA eligibility rule illegal under section 1 of the Sherman Act.[209]

Boris v. USFL raised an antitrust question identical to the one presented in *Denver Rockets*, the claims only differed in that the sport

200. Denver Rockets, 325 F. Supp. at 1063.

201. *Id.*

202. *See* Kobin, *supra* note 32, at 488–89.

203. *Id.* at 489 (quoting Jones v. NCAA, 392 F. Supp. 295, 304 (D. Mass. 1975).

204. *See Denver Rockets*, 325 F. Supp. at 1049.

205. *Id.* at 1055.

206. *Id.* at 1060.

207. *Id.* at 1061.

208. *Id.* at 1061, 1066.

209. Roberts, *supra* note 12, at 363.

involved was football.[210] This eligibility rule was similarly challenged under section 1 as an absolute exclusion of a number of skilled collegiate athletes who were deemed ineligible under the rule.[211] The district court held in favor of Boris "finding in a single sentence, without citation or further explanation, that the USFL's rule 'constituted a "group boycott," and was, therefore, a per se violation of section 1 of the Sherman Act.'"[212]

Another player restraint case, *Linseman v. World Hockey Ass'n*, involved a challenge to the eligibility rule of the now defunct WHA.[213] The regulation's validity was contested on the ground that it amounted to a group boycott and an unreasonable restraint of trade.[214] In light of the damages to the league, as well as those inflicted on Linseman's ability to compete, the court applied the per se rule and held the concerted boycott to be "illegal without regard to any claimed justification for the restraint."[215]

If the district court in the present case applies this form of scrutiny to the NFL's Eligibility Rule, Clarett might as well throw on some pads and start training, as he will likely be playing in an NFL game very soon. The nature of the NFL Eligibility Rule is essentially identical to the rules characterized as group boycotts and held as per se illegal in the previous cases.[216] As was the case in *Denver Rockets*, *Boris*, and *Linseman*, the NFL Eligibility Rule is no doubt a primary boycott where actors at one level of a trade pattern, the NFL team owners, are refusing to deal with actors at another level, Clarett and other qualified football players who are ineligible under the league rule.[217] By relying heavily on these cases, the district court will have no concern for dislocating the NFL's product market, competitive balance, league efficiency, consumer welfare or other justification. The court can with one swift act strike down the eligibility provision and change the nature of professional football forever.

D. Is the Challenged Eligibility Rule Reasonable Under the Rule of Reason?

Although Clarett's case appears to be resolvable under a per se

210. Boris v. United States Football League, No. CV 83 4980, 1984. U.S. Dist. LEXIS 19061, at *1 (C.D. Cal. Feb. 28, 1984).

211. *Id.* at *6.

212. Roberts, *supra* note 12, at 365.

213. *Linseman*, 439 F. Supp. at 1317.

214. *Id.*

215. *Id.* at 1320.

216. *See id.*; *see also Boris*, 1984 U.S. Dist. LEXIS 19061.

217. *See Denver Rockets*, 325 F. Supp. at 1061.

analysis, recently courts have shifted gradually toward using the rule of reason analysis for disputes involving sports industries.[218] Recent, courts have refused to apply the per se rule where, based on the peculiar characteristics of a business, there is a need for cooperation among industry participants necessitating some kind of concerted refusal to deal.[219] This idea is paralleled within the league structure of the NFL. In the NFL, teams are not true competitors whereby each club has a stake in the accomplishments of other teams.[220] No NFL team is interested in driving another team out of business because neither the teams nor the league would survive on their own.[221] Thus, courts have concluded that "the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules."[222] In turn, courts believe that when scrutinizing the legality of player restrictions in professional sports, the principles of antitrust law are better served by utilizing the rule of reason test.[223]

Under a rule of reason analysis, a restraint is deemed unreasonable if it is significantly anticompetitive in purpose or effect.[224] If "the restraint is found to have legitimate business purposes whose realization serves to promote competition, the 'anticompetitive evils' of the challenged practice must be carefully balanced against its 'pro-competitive virtues' to ascertain whether the former outweigh the latter."[225] A restriction will be seen as unreasonable if the "net effect" of this balance shows that the restraint substantially hindered competition.[226] However, even if a regulation has substantial pro-competitive justifications, it can be struck down as unreasonable if it is determined to be more restrictive than necessary to achieve its purposes.[227]

The first step in a rule of reason analysis is to identify the market that is allegedly being restrained.[228] In the present case, Clarett will most likely argue that the NFL Eligibility Rule inhibits the market for professional football player services. Within this market, highly talented collegiate

218. Tannenbaum, *supra* note 23, at 209.

219. Smith v. Pro Football, Inc., 593 F.2d 1173, 1180 (D.C. Cir. 1978).

220. *Mackey*, 543 F.2d at 619.

221. *Id.*

222. *Id.*

223. *Smith*, 593 F.2d at 1182; *see also* Kapp v. NFL, 390 F. Supp. 73, 82 (N.D. Cal. 1974).

224. *Smith*, 593 F.2d at 1183.

225. *Id.*

226. *Id.*

227. *See* Tannenbaum, *supra* note 23, at 209.

228. *See* Capital Imaging Assoc., P.C. v. Mohawk Valley Med. Ass'n, Inc., 996 F.2d 537, 543 (2d Cir. 1993).

football players can be seen as suppliers or producers of labor and the NFL as the purchaser or consumer of that product.[229] It is easy to see how an eligibility rule, which essentially limits what services can be purchased, restrains this particular market. In a substantial number of cases, "courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services."[230] In *Mackey*, though the NFL disputed that a restriction on competition for players' services was prohibited by the Sherman Act, the Eighth Circuit explicitly stated that the market for player's services was within the ambit of the Act.[231] Based on the fact that there are no reasonable substitute markets for professional football players' services in the United States, any anticompetitive effects of the Eligibility Rule on this market will be equally amplified.

The next phase of the analysis is to ascertain the anticompetitive evils associated with the Eligibility Rule.[232] This element which is the heart of Clarett's argument, invokes numerous damaging arguments regarding the extent to which the league's eligibility requirement unreasonably restrains competition.[233] First, the rule restrains the player services market by restricting a college athlete's "chance to freely market one's labor skills."[234] Due to the restraints of the Eligibility Rule, the best college football players in the United States are not able to utilize the free market system to benefit from their talents[235] as any American in another profession could. This type of eligibility requirement, which places no regard for ability, is unprecedented in the American job marketplace.[236] While an M.I.T. student at the top of his or her class can enter the job market and secure the job of his or her choice regardless of age, the most skilled college football player cannot market his talents until an arbitrary date passes. A sports agent posed the following rhetorical question that echoed this sentiment, "in what other field are roadblocks to advancement put in place? Imagine if Bill Gates had been blocked from dropping out of Harvard to start Microsoft."[237] This delay on a football player's ability to enter the market

229. Kobin, *supra* note 32, at 509–11.

230. *Mackey*, 543 F.2d at 617.

231. *Id.* at 618.

232. *See Smith*, 593 F.2d at 1183.

233. *See* ESPN.COM, *supra* note 2.

234. Jeffrey D. Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. CAL. L. REV. 797, 798 (1991).

235. *Smith*, 593 F.2d at 1185.

236. *See id.* at 1185–86.

237. Clarke, *supra* note 21.

can in many cases cause irreparable injury.[238] The longer an athlete is forced to stay in college against his wishes, the greater the chance an injury will occur which would harm his abilities to compete professionally and receive a corresponding financial windfall. Assume a college football player "play[s] four years of college, say [he] get[s] 250 carries a season—and that's not including all the hits in practice, spring ball, things like that—so by the time [he] get[s] to the NFL it's kind of like [his] body is beat up."[239] Were it not for the Eligibility Rule, the athletes with the most professional market value and talent could reap the benefit of their superior abilities regardless of age.

Second, the Eligibility Rule not only limits a *player's* ability to benefit from a free market, but also eliminates a *team's* ability to compete for the services of the most talented athletes.[240] The purpose of the annual NFL draft is to allow each team to obtain the rights to incoming college football players in an attempt to improve the quality of their team.[241] In the hopes of maintaining competitive balance throughout the league, the NFL's worst teams from the previous year receive higher picks in the draft so that they will have the best opportunity to acquire the most talented athletes entering the league.[242] If the NFL is truly interested in helping its teams improve, it makes little sense to restrict those teams from drafting the most talented players in college football solely based on age.[243] Assuming that the team with the first pick in this year's upcoming draft is in dire need of a running back, and that team believes Maurice Clarett is the best running back in the collegiate ranks, why should that team's improvement be impeded because the rules prohibit the team from drafting a player that falls below an arbitrary age? During the "1990 NFL draft, (which was the first one that allowed juniors to enter the draft) five of the first seven picks (including the first one . . .) were juniors."[244] This shows that the desire of NFL teams to draft younger players based on their talent exists, but this league rule limits the supply of young players that possess the skills and talents to succeed in the NFL.[245] Therefore, it can be argued that this rule has an anticompetitive affect on certain NFL teams.

Finally, the quality of the league suffers because of this

238. *Linseman*, 439 F. Supp. at 1320.
239. Wojciechowski 2, *supra* note 19.
240. *Linseman*, 439 F. Supp. at 1317 n.2.
241. *Smith*, 593 F.2d at 1175–76.
242. *Id.*
243. *See id.* at 1204.
244. Tannenbaum, *supra* note 23, at 215.
245. *See id.* at 214–15.

anticompetitive effect. The NFL takes pride in being the premiere forum for professional football by employing only the most talented athletes. It sells its product to fans through ticket, merchandise, and television contracts by asserting it provides the highest quality football entertainment available.[246] However, it could be said that the NFL is engaging in false advertising—although a stretch—by excluding certain highly talented athletes. Because the rule renders ineligible some of the most talented football players in the world based on the number of years they have been out of high school, "the entertainment product the league is trying to sell [is] not . . . as attractive."[247] If no such rule were present, the most talented athletes could enter the league, increasing not only the quality of team play, but also the talent level and entertainment value of the league.[248] An improved quality of football and talent on the field would also likely lead to an increase in fan interest and, in turn, league revenues.[249] Nevertheless, the anticompetitive effect of the rule harms the overall entertainment value of the league.[250]

At this stage of the analysis, the burden would shift to the NFL to present pro-competitive justifications for the Eligibility Rule in an effort to depict it as reasonable. The first such justification the NFL can present to the court is the notion of preserving safety in the league.[251] Similar to *Neeld*, the NFL will probably argue that the purpose and effect of the Eligibility Rule was not to achieve anticompetitive goals but rather to promote safety.[252] In *Neeld*, the NHL argued that the purpose of excluding vision impaired players was to promote safety for both Neeld and the players who would compete against him.[253] After taking judicial notice of the rough and physical nature of hockey,[254] the court noted that regardless of the amount of protective gear Neeld employed, he would still encounter great danger when players approached him on his blind side.[255] The court therefore found this restraint on competition to be reasonable based on the overriding safety justifications.[256] Therefore, the NFL will probably argue

246. *See N. Am. Soccer League*, 670 F.2d at 1251.
247. Tannenbaum, *supra* note 23, at 210.
248. *See* Schneider, *supra* note 230, at 824.
249. *See id.*
250. *See Mackey*, 543 F.2d at 621.
251. *Id.*
252. Neeld v. NHL, 594 F.2d 1297, 1300 (9th Cir. 1979).
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*

that the eligibility rule was designed to protect the physical well-being of young athletes.

However, the distinctions between the pro-competitive arguments of the NHL and the NFL are quite sharp. In *Neeld*, the safety ban affected a very limited number of athletes[257] whereas the NFL's ban potentially affects hundreds of collegiate football players every year. Thus, the NFL's Eligibility Rule is a stronger anticompetitive restraint on the market. Additionally, the NHL prohibited certain athletes from competing based on a disability the league felt would create additional dangers to an already dangerous sport.[258] In the NFL, however, the Eligibility Rule does not ban participation based on a disability or a lack of talent, but rather imposes a seemingly arbitrary across-the-board ban. College athletes already compete in a "fast and violent game in which they have to withstand high-impact collisions"[259] and where injuries are common; the NFL rule certainly is not keeping athletes any safer by making them stay in college football. Furthermore, the state of the art training facilities, protective equipment, and expert medical staffs provided by the NFL might actually afford football players with playing conditions that are safer than those players experience in college. Finally, though the safety of players is a major concern in every professional sport, it seems slightly ironic that the NFL is the league that is attempting to promote this justification. More than any other sport, "[t]he NFL is in the business of hurt."[260] Every advertisement or highlight for professional football involves a hard-hitting collision. Crowds "ooh" and "ahh" at tackles that leave players squirming on the field. Even television coverage of NFL games cues in on player injuries, giving viewers close-up images of broken fingers, dislocated shoulders, and bloody uniforms. It seems difficult to be persuaded by the NFL's pro-competitive safety justifications for the Eligibility Rule given these facts.

Another justification the NFL will likely assert is an interest in competitive balance throughout the league. The league can argue that the restraint on player services ensures the most mature players are on the field as opposed to a number of young, inexperienced athletes. Under this theory, the NFL can push the argument that with too many young players in the league "the quality of play in the NFL would thus suffer, leading to a

257. *See id.*

258. *See Neeld*, 594 F.2d at 1300.

259. Nick Cafardo, *NFL Could Get Taken to School on Draft*, BOSTON GLOBE, Aug. 10, 2003, at C4.

260. Ian O'Connor, *Commentary: Clarett has Every Right to Enter NFL Draft*, CENTRALOHIO.COM (Sept. 23, 2003), *at* http://www.CentralOhio.com/ohiostate/stories/20030923/football/315434.html.

reduced spectator interest, and financial detriment both to the clubs and the players."[261] In its analysis of the league's Rozelle Rule, the *Mackey* court acknowledged this justification stating, "[w]e do recognize . . . that the NFL has a strong and unique interest in maintaining competitive balance amongst its teams."[262] However, there is no evidence that letting younger players in the league would have an adverse effect on the competitiveness of the league.[263] College juniors, as opposed to seniors, were allowed to enter the NFL draft in 1990,[264] and there is no doubt that fan interest and league revenues have increased in the past thirteen years.[265] If the quality of play on the field had diminished as a result of letting younger players in the league, those numbers would have fallen, but instead they have only increased.[266] In *purpose*, this justification for the Eligibility Rule appears to be pro-competitive, but there is nothing to show that in *effect* the rule is appropriate.[267]

The NFL can make two related pro-competitive justifications available for its Eligibility Rule. First, the NFL will maintain that this rule benefits the college athlete by promoting the importance of receiving a college education.[268] This "educational" argument has been presented to courts before to no avail.[269] In *Denver Rockets*, the NBA attempted to defend its eligibility rule by stating that the rule ensures "each professional basketball player will be given the opportunity to complete four years of college prior to beginning his professional basketball career."[270] The court explicitly rejected this rationale as a justification for the rule, noting

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261. *Mackey*, 543 F.2d at 621.

262. *Id.*

263. *See* Kobin, *supra* note 32, at 523.

264. *See* Tannenbaum, *supra* note 23, at 215; *see also* Associated Press, *supra* note 9.

265. Since 1990, the NFL has satisfied its growing fan base by adding 4 expansion teams—the Carolina Panthers, Jacksonville Jaguars, Cleveland Browns and Houston Texans. In 2000, "the NFL set an all-time paid attendance record . . . for the third consecutive year, reaching the 20-million paid attendance mark for only the second time in league history. Regular season paid attendance of 16,387,289 for an average of 66,078 per game also was an all-time record for the third consecutive season." Additionally, the Super Bowl continues to be television's most-watched event. Super Bowl XXXVII, in which the Tampa Bay Buccaneers defeated the Oakland Raiders 48-21 at Qualcomm Stadium in San Diego, "was witnessed by 138.9 million viewers, making [it] the most-watched program in U.S. television history." *NFL History: 2001-*, NFL.COM (Oct. 8, 2003), *at* http://www.nfl.com/history/chronology/2001-.

266. *See* Dodd 1, *supra* note 3; *see also* Tannenbaum, *supra* note 23, at 215; *see also* discussion *supra* note 260.

267. *See* Kobin, *supra* note 32, at 523.

268. *See Boris*, 1984 U.S. Dist. LEXIS 19061, at *3.

269. *See id.*; *see also* Denver Rockets v. All Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

270. *Denver Rockets*, 325 F. Supp. at 1066.

"[h]owever commendable this desire may be, this court is not in a position to say that this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws."[271] The New York court in the present case should view the NFL's argument in a similar manner. Though it is admirable of the NFL to assert an interest in the college education of its athletes, it is not the league's, but rather the individual's decision on how to approach collegiate life. By keeping these athletes in college, the league is making decisions for these players which in turn harms the market for player services in the NFL.

As a second justification for keeping football players in college, the NFL can contend that this will keep team investments in player development costs at a minimum.[272] In most professional sports, "collegiate athletics provides a more efficient and less expensive way of training young . . . players than the so-called 'farm team' system."[273] Professional football is no different, which leads to the conclusion that there seems to be some collusion between the NFL and the NCAA to restrain the football player labor market.[274] In his article, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, Thomas R. Kobin states:

> [I]t is in the NFL's best interest to have most of these players remain in college and develop their football skills for four or five years. Unlike MLB and the NHL which both have well developed minor league systems, the NFL does not have an established minor league where younger players can develop their skills. By having football players develop at the collegiate level for four or five years, the NFL is able to get well developed players without having to invest revenues into financing their own minor league system. The NFL recently attempted to support a lasting minor league system in the form of the WLAF. The league was a huge financial burden on the NFL and it was dismantled after its second season.[275]

Although this system and its rules are undoubtedly economically beneficial for the NFL and its teams,[276] it has similarly been cast off by courts involved in player restraint cases as an illegitimate pro-competitive

271. *Id.*
272. *See* Kobin, *supra* note 32, at 513.
273. *Denver Rockets*, 325 F. Supp. at 1066.
274. *See* Kobin, *supra* note 32, at 514.
275. *Id.* at 512–13.
276. *See id.* at 513.

justification.[277] *Linseman* stated that an organized restraint of trade would not be justified merely because it was based on economic necessity.[278] The district court noted that "[i]f 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."[279] Likewise, in *Mackey*, the court addressed this issue and found it unavailing in that training "expenses are similar to those incurred by other businesses, and that there is no right to compensation for this type of investment."[280] Seeing how development costs are "ordinary cost[s] of doing business and . . . not peculiar to professional football,"[281] it is understood this argument will not succeed as a pro-competitive justification for restraint imposed by the league's eligibility rule.[282]

Even if the court did find that any of the above justifications would offset and outweigh the anticompetitive evils of the Eligibility Rule, the NFL would still have to overcome the burden of demonstrating that this rule was the least restrictive means of achieving those goals.[283] Under a rule of reason analysis, courts have stated that a regulation will be deemed unreasonable and in violation of the antitrust laws "where less restrictive means than those used could have been employed."[284]

In *Mackey*, though the court accepted that there were pro-competitive justifications for the NFL's Rozelle Rule, it was considered more restrictive than necessary and "unreasonable in that it was overly broad, unlimited in duration, [and] unaccompanied by procedural safeguards."[285] The current eligibility rule is similarly harsh. Like that in *Mackey*, the Eligibility Rule is overly broad in that it is an across-the-board ban on football players with no regard to talent or age. A collegiate football player could be the LeBron James of football but never get the chance to enter the NFL draft until the stipulated time, regardless of team interest. Similarly, a situation could arise where a talented player may have been held back in school and not graduate high school until the age of 20. Under the NFL Eligibility Rule, though a primary interest is protecting the safety of immature bodies, this

277. *See Mackey*, 543 F.2d at 621; *see also Denver Rockets*, 325 F. Supp. at 1066–67; *Boris*, 1984 U.S. Dist. LEXIS 19061, at *9; *Linseman*, 439 F. Supp. at 1317.

278. *Linseman*, 439 F. Supp. at 1322.

279. *Id.*

280. *Mackey*, 543 F.2d at 621.

281. *Id.*

282. *Id.*

283. *See id.*

284. *Denver Rockets*, 325 F. Supp. at 1066.

285. *Mackey*, 543 F.2d at 621.

athlete would not be able to enter the league until he is 23, whereas most players can enter at age 21.[286] Additionally, the league has not established any procedural safeguards in relation to this rule.[287] Whereas other leagues have "excluded players only after their skill [has] been assessed, the present rule is a blanket restriction . . . without any consideration of talent."[288] It is clear that even if the NFL can successfully argue its pro-competitive justifications, the New York District Court will likely recognize that there are many alternative means to achieving these ends than the overly restrictive rule adopted by the NFL.

IV. POLICY DISCUSSION

As seen in countless other antitrust jurisprudence rulings, "the outcome of the case may not be decided on the merits as much as by the ideological beliefs of the judge."[289] Thus, it is important to view the opposing policy arguments regarding the existence of the NFL Eligibility Rule.

Notwithstanding the legal arguments already posed, strong policy concerns may merit retaining the NFL Eligibility Rule in its present form. Various sports commentators feel that many collegiate football players are not physically or mentally ready to enter the NFL prior to the time the NFL rule allows.[290] This is analogous to the pro-competitive justification regarding safety. Even some current NFL players and coaches believe that the bodies of younger athletes would not be able to survive the NFL.[291] For example, LaVar Arrington, a linebacker on the Washington Redskins, said competing against a player currently ineligible "would be like hitting a kid!"[292] Similarly, a scout for the Green Bay Packers explained that if a collegiate freshman entered the NFL, "it would be the worst mistake he ever made in his young, adolescent career . . . . People don't realize how physically demanding football is."[293]

The mental ability and stamina players need to last through an NFL

286. *See* Dodd 1, *supra* note 3; *see also* ESPN.COM, *supra* note 2.

287. *See Linseman*, 439 F. Supp. at 1322 (stating that procedural safeguards can weigh in favor of upholding a league rule).

288. *Id.* at 1323.

289. Tannenbaum, *supra* note 23, at 211.

290. *See* Dodd 1, *supra* note 3 (discussing the viewpoints of various players and coaches).

291. *See id.*

292. Clarke, *supra* note 21.

293. *Id.*

season is arguably more demanding than that of a college season.[294] Pete Carroll, the head coach at the University of Southern California, noted that the pressure of the NFL requires a "level of focus and seriousness [that] are beyond their years."[295] Another consultant associated with the NFL draft agreed that "[p]layers have no idea of how complicated systems are. They just think it's, 'Red Right, 29 Toss, go to the line of scrimmage and run the play.' It isn't that way."[296]

Not only is the game itself a mental challenge, but the lifestyle surrounding professional football similarly requires a mentally mature athlete.[297] Life in the NFL is described as an atmosphere "so different than the protective lifestyle of a college setting, where you have tight schedules and restrictions."[298] Some believe that by forcing players to remain in college for a certain number of years, the Eligibility Rule helps them obtain an education in both their core subjects *and* also in life.[299] A final policy concern pushed forward by the NFL is a desire to maintain the integrity of the game.[300] An NFL spokesman noted that the game has succeeded for a number of years with the current eligibility rule in place and the fact no athlete has previously challenged it "suggests that the rule makes sense and is working in everybody's best interest."[301]

However, there are a comparable number of sports authorities who believe the Eligibility Rule is outdated and overly restrictive of collegiate athletes.[302] In contrast to the previous policy arguments, other experts argue that this physical barrier no longer exists as kids are getting "bigger and stronger and faster . . ."[303] The president of the Indiana Pacers, a franchise in the NBA, believes "that the guys who come out of high school that have the physical bodies can succeed right away."[304] Others assert that whether these athletes are physically or mentally ready for the NFL does not matter as long as there is a team who wants to draft them.[305] NFL franchises are

294. *See* Dodd 1, *supra* note 3.

295. *Id.*

296. *Id.*

297. John Moredich, *Mackovic, USC Coach Oppose Earlier Draft Eligibility*, THE TUCSON CITIZEN, Oct. 25, 2002, at 8C.

298. *Id.*

299. Cafardo, *supra* note 254.

300. *See* Dodd 1, *supra* note 3.

301. J.A. Adande, *He Should Break Legal Tackle*, L.A. TIMES, Aug. 28, 2003, at D9.

302. *See generally* Dodd 1, *supra* note 3 (arguing that some collegiate athletes can physically compete and should be allowed to enter the NFL Draft at a younger age).

303. *Id.*

304. *Id.*

305. *See id.*

multi-billion dollar companies run by experienced professionals who know talent and know how to manage a business.[306] A first round pick in the 2000 NFL Draft earned on average $1.5 million per year.[307] These corporations will not spend the millions of dollars necessary to hire draft picks if they believe their "employee" will not survive.[308] It follows that the teams themselves, and not the governing rules, should determine whether an athlete possesses the appropriate ability to handle the learning curve or possess the prototype physique.

In response to the NFL's desire to maintain the tradition of professional football, those in favor of striking down the Eligibility Rule can point to the eligibility standards of other successful professional sports.[309] The NFL upholds an eligibility rule that is uniquely restrictive compared to most other professional sports entities, all of whom allow an athlete to sign a contract or compete by the age of eighteen.[310] In the Pro Bowlers Association, bowlers can turn pro at eighteen without parental consent as long as they have maintained an average score above 200.[311] Even younger bowlers can enter the league if they have parental consent and can meet the talent requirements.[312] If an athlete wishes to play professional baseball, Major League Baseball will allow high school students to be drafted onto professional teams after their senior year.[313] Similarly, American athletes are eligible for the NBA draft once their high school class has graduated while foreign players must be eighteen.[314] In professional hockey, a sport arguably as violent as football, the NHL's provisions state that a player must be eighteen to be eligible for the draft.[315] The ATP, the governing body for professional tennis, allows athletes as young as 14 to compete professionally.[316] That organization, unlike the

306. "The value of a National Football League team rose this year to an average of $628 million, up 19% from a year ago." Michael K. Ozanian, *Showing You the Money*, FORBES.COM (Sept. 15, 2003), *at* http://www.forbes.com/free_forbes/2003/0915/081tab.html.

307. Dodd 1, *supra* note 3.

308. *See id.*

309. *See generally* Dennis Dodd, *Eligibility Age Rules for Pro Leagues, Tours*, CBS.SPORTSLINE.COM (Sept. 1, 2003) *available at* http://cbs.sportsline.com/collegefootball/story/6609221 (listing eligibility rules for various professional sports leagues) [hereinafter Dodd 2].

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. Dodd 2, *supra* note 304.

316. *Id.*

NFL, has additional procedural safeguards including "limit[ed] media access and . . . mentoring programs" for younger players.[317] Lower eligibility standards "hasn't hurt the NBA, professional golf, tennis and other sports that have big money to go along with big expectations,"[318] so why should the NFL be viewed as any different?

Furthermore, sports leagues with younger participants have not only succeeded, but some of sports most recognized athletes joined the professionals at younger ages than are now permitted by the NFL.[319] Additionally, "[n]ine of the 15 players on the 2001-02 All-NBA team played two years or less of college basketball. That's 60 percent of the league's best players having less than three years of college basketball experience."[320] The success of underage athletes in other sports upholds the argument that younger players should be able to compete in the NFL.

A final policy argument in favor of lessening the harshness of the Eligibility Rule is that many collegiate football players have pressing financial needs.[321] Unlike the college players of other sports, college football players cannot turn professional and benefit from a financial windfall that would help their underprivileged families because of this rule.[322] Clarett explained, "if the opportunity comes and you have a chance to take care of your family, and your family would be set for the rest of their lives, and don't have to go through things you went through, of course I'm going to take the chance."[323] When an athlete has tremendous professional market value, why play for close to nothing in college when he can earn more favorable compensation and in the case of many young athletes like Clarett, escape the dangerous neighborhoods they live in.[324]

Beyond a court's legal analysis of the NFL's Eligibility Rule, the compelling policy arguments in favor of relaxing the NFL drafting standards should sway the court to give Clarett and other collegiate athletes

317. *Id.*

318. Dodd 1, *supra* note 3.

319. Moses Malone and Bobby Orr are just a few examples of players who forced the court in *Linseman* to "take judicial notice of the fact that many teenagers have played in the professional ranks with distinction." Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1323 (D. Conn. 1977) (Modern-day examples include Kobe Bryant, Kevin Garnett, Alex Rodriguez and Ken Griffey Jr., among others).

320. Dodd, *supra* note 3.

321. *See id.*; *see also* Wojciechowski 1, *supra* note 4 (discussing Clarett's background as grounds for his desire to make money by playing professional football).

322. *See* Wojciechowski 1, *supra* note 4.

323. Wojciechowski 2, *supra* note 19.

324. Clarett saw his "next-door neighbor stagger toward [his] front lawn and bleed to death on the grass[.]" Wojciechowski 1, supra note 4.

in similar positions a chance to play professionally.

V. CONCLUSION

Based on the preceding arguments, the outcome of this antitrust analysis favors collegiate football players who have been excluded from the NFL by way of its eligibility rule. If the *Clarett* court strikes down the rule, most commentators agree that "[i]t's not going to open the floodgates . . . [and o]nly the (elite) players will benefit."[325] Without this rule, the free market system will enable teams to self-regulate, deciding which players belong in the league and which do not. Even given the fact that any collegiate football player would be able to declare for the NFL Draft, "that doesn't mean anyone is going to draft you."[326] Once a number of unqualified underclassmen are rejected by teams on draft day, players will realize that only the most exceedingly talented players will survive the substantial leap to the NFL prior to their junior and senior years. As a result, a number of athletes will have to remain in school for a period of time similar to that imposed by the present rule.

Despite the present eligibility rule's apparent violation of the Sherman Act, this does not mean there is not a need for an eligibility rule that determines a potential player's eligibility status. There remain a number of alternative eligibility standards that the NFL could utilize to maintain its pro-competitive justifications. If the NFL is truly concerned about athletes obtaining an education, a possible alternative is to lower the league's eligibility standard to eighteen years of age and push the NCAA to alter its rules regarding amateur status. Recently, the NCAA adopted a new rule that "allows college athletes to apply for early entry into the NBA without automatically forfeiting their remaining college eligibility. The rule permits athletes to declare for early entry and then announce, 30 days after the NBA Draft, whether or not they intend to return to collegiate competition."[327]

Baseball players, as well, are treated differently than collegiate football players. In contrast to the NFL, "MLB will draft players at the high school and college levels without the players voluntarily entering the draft. Even if a baseball player is drafted he does not lose his college eligibility. The player can even entertain offers from the professional team that drafted

325. Tom Farrey, *Brown Says Clarett can be "Pioneer,"* ESPN.COM (Sept. 23, 2003), *at* http://sports.espn.go.com/espn/print?id=1621965&type=story.

326. *Id.*

327. Tannenbaum, *supra* note 23, at 215.

him without losing eligibility."[328] If the NCAA were to institute a similar rule in college football, this would give athletes the opportunity to return to school if they are not drafted in the NFL. However, under the current system they are not afforded that luxury.[329]

Additionally, if the NFL motives for maintaining this rule—the athlete's interests—are genuine, the NFL could create some type of procedural safeguard by which collegiate football players could petition the NFL for eligibility. Under this system, the league could survey its teams to determine whether there is any interest in drafting a specific athlete. If the teams express interest, the NFL could grant that individual a pass into the league, and if they do not, the player understands his or her chances of playing professionally, making it possible for that person to continue with school. This rule, unlike the present eligibility provision, would take into account ability and team interest, rather than banning the player from the league without regard to either of these vital factors.

Regardless of whatever alternatives exist as to the present provision, strong evidence would support a decision by the *Clarett* court to strike down the NFL's current Eligibility Rule as a violation of the Sherman Act because it is overly restrictive, particularly in light of case law and similar rules throughout the sports world.

VI. POSTSCRIPT

Added February 20, 2004

A hole has opened up in the all-out ban that prevented Maurice Clarett from playing professional football in the NFL.[330] On February 5, 2004, the Honorable U.S. District Court Judge Shira A. Scheindlin supplied Clarett and other previously excluded football players with a critical block by declaring that the league's eligibility rule "must be sacked" due to its violation of antitrust law.[331]

A. Case Summary

In the opinion, Judge Scheindlin noted that the case raised serious questions at the crossroads of labor law and antitrust law, ultimately

328. Kobin, *supra* note 32, at 516.

329. *Id.* at 516–17.

330. *See* Associated Press, *NFL Plans to Appeal Ruling* (Feb. 5, 2004), *at* http://sports.espn.go.com/nfl/news/story?id=1727856.

331. *Id.* (quoting Clarett v. NFL, 2004 U.S. Dist. LEXIS 1396, *3 (S.D.N.Y. 2004)).

forcing the court to decide whether "Clarett's right to compete for a job in the NFL . . . trump[s] the NFL's right to categorically exclude a class of players that the league has decided is not yet ready to play."[332]

To preserve the eligibility rule in its current form, the NFL raised three primary arguments before the court.[333] First, the league argued that because the Rule is the result of a collective bargaining agreement between the league and the NFLPA, it should be immune from antitrust scrutiny under the nonstatutory labor exemption.[334] Judge Scheindlin rejected this proposal on the grounds that none of the key elements of the exemption[335] were met, specifically noting that "the [Eligibility] Rule does not concern a mandatory subject of collective bargaining, governs only non-employees, and did not clearly result from arm's length negotiations."[336]

Next, the NFL contended that Clarett lacked standing to invoke the antitrust act in the present suit, and therefore the league should be granted summary judgment on the case.[337] The court disagreed, however, acknowledging that Clarett "has standing to sue because his injury flows from a policy that excludes all players in his position from selling their services to the only viable buyer—the NFL."[338]

Finally, the NFL claimed that its eligibility rule was reasonable and could, on its face, withstand antitrust scrutiny.[339] Due to the fact that the NFL failed to illustrate the rule's promotion of competition, the Court recognized that Clarett's injury is the very type "that the antitrust laws are designed to prevent."[340] After tackling each issue, Judge Scheindlin stated that "while, ordinarily, the best offense is a good defense, none of *these*

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332. Clarett v. NFL, 2004 U.S. Dist. LEXIS 1396, *2 (S.D.N.Y. 2004).

333. *Id.*

334. *Id.*

335. *See* discussion *supra* Part I.C. In *Mackey v. NFL*, the Court stipulated that three requirements must be met for the nonstatutory labor exemption to apply:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

543 F.2d 606, 614 (8th Cir. 1976).

336. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *2–3.

337. *Id.* at *2.

338. *Id.* at *3.

339. *Id.* at *2.

340. *Id.* at *3

defenses hold the line."[341]

B. Upon Further Review: Clarett v. NFL *on Appeal*

Though the Southern District Court of New York ultimately came to the conclusion proposed in the preceding Comment,[342] the particular methods used by the Court could easily be called into question by the NFL in its pending appeal before the Second Circuit Court of Appeals.[343]

1. Was the District Court's Analysis of the Nonstatutory Labor Exemption Flawed?

To begin, the NFL may on appeal request that the Second Circuit "throw a flag" on the district court's analysis of the nonstatutory labor exemption.[344] The court first rejected the NFL's bid for the exemption because it believed the league's eligibility rule did not address a mandatory subject of collective bargaining.[345] Judge Scheindlin noted that absent from the Eligibility Rule was any reference to wages, hours or conditions of employment.[346] The Court explained that "wages, hours, or working conditions affect only those who are employed or eligible for employment," and because the league rule makes a class of players unemployable, it does not deal with a mandatory subject of bargaining.[347] This determination by the district court appears misguided, particularly when requisite legal precedent and policies previously discussed in this Comment are taken into consideration.[348] Though there are no clear guidelines established in determining the "working conditions" that the NLRA deems are mandatory subjects of bargaining, previous courts have held that the subject must "*materially* or *significantly* affect the terms or conditions of employment."[349] A league rule concerning the eligibility of

341. *Id.* at *2 (emphasis in original).

342. *See* discussion *supra* Part V.

343. Associated Press, *Lawyer: Clarett will be in Draft* (Feb. 11, 2004), *at* http://sports.espn.go.com/espn/print?id=1732768&type=story.

344. Associated Press, *Commissioner Says NBA Will Not be Affected* (Feb. 15, 2004), *at* http://sports.espn.go.com/nba/allstar2004/news/story?id=1736236.

345. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *38. The NLRA defines mandatory subject of collective bargaining as "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d) (2003).

346. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *38.

347. *Id.*

348. *See* discussion *supra* Part III.A.2.

349. Seattle First Nat'l Bank v. NLRB, 444 F.2d 30, 33 (9th Cir. 1971) (emphasis in original); *see also* Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass

potential players is essentially a restriction on the hiring practices of the league employers—NFL teams. In any business, a company's hiring practices are neither remote nor incidental to working conditions, but rather serve a central role in defining the nature of the company. It is unclear how the district court came to the conclusion that "conditions of employment" have no effect on potential employees excluded by the subject of bargaining; but the absence of any cited legal basis to the Court's comment points to the fact that this is a novel and unsubstantiated idea.

Additionally, the Court's rejection of a case proffered by the NFL to prove that its eligibility rule is a mandatory subject of bargaining is likely to leave the Court of Appeals scratching its head. Judge Scheindlin recognized that in *Caldwell v. American Basketball Ass'n*,[350] the court applied the "nonstatutory labor exemption because 'a mandatory subject of bargaining pertinent in the instant matter is the circumstances under which an employer may discharge or refuse to hire an employee.'"[351] The opinion noted that it is "simple" to understand how the court in *Caldwell* viewed the "conditions under which an employer may terminate an employee" as a mandatory subject of bargaining because that court "treated the refusal to hire as synonymous with the dismissal."[352]

Once again, Judge Scheindlin seems misguided. She first quotes a portion of the *Caldwell* opinion that states that "a mandatory subject of bargaining . . . is the circumstances under which an employer may . . . refuse to hire an employee."[353] She then asserts that the nonstatutory labor exemption was applied in *Caldwell* because a mandatory subject of collective bargaining is "the conditions under which an employer may terminate an employee," which is "synonymous" with the conditions under which an employer may refuse to hire an employee.[354] Yet in light of both of these comments, Judge Scheindlin stated that the NFL's Eligibility Rule, which stipulates the conditions under which a team must *refuse to hire* a prospective employee, is inexplicably *not* a mandatory subject.[355] One of the NFL's key arguments on appeal will likely be that Judge Scheindlin's application of this prong of the nonstatutory labor exemption is incorrect.

The Court also denied the NFL's request for an exemption on the grounds that the Eligibility Rule affected parties outside of the collective

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Co., 404 U.S. 157 (1971); NLRB v. USPS, 18 F.3d 1089 (3d Cir. 1994).

350. 66 F.3d 523 (2d Cir. 1995).

351. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *43 (citing *Caldwell*, 66 F.3d at 528).

352. *Id.*

353. *Id.*

354. *Id.*

355. *See id.* at *44.

bargaining relationship.[356] The reasoning supporting this conclusion is both erroneous and somewhat convoluted.[357] Judge Scheindlin acknowledges that "there is no dispute that collective bargaining agreements, and therefore the nonstatutory labor exemption, apply to both prospective and current employees."[358] Clarett is no doubt a prospective employee of the league since he will be eligible to be drafted within a year; but curiously the district court noted that his particular situation is "very different."[359] First, Judge Scheindlin explained that "Clarett's eligibility was not the union's to trade away."[360] However, she neglected to fully justify her seemingly contradictory acceptance of the union's ability to trade away a future player's right to choose where to play and for what salary (as is the case with the NFL Draft) while rejecting the union's power to control eligibility.[361] Such was the case in *Zimmerman v. NFL*, where a potential NFL player challenged the league's supplemental draft, arguing that the labor exemption should not apply since prospective employees outside of the bargaining unit were most hard-hit by the draft's impact.[362] The *Zimmerman* court concluded that this prong of the labor exemption was satisfied because "potential future players" who enter the bargaining unit at a later time are bound by its terms.[363] Judge Scheindlin acknowledged that "employees who are hired after the collective bargaining agreement is negotiated are nonetheless bound by its terms because they step into the shoes of the players who did engage in collective bargaining."[364] However, Clarett is no different than the countless other prospective employees who were bound by the terms of the collective bargaining agreement of the profession they wish to enter; it is unclear how and why the district court elected to treat him in this distinct way.

At the conclusion of its analysis, the district court refused to apply the nonstatutory labor exemption as a shield for the NFL Eligibility Rule because the league "failed to demonstrate that the Rule evolved from arm's-length negotiations between the NFLMC [(National Football League Management Council)] and the NFLPA [(National Football League Players

356. *Id.* at *45.

357. *See* discussion *supra* Part III.A.1.

358. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *45.

359. *Id.* at *46.

360. *Id.*

361. *See generally* Zimmerman v. NFL, 632 F. Supp. 398 (D.D.C. 1986).

362. *Id.* at 405; *see also* discussion *supra* Part III.A.1.

363. *Zimmerman*, 632 F. Supp. at 405; *see also* discussion *supra* Part III.A.1.

364. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *46–47.

Association)]."[365] While the court's previous analysis of this exemption seemed off-base, Judge Scheindlin's breakdown of this element appears to be proper. To support this refusal, the court traced the evolution of the Eligibility Rule in order to show that it could not have developed from the collective bargaining process.[366] Judge Scheindlin highlights the fact that though the Eligibility Rule was created in 1925, the NFLPA was not formed until 1956 and, furthermore, did not become the players' exclusive bargaining agent until 1968.[367] The fact that the Eligibility Rule predates the formation of the NFLPA and the collective bargaining process, seems to indicate that it was unilaterally created by the league and not the result of arm's-length bargaining.[368] This line of reasoning is strengthened by *Mackey*, where the Eighth Circuit took note of the fact that the league's Rozelle Rule had remain unmodified since it was unilaterally forced upon the players by the NFL in 1963, prior to the league's established collective bargaining relationship with the NFLPA.[369] This led the *Mackey* court to conclude that nothing in the parties' collective bargaining relationship concerning the rule could be characterized as legitimate bargaining, thus precluding the application of the nonstatutory labor exemption.[370]

In response, the NFL did a very poor job maintaining that the Eligibility Rule *was* addressed during collective bargaining negotiations. The only evidence they presented to the court was the Declaration of Peter Ruocco, the Senior Vice President of Labor Relations of the NFL Management Council, asserting: "During the course of collective bargaining that led to the 1993 CBA, the eligibility rule itself was the subject of collective bargaining."[371] However, as noted earlier in this Comment, there is no reference to the Eligibility Rule anywhere in the CBA to signify that it was a focal point of negotiations.[372] Rather, as the district court points out, the only language within the CBA that relates to the Eligibility Rule states that the NFLPA "*waived* . . . its rights *to bargain*

365. *Id.* at *47.

366. *See id.*

367. *Id.* (citing Smith v. Pro Football, 420 F. Supp. 738, 741 (D.D.C. 1976) *aff'd in part and rev'd in part*, 193 U.S. App. D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978)) ("As of March 5, 1968, the National Football League Players Association became the exclusive bargaining agent and representative of the NFL players. This union executed its first collective bargaining agreement with the NFL owners in November of 1968 . . . .") *Id.*

368. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *48.

369. *See Mackey*, 543 F.2d at 615–16.

370. *See id.*

371. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *48.

372. *See* discussion *supra* Part III.A.3.

over any provision of the Constitution and Bylaws."[373]

A similar type of "zipper clause" was rejected as evidence of bona fide arm's-length bargaining by the Eighth Circuit in *Mackey*.[374] There, the 1970 CBA between the NFL and the NFLPA neglected to make any express reference to the Rozelle Rule, but rather stated: "This Agreement represents a complete and final understanding on all bargainable subjects of negotiation among the parties during the term of this Agreement."[375] This clause demonstrated that the players decided not to bargain over or challenge the Rozelle Rule, alternatively choosing to consent to the status quo.[376] Without any further evidence that the rule was actually a focal point of negotiations, however, the Eighth Circuit refused to grant an exemption because "the union's acceptance of the status quo . . . [could not] serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act."[377]

The "zipper clause" present in *Clarett* is likewise just an acceptance of the status quo without any further negotiation, and thus was correctly rejected as evidence of arm's-length bargaining by the district court.[378] Judge Scheindlin properly points out that this waiver not only "demonstrate[d] that the union agreed not to *bargain over* or *challenge* the Rule . . . [but also] in no way demonstrate[d] that the Rule itself arose from, or was agreed to during, the process of collective bargaining."[379] Therefore, the district court appropriately withheld application of this exemption.

Though this third and final element of the nonstatutory labor exception appears to have been applied correctly by the district court, the NFL does have a few options on appeal. First, the league could present support that adds more evidentiary weight than a mere declaration to strengthen their claim that the Eligibility Rule was a focal point of negotiations at some stage of the collective bargaining process.[380]

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373. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *49 (emphasis in original) (referencing Articles III, IV, and IX of the 1993 CBA).

374. *See Mackey*, 543 F.2d at 613.

375. *Id.*

376. *See id.*

377. *Id.* at 616.

378. *See Clarett*, 2004 U.S. Dist. LEXIS 1396, at *49.

379. *Id.*

380. *See* McCourt v. California Sports, Inc., 600 F.2d 1193, 1200–02 (6th Cir. 1979). In *McCourt*, several pieces of evidence led to the Sixth Circuit's determination that arm's-length bargaining over the NHL's reserve clause had occurred. Such evidence included witness testimony providing exact dates of meetings spanning over three years in which the reserve clause was negotiated between the players' union and the league, the creation of a special committee by the league to specifically discuss a new clause, the numerous back and forth rejection of proposed clauses, and the threat of a potential strike by the players as a bargaining tactic. *Id.*

Alternatively, the NFL may argue that the "zipper clause" present in the CBA is not merely an acceptance of the status quo by the players' union, but rather an acceptance of that waiver (which encompasses the Eligibility Rule) was bargained for in exchange for some other benefit to the constituents of the union.[381] In *Mackey*, the NFL argued that the union accepted the "zipper clause" because "the players derive indirect benefit from the Rozelle Rule . . . [in that] the union's agreement to the Rozelle Rule was a *quid pro quo* for increased pension benefits and the right of players to individually negotiate their salaries."[382] Though the Eighth Circuit could find no such *quid pro quo* to support the league's argument in *Mackey*,[383] if the NFL in *Clarett* can prove in its appeal that a "fair amount of give and take took place"[384] over the waiver and that the union actually received a specific benefit in return for its agreement not to bargain over the Eligibility Rule, the court may conclude that bona fide arm's-length bargaining over the rule *did* take place and thus the exemption should be applied. However, unless the NFL can present evidence of give-and-take bargaining that reflects more than the mere comment that the Eligibility Rule was a focal point of negotiations, the court should affirm on the issue of the nonstatutory labor exemption.

2. Did the District Court Incorrectly Grant Summary Judgment?

Finally, the NFL can argue that the district court's application of summary judgment was inappropriate because genuine issues as to material facts remain.[385] In its response to Clarett's complaint and motion for

381. *See Mackey*, 543 F.2d at 616.

382. *Id.*

383. *Id.*

384. *Zimmerman*, 632 F. Supp. at 407.

385. The *Clarett* court explained: *Rule 56 of the Federal Rules of Civil Procedure* provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "An issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" A fact is material when it "'might affect the outcome of the suit under the governing law.'" A party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. In turn, to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact. To do so, he "must show more than a 'metaphysical doubt' as to material facts," and he may not rely on conclusory allegations or unsubstantiated speculation. Rather, the non-moving party must produce admissible evidence that supports his pleadings. In this regard, "the 'mere existence of a scintilla of evidence' supporting the non-movant's case is also insufficient to defeat summary judgment." In determining whether a genuine issue of material facts exists, the court must construe the evidence in the light most favorable to the non-moving party and draw all inferences in that party's favor. Accordingly, the

summary judgment, the NFL asked that "if the suit is not dismissed on the [exemption or standing] grounds . . . a trial is needed to determine whether the Rule is a reasonable restraint of trade."[386] However, after rejecting the NFL's bid for summary judgment on its defenses, the district court believed that there was no basis for sending the rule of reason inquiry to a jury.[387] In granting Clarett his request for summary judgment, Judge Scheindlin said, "[t]here is no need to proceed to trial or engage in fact-finding because the league has failed, as a matter of law, to offer any pro-competitive justifications for the Rule. Accordingly, no jury is required to find that the anticompetitive effects of the Rule outweigh its pro-competitive benefits."[388]

This decision by the district court may be regarded as erroneous for two reasons. First, courts and sports legal analysts seem to agree that summary judgment should be used "sparingly" in antitrust cases involving player restraints.[389] The Ninth Circuit in *Neeld* expressed that sustaining the burden of proving the absence of a genuine issue as to any material fact "is particularly rigorous in antitrust cases (especially) where motive and intent are important."[390] Other cases governing player restraint issues have accorded summary judgment only after skipping the fact intensive analysis of the rule of reason by utilizing the per se approach.[391] Gary Roberts, an antitrust and sports law expert at Tulane University, believes that "[Judge] Scheindlin was 'flat-out wrong' for granting summary judgment in favor of Clarett without a full trial, given the complicated factual analysis involved in an antitrust complaint."[392] Jim McKeown, another antitrust and sports law expert who provided legal assistance for Major League Baseball, agrees that Judge Scheindlin gave little consideration to the NFL's pro-

court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Summary judgment is therefore inappropriate "if there is *any* evidence in the record that could reasonably support a jury's verdict for the non-moving party." *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *24–27.

386. *Id.* at *24.

387. *See id.* at *89.

388. *Id.*

389. Neeld v. NHL, 594 F.2d 1297, 1300 (9th Cir. 1979); *see also* Len Pasquarelli, *Stay of Order Likely Won't Come in Time*, ESPN.COM (Feb. 5, 2004), *at* http://sports.espn.go.com/espn/print?id=1728262&type=story [hereinafter Pasquarelli 2].

390. *Neeld*, 594 F.2d at 1300 (citing Mutual Fund Investors v. Putnam Mgmt. Co., 553 F.2d 620, 624 (9th Cir. 1977)).

391. *See* Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049 (C.D. Cal. 1971); *see also* Boris v. United States Football League, No. CV 83 4980, 1984. U.S. Dist. LEXIS 19061, at *1 (C.D. Cal. Feb. 28, 1984).

392. *See* Pasquarelli 2, *supra* note 383.

competitive arguments in justification of the Eligibility Rule.[393] He stated, "I would never say the judge was negligent.... But she did not want to consider any effects in other markets."[394]

Second, the district court cast off each and every justification presented by the NFL without any analysis whatsoever.[395] The NFL's first justification—to protect underdeveloped athletes from injury—was "dismissed out of hand" by the Court.[396] The Court's failure to address this issue is troubling due to the fact that *Neeld* upheld the reasonableness of an eligibility restraint because it was based primarily on the interest of participant safety.[397] In explaining the standard for summary judgment, the district court explained that its "task is not to 'weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'"[398] However, it seems here that Judge Scheindlin ignored this standard. Though there is a genuine issue as to whether these justifications put forth by the NFL are sufficient, the Court seemingly determined the truth of the matter for itself, relieving itself of the responsibility to hold a jury trial in which the jury would the evidence. As a result, the NFL may be successful in establishing that the district court's decision to grant summary judgment was flawed, as a complicated antitrust analysis was necessary.

In light of the preceding arguments, it would not be surprising to see the Second Circuit Court of Appeals remand this case or conduct a *de novo* review to ensure that the proper analysis is accorded to this historic debate. Regardless of whether the facts of this case are ultimately placed in the hands of a judge or jury, the legal arguments examined in this Comment demonstrate that the present form of the NFL Eligibility Rule is in violation of antitrust law and must be revised.

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393. *Id.*

394. *Id.*

395. *See Clarett*, 2004 U.S. Dist. LEXIS 1396, at *86–89. The NFL offered four justifications in support of the Eligibility Rule:

> [1] protecting younger and/or less experienced players—that is, players who are less mature physically and psychologically—from heightened risks of injury in NFL games; [2] protecting the NFL's entertainment product from the adverse consequences associated with such injuries; [3] protecting the NFL clubs from the costs and potential liability entailed by such injuries; and [4] protecting from injury and self-abuse other adolescents who would over-train—and use steroids—in the misguided hope of developing prematurely the strength and speed required to play in the NFL.

Id. at *85.

396. *Id.* at *86.

397. *Neeld*, 594 F.2d at 1300.

398. *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *27.

C. Is Clarett Still the Right Person to be Challenging This Rule?

An issue in this case that has escaped attention is that of the constitutionality of Clarett's claim. If, by chance, the Second Circuit Court of Appeals reverses the district court's decision, Clarett will by that time either be a member of an NFL team (which will no doubt refuse to void the contract of a player with which they expended a high draft pick) or enough time will have lapsed so that he would be eligible under the current NFL rule. This scenario presents a procedural problem. Due to the fact that Clarett brought suit against the NFL as a sole plaintiff, rather than as a representative of a class of ineligible athletes, Clarett will no longer be a real party in interest and the suit will become moot.[399] As a result,

399. "'[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case of controversy.'" Defunis v. Odegarrd, 416 U.S. 312, 316 (1974). In *Defunis*, the Supreme Court found that the controversy surrounding a student at the University of Washington Law School had ceased to be "definite and concrete" and no longer involved parties having adverse legal positions because the student would have finished his law school education regardless of any decision the court reached on the merits of the case. *Id.* Clarett's case is strikingly similar in that he may become eligible under the prior rule or be drafted onto an NFL team and enter the league before the Second Circuit Court of Appeals is ever given a chance to review the case. Additionally, Clarett's case, like *Defunis*, presents no question that is "capable of repetition, yet evading review" since Clarett will never again have be subject to the NFL's draft eligibility rules. *See id.* at 318–19. As a result, there would no longer be a live case or controversy and any decision by the court would be an "advisory opinion."

ineligible college football players will continue to be banned from the NFL until another Spencer Haywood, Robert Boris or Maurice Clarett accepts the burden of sacking this league rule. It took seventy-eight years for the first attempt, there is no telling how long it would take for a second.

*Robert D. Koch**

* This Comment is dedicated to all the athletes who continue to play sports for the love of the game. Very special thanks to: my Mom, for being there every step of the way; my Dad, for always pushing me to be better; my Brother, for introducing me to the beauty of sports; my Sister, for always putting things in perspective; my family and friends, for their continuing support; Squire, Sanders & Dempsey and Troy & Gould, for giving me a chance; Barry Goldberg, for having high expectations of me; Ken Ziffren, for pushing me to go to law school; Professors Daniel Lazaroff and Jay Dougherty, for their guidance; and Michael Berger, Eric Fireman and Slade Sohmer, for writing their own publishable articles each and every day. Special thanks to those who encouraged, inspired, and humored me while writing this Comment: ESPN, NFL Sunday Ticket, MLB, the NBA, MFBL, the La clan, G&JRL, and the VVABL. Thank you to *all* of the editors and staffers of ELR, especially Krystal Hauserman, Carla Israelson, Manisha Kapoor, Emily Ayers, and Crystin Wiegers for spending *their* time to contribute to this Comment. Finally, thank you to Jaime, for having nothing to do during the fall of 2001.