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With the First Pick in the 2004 NFL Draft, the San Diego Chargers Select... ? : A Rule of Reason Analysis of What the National Football League Should Have Argued in Regards to a Challenge of Its Special Draft Eligibility Rules under Section 1 of the Sherman Act

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**WITH THE FIRST PICK IN THE 2004 NFL DRAFT,
THE SAN DIEGO CHARGERS SELECT . . . ? : A RULE OF
REASON ANALYSIS OF WHAT THE NATIONAL
FOOTBALL LEAGUE SHOULD HAVE ARGUED IN REGARDS
TO A CHALLENGE OF ITS SPECIAL DRAFT ELIGIBILITY
RULES UNDER SECTION 1 OF THE SHERMAN ACT**

JUSTIN MANN GANDERSON*

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This article was completed before the United States Court of Appeals for the Second Circuit rendered its decision in *Clarett v. National Football League*.¹ At the time that this article was completed, the United States Court of Appeals had not reached a decision regarding the *Clarett* case. Accordingly, this article does not comment on any of the court proceedings that occurred after the initial United States District Court decision in *Clarett*, or any possible future decisions regarding this case.² This article only uses the framework of the United States District Court decision in *Clarett* to comment on what the National Football League should have argued so that its Special Draft Eligibility Rules could pass antitrust scrutiny.

I. FIRST ROUND—INTRODUCTION

Maurice Clarett was one of the best National Collegiate Athletic Association (NCAA) Division I-A college football players in the country during the 2002 season. As a true freshman³ at Ohio State University, Clarett led his team to the 2002 NCAA Division I-A National Football Championship, and rushed for 1237 yards and sixteen touchdowns during the regular season.⁴ In fact, Clarett had better statistics in his freshman year than former Ohio State and NFL star running backs Archie Griffin, Robert Smith, and Eddie George.⁵ Accordingly, Clarett may be destined for stardom in the National Football League (NFL), despite not playing college football during his sophomore year due to NCAA violations.

¹ No. 03-CV-7441, 2004 U.S. Dist. LEXIS 1396 (S.D.N.Y. Feb. 5, 2004), *stay denied*, 2004 U.S. Dist. LEXIS 1768 (S.D.N.Y. Feb. 11, 2004), *application denied*, 2004 U.S. LEXIS 3231 (Apr. 22, 2004).

² *See id.*

³ A college student athlete is a true freshman when he or she plays in varsity level athletic games during his or her first year at the college. Clarett's performance as a true freshman is significant because many football players are *redshirted* their freshman years to allow for further development. Generally, when a player is *redshirted*, he or she is allowed to practice with the team, but is not allowed to play in any games during the season.

⁴ *See* ESPN.com News Services, *Larry Fitzgerald*, available at <http://sports.cspn.go.com/ncf/player/profile?playerId=134936> (last visited Apr. 4, 2004). Following the 2002 college football season, Clarett was "named to several 2003 preseason All-America teams, voted the [number one] running back in college football by the Sporting News, named a first-team All-Big Ten pick, and was named Big Ten Freshman of the Year." Complaint at ¶ 23, *Clarett v. Nat'l Football League, Inc.*, 2004 U.S. Dist. LEXIS 1396 (S.D.N.Y. 2003) (No. 03-CV-7441).

⁵ *See* Bruce Feldman, *Clarett's Debut One of the Best in Buckeye History* (Aug. 24, 2003), available at <http://cspn.go.com/ncf/s/2002/0824/1422378.html>.

Although Clarett, weighing 230 pounds and standing six feet tall,⁶ seems to be the prototypical player that the NFL desires,⁷ this student-athlete will not have the opportunity to participate in the NFL during the 2004 season per the NFL's Special Draft Eligibility Rules.⁸ The Special Draft Eligibility Rules allow players to enter the draft only after "three full college seasons have elapsed since their high school graduations."⁹ As a result of this rule, Clarett filed a Complaint against the NFL in the United States District Court for the Southern District of New York.¹⁰ Among his many claims, Clarett alleges that the NFL's Special Draft Eligibility Rules violate Section 1 of the Sherman Act¹¹ because the Rules constitute an unlawful restraint of competition.

On February 5, 2004, United States District Court Judge Shira A. Scheindlin agreed with Clarett that the Special Draft Eligibility Rules violate "the antitrust laws . . . [and] cannot preclude Clarett's eligibility for the 2004 NFL draft."¹² In holding that Clarett is now eligible for the draft, Judge Scheindlin rejected the NFL's four arguments in favor of its Special Draft Eligibility Rules under the Rule of Reason.¹³ This article will not examine

⁶ *Clarett*, 2004 U.S. Dist. LEXIS 1396, *stay denied*, 2004 U.S. Dist. LEXIS 1768 (S.D.N.Y. Feb. 11, 2004), *application denied*, 2004 U.S. LEXIS 3231 (Apr. 22, 2004).

⁷ *See id.* (noting that Clarett "is taller and heavier than some of the NFL's all-time greatest running backs, including Walter Payton (5'10", 200), Barry Sanders (5'8", 203) and Emmitt Smith (5'9", 207)").

⁸ Note that the author refers to the draft rules found in CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE app. 1990-4 (2003) as the Special Draft Eligibility Rules.

⁹ CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE app. 1990-4 (1) (2003). *See also* CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. XII, § 12.1(A) (2003). The player must petition the NFL by completing the NFL's Special Draft Eligibility form. This form is not difficult to complete. In fact, the author completed the form and successfully petitioned the NFL in 2001 to enter the 2001 draft after his junior season at Cornell University where he was a punter. Furthermore, it should be noted college players who choose to enter the NFL draft early pursuant to the Special Draft Eligibility Rules "must include in his application an irrevocable renunciation of any further college football eligibility." CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE app. 1990-4(3) (2003). This *renouncement of eligibility rule* is necessary for the NFL to run efficiently, as it ensures that the Draft will continue to function. For example, if a player was allowed to enter the Draft each season and then return to college if he did not like the club which drafted him, then he would eventually become an undrafted rookie free agent. NFL COLLECTIVE BARGAINING AGREEMENT art. XVI, §§ 9, 11 (2002) (note that this CBA is in effect from 2002-2008). If every player did this process, then the draft would be obsolete, as most players would desire to be free agents. This would then create a chaotic and inefficient bidding market for player services.

¹⁰ *See* Complaint, *Clarett*, 2004 U.S. Dist. LEXIS 1396. Although Clarett graduated high school in December 2001, only two full college seasons have elapsed since he filed this Complaint.

¹¹ 15 U.S.C. § 1 (2004). Complaint at ¶¶ 33-34, *Clarett*, 2004 U.S. Dist. LEXIS 1396.

¹² *Clarett*, 2004 U.S. Dist. LEXIS 1396, at *93.

¹³ The NFL argued that:

[t]he purposes of the eligibility rule include [1] protecting younger and/or less experienced

the NFL's losing arguments. Rather, this article will examine the arguments that the NFL did not formulate in the *Clarett* lawsuit—arguments that the author feels would have provided a successful defense from any antitrust lawsuit regarding the NFL's Special Draft Eligibility Rules under the Rule of Reason.

After observing the NFL's history and background in Part II and briefly surveying Section 1 of the Sherman Act and its corresponding legal doctrine/analysis in Part III, Part IV of this article will examine the best argument in support of the NFL's Special Draft Eligibility Rules through a Rule of Reason analysis. Nevertheless, this article will not examine the *Clarett* lawsuit specifically.¹⁴ The purpose of this article is to explore the best possible antitrust arguments in support of the NFL's Special Draft Eligibility Rules under a Rule of Reason approach—whether the procompetitive effects of the Special Draft Eligibility Rules outweigh the anticompetitive effects—in regards to possible future litigation on this subject. It just so happens that the NFL did not make the best arguments in the *Clarett* lawsuit.

II. SECOND ROUND – HISTORY AND BACKGROUND OF THE NFL AND THE NFL DRAFT

A. A Brief Overview of the NFL¹⁵

In 1920, the NFL was formed as an “unincorporated association comprised of member clubs which own and operate professional football teams.”¹⁶ Compared to other American professional sports, like baseball, the

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.

Clarett, 2004 U.S. Dist. LEXIS 1396, at *85.

¹⁴ See *Clarett*, 2004 U.S. Dist. LEXIS 1396; see also A. Randall Farnsworth, *Herschel Walker v. National Football League: A Hypothetical Lawsuit Challenging the Propriety of the National Football League's Four-or-Five Year Rule Under the Sherman Act*, 9 PEPP. L. REV. 603 (1982) (analyzing a hypothetical antitrust lawsuit between Herschel Walker and the NFL in regard to the NFL's draft eligibility rules prior to the enactment of the Special Draft Eligibility Rules in 1990).

¹⁵ See also *American Football History*, available at http://wiwi.cssortment.com/americanfootball_rwff.htm (last visited Apr. 4, 2004) (providing an overview of the history of professional football in the United States and NFL).

¹⁶ *Mackey v. Nat'l Football League*, 543 F.2d 606, 610 (8th Cir. 1976).

NFL was not taken seriously¹⁷ until the NFL hired Pete Rozelle as Commissioner in 1960.¹⁸ The year prior to Rozelle's hiring, the NFL had seventy-two games a year that were watched by approximately 3,140,000 paid spectators.¹⁹ In 1973, thirteen years after Rozelle took over as Commissioner, the NFL had 182 games a year attended by approximately 10,731,000 paid spectators.²⁰ Furthermore, in 1962, Rozelle negotiated the NFL's first league-wide television contract, which paid an estimated \$326,000 per year to each member club.²¹ There is no doubt that the NFL transformed under Rozelle from a mediocre professional sports league with modest support to a dominant professional sports league. The NFL transformed itself into a marketing machine with a business mastermind at its helm.²²

In 1968, the National Labor Relations Board (NLRB) recognized the National Football League Players' Association (NFLPA) as a labor organization, further cementing the NFL as a true business organization.²³ For the first time in NFL history, players gained a substantial voice in the operation of the NFL and in the terms of their employment. Accordingly, in the years following the NFLPA's inception, the NFL players and the NFL clubs have collectively bargained over a myriad of terms and conditions on player employment, including the NFL draft and NFL operations, in its Collective Bargaining Agreement (CBA).

Today, the NFL, both as a source of entertainment and as a business entity, is flourishing even more than it did during the Rozelle years (1960s and 1970s).²⁴ The NFL is first and foremost a business, and this plays an

¹⁷ In a 1961 Gallup Poll, 34 percent of the country reported that baseball was their favorite sport, whereas only 21 percent felt that football was their favorite sport. See DAVID HARRIS, *THE LEAGUE 5* (Bantam Books 1986).

¹⁸ By 1972, 36 percent of the country reported football to be their favorite sport, whereas only 21 percent reported baseball to be their favorite sport. See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² According to the NFL Constitution and By-laws:

[T]he purpose and objects for which the [NFL] is organized are: (A) To promote and foster the primary business of the [NFL] members, each member being an owner of a professional football club . . . (B) To do and perform such other functions as may be necessary to carry out the purpose and objects of the [NFL].

CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. II, §§ 2.1(A), (B) (2003).

²³ See *Mackey*, 543 F.2d 610.

²⁴ The NFL is a multi-billion dollar business today. See *American Football History*, available at http://wiwi.essortment.com/americanfootball_rwff.htm (last visited Apr. 4, 2004).

important role when analyzing the NFL through an antitrust lens.²⁵ The NFL's rules and regulations, either as created by the NFL clubs, the Commissioner, or collectively bargained with the NFLPA in the CBA, are geared towards maximizing the NFL's profits, which correlate to maximization of each member club's profits.

The NFL is not the typical business enterprise.²⁶ Although each member club is owned and operated independently, per the NFL's Constitution and Bylaws, each member club shares its revenues from television contracts and a large portion of its revenues from ticket sales.²⁷ Therefore, although each club is competing with one another on the playing field for the best record and off the playing field for the best players, member clubs are not necessarily competing against one another for revenues.²⁸ Under the NFL's revenue sharing model, the only way to maximize profit is for each game to be as competitive as possible.²⁹ More exciting football games result in more fan support; more fan support results in more ticket sales and larger television contracts,³⁰ as well as other sources of revenue that are not shared among NFL clubs.³¹ Accordingly, rules like

²⁵ "In the 1990s [the NFL] is a business and a science that is played incidentally as a game." RICHARD WHITTINGHAM, *THE MEAT MARKET* 79 (Macmillan Publishing Company 1992) [hereinafter WHITTINGHAM].

²⁶ See David G. Kabbes, *Note: Professional Sports' Eligibility Rules: Too Many Players on the Field*, 1986 U. ILL. L. REV. 1233, 1247 (1986) (explaining that the NFL is a "unique business").

²⁷ See CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. X, § 10.3; art. XIX, § 19.1(A); 1999 Res. G-3, 2001 Res. G-1 (2003). These two sources provide a great source of revenue for NFL Clubs.

²⁸ As a member of the NFL, each NFL club competes against other clubs of other professional sports leagues—the National Basketball Association, Major League Baseball, the National Hockey League—for revenues and market share. Because the majority of NFL clubs are located in different metropolitan areas, they do not compete against one another for market share. However, there are two metropolitan areas which are home to more than one club—New York Giants/New York Jets, Oakland Raiders/San Francisco 49ers. Nevertheless, both the Giants/Jets and the Raiders/49ers never played a home game on the same day during the 2003–04 season. *NFL Team-By-Team Schedules*, Chicago Sun-Times, Sept. 4, 2003, at 20. This scheduling technique reduces the competition between each team in the same market.

²⁹ NFL clubs are able to generate revenue which is not shared among each NFL club, NFL COLLECTIVE BARGAINING AGREEMENT art. XXIV, § 1(a) (2002) (noting that teams do not share certain revenue such as "revenue derived from concessions, parking, local advertising . . . [and certain] luxury box income."). Nevertheless, the only way for each club to maximize total revenue is for the NFL, as a whole, to maximize revenue—the whole equals the sum of its parts. See interview with an NFL club executive and an NFL club attorney who both requested to remain anonymous (Nov. 5, 2003) (reinforcing this theory).

³⁰ E.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1176 (D.C. Cir. 1978).

³¹ See NFL COLLECTIVE BARGAINING AGREEMENT art. XXIV, § 1(a) (2002).

the salary cap,³² draft,³³ and draft eligibility rules³⁴ even out the talent³⁵ between clubs. These rules also ensure that every player maintains a threshold skill level throughout his career since no spectator wants to watch football games played by inept football players.

When analyzing the NFL through an antitrust paradigm, it is imperative that a court examines the NFL through a special lens.³⁶ A court must consider the NFL's unusual revenue sharing model, its unusual infrastructure, and its underlying business motives. The NFL competes against other professional sports leagues and other entertainment mediums for revenue more than NFL clubs compete against each other for revenues.³⁷ In recognition of these unique attributes, a court cannot analyze the NFL under a conventional business framework.

B. A Brief Overview of the NFL Draft

Most professional sports leagues have a draft,³⁸ which is designed to create an efficient and cost-effective way of bringing new players into the league. The draft also serves the purpose of distributing talent equally between clubs.³⁹ In other words, the worst team from the previous season will have the first choice in a round (it will select the best player for its team), and the best team from the previous season will have the final choice in a round (it will select the best player available from the remaining draft pool).⁴⁰ Thus, the worst teams have the best chance at gaining an *impact player* who will help the entire team improve in the upcoming season.

The NFL's first draft occurred in 1935, and continues to be the most important and efficient way for new talent to enter the NFL.⁴¹ The court in

³² See NFL COLLECTIVE BARGAINING AGREEMENT art. XXIV& XXV.

³³ See NFL COLLECTIVE BARGAINING AGREEMENT art. XVI. CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. XII (2003).

³⁴ See NFL COLLECTIVE BARGAINING AGREEMENT art. XVI (2002). CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. XII; 1990 Res. 4(1) (2003).

³⁵ The talent being both veteran players, and future players who will be acquired through the NFL draft and through waivers.

³⁶ See *infra* Part III.

³⁷ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978).

³⁸ All of the major professional sports leagues in the United States have a draft. This includes the NFL, the National Basketball Association, the National Hockey League, and Major League Baseball. However, each league has different draft rules and draft eligibility requirements.

³⁹ See WHITTINGHAM, *supra* note 25 at 73 (quoting Jim Finks, president of the New Orleans Saints, and Chairman of the NFL's Competition Committee in 1991).

⁴⁰ See *Smith*, 593 F.2d at 1175. Note an NFL club may pass on the best overall player in the draft for the best player for its club's style of play at a specific position.

⁴¹ See, e.g., WHITTINGHAM, *supra* note 25 (describing the NFL draft using the 1991 draft as an

*Smith v. Pro Football, Inc.*⁴² described the draft as a “procedure under which negotiating rights to graduating college football players are allocated each year among the NFL clubs in inverse order of the clubs’ standing.”⁴³ The *Smith* court commented that the “NFL draft . . . is designed to promote ‘competitive balance’ [within the NFL].”⁴⁴ However, the *Smith* court held that the draft, as it existed in 1968, was in violation of antitrust laws.⁴⁵ Nevertheless, the court in *Powell v. National Football League*,⁴⁶ held that the NFL draft was not in violation of antitrust laws because the “College Player Draft was a subject of mandatory bargaining”⁴⁷ between the NFL and the NFLPA in the CBA.⁴⁸ Because the NFL draft was the result of a good faith arms-length agreement, the NFL received a labor exemption from antitrust laws⁴⁹ in regards to the draft during the years in which that particular CBA was valid.⁵⁰ Both current and future players are bound to the terms of the draft as outlined in the requisite CBA.⁵¹

Although the CBA acknowledges the draft process, there is no language in the current CBA (2002-08) describing the Special Draft Eligibility Rules

example). However, a player, who is not drafted or who chooses not to sign with the team that drafted him, becomes an undrafted free agent. An undrafted free agent, unlike a drafted player, can bargain with every NFL club. See NFL COLLECTIVE BARGAINING AGREEMENT art. XVI, §§ 4-9, 11 (2002).

⁴² 593 F.2d 1173 (D.C. Cir. 1978).

⁴³ *Id.* at 1175.

⁴⁴ *Id.*

⁴⁵ See *id.* at 1186-88.

⁴⁶ 711 F. Supp. 959 (D. Minn. 1989).

⁴⁷ *Id.* at 962. The analysis used in *Powell* is known as the Mackey Test, which was derived in *Mackey v. Nat’l Football League*, 543 F.2d 606, 616 (8th Cir. 1976) (holding that “the agreements between the clubs and the players embodying the Rozelle Rule do not qualify for the labor exemption”).

⁴⁸ See *Powell*, 711 F. Supp. at 964. See also *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (holding that the non-statutory labor exemption applies to a unilateral change to player contracts—when negotiations reached an impasse—because the provision was within the scope of the NFL’s CBA); *Clarett v. Nat’l Football League*, No. 03-CV-7441, 2004 U.S. Dist. LEXIS 1396, at *38-47 (S.D.N.Y. Feb. 5, 2004) (alluding to the fact that the draft process in general receives the non-statutory labor exemption from antitrust scrutiny).

⁴⁹ See, e.g., *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., Inc.*, 381 U.S. 676, 710 (1965) (holding that collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws); *United Mine Workers v. Pennington*, 381 US 657, 667 (1965).

⁵⁰ See *Powell*, 711 F. Supp. at 964. Nevertheless, courts do recognize that the NFL draft does place restrictions on players in that a drafted rookie player who “does not wish to sign a contract with or play for the NFL club which ‘owns’ the rights to him, . . . [cannot] negotiate with or play for any other NFL club” during that season. *Id.* at 962.

⁵¹ See *id.* at 963. *Accord Zimmerman v. Nat’l Football League*, 632 F. Supp 398, 405 (D.D.C. 1986) (stating “not only present but potential future players for a professional sports league are parties to the bargaining agreement”).

adopted by the NFL in 1990.⁵² Therefore, the labor exemption may not be a viable defense for the NFL because the Special Draft Eligibility Rules are only contained in the NFL's Constitution and Bylaws,⁵³ technically, the Special Draft Eligibility Rules are not a mandatory subject of bargaining.⁵⁴ Accordingly, an inquiry into Section 1 of the Sherman Act is necessary in order to determine whether the NFL's Special Draft Eligibility Rules satisfy the law.

III. THIRD ROUND—BACKGROUND OF SECTION 1 OF THE SHERMAN ACT⁵⁵

The Sherman Act was enacted in 1890 and designed as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."⁵⁶ Specifically, Section 1 of the Sherman Act declares that "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is . . . illegal."⁵⁷ This legislation was left open-ended, as Senator Sherman, sponsor of the Act, realized that the large number of business organizations made a rigid legislative framework impractical.⁵⁸ Accordingly, courts developed different rationales for analyzing antitrust suits based on the different business and trade practices, and filled in these large interpretive gaps missing in Section 1 of the Sherman Act.⁵⁹

⁵² See NFL COLLECTIVE BARGAINING AGREEMENT (2002).

⁵³ See CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. XII, § 12.1(A), app. 1990-4(1) (2003).

⁵⁴ In fact, the court in *Clarett v. Nat'l Football League*, No. 03-CV-7441, 2004 U.S. Dist. LEXIS 1396, at *30-50 (S.D.N.Y. Feb. 5, 2004) held that the non-statutory labor exemption does not apply to the NFL's Special Draft Eligibility Rules. Nevertheless, it seems that the NFL could challenge this ruling in a future lawsuit.

⁵⁵ Note that the purpose of this article is not to give the general history of Antitrust law or the Sherman Act. However, the purpose of this section is to explore briefly the judiciary's framework for analysis in order to examine further the NFL's Special Draft Eligibility Rules under an Antitrust lens.

⁵⁶ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

⁵⁷ 15 U.S.C. § 1 (2004).

⁵⁸ Senator Sherman stated that:

. . . it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. This bill is only an honest effort to declare a rule of action.

James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L. J. 257, 300 n.359 (1989) (quoting 21 Cong. Rec. 2460 (1890)).

⁵⁹ See *id.* The Court in *Standard Oil Co. v. United States* found that because:

the contracts or acts embraced in [Section 1 of the Sherman Act] were not expressly defined

Generally, courts employ two frameworks—Per Se and the Rule of Reason—for analyzing claims in violation of the Sherman Act.⁶⁰ As a result, courts generally hold that certain trade practices such as price fixing,⁶¹ division of markets,⁶² group boycotts,⁶³ and tying arrangements⁶⁴ constitute a Per Se violation of the Sherman Act. The Court in *Northern Pacific Railway Co. v. United States*⁶⁵ best explained the rationale for a Per Se violation by stating, “there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”⁶⁶

On the other hand, where the trade practice does not have such a pernicious effect on competition and has some redeeming virtue, the courts will employ the Rule of Reason.⁶⁷ The Rule of Reason approach requires a detailed factual inquiry in order for a court to determine whether a particular practice is procompetitive or anticompetitive, and whether the particular restraint on trade was unreasonable. The Court in *Chicago Board of Trade v. United States*⁶⁸ stated:

. . . it inevitably follows that . . . the standard of reason which had been applied at the common law and in this country . . . was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

221 U.S. 1, 60 (1911).

⁶⁰ The Court in *Nat'l Society of Prof'l Eng'rs v. United States* explains:

[t]here are . . . two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are “illegal *per se*.” In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reason why it was imposed.

435 U.S. 679, 692 (1978).

⁶¹ See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940).

⁶² See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, *aff'd*, 175 U.S. 211 (1899).

⁶³ See *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild v.*

Federal Trade Comm'n, 312 U.S. 457, 467 (1941).

⁶⁴ See *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947).

⁶⁵ 356 U.S. 1 (1958).

⁶⁶ *Id.* at 5.

⁶⁷ The Court in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) was the first to advance heavily the Rule of Reason standard; this decision gave courts much discretion in Sherman Act lawsuits.

⁶⁸ 246 U.S. 231 (1911). See also *Appalachian Coals, Inc. v. United States*, 228 US 344 (1933).

Note that Court in *Chicago Bd. of Trade* never used the phrase Rule of Reason. Nevertheless, legal scholars frequently cite this decision as a classic case which employed the Rule of Reason. E.g., E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 4.05, at 127-29 (4th ed. 2003) [hereinafter SULLIVAN & HARRISON].

[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. *To determine that question the court must ordinarily consider the facts peculiar to the business . . . ; its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained are all relevant facts.*⁶⁹

Furthermore, the Court in *Mackey v. National Football League*⁷⁰ noted that the “focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.”⁷¹

The first issue in a Sherman Act lawsuit is whether the Rule of Reason or the Per Se test should apply.⁷² If a court declares that the alleged business practice is without redeeming competitive effects, then the factual inquiry ends, as the practice is Per Se illegal. However, if a court finds that the business is of a *peculiar* nature, and that the business aspect at issue has possible procompetitive effects, then a court must utilize the Rule of Reason approach. Accordingly, a court should analyze the NFL’s Special Draft Eligibility Rules under a Rule of Reason approach⁷³ because the NFL, like other sports leagues, has an abnormal business structure and can sufficiently allege to a court that its Special Draft Eligibility Rules have procompetitive effects.⁷⁴

⁶⁹ *Chicago Bd. of Trade*, 246 U.S. at 238 (emphasis added).

⁷⁰ 543 F. 2d 606 (8th Cir. 1976).

⁷¹ *Id.* at 620 (citing *Chicago Bd. of Trade*, 246 U.S. 231 (1911); *Worthen Bank & Trust Co. v. Nat’l BankAmericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974)).

⁷² Courts have not developed a rigid test to determine whether the Per Se rule or the Rule of Reason should be used because “[n]ot all restrictive conduct is inherently anticompetitive.” SULLIVAN & HARRISON, *supra* note 68, § 4.05, at 127. This is mainly a result of the fact that “antitrust laws are largely judge made, derived from statutory interpretation.” *Id.* Accordingly, determinations are made on a case-by-case basis on “fine line distinctions.” *Id.* As a result, this area of the law is inconsistent. *Id.* However, some courts have created standards to aid themselves in determining which test should be used, beyond if the business practice fits into one of the Per Se categories. *See, e.g., Levine v. Cent. Florida Medical Affiliates, Inc.* 72 F.3d 1538, 1549 (11th Cir. 1996) (applying the Per Se rule “only when history and analysis have shown that in sufficient similar circumstances the rule of reason unequivocally results in a finding of liability”) (quoting *Consultants & Designers v. Butler Serv. Group*, 720 F.2d 1553 (11th Cir. 1983)).

⁷³ *See infra* Part IV.A.

⁷⁴ *See infra* Part IV.B.

IV. FOURTH ROUND—SECTION 1 OF THE SHERMAN ACT AND THE NFL'S SPECIAL DRAFT ELIGIBILITY RULES

A. *Prior Application of the Rule of Reason and the Per Se Rule in Sports Leagues' Antitrust Lawsuits*

When dealing with antitrust disputes regarding sports leagues such as professional football,⁷⁵ professional basketball,⁷⁶ and professional golf,⁷⁷ courts often apply a Rule of Reason approach due to the peculiar business nature of sports leagues. In fact, in *Clarett v. National Football League*,⁷⁸

⁷⁵ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (employing a Rule of Reason analysis in regards to an antitrust challenge to the NFL draft); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (employing a Rule of Reason analysis in regards to an antitrust challenge to the Rozelle Rule); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381 (9th Cir. 1984) (employing a Rule of Reason analysis in regards to an antitrust challenge of an NFL club's relocation to another city); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982) (employing a Rule of Reason analysis in regards to an antitrust challenge of the NFL's cross ownership ban); *but see Bowman v. Nat'l Football League*, 402 F. Supp. 754 (D. Minn. 1975) (employing an analysis similar to the Per Se analysis in regards to an antitrust challenge of the NFL's refusal to contract during the season with former World Football League players, whose league folded in the middle of the season).

⁷⁶ See *Molinas v. Nat'l Basketball Ass'n.*, 190 F. Supp 241 (S.D.N.Y. 1961) (employing a Rule of Reason approach in regards to a rule which prohibited a player who gambled from playing in the National Basketball Association); *cf. Denver Rockets v. Haywood*, 325 F. Supp 1049 (D. Cal. 1971) (employing a Per Se approach in an antitrust challenge where a professional basketball player, Haywood, in a rival professional basketball league was not allowed to play in the National Basketball Association, pursuant to the league's eligibility rules, after he had already contracted to play with a National Basketball Association club). In a similar case to *Denver Rockets*, *Linseman*, a professional hockey player challenged the draft rules of the World Hockey Association—similar to the National Hockey League—in an antitrust action. See *Linseman v. World Hockey Ass'n*, 439 F. Supp 1315 (D. Conn. 1977). Here, the court employed a Per Se approach like the court in *Denver Rockets* because *Linseman*, like *Haywood*, was already a professional player. See *id.* The *Denver Rockets* and *Linseman* courts used the Per Se rule because the courts are analyzing the eligibility rules in regard to those players who have played professionally in the same sport before but never in that particular sports league. This is a different scenario from the investigation posed in this article, as it analyzes an antitrust challenge from those who have never played professionally before (amateurs) in the sport in which they are trying to gain eligibility. This article does not attempt to explore an antitrust lawsuit in regards to whether a professional football player in another professional football league could enter the NFL, even if that player did not satisfy the requirements of the NFL's Special Draft Eligibility Rules.

⁷⁷ See *Deesen v. Prof'l Golfer's Ass'n of Am.*, 358 F.2d 165 (9th Cir. 1966) (using a Rule of Reason approach where a golfer challenged the PGA's tournament eligibility rules). Although the Professional Golfer's Association is not technically a *league*, it is a professional golfing organization with blanket rules and regulations.

⁷⁸ No. 03-CV-7441, 2004 U.S. Dist. LEXIS 1396 (S.D.N.Y. Feb. 5, 2004), *stay denied*, 2004 U.S. Dist. LEXIS 1798 (S.D.N.Y. Feb. 11, 2004), *application denied*, 2004 U.S. Dist. LEXIS 3231 (Apr. 22, 2004).

United States District Court Judge Scheindlin decided that the “validity of the [NFL’s Special Draft Eligibility Rules] must be analyzed under the Rule of Reason.”⁷⁹ On the other hand, professional baseball is exempt from antitrust law.⁸⁰ However, the Court in *Flood v. Kuhn*⁸¹ acknowledged that the only reason baseball receives an exemption is because “[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court’s expanding concept of interstate commerce.”⁸² Subsequently, the Court stated that the only way to change this anomaly is through congressional legislation.⁸³

B. Rule of Reason Analysis of the NFL’s Best Arguments for Upholding Its Special Draft Eligibility Rules⁸⁴

In order for the NFL to successfully defend itself against an antitrust challenge to its Special Draft Eligibility Rules, the NFL must argue that its

⁷⁹ *Id.* at *75-76. See also Spencer R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen From Entering Professional Sports Drafts*, 8 SETON HALL J. SPORTS L. 539, 556 (1998) [hereinafter Rosner] (commenting that it is “now clear that a Rule of Reason analysis should be performed in any future challenges to the draft eligibility rules of the professional sports leagues, including one which limits the ability of athletes to enter the draft directly out of high school”).

⁸⁰ See *Fed. Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball*, 259 U.S. 200 (1922) (exempting professional baseball from antitrust laws).

⁸¹ 407 U.S. 258 (1972).

⁸² *Id.* at 282 (furthering the exemption of professional baseball from antitrust laws); see also *Radovich v. Nat’l Football League*, 352 U.S. 445, 451 (1957) (limiting the holding of *Federal Baseball Club of Baltimore* to only professional baseball).

⁸³ *Flood*, 407 U.S. at 279 (quoting *Radovich*, 352 U.S. at 450-52).

⁸⁴ Note that the NFL could make other arguments in defense of its Special Draft Eligibility Rules prior to a court analyzing this alleged antitrust violation under the Rule of Reason analysis. The NFL could argue that it is a Joint Venture/Single Entity, thus precluding an antitrust inquiry. See Robert C. Heintel, *The Need for an Alternative Regulation of the National Football League*, 46 CASE W. RES. L. REV. 1033, 1042-45 (1996) [hereinafter Heintel]; but see *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1387-90 (9th Cir.1984). Or it may claim that it is a Natural Monopoly, thus limiting antitrust attacks. See Heintel at 1052-56. Moreover, the NFL could argue the Ancillary Restraint Doctrine, see *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1102 (1st Cir. 1994), or the Labor Exemption, see *Powell v. Nat’l Football League*, 711 F. Supp. 959, at 964; but see *Clarett v. Nat’l Football League*, No. 03-CV-7441, 2004 U.S. Dist. LEXIS 1396, at *30-50 (S.D.N.Y. Feb. 5, 2004) (stating that the nonstatutory labor exemption does not apply to the NFL’s Special Draft Eligibility Rules); Robert A. McCormick & Matthew C. McKinnon, *Professional Football’s Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L. J. 375, 381-417 (1984); Finally, the NFL may be able to avoid judicial scrutiny altogether by arguing that this type of restraint is a matter that should be left to the legislature, as Congress has granted sports leagues exceptions to antitrust law in certain instances. See 15 U.S.C. § 1291 (2003) (exempting “agreements covering the telecast of sports contests and the combining of professional football leagues” from antitrust laws).

Special Draft Eligibility Rules promote competition among its member clubs for the services of future players. However, at first glance, it appears that the NFL does not have any strong arguments that show that its Special Draft Eligibility Rules promote competition.⁸⁵ The NFL cannot deny that its Rules are anticompetitive in nature. The Special Draft Eligibility Rules do exclude certain younger players, who may be capable of performing at the NFL level successfully, from marketing their services to each NFL club through the draft process. These Rules completely eliminate competition between clubs for the services of these younger players who are not yet eligible, and restrict the freedom of these younger players to offer their services to interested clubs. Nevertheless, when analyzing the NFL's Special Draft Eligibility Rules under the proper framework, a court should find that these Rules are more procompetitive than anticompetitive.⁸⁶

1. PRIOR DRAFT ANALYSIS – *SMITH V. PRO FOOTBALL, INC.*

In *Smith v. Pro Football, Inc.*,⁸⁷ Washington Redskins wide receiver James McCoy (Yazoo) Smith challenged the NFL Draft as it existed in 1968, alleging that it was “an unreasonable restraint of trade in violation of [Section 1 of the Sherman Act], and that, but for the draft, he would have negotiated a far more lucrative contract when he signed as a player in [1968 draft].”⁸⁸ Although the draft may resemble a group boycott, the *Smith* court found that the NFL's unique structure requires a Rule of Reason analysis, precluding a classic group boycott (Per Se) analysis.⁸⁹ Nevertheless, the *Smith* court held that the NFL draft was “an unreasonable restraint of trade . . . [and] . . . was concededly anticompetitive in purpose.”⁹⁰ The *Smith* court explained:

The justification asserted for the draft is that it has the legitimate business purpose of promoting “competitive balance” and playing-field equality among the teams, producing better entertainment for the public, higher salaries for the players, and increased financial security for the clubs. The NFL has endeavored to summarize this justification by saying that the draft ultimately has a “procompetitive” effect, yet this shorthand entails no small risk of confusion.

⁸⁵ See *supra* note 13 and accompanying text.

⁸⁶ See *infra* Parts IV.B.1-5.

⁸⁷ 593 F.2d 1173 (D.C. Cir. 1978).

⁸⁸ *Id.* at 1174-75. Note that the *Smith* Court did not specifically analyze the draft eligibility requirements. Rather, it analyzed the draft process as a whole.

⁸⁹ See *id.* at 1179.

⁹⁰ *Id.* at 1187.

The draft is “procompetitive,” if at all, in a very different sense from that in which it is anticompetitive. The draft is anticompetitive in its effect on the market for players’ services, because it virtually eliminates economic competition among buyers for the services of sellers. The draft is allegedly “procompetitive” in its effect on the playing field; but the NFL teams are not economic competitors on the playing field, and the draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost. Because the draft’s “anticompetitive” and “procompetitive” effects are not comparable, it is impossible to “net them out” in the usual rule-of-reason balancing. The draft’s “anticompetitive evils,” in other words, cannot be balanced against its “procompetitive virtues,” and the draft be upheld if the latter outweigh the former. In strict economic terms, the draft’s demonstrated procompetitive effects are nil.⁹¹

The *Smith* court held that the NFL draft, as it existed in 1968, was illegal under the Rule of Reason. Accordingly, the *Smith* court’s holding seems to present prima facie evidence that any future draft or further draft restriction would be illegal.⁹² Even though the *Powell* court sidestepped the *Smith* court’s holding through the labor exemption, legalizing the NFL draft process described in the CBA,⁹³ the NFL still must overcome this harsh analysis in order to prevail in a Section 1 lawsuit with regard to its Special Draft Eligibility Rules. A player challenging these Special Draft Eligibility Rules would rely on the *Smith* court’s analysis and analogize the anticompetitive effects of the NFL draft to the anticompetitive effects of Special Draft Eligibility Rules—both of which “eliminate economic competition among buyers for the services of sellers, . . . [and do not encourage] . . . others to enter the market and to offer the product at lower cost.”⁹⁴ Furthermore, this player would also rely on *National Society of Professional Engineers v. United States*⁹⁵ for the proposition that a court’s analysis of the Special Draft Eligibility Rules should focus on the “competitive significance of the restraint . . . [and not] . . . whether a policy

⁹¹ *Id.* at 1186.

⁹² *Accord* *Clarett v. Nat’l Football League*, No. 03-CV-7441, 2004 U.S. Dist. LEXIS 1396, at *78-84 (S.D.N.Y. Feb. 5, 2004) (describing *Clarett*’s prima facie antitrust claim under Section 1 of the Sherman Act).

⁹³ *See Powell v. Nat’l Football League*, 711 F. Supp. 959, 964 (D. Minn. 1989).

⁹⁴ *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978).

⁹⁵ 435 U.S. 679 (1978).

favoring competition is in the public interest, or in the interest of the members of an industry."⁹⁶ In other words, a rule that simply makes football games more exciting is not an adequate reason for a court to uphold the rule under antitrust scrutiny.

2. CURTAILING ANALOGIES TO *SMITH V. PRO FOOTBALL, INC.*

When formulating its arguments for its Special Draft Eligibility Rules, the NFL cannot rely solely on an argument that the Special Draft Eligibility Rules are necessary for the economic survival of the league, or on the reasoning the NFL used in *Smith*, because a court would reject both. Rather, the NFL must show that the procompetitive effects of the Special Draft Eligibility Rules outweigh their anticompetitive effects, or at least, the procompetitive and anticompetitive effects net out.⁹⁷ The NFL would distinguish the antitrust NFL draft analysis in *Smith* because the current NFL draft has changed since 1968. Furthermore, the *Powell* court held that the draft process in general is legal under the non-statutory labor exemption. Even though the Special Draft Eligibility Rules are not found in the CBA, these Special Draft Eligibility Rules evolved partly from the fact that the draft process is a legal and accepted business practice in the NFL market for new player services. In fact, the Special Draft Eligibility Rules are actually less restrictive than the eligibility requirements imposed prior to 1990.⁹⁸

The NFL can circumvent a challenger's argument that the *Smith* court's holding should apply to the Special Draft Eligibility Rules by analogy. Although the *Smith* court is correct in observing that players cannot offer their services at a lower cost,⁹⁹ this aspect of the draft process is presently legal under the non-statutory labor exemption. This particular anticompetitive aspect of the draft is not currently challengeable under antitrust laws.¹⁰⁰

⁹⁶ *Id.* at 692. *Accord Smith*, 593 F.2d at 1186 (applying this analysis to the NFL draft).

⁹⁷ *See Smith*, 593 F.2d at 1188-89.

⁹⁸ The NFL's General Rules of Eligibility state:

[n]o person shall be eligible to play or be selected as a player unless (1) all college football eligibility of such player has expired; or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college, or university; or (3) such player receives a diploma from a recognized college or university prior to September 1st of the next football season of the League.

CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. XII, § 12.1(A) (2003).

⁹⁹ The *Smith* court found that the NFL draft process does "not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost." *Smith*, 593 F.2d at 1186.

¹⁰⁰ Furthermore, the minimum rookie salary scale, also legal per the CBA, eliminates potential players from offering their services below a certain minimum. NFL COLLECTIVE BARGAINING AGREEMENT art. XXXVIII, §6 (2002). This also precludes the effect of a decrease in players' salary if

The Special Draft Eligibility Rules only effect the *eligibility requirements* for the draft, as the *legalized draft process* is responsible for disallowing players to create a more competitive market by offering their services at a lower cost to each club.¹⁰¹ Therefore, an analysis proceeds on the assumption that a potential draftee challenging the Special Draft Eligibility Rules can only argue that *these particular* eligibility requirements spurn anticompetitive effects. This *lower cost* argument is only attributable to the draft process, not to the draft's eligibility requirements. A court must examine the Special Draft Eligibility Rules through a lens, which accepts the *draft process* as a baseline that is currently unchallengeable.

Nevertheless, an ineligible player would still argue that the NFL must overcome the *Smith* court's analysis. The *Smith* court states the NFL cannot offset the economic anticompetitive effects of its draft (and the Special Draft Eligibility Rules by analogy) by creating competition for players' services on the field "[b]ecause the draft's 'anticompetitive' and 'procompetitive' effects are not comparable."¹⁰² However, the *Smith* court is missing a vital step in its analysis—the court does not understand the NFL as a business. If NFL clubs are able to assess fully potential draftees and ensure that each potential draftee has a requisite level of talent, then clubs are more likely to draft the highest percentage of the best and most mature players each year from the general draft pool. If clubs are consistently able to draft the best players each year, then each club will compete against one another on the playing field with the best players. Better players on the field will result in a better entertainment product, which will result in more shared and non-shared revenues for each NFL club.¹⁰³ If drafting better players helps to increase each club's total revenues, economic competition is created among clubs to draft better players; each club desires to maximize shared and non-shared revenues. Therefore, a court could adequately compare the Special Draft Eligibility Rules' procompetitive and anticompetitive effects, since they both have economic foundations. Even though the Special Draft Eligibility Rules restrict certain players from entering the draft market (an economic anticompetitive effect), they also help create an efficient draft market. This

more players are allowed to enter the market. Although this may seem anticompetitive because this provision is in the CBA, it receives the nonstatutory labor exemption.

¹⁰¹ Each player is only allowed to offer his services at a lower cost after he is drafted. This negotiation is post-draft and has little effect on which player a club drafts. However, it may affect which players are signed to a professional contract. Furthermore, after the draft concludes, those players not drafted become undrafted free agents and may offer their services to clubs at a lower cost, but not lower than the minimum salary scale. NFL COLLECTIVE BARGAINING AGREEMENT art. XVI, §§ 9, 11 & art. XXXVIII, §6 (2002).

¹⁰² *Smith*, 593 F.2d at 1186.

¹⁰³ See *supra* Part II.A.

efficient market allows each club to reduce its *draft risk*¹⁰⁴ and compete more with one another to draft the best players—better players equaling more revenue (an economic procompetitive effect).

3. THE EFFICIENCY REVIEW FRAMEWORK FOR THE RULE OF REASON

The NFL's best arguments center on the fact that its Special Draft Eligibility Rules are the most efficient way for NFL member clubs to acquire rights to future players in the draft framework.¹⁰⁵ An efficient NFL draft market for player services creates more procompetitive effects than a draft without the Special Draft Eligibility Rules. In *NCAA v. Board of Regents*,¹⁰⁶ the Court dealt with the NCAA's television plan to increase total profits by limiting the number of college athletic team sports games each college could televise in order to increase total profits. The NCAA Court reasoned that this was a horizontal restraint on "NCAA member institutions to compete in terms of price and output."¹⁰⁷ The Court acknowledged "that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all"¹⁰⁸ (restraints based upon efficiency), and that "a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraint"¹⁰⁹ (justifications for its restraints based upon efficiency). In employing this efficiency-based framework for a sports-related case, the NCAA court cited *Broadcast Music, Inc. v. Columbia Broadcasting System*¹¹⁰ for the proposition that "a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive."¹¹¹ In other words, if the restraint is necessary for the business to run in an efficient manner, and is more procompetitive than not, then the trade practice may pass antitrust scrutiny.¹¹² Although the NCAA Court held that that the "NCAA has restricted rather than enhanced the place of intercollegiate athletics . . . by curtailing output and blunting the

¹⁰⁴ See *infra* Part IV.B.3.

¹⁰⁵ The Smith court admits "some form of player selections system may serve to regulate and thereby promote competition in what would otherwise be a chaotic bidding market for the services of college players." *Smith*, 593 F.2d at 1181.

¹⁰⁶ 468 U.S. 85 (1984).

¹⁰⁷ *Id.* at 102.

¹⁰⁸ *Id.* at 101.

¹⁰⁹ *Id.* at 103.

¹¹⁰ 441 U.S. 1 (1979).

¹¹¹ *NCAA*, 468 U.S. at 103 (citing *BMI*, 441 U.S. at 18-23).

¹¹² The *BMI* Court stated that one review standard for the Rule of Reason analysis is whether the business practice is "designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *BMI*, 441 U.S. at 20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978)).

ability of member institutions to respond to consumer preference,¹¹³ the NCAA Court's efficiency framework is appropriate for analyzing a controversy involving the NFL and its Special Draft Eligibility Rules. Through its Special Draft Eligibility Rules, the NFL makes its *legalized* draft for player services *more* efficient, which results in *more* competition between clubs for player services.¹¹⁴

4. THE EFFICIENCY ARGUMENTS FOR THE NFL'S SPECIAL DRAFT ELIGIBILITY RULES

The NFL should argue that the Special Draft Eligibility Rules create an efficient means for obtaining players' rights and services in the draft market. Although the Special Draft Eligibility Rules create a smaller draft market as compared to a market in which all potential draftees could enter within the basic draft system, this smaller market fosters more competition between member clubs for player services because it allows each member club to fairly assess which players to draft. Currently, NFL clubs have a difficult time assessing a potential draftee's talent, which results in a *draft risk*. This process is not only a risk,¹¹⁵ but it is very costly and time consuming as well.¹¹⁶ For example, in his experience as an NFL coach, Bill Arnsparger explains, "generally half of those drafted would be released by the start of the regular season [because they are not ready or able to play at the NFL level]."¹¹⁷ A fifty percent success rate in drafting players seems to be quite a risk, as this is a high turnover draft rate. Furthermore, both Bill Arnsparger and Rich Mercier,¹¹⁸ former offensive lineman for the Baltimore

¹¹³ NCAA, 468 U.S. at 120.

¹¹⁴ See *infra* Part IV.B.4.

¹¹⁵ In other words when a club drafts a player, there is a high risk that the player will not perform well at the professional level.

¹¹⁶ Scouts and coaches spend countless hours going through film of each individual player, and observing players at games, practices, and workouts.

¹¹⁷ E-mail Interview with Bill Arnsparger, former NFL Head Coach (Nov. 27, 2003), whose experience includes not only NFL coaching (he was Head Coach of the New York Giants, Defensive Coordinator of the Miami Dolphins, and Assistant Coach of the Baltimore Colts) but NCAA experience (he was Head Coach at Louisiana State University, Special Teams Coach at Cornell University) as well. One NFL club commented that it is "very hard to project how a player at college will perform at the [professional level]." Interview with an NFL club executive and an NFL club attorney who both requested to remain anonymous (Nov. 5, 2003). Furthermore, this risk is exemplified by the fact that "more than 360 non-senior players entered the draft between 1990 and 2000. Of that group, almost one out of every four was never offered an NFL contract," and this number does not even include those who received a contract, but had short/unsuccessful professional careers. See Liz Clarke, *Boys to Men: NFL Continues to Block Young Ones*, The Washington Post, Nov. 8, 2002, at D01 [hereinafter Clarke].

¹¹⁸ Mercier was an All American Offensive Lineman for the University of Miami (Fla.) (UM),

Ravens, estimate that it costs the NFL a large sum of money to invite each potential player to the NFL scouting combines,¹¹⁹ as well as unspecified, but great scouting costs, which Richard Whittingham reports to be over \$1 million per team.¹²⁰ If more players are allowed to enter the draft, then presumably the NFL would incur more costs in scouting these players, and the scouting reports would be less thorough due to the influx of players entering the draft and the rigid time constraints. As a result, the draft market would be less efficient, making it more difficult for clubs to assess the talent of potential draftees in an accurate manner. Therefore, NFL clubs are less likely to compete for players' draft rights if they cannot assess players in an accurate manner.

The Special Draft Eligibility Rules reduce the *draft risk* that each club incurs when drafting a college player. By increasing the reliability of information obtained from scouting players and reducing costs, member clubs form stronger opinions about whom they desire to draft. As a result, this *draft risk* factor will be reduced, and NFL clubs will compete more with one another during the draft because clubs are more likely to compete for a player's draft rights if they are better able to assess talent. Furthermore, with a smaller draft pool, players will now have more competition between one another as they compete for draft status—the more talented players having a higher draft status. This causes players to train harder for draft status, and allows clubs to better assess their talents. If NFL clubs are not able to distinguish players from one another, and in turn, players are not able to adequately distinguish themselves from one another, then competition between each club for these players in the draft pool will decrease because each draftee will appear equal.¹²¹ If a club can easily substitute one player for

and was drafted by the Baltimore Ravens, in 2000 where he played for three seasons. See Interview with Rich Mercier, Former Offensive Lineman for the Baltimore Ravens in Miami, Fla. (Nov. 17, 2003).

¹¹⁹ See Interview with Rich Mercier, Former Offensive Lineman for the Baltimore Ravens, in Miami, Fla. (Nov. 17, 2003); E-mail Interview with Bill Arnsparger, former NFL Head Coach, (Jan. 28, 2004). NFL combines are sanctioned workouts where potential draftees work out for NFL clubs, so that clubs are better able to evaluate their abilities. Some combines are invitation only, whereas others are open to any player who is eligible for the draft. In 1991, combines kept "serious tabs on about five thousand college players." WHITTINGHAM, *supra* note 25, at 44. See also Vic Carucci, *Combine Still Critical in Evaluating Talent* (Feb. 18, 2003), available at <http://www.nfl.com/draft/story/6197027> (noting the importance of the combines and the competition which results between clubs for player services after observing players at the combine).

¹²⁰ Whittingham notes that in 1991, each NFL club spent over 1 million dollars on independent scouting, not including costs of combines. See WHITTINGHAM, *supra* note 25, at 44. Arnsparger notes that Whittingham's estimates are fairly accurate today as well, but that each team varies on how much it spends depending on its attention to detail. See E-mail Interview with Bill Arnsparger, former NFL Head Coach (Jan. 28, 2004).

¹²¹ Although it is not likely that this will affect the marketability and competition of first round draft picks, this will certainly affect those players drafted in the later rounds. However, this scenario may

any other player, then the influence from agents, player marketability, and scouting will decrease, resulting in less competition for players' services. More competition will result when the NFL draft operates efficiently, as better players will distinguish themselves from mediocre ones.¹²² Likewise, NFL clubs can distinguish between which players they wish to draft. Better players and efficient scouting will result in a better and more defined *supply* with an increase in *demand* for these better players.

The Special Draft Eligibility Rules assure clubs that all draft eligible players will have at least three years after graduating high school to improve both their mental and physical skills for the NFL.¹²³ As a result, each player has a better chance at efficiently marketing his services to NFL clubs with the help of agents.¹²⁴ Agents play an integral part in this draft market for player services, and the Special Draft Eligibility Rules aid agents in this process. The Special Draft Eligibility Rules help increase a player's marketability because they require players who wish to play in the NFL to go to college¹²⁵ and increase their *human football capital*¹²⁶ over a period of at

affect first round draft picks if players are allowed to enter the draft earlier because NFL clubs will have a more difficult time determining the best potential draftees (first round picks) from the remainder of the potential draftees.

¹²² NFL scouts are very particular in designating players as top prospects. Statistics are not the sole way in which scouts and NFL clubs analyze draftees; they also look at physical abilities, mental abilities, and character. See WHITTINGHAM, *supra* note 25, at 81-83. For instance, although University of Oklahoma quarterback Jason White won the 2004 Heisman Trophy, awarded annually to the best college football player, he is not considered to be a first or second round draft pick. In fact, he was slated to be a fifth or seventh round draft pick. As a result, he is not entering the NFL draft, and will play football for the University of Oklahoma one more season in hopes of increasing his draft prospects. See Artie Gigantino, *Gigantino: No Surprises . . . Yet*, available at <http://www.foxsports.com/content/view?contentId=1986624> (last visited Apr. 4, 2004). Therefore, as the NFL draft becomes a more efficient market for NFL clubs, players also help create more competition by honing their skills in college for longer periods. This creates better potential draftees, so there will be more competition among NFL clubs to attain these better players.

¹²³ Even with this three-year threshold, many players who leave college for the NFL draft after their junior year will still not be drafted by NFL clubs. Dan Rovell reports that "[a]ccording to the estimates, approximately half of the [forty two] juniors eligible to be taken in this year's [2004 NFL] draft will go undrafted." Dan Rovell, *Agents Predict 'Free-For-All'* (Feb. 5, 2004), available at <http://sports.espn.go.com/nfl/news/story?id=1728315> [hereinafter Rovell]. If a player goes undrafted it is either a result of inadequate scouting, or that the player is not ready for the NFL game.

¹²⁴ When the author presented this idea to an NFL club, the NFL club agreed with the author. See interview with an NFL club executive and an NFL club attorney who both requested to remain anonymous (Nov. 5, 2003).

¹²⁵ Presumably a player not attending college could work out on his own in order to increase his *human football capital*. However, most players who desire to play in the NFL will play college football in order to increase their *human football capital*.

¹²⁶ Increased human football capital means that the longer each player remains and develops his skills at the collegiate level, or through individual training outside of the collegiate level, the better chance

least three years following high school graduation. As a result, the agents are able to sell a more defined product (the player's services) to a more interested customer (an NFL club).¹²⁷ The *draft risk* is reduced because potential draftees are better prepared for the NFL game, more likely to catch the eye of an NFL club through the scouting process, and more likely to succeed in the NFL. By reducing the *draft risk*, competition will increase between NFL clubs for players' services in the draft.

One cannot ignore the important role that agents play in fostering competition among NFL clubs for players' services. Agents are able to prompt clubs to compete for player services in the NFL draft in ways that they would not ordinarily compete.¹²⁸ For example, in his 1997 autobiography, *A Shark Never Sleeps*, Drew Rosenhaus¹²⁹ describes the marketing and the competition between NFL clubs that occur before clubs draft potential first round draft picks. Specifically, Rosenhaus's dealings as an agent for former University of Miami (Fla.) wide receiver Yatil Green in the 1997 NFL Draft provide an example of this marketing and competition.¹³⁰ Before Green was selected by the Dallas Cowboys, Rosenhaus commenced discussions with different NFL coaches, such as New Orleans Saints Head Coach Mike Ditka, about the possibility of Green being drafted by their clubs.¹³¹ In fact, minutes before the Cowboys decided to draft Green, Cowboys Head Coach Jimmy Johnson telephoned Rosenhaus and Green to discuss the possibility of Green playing for the Cowboys.¹³² Agents help introduce these potential draftees to various clubs, and as a result, create interest among clubs to compete with one another in order to draft the players that they desire.¹³³

he has at marketing his skills to an NFL club. In a way, this is true with many jobs, for the longer one trains or goes to school, the more likely one will be able to create a sustained competitive market for one's services.

¹²⁷ See WHITTINGHAM, *supra* note 25 (detailing the draft process in general); RON SIMON, THE GAME BEHIND THE GAME 111-28 (Voyageur Press 1993) [hereinafter SIMON] (detailing the bargaining power that an agent has when dealing with an NFL club after the player is drafted); DREW ROSENHAUS, A SHARK NEVER SLEEPS (Pocket Books 1997) [hereinafter ROSENHAUS] (detailing the bargaining power that an agent has when dealing with an NFL club before and after the player is drafted).

¹²⁸ *But see* ROSENHAUS, *supra* note 127, at 147-57 (explaining that most of the competition, especially competition created by agents, for player services occurs during free agency).

¹²⁹ In fact, Rosenhaus, one of the most powerful player agents in professional sports, was a model for Tom Cruise's character in Cameron Crowe's Academy Award winning film *Jerry Maguire* (1996), a drama based on the life of a sports agent. See Jeff Merron, *Reel Life: 'Jerry Maguire,' available at* <http://espn.go.com/page2/s/closer/020716.html> (last visited Apr. 1, 2004).

¹³⁰ See ROSENHAUS, *supra* note 127, at 167-82.

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *supra* footnotes 137, 155.

Admittedly, a potential draftee suing the NFL may make the counterargument that the increased bargaining power from agents only affects those who are first round picks. From his experience in both the NFL draft and the NFL, Rich Mercier observed that after the first round “agents don’t have [as much] bargaining power [or influence with NFL clubs].”¹³⁴ In fact, he noted that aside from the top picks and free agents, the agent’s bargaining power and influence is not as prevalent.¹³⁵ Nevertheless, it seems that agents are still able to partially influence a club’s draft selections in the later rounds. Agents are able to market a *lower rated* player with an adequate amount of college football experience to various clubs because they have established relationships with particular clubs.¹³⁶ This results in more competition between these clubs to draft this player.¹³⁷

Without these Special Draft Eligibility Rules, the market for player services would be less competitive than it is currently. An agent would have a more difficult time influencing a club to draft a *lower rated* player because clubs would have more difficulty projecting the player’s current and future value due to his minimal experience and exposure (fewer than three years removed from high school graduation). A club is more likely to draft a player via the agent’s *sales pitch* if the player has developed his skills as a football player in both practice and in competition. The three-year threshold included in the Special Draft Eligibility Rules reflects the period of time which is needed in order for *lower rated* potential draftees, NFL clubs, and agents to act efficiently, creating more competition in the draft market—the agent being the catalyst for a club’s increased interest in a player and the resulting competition between multiple clubs for this player.¹³⁸ Even though the Special Draft Eligibility Rules are anticompetitive in that they have an economic effect of keeping certain players ineligible, the Special

¹³⁴ Interview with Rich Mercier, Former Offensive Lineman for the Baltimore Ravens, in Miami, Fla. (Nov. 17, 2003).

¹³⁵ See *id.* See also Clark, *supra* note 117, at D01 (reporting how the salaries for first round draft picks decrease from the top of the first round to the bottom of the first round).

¹³⁶ In this case, the three-year threshold reflects a period of time that is necessary in order for *lower rated* potential draftees, NFL clubs, and agents to act in an efficient manner, so that the market can be pro-competitive.

¹³⁷ In other words, Club A may trade a player, or another draft pick, for Club B’s earlier draft pick, to ensure that Club A will be able to select, or have a better chance at selecting, the player that it desires.

¹³⁸ An agent facilitates more competition between clubs if the player has *good playing experience* and has matured both mentally and physically because NFL scouts and clubs are more influenced if the player is fully ready to play at the NFL level consistently. A player is more likely to play consistently well at the NFL level, if he has played consistently well against good competition—as compared to a currently ineligible player who may need more years to develop or may need more years to show that he is a consistent performer.

Draft Eligibility Rules actually increase competition for player services because they create a more efficient market for agents to sell players' services to NFL clubs.

A potential draftee would attempt to counter this argument by showing that this agent market efficiency argument does not affect NFL club behavior enough for Special Draft Eligibility Rules to satisfy antitrust laws; the NFL market is still chaotic and will never be truly efficient. Rob Chudzinski, Offensive Coordinator at University of Miami (Fla.), speculates that the "NFL has more resources [and] would make adjustments [to find the best players]."¹³⁹ Furthermore, in the past, the NFL and other professional sports leagues, like the National Basketball Association (NBA),¹⁴⁰ have found players who had little exposure. Major League Baseball (MLB) has found future star players with little exposure,¹⁴¹ and the Baseball draft contains many more high school players than the NBA draft.¹⁴² Moreover, players like Maurice Clarett are already known on a national level. Presumably, the NFL would have no problem scouting players like Clarett, or other college superstars who are not yet eligible for the NFL draft.

Although a player like Clarett may still have enough exposure to create a competitive market for his services, most players do not have such national

¹³⁹ Interview with Rob Chudzinski, Offensive Coordinator at UM, in Coral Gables, Fla. (Nov. 19, 2003). After the completion of the 2003 college football season, Chudzinski resigned from his positions as Offensive Coordinator and Tight Ends Coach at UM, and accepted a position as the Tight Ends Coach for the Cleveland Browns. As a collegiate player, Chudzinski played Tight End at UM where he earned three letters and helped UM win two of its five NCAA National Championships.

¹⁴⁰ However, the NBA's situation is slightly different than the NFL's situation because each NBA club has fewer players and positions needed to fill a squad. The NBA is also able to scout foreign players more easily because many of these players already play professional basketball in Europe. Furthermore, NBA clubs are able to scout younger players in the United States easier than NFL clubs because basketball players play in more games than football players, and high school basketball players partake in Amateur Athletic Union (AAU) Basketball, which allows the best players to play against each other in tournaments where scouts can easily watch and assess talent. There is no AAU football organization. See Telephone Interview with Martin J. Ganderson, Esq., former Norfolk, Virginia AAU Director for the Boo Williams Summer League AAU Basketball Program (Apr. 12, 2004) (agreeing with the author's aforementioned statements).

¹⁴¹ Baseball, like basketball, also has an AAU organization. AAU Baseball's function in the draft process is similar to AAU Basketball's function in the draft process. Telephone Interview with Martin J. Ganderson, Esq., former Norfolk, Virginia AAU Director for the Boo Williams Summer League AAU Basketball Program (Apr. 12, 2004) (agreeing with the author's aforementioned statements).

¹⁴² This is evidenced by the fact that MLB has an Amateur Draft, in which high school players are selected by MLB clubs. However, MLB is very different from the NFL because MLB has an extensive farm system which allows MLB clubs to foster player development—especially high school players. The NFL's farm system is College Football, although both Rob Chudzinski and Bill Arnsparger note that the NFL has pseudo farm systems like NFL Europe and the Arena Football League. See Interview with Rob Chudzinski, Offensive Coordinator at UM, in Coral Gables, Fla. (Nov. 19, 2003); E-mail Interview with Bill Arnsparger, former NFL Head Coach (Nov. 27, 2003).

exposure (marketability). The draft market becomes less efficient and less competitive overall when players do not have marketability because NFL clubs have a more difficult time seeking out players who do not have such national exposure. The Special Draft Eligibility Rules make the market, as a whole, more competitive in both an athletic and economic sense, because without these eligibility requirements, the majority of players entering the draft would have no marketability. Players who develop over three years¹⁴³ after high school graduation per the Special Draft Eligibility Rules will most likely have higher marketability than a player who has not developed over three years. This increased marketability fosters competition between each NFL club for player services because these potential draftees are able to attract a club's interest more easily. Likewise, the *draft risk* is partially reduced because clubs are better able to assess these players' talents. Without the proper information, the NFL draft will not run efficiently, and become less competitive.

Moreover, many sources agree that the NFL draft (from a player's and club's standpoint) is more efficient and competitive with the Special Draft Eligibility Rules in place. According to sources at the NFLPA, "players are better off staying in college and giving both their bodies and minds time to fully mature. That way, they'll enter the league with their earning potential at its highest—a wise decision, given the brevity of the typical pro career."¹⁴⁴ Furthermore, Bill Arnsparger explains that neither a "high school player [nor] a young college player are ready for the physical and mental challenges of the NFL. In fact, [many players] who have completed their eligibility are not ready for the faster pace [of the NFL]. Pro football is very demanding in today's world."¹⁴⁵ Even those people who believe that a core of younger college players could meet the mental and physical demands of the NFL still admit that most are not ready.¹⁴⁶ For example, through his experience as

¹⁴³ One can assume that a player will become a better player with more development.

¹⁴⁴ Clarke, *supra* note 117, at D01.

¹⁴⁵ E-mail Interview with Bill Arnsparger, former NFL Head Coach (Nov. 27, 2003). Washington Redskins Linebacker Lavar Arrington and Detroit Lions Defensive Lineman Dan Wilkinson, both of whom left early for the NFL draft, feel that no players are ready for the stresses of the NFL before the three-year threshold of the NFL's Special Draft Eligibility Rules. See Clarke, *supra* note 117, at D01.

¹⁴⁶ When a college player is debating on whether to declare himself eligible for the draft under the Special Draft Eligibility Rules, the NFL offers to evaluate the player, free of charge, to inform him of where he may be drafted. The NFL offers this service because many players who desire to declare themselves eligible under the Special Draft Eligibility Rules are not ready for the NFL. See Telephone Interview with Bill Arnsparger, former NFL Head Coach (Nov. 21, 2003). The NFL seeks to dissuade players from entering the draft who will not be top draft picks, so they can play college one more year and improve for the draft the following year. This helps to ensure that the NFL will have better players entering the draft. Accordingly, in his experience as an NFL coach, Arnsparger stated, "generally half

Senior All-American Linebacker for the University of Miami (Fla.) playing alongside and against the top college football players in the country, Jonathan Vilma¹⁴⁷ feels that while there are some younger college players who are ready for the NFL on a physical level, most are not ready on a mental level; only a select few could compete in the NFL.¹⁴⁸ Moreover, in his experience as both a player and a college coach, Chudzinski believes that “under one percent of [freshman and sophomores in College Football] could play in the NFL if they left early [for the NFL draft].”¹⁴⁹

If the football players currently entering the draft, per the Special Draft Eligibility Rules, are better football players,¹⁵⁰ one would assume that better players marketing better services would create a more athletically and economically competitive market for player services between each member club. After all, NFL clubs do not want *mediocre* football players because this would create less exciting games and result in a decline in revenue.¹⁵¹ NFL clubs only want to select the best players eligible for the draft¹⁵² because the NFL

of those drafted would be released by the start of the regular season [because they are not ready or able to play football on the NFL level].” E-mail Interview with Bill Arnsperger, former NFL Head Coach (Nov. 27, 2003). Moreover, unlike all other major professional sports leagues, the vast majority of the contracts in the NFL are not guaranteed, so that if a player is injured or does not perform during training camp, a club is allowed to cut him and pay him a pro-rated salary. See SIMON, *supra* note 127, at 116.

¹⁴⁷ Vilma is also slated to be a first round draft pick in the 2004 NFL Draft. See Len Pasquarelli, *Size Won't Stand in Vilma's Way* (Feb. 23, 2003), available at http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=1742044.

¹⁴⁸ Jonathan Vilma believes he will be a first round NFL draft pick, and would have been selected as a top draft pick if he had chosen to forgo his junior year at the UM and entered the draft early (as he has competed against and played alongside current NFL players). He is basing his opinion on his assessment of other players' ability as compared to his own. His ability is close to that of an NFL player. See Interview with Jonathan Vilma, All-American Senior Linebacker at UM, in Coral Gables, Fla. (Nov. 3, 2003). Other players agree with Vilma. See Interview with Eric Winston, Sophomore Offensive Lineman at UM, in Coral Gables, Fla. (Nov. 3, 2003). See Interview with Brock Berlin, Redshirt Junior Quarterback at UM, in Coral Gables, Fla. (Nov. 3, 2003). See Interview with Baraka Atkins, Redshirt Freshman Defensive Lineman at UM, in Coral Gables, Fla. (Nov. 11, 2003). See Interview with Vernon Carey, Redshirt Senior Offensive Lineman at UM, in Coral Gables, Fla. (Nov. 18, 2003). See Interview with Chris Myers, Redshirt Junior Offensive Lineman at UM, in Coral Gables, Fla. (Nov. 3, 2003). See Interview with Jon Peattie, Redshirt Freshman Placekicker at UM, in Coral Gables, Fla. (Nov. 3, 2003).

¹⁴⁹ Interview with Rob Chudzinski, Offensive Coordinator at UM, in Coral Gables, Fla. (Nov. 19, 2003). Chudzinski also commented that most “underclassmen aren't ready to compete in college, much less the professional level.” *Id.*

¹⁵⁰ One can assume a player who has developed mental and physical football skills for at least three years (after graduating high school) is likely to be a better football player than he would have been prior to this training and development.

¹⁵¹ See *supra* Parts II.A-B.

¹⁵² NFL clubs want the best players who are able to play the season directly following the NFL draft, and who are most likely to help the club better itself on the field. See Interview with an NFL club executive and an NFL club attorney who both requested to remain anonymous (Nov. 5, 2003).

desires to maximize its revenues—both shared and non-shared revenues.¹⁵³ The NFL is simply creating an efficient, but smaller, market through the exclusion of players who would not be selected in the draft due to a lack of experience, as well as a lack of mental and physical skills.¹⁵⁴

Competition for player services will increase with better players in the draft, as NFL clubs desire players who are more likely to succeed;¹⁵⁵ there is less competition for players' services in a mediocre draft market. Joel Rodriguez, a Redshirt Junior Center at the University of Miami (Fla.), feels that the NFL's Special Draft Eligibility Rules help create "better [player] marketability . . . by making sure that players have been in good competition."¹⁵⁶ As a player who may desire to play in the NFL, it is important for Rodriguez to present his name and football ability to the NFL because this creates interest.¹⁵⁷ A player with only one year of college football experience, or a player attempting to enter the draft directly out of high school, would not have this same marketability or talent, and therefore, not catch the attention of NFL clubs. This results in a decrease in competition among clubs for player services, as a whole, and causes the market to become watered down with less talented players.

¹⁵³ Even though the NFL's revenue sharing business model depends upon each club having relatively equal talent, clubs still compete with one another in order to get the players that will best help their organization succeed on the field. See Interview with an NFL club executive and an NFL club attorney who both requested to remain anonymous (Nov. 5, 2003). This results in an increase of the non-shared revenues available to each individual club. See *supra* Part II.A.

¹⁵⁴ Although physical and mental maturity is a concern that is outside the scope of an antitrust law, it is relevant in this case because the level of maturity helps create an efficient draft market for the NFL.

¹⁵⁵ NFL clubs compete with one another in order to draft the best players. One common technique that NFL clubs employ in order to secure the draft rights of a particular player is to trade up in the draft. For example, Club A (which has the fifth overall pick) and Club B (which has the sixth overall pick) will both offer to trade current/future draft picks, or current players, with Club C (which has the third overall pick) in order to have a better chance at drafting the player that it desires; Club A and Club B are competing with each other for Club C's higher draft pick slot. This competition was best exemplified in the 2004 NFL Draft where many NFL clubs traded up in the draft to ensure that they would be able to draft the players that they desired. See Associated Press, *Chargers Draft Eli, Then Trade Him to the Giants* (Apr. 28, 2004), available at <http://sports.espn.go.com/nfldraft/draft04/news/story?id=1788911> (noting the many NFL clubs which traded up in the first round of the 2004 Draft). An NFL club would not trade up in the draft to select a player unless the NFL club believed that the player is likely to succeed in the NFL.

¹⁵⁶ Interview with Joel Rodriguez, Redshirt Junior Center at UM, in Coral Gables, Fla. (Nov. 11, 2003).

¹⁵⁷ A potential draftee receives more exposure through playing college football. Furthermore, by playing at a college which plays against other good college football teams, a potential draftee is able to show NFL clubs his talent, which creates competition between NFL clubs to attain his draft rights. This interest is then perpetuated as clubs observe prospective draftees at NFL scouting combines or at college team games, practices, or workouts.

By barring these players from entering the draft, the NFL is creating a more efficient draft market because the draft will consist of a higher proportion of marketable players, as compared to a draft in which these less qualified players could enter at any time. Clubs will compete more for players in a market designed to create the most qualified potential draftee because the *draft risk* is reduced; clubs will be able to assess talent more accurately and efficiently. Moreover, the Special Draft Eligibility Rules ensure that each subsequent draft has the most marketable players possible, in that those less marketable players, who would have left prior to the three year threshold, will now develop more marketability, resulting in more competition between clubs.¹⁵⁸

Nevertheless, this efficiency model argument does present a flaw. If the Special Draft Eligibility Rules were not in effect, then presumably some NFL clubs would select a few younger players currently ineligible under the Special Draft Eligibility Rules. Some clubs may feel that the *draft risk* of a younger player is low when compared to the player's possible future returns. Moreover, both the NBA and the NFL made exceptions to their eligibility rules at various times in the past in order to avoid potential lawsuits.¹⁵⁹ In

¹⁵⁸ For example, in 2003, then Senior California-Berkeley Quarterback Kyle Boller was able to attract the attention of the Baltimore Ravens, an NFL club, during the draft, because of his play during his senior season. In fact, Boller impressed the Ravens so much that the Ravens traded up in the draft in order to draft Boller. Boller created more marketability for himself and created competition among teams to draft him because he did not leave for the NFL as a junior; the Ravens would not have traded to draft Boller if no other team desired to draft him. Like Boller, Senior University of Mississippi Quarterback Eli Manning decided to remain in college for his senior year, and as a result, he became the first player selected in the 2004 NFL Draft. See Mel Kiper, Jr., *Gamble, Wilfork Join Big Board* (Jan. 7, 2004), available at http://proxy.espn.go.com/nfl/columns/story?columnist=kiper_jr_mel&id=1702575 (commenting that "[i]f Manning had declared for the [2003] draft last year, he could have been a late first-rounder"). Although no NFL club traded up to draft for Manning, see ESPN.com News Services, *Chargers Still Listening to Offers* (Apr. 16, 2004), available at <http://sports.espn.go.com/nfldraft/draft04/news/story?id=1783996> (noting that many NFL clubs were interested in trading up so that they could select Manning first), the New York Giants eventually traded its first round draft pick, Senior North Carolina State Quarterback Philip Rivers, its 2004 third round pick, and its first and fifth round picks in 2005 in order to acquire Manning's rights. See Associated Press, *Swap at the Top* (Apr. 24, 2004), available at <http://sportsillustrated.cnn.com/2004/football/nfl/specials/draft/2004/04/24/draft.saturday.ap/index.html>. By analogy, this same analysis can be applied to those players who choose not to challenge the NFL's Special Draft Eligibility Rules and remain in college until they are draft eligible per the three-year threshold—a threshold in which the NFL believes is the requisite amount of time a player needs to develop adequately for the NFL.

¹⁵⁹ After Spencer Haywood, a professional basketball player, challenged the NBA draft rules, in *Denver Rockets v. Haywood*, 325 F. Supp 1049 (D. Cal. 1971), the NBA granted exceptions to its rules through a hardship exemption, but eventually dropped this rule and opened the NBA draft to any person who had graduated from high school. See Rosner, *supra* note 79, at 550-53. Prior to the enactment of the Special Draft Eligibility Rules, the NFL had granted special exemptions to the NFL Draft Rules to

reaction to the rise in potential challenges, and the fact that younger players were developing faster both physically and mentally at the high school and college level,¹⁶⁰ the NBA now allows high school players to enter its draft.¹⁶¹ Likewise, the NFL amended its original draft eligibility rules and created its Special Draft Eligibility Rules.¹⁶² Thus, it seems that the NFL, along with the NFLPA, could create a mechanism in order to examine a player's special case.¹⁶³

Yet, even if the NFL were to create a mechanism to examine *special cases*, this procedure still creates the same inefficiencies that occur when there are no eligibility requirements. NFL clubs would still scout all players because clubs would not know which players would declare themselves eligible for the draft and for which year. Additionally, more under-qualified players would probably enter the draft believing they could compete in the NFL.¹⁶⁴

several players, including Notre Dame running back Al Hunter in 1977 and Pittsburgh running back Craig (Ironhead) Heyward in 1988. In 1989, the NFL granted twenty-five hardship exemptions to twenty-five underclassmen. See *id.* at 556.

¹⁶⁰ In his experience as Head Strength and Conditioning Coach for Cornell University and Former Offensive Lineman for the Tulane University Green Wave, Tom Howley believes that:

incoming freshmen football players are becoming more physically fit as training technology *trickles down* from professional and collegiate programs. High school coaches are becoming more aware of the advantages of having a year-round training program and have better access to information via coaching clinics, seminars, trade magazines, etc. In addition, many of today's high school coaches grew up doing some sort of training (either with the team or on their own) and are more aware than their predecessors of the benefits of physical fitness (injury prevention and performance enhancement). In addition, time and facility restrictions at the high school level will impact the quality and quantity of the program.

E-mail Interview with Tom Howley, Head Strength and Conditioning Coach for Cornell University and Former Offensive Lineman for the Tulane University Green Wave (Feb. 5, 2004).

¹⁶¹ See NBA COLLECTIVE BARGAINING AGREEMENT art. X, § 10 (1999), available at <http://www.nbpa.com/cba/articleX.html> (last visited Apr. 4, 2004).

¹⁶² The NFL's original draft eligibility rules regarding college football players are still the baseline rules of eligibility. These rules states that a college football player may enter the draft if all of his college football eligibility has expired, five years have elapsed since the player first entered a college, or the player has graduated from a college. See CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE art. XII, § 12.1(A) (2003). The Special Draft Eligibility Rules simply amended these baseline rules to allow for players to apply to enter the draft after "three full college seasons have elapsed since their high school graduations." CONST. AND BYLAWS FOR THE NAT'L FOOTBALL LEAGUE app. 1990-4(1) (2003).

¹⁶³ If the NFL and the NFLPA created a mechanism—and codified it in the CBA—to allow those who are currently exempted from the draft to petition the NFL to enter the draft, then presumably it would be exempt from antitrust scrutiny under the non-statutory labor exemption. See *supra* Parts II.B, IV.B.2. See also *Clarett v. Nat'l Football League*, No. 03-CV-7441, 2004 U.S. Dist. LEXIS 1396, at *91-93 (describing less restrictive alternatives to the Special Draft Eligibility Rules).

¹⁶⁴ However, many players would still choose not to enter the draft early because they realize that they are not physically and mentally ready for the NFL. Accordingly, those players who leave early, but who are not ready for the NFL's high level of play, are less likely to be drafted, and are more likely to be cut from an NFL team in training camp, as they do not possess the talent to play in the NFL. Players

This results in a larger mediocre draft pool, which would result in less athletic competition, and less economic competition. By preventing a player like Maurice Clarett from entering the draft for an additional year, the NFL is merely creating a more efficient and competitive draft market for all potential draftees' services. If Clarett has another successful college football season, more clubs will compete for his draft rights. If he does not have another successful season, then clubs will not compete as much for his services and will compete for others who have proven that they are more consistent and better equipped to succeed at the NFL level after three years of preparation.¹⁶⁵ The Special Draft Eligibility Rules guarantee that the draft will be as athletically competitive as possible each year because they guarantee that all players have at least a certain amount of marketability and *human football capital*.¹⁶⁶ The better the pool of players in the draft each year, the more athletic competition there is between clubs for players' services in the draft market each year. Thus, this increased athletic competition results in greater economic competition between each club.

5. THREE-YEAR THRESHOLD AS NON-ARBITRARY

One final hurdle that the NFL may face is whether the three-year threshold is so arbitrary that there is no valid reason for adopting it,¹⁶⁷ especially when compared to other professional leagues¹⁶⁸ and the history of the draft.¹⁶⁹ However, the NFL should argue that this three-year

choose to stay in their college football programs, for these schools place student athletes in highly intense game situations, lifting programs, and daily practices, so that they can hone their skills as football players.

¹⁶⁵ Note that this argument worries many players because they may injure themselves, or their *player stock* may decrease before they become eligible. Therefore, they may either never play football at the professional level, or play with a substantially smaller contract than they would have had minus the Special Draft Eligibility Rules. *E.g.*, Interview with Ryan Moore, Redshirt Freshman Wide Receiver for UM in Coral Gables, Fla. (Nov. 12, 2003).

¹⁶⁶ The Special Draft Eligibility Rules guarantee that the draft will be as athletically competitive as possible each year because it guarantees that all players have a certain amount of marketability and *human football capital*.

¹⁶⁷ Howley stated that he did not "have a clue as to why the NFL has a rule preventing players from leaving [for the NFL] prior to [the three-year threshold]." E-mail Interview with Tom Howley, Head Strength and Conditioning Coach for Cornell University and Former Offensive Lineman for the Tulane University Green Wave (Jan. 4, 2004).

¹⁶⁸ None of the other major professional sports leagues' (NBA, MLB, NHL) eligibility requirements are as stringent as the NFL's eligibility requirements. See Jeff Schultz, *Clarett's Suit Opens NFL Pandora's Box*, *The Atlanta Journal-Constitution* (Sept. 25, 2003), available at www.ajc.com/sports/content/sports/columns/schultz/092503.htm (speculating why the NBA, MLB, and NHL have less stringent draft eligibility requirements than the NFL, and the repercussions of each professional leagues' less stringent draft eligibility requirements).

¹⁶⁹ See Rosner, *supra* note 79, at 556. The NFL's current and past eligibility rules have been the

threshold requirement is not arbitrary and serves a legitimate business purpose.¹⁷⁰ For example, Arnsparger states that the current three-year threshold allows players to make key “gains in maturity [both] physically and mentally.”¹⁷¹ These gains made during the three-year threshold are essential, for “many [players who] have completed their eligibility [requirements] are not even ready for the faster pace [of the NFL].”¹⁷² Furthermore, Bernie DePalma, Head Athletic Trainer/Physical Therapist for Cornell University, finds that the three-year threshold is justified.¹⁷³ He asserts that “an [eighteen] year old cannot compete physically with a mature [twenty-four] year old, or even a [twenty-one] year old—there’s a tremendous difference physiologically (strength, power, muscle endurance, etc.).”¹⁷⁴

Although a draft age restriction on its face would violate antitrust law,¹⁷⁵ this three-year threshold is technically not an age requirement since persons applying for eligibility pursuant to the rule can be of different ages.¹⁷⁶ Eligibility depends on a player’s graduation date from high school; the three-year threshold is merely an experience and maturity requirement, not an age requirement. Presumably, the NFL believes that three years is needed for players to develop both mentally, on and off the field, and physically for the NFL.¹⁷⁷ On the other hand, if the NFL is wrong, and most players can

four or five year rule. It seems that the NFL amended its eligibility rules to allow for the current Special Draft Eligibility Rules and the three-year threshold to avoid potential future lawsuits of underclassmen who desired to enter the NFL draft before they graduated or were no longer eligible. Accordingly, the NFL may one day amend its current Special Draft Eligibility Rules to allow for younger players to enter the draft earlier.

¹⁷⁰ See *supra* Part II.A.

¹⁷¹ E-mail Interview with Bill Arnsparger, former NFL Head Coach (Nov. 27, 2003).

¹⁷² *Id.* John Gruden, Head Coach for the Tampa Bay Buccaneers, commented: “I don’t see how an [eighteen] or [nineteen] year old is ready for the NFL. This is a year-round job and they’ve never been through that. Personally, I don’t want any [eighteen] or [nineteen] year olds in my locker room.” ESPN.com News Services, *Coach Contradicts Emmitt’s Support* (Sept. 26, 2003), available at <http://sports.espn.go.com/nfl/news/story?id=1623700>.

¹⁷³ See E-mail Interview with Bernie DePalma, Head Athletic Trainer/Physical Therapist for Cornell University (Jan. 6, 2004).

¹⁷⁴ *Id.*

¹⁷⁵ See *Linsman v. World Hockey Ass’n*, 439 F. Supp 1315, 1320-21 (D. Conn. 1977).

¹⁷⁶ Therefore, a gifted student athlete could potentially graduate high school at the age of fifteen, and declare for the NFL draft at the age of eighteen. However, an NFL club is not likely to draft such a young player due to his lack of physical and mental development.

¹⁷⁷ This is similar to the arguments the government makes when setting age requirements for alcohol sales/consumption and a driver’s license. Although the aforementioned regulations serve a legitimate state interest, it would follow that the Special Draft Eligibility Requirements serve a legitimate interest in the eyes of the NFL, which for all intents and purposes is equivalent to the government in regards to football.

compete in the NFL before the three-year threshold accrues,¹⁷⁸ one presumes that there would have been more lawsuits challenging the NFL's Rules in the past, other than Claret's pending lawsuit.¹⁷⁹ Nonetheless, the three-year threshold is rationally related to a legitimate business purpose because it increases competition between clubs for players' services in the draft market. The threshold also ensures that there will not be a "chaotic bidding market for the services of college players."¹⁸⁰ Further, it helps to increase the competitive nature of the league, which results in more revenues.¹⁸¹ After all, why should the NFL be penalized for having a threshold experience requirement when many jobs demand a requisite amount of experience which is not in violation of antitrust law?

V. FIFTH ROUND—CONCLUSIONS

In order to prevail against an antitrust challenge to its Special Draft Eligibility Rules, the NFL must prove, under a Rule of Reason analysis, that its Special Draft Eligibility Rules "have positive, economically [p]rocompetitive benefits that offset its anticompetitive effects, or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is [i]nsubstantial."¹⁸² It seems that the NFL could have presented the aforementioned efficiency arguments to prove that its Special Draft Eligibility Rules help to foster athletic and economic competition between NFL clubs for potential draftees' services. In fact the Special Draft Eligibility Rules create a more procompetitive market than if they were not in effect. However, despite these arguments, the key to success in challenging the Special Draft Eligibility Rules under Section 1 of the Sherman Act will be whether a court is able to understand the NFL's unique business structure, the game and nature of professional football, and the importance of the draft process in general. If the NFL had presented the aforementioned arguments, then Paul Tagliabue, the present Commissioner of the NFL, would not have to worry about saying: with the first pick of the

¹⁷⁸ See Rovell, *supra* note 123, at 34.

¹⁷⁹ In 1994, Florida State Wide Receiver Tamarick Vanover, a true sophomore, attempted to challenge the NFL's Special Draft Eligibility Rules, but did not succeed. See Rosner, *supra* note 79, at 556 n.128.

¹⁸⁰ *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1181 (D.C. Cir. 1978). Moreover, the *Smith* court stated that "some form of player selection system may serve to regulate and thereby promote competition in what would be a chaotic bidding market for the services of college players." *Id.* The Special Draft Eligibility Rules and the three-year threshold do regulate and promote competition. See *supra* Part IV.B.

¹⁸¹ See *supra* Part II.A.

¹⁸² *Smith*, 593 F.2d at 1188-89.

NFL draft, an NFL club selects a player who is less than three years out of high school.

