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# Regulation of Playing Equipment by Sports Associations: The Antitrust Implications

Shlomi Feiner

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# REGULATION OF PLAYING EQUIPMENT BY SPORTS ASSOCIATIONS: THE ANTITRUST IMPLICATIONS

SHLOMI FEINER\*

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## I. INTRODUCTION

Sports are big business. The assertion has become a mantra for those disenchanted with the current state of professional and amateur athletics. However, recollection of *glory days* is often obscured by the passage of time. Sports, and in particular professional sports, have been a thriving industry for over a century. Moreover, as with other industries, sports leagues' and associations' conduct has been the subject of administrative and judicial scrutiny for decades. In antitrust law, the 1922 Supreme Court decision in *Federal Baseball Club v. National League*<sup>1</sup> marked the inception of Major League

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\* This article was completed in early 1999 in conjunction with the author's LL.M. studies. Subsequent developments in the ongoing lawsuits cited herein have not been incorporated. Nonetheless, the relevance of such cases and the conclusions of this article, in the author's opinion, remain current.

<sup>1</sup> Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

Baseball's antitrust exemption. Other entities in the sports sector have not been as fortunate.

Antitrust law is designed to promote competition in all aspects of American life. It has been described as the "Magna Carta of free enterprise."<sup>2</sup> Ideologically, competitive market forces will deliver the optimal social outcomes.<sup>3</sup> The concern is that, with respect to the sports industry, courts have departed from this philosophy. Antitrust scrutiny of the conduct of sports bodies has often been less rigorous than that of conventional industries.<sup>4</sup> However, the free market principles on which antitrust law is based appear equally applicable in the sports context. This "policy of non-enforcement," as some have described it, has effectively granted all professional sports an exemption from antitrust laws.<sup>5</sup>

Several justifications have been advanced for the generally deferential approach of the judiciary. Most often, mention has been made to the unique nature of organized sport, where "horizontal restraints on competition are essential if the product is to be available at all."<sup>6</sup> This view is prevalent in the context of sports association equipment rules. Without standard rules of play, no meaningful competition on the playing field can occur. However, antitrust concerns may arise when the rules move beyond mere regulation of play to the limitation of equipment used by the participants. The governing bodies clearly see the latter as an extension of the former — regulation of equipment is essential to the preservation of the game. Unsurprisingly, in the view of a senior golf official, the purpose of the rules

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<sup>2</sup> The Supreme Court, in *United States v. Topco Ass'n*, 405 U.S. 596, 610 (1972), stated: Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

<sup>3</sup> The Supreme Court conveyed this view in *N. Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), stating that the basic premise of the Sherman Act was "that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

<sup>4</sup> Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 264 (1993).

<sup>5</sup> John J. Scura, *The Time Has Come: Ending the Antitrust Non-Enforcement Policy in Professional Sports*, 2 SETON HALL J. SPORT L. 151, 172-73 (1992).

<sup>6</sup> *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984).

is "to preserve the traditions of the game, and to insure that a player's score is the product of his skill, rather than his equipment."<sup>7</sup>

Conflicting influences cloud the antitrust analysis of such rules. To an extent, equipment rules are undoubtedly essential for the sports product to exist. Additionally, in other industries, standards set by joint venture parties or trade associations often exhibit pro-competitive effects.<sup>8</sup> These factors prompt some writers to suggest that no serious antitrust allegations can be asserted against sports organizations for rules pertaining to the configuration of playing venues, the playing equipment used, or the game's conduct.<sup>9</sup> However, as detailed in other industries, product standards can have significant anti-competitive effects, particularly on innovation.<sup>10</sup> For this reason, courts have been averse to dismissing such antitrust claims outright, even in the context of sports organization equipment rules. Rather, they have preferred to inquire into the competitive effects of the impugned rule.

In contrast to some commentators' views, the potential scope of equipment rule antitrust litigation is significant. The history of the USGA golf club rules and the NCAA aluminum baseball bat rules, two current areas of controversy, illustrate this. These organizations' efforts and the opposition they have encountered from sporting goods manufacturers are detailed in Part II. The judiciary's attempts to resolve these types of disputes are presented in Part III. The jurisprudence reveals that the courts have indeed adopted a deferential approach, resorting to a rule of reason analysis of sports organization rules. The judiciary, while balancing the procompetitive and anticompetitive effects, routinely cedes to the unique nature of organized sport in rejecting antitrust liability. However, the difficulty for sports associations arises from the *potential* for liability. The lack of an explicit exemption, despite de facto treatment as such with respect to rules regulating equipment, leaves sports organizations vulnerable to antitrust litigation. The experience of the PGA and USGA, discussed in Part II, reveals the value of litigation threats. Given the approach adopted by the courts, the additional step of limited antitrust immunity would permit sports organizations to mandate the rules of play essential for the existence of their "product." In this respect, a brief respite from judicial scrutiny would not harm

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<sup>7</sup> Affidavit of Frank Thomas, Technical Director of the USGA, *quoted in* Weight-Rite Golf Corp. v. USGA, 766 F. Supp. 1104, 1107-08 (M.D. Fla. 1991), *aff'd*, 953 F.2d 651 (11th Cir. 1992).

<sup>8</sup> Sean P. Gates, *Standards, Innovations, and Antitrust: Integrating Innovation Concerns into the Analysis of Collaborative Standard Setting*, 47 EMORY L.J. 583, 583-84 (1998).

<sup>9</sup> Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2633 (1996).

<sup>10</sup> Gates, *supra* note 8, at 584.

competition. Rather, it would further the rationales of antitrust law, and allow free competition to yield the optimal results.

## II. CURRENT SPORTING GOODS MANUFACTURER — SPORTS ASSOCIATION CONFLICTS

Some commentators have expressed considerable skepticism as to the viability of antitrust claims by equipment manufacturers relating to playing equipment standards established by sports leagues or associations.<sup>11</sup> Nonetheless, several sports regulatory bodies have encountered precisely such claims.<sup>12</sup> Recent events in several areas have triggered the potential for future antitrust litigation. This section will review the two most prominent instances, involving professional golf<sup>13</sup> and college baseball.<sup>14</sup>

### A. *The Rules of Golf*

#### 1. BACKGROUND

The sport of golf is overseen by the United States Golf Association (USGA) in North America and by the Royal and Ancient Golf Club of St. Andrew's (R&A) in the rest of the world. These bodies administer the Rules of Golf in an effort to preserve the character and integrity of the game of

<sup>11</sup> For example, Professor Gary Roberts stated that "[i]t would require an active imagination to claim that any of the rules [that govern the actual conduct of athletic contests, including . . . required equipment] violate the rule of reason." See Gary R. Roberts, *supra* note 9, at 2648.

<sup>12</sup> These cases will be discussed in Part III.

<sup>13</sup> Golf equipment is a \$2 billion industry worldwide, dominated by five firms: Titleist/Cobra, Callaway, Taylor Made, Spalding/Top Flite, and Karsten Manufacturing. See Gil Copps, *High-Tech Driving for Lower Scores*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, May 4-10, 1998, at 28.

<sup>14</sup> Potential litigation is not limited to these sports, however. In recent years the Union Cycliste Internationale (UCI) has banned extended handlebars designed to suit the "Superman" racing style of bicyclist Graeme Obree. Previously, Obree's "toadstool"-shaped saddle was rejected by the UCI. UCI president Hein Verbruggen encapsulated the usual rationale behind such decisions: "We want riders to win because they are the best, rather than because they have the best equipment." Thus, the UCI altered their Article 49, governing both the rider's position and equipment. See Robin Nicholl, *Obree's Riding Position Banned*, THE INDEPENDENT (LONDON), Oct. 10, 1996, at 29; Robin Nicholl, *Cycling: No Daylight for Obree as Riding Position Falls Foul of Rules*, THE INDEPENDENT (LONDON), Aug. 16, 1994, at 36. See also Matthew E. Mantell, *What is the UCI? Union Cycliste Internationale*, BICYCLING, June 1989, at 64 (providing an overview of the administrative structure of the UCI); John Rofé, *High-Tech Advances Drive Bike Market; With Sales Sagging in the '90s, Innovations are Especially Important in Competitive Bicycle Industry*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Sept. 14-20, 1998, at 27 (describing role of innovation in the \$5.2 billion cycling industry).

golf.<sup>15</sup> Compliance with the Rules is mandated for all USGA-sanctioned events. However, the majority of golf associations, including the Professional Golfers' Association (PGA) Tour, voluntarily comply with the Rules.<sup>16</sup> The USGA-established standards and regulations for playing equipment, an integral part of the Rules of Golf, have been the source of contentious litigation in the past,<sup>17</sup> and may again prove to be troublesome.<sup>18</sup>

The golf equipment controversy of the late 1980s and early 1990s centered on the legality of square grooved irons.<sup>19</sup> This confrontation originated between the USGA and Karsten Manufacturing, producer of the Ping Eye2 golf club, and later included the PGA Tour. Traditionally, USGA requirements limited the grooves on an iron's clubface to a V-shape.

<sup>15</sup> Rules 4-1 to 4-3 set the general standards for golf clubs, while the more specific, technical requirements found in Appendix II. Typically, clubs are submitted to the USGA for approval prior to their use in USGA-sanctioned events: Mike Purkey, *Equipment Rules; Golf Supply Standards of the United States Golf Association*, GOLF MAGAZINE, Aug. 1993, at 70.

<sup>16</sup> Frank Hannigan, *The Right to Change the Rules; A Former USGA Official Offers His Perspective on the Debate*, GOLF WORLD, June 5, 1998. See generally AL BARKOW, *THE HISTORY OF THE PGA TOUR* (1st ed. 1989); HERB GRAFFIS, *THE PGA: THE OFFICIAL HISTORY OF THE PROFESSIONAL GOLFERS' ASSOCIATION OF AMERICA* 416-38 (1975). David Fay, executive director of the USGA, commented on the limitations inherent with this regulatory regime:

We write the rules and hope they are followed. I don't think golfers disrespect the rules wholesale. I think they follow the rules selectively. The rules of the game are so much more complex than in any other sport and they always will be.

We remain committed to trying to educate people about the rules, but we can't put a gun to their head and say play by the rules.

Alan Byrd, *Q&A with David Fay*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, May 10-14, 1998, at 32-33.

<sup>17</sup> One example is the antitrust suit launched against the USGA by Weight-Rite. The suit was precipitated by the USGA's rejection of Weight-Rite's golf shoe, which purportedly provided illegal support to a golfer during the swing motion. A substantive discussion of the Weight-Rite litigation is included in Part III.

Apart from manufacturers, who clearly are self-interested, there are others in the golf world that doubt the alleged deleterious effects of innovations in golf equipment. Frank Thomas, who served as technical director of the USGA for more than 21 years, stated that, in his estimation, "equipment has had virtually no measurable effect on the game in the last 30 years." In the antitrust context, such opinions contribute to the uncertainty surrounding USGA claims that limitations on equipment are necessary to preserve the integrity of the game of golf. See Jaime Diaz, *Doubting Thomas; Frank Thomas of the USGA is Skeptical About Claims That Modern Equipment is Ruining the Game*, SPORTS ILLUSTRATED, July 3, 1995, at G10.

<sup>18</sup> Hannigan, *supra* note 16. For example, Callaway Golf Co. has threatened legal action in response to the USGA proposals on the "spring-like" effect, discussed below. John Lombardo, *Help or Hype? New Clubs Spur Debate; Golf Companies are Falling Over Themselves in Coming Up With 'Better' — and Costlier — Equipment*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Sept. 14-20, 1998, at 24.

<sup>19</sup> For a detailed review of the factual history, see *Gilder v. PGA Tour*, 727 F.Supp. 1333 (D.Ariz. 1989), *aff'd*, 936 F.2d 417 (9th Cir. 1991).

However, changes in the wording of the USGA rule in 1983 first permitted square grooves.<sup>20</sup> Subsequent testing revealed the performance-enhancing effects of the new technology. The studies conducted by the USGA indicated that square grooves produced a higher spin rate, as compared to V-shaped clubs, in medium to light rough.<sup>21</sup> The significance of this revelation was clear to professional golfers. With more spin came more control. The USGA's contention was that players with longer but more inaccurate drives accrued an advantage – they could now “swing for the greens,” for the consequences of hitting out of the rough had been limited.

In June 1987, the USGA ruled that the Ping Eye2 clubs, the most popular irons in golf history at that time, did not conform to USGA standards. The association declared the club illegal because its square grooves were too close together, and thus produced excessive spin.<sup>22</sup> Karsten Manufacturing sued, and the USGA quickly settled. Under the settlement, the Ping Eye2 irons were declared legal on the condition that future models manufactured by Karsten would have the grooves further apart. However, the PGA Tour then intervened and took the extraordinary step of declaring all square-grooved clubs illegal. Deane Beman, commissioner of the PGA Tour, reasoned that “[t]he historical role of ruling on equipment is not ours. But the technology and sophistication of the manufacturers has outstripped the ability of the USGA and the R&A to oversee the game. Litigation will continue to play a role in that.”<sup>23</sup> In banning the square grooves, antitrust concerns necessitated the abstention of seven members of the Tour's 10-member policy board due to their contractual ties to equipment manufacturers.<sup>24</sup>

Karsten Manufacturing and a group of professional golfers, users of the Ping Eye2, sought to enjoin the PGA Tour from implementing its ban on square-grooved irons. Karsten initiated a lawsuit in response to the PGA

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<sup>20</sup> The rule change was adopted as a result of technological improvements in the manufacturing of iron heads. Manufacturers had shifted from traditional forging process to the investment-cast process. However, these developments resulted in U-shaped grooves, rather than V-shaped. The wording of the rule was altered to incorporate this new design. See Jaime Diaz, *Has Golf Gotten Too Groovy?*, SPORTS ILLUSTRATED, Aug. 3, 1987, at 52.

<sup>21</sup> *Id.* See also E.M. Swift, *Choose Your Weapon; Golf Technology has Taken a Quantum Leap*, SPORTS ILLUSTRATED, July 9, 1990, at 40.

<sup>22</sup> The amount of spin generated by the club is a result of several factors, including the shape of the grooves, the width of each groove and the distance between the grooves. An improvement by Karsten to the square grooves (specifically, the rounding of the grooves' edges) triggered a violation of the USGA's regulations with respect to the distance between the clubs. Diaz, *supra* note 20.

<sup>23</sup> Swift, *supra* note 21.

<sup>24</sup> Jaime Diaz, *PGA Tour Counters Image from Lawsuit*, N.Y. TIMES, Mar. 8, 1992, at 8:6. See also PAUL C. WEILER AND GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* 904-05 (2nd ed. 1998).

Tour ban, claiming violations of Sections 1 and 2 of the Sherman Anti-Trust Act.<sup>25</sup> Thus, to ensure the validity of the ban, the PGA Tour revised its by-laws relating to quorum requirements and subsequently readopted the square groove rule.<sup>26</sup> Despite the steps taken by the PGA Tour, the Ninth Circuit affirmed the injunction preventing the Ping Eye2's ban from the PGA Tour.<sup>27</sup> The court, while not expressing an opinion on the antitrust issues "other than they are not insubstantial," held that the balance of hardships weighed in favor of the manufacturer and the professional players.<sup>28</sup> Then, on the eve of trial, like the USGA before it, the PGA Tour settled with Karsten.

Under the terms of the settlement, the PGA Tour rescinded its ban on the use of square-grooved clubs in Tour events, and pledged not to institute any future rule prohibiting such clubs unless the USGA took such steps.<sup>29</sup> In so doing, the PGA Tour and Karsten acknowledged "that the USGA is the principal rule-making body of golf."<sup>30</sup> However, the settlement also called for the PGA Tour's formation of a five-member equipment advisory committee. The independent committee would study any equipment matters that arise and would make recommendations to the Tournament Policy Board.<sup>31</sup> Both sides claimed victory with the settlement. For Karsten, the legal wrangling over the Ping Eye2 irons had ended, with continued use of the clubs on the professional tour cemented. For the PGA Tour, the establishment of the advisory committee affirmed that it had retained the right to make determinations on equipment independently of the USGA.<sup>32</sup>

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<sup>25</sup> 15 U.S.C. §§ 1, 2 (2002).

<sup>26</sup> *Gilder*, 727 F.Supp. at 1334.

<sup>27</sup> *Gilder v. PGA Tour*, 936 F. 2d 417 (9th Cir. 1991).

<sup>28</sup> *Id.* at 422-24. The Ninth Circuit found that the alleged harm to the PGA Tour in the form of damage to its reputation as a sports governing body was speculative in relation to the concrete harm that would be suffered by Karsten (in terms of lost sales) and the professional golfer plaintiffs (in terms of lost tournament earnings).

<sup>29</sup> Joe Strauss, *Ping Settlement Avoids Lawsuit Against PGA*, THE ATLANTA JOURNAL AND CONSTITUTION, Apr. 15, 1993, at G3; Joe Strauss, *Square Groove Controversy: Ping Changes Face of Golf; Inventor Faces Down PGA Tour Over Ban of his Clubs*, THE ATLANTA JOURNAL AND CONSTITUTION, Apr. 16, 1993, at E10.

<sup>30</sup> *Square Deal: The PGA Tour and Karsten Manufacturing Solved Their Dispute Over Square Grooves Out of Court*, GOLF MAGAZINE, June 1993, at 142.

<sup>31</sup> Larry Dorman, *PGA Settled Suit, But Won Equipment War*, FORT LAUDERDALE SUN-SENTINEL, Apr. 18, 1993, at 9C.

<sup>32</sup> *Id.* Not all members of the golf community saw the establishment of the advisory committee as a beneficial result of the settlement. Chuck Yash, President and CEO of Taylor Made Golf Co. stated: The USGA is set up to control and uphold the game. As a result, the Tour doesn't need to have an implements committee. I don't think it's right for [PGA Tour Commissioner] Deane and the PGA Tour to have their own set of rules. It is necessary that the Tour and the USGA communicate and work better together.

Nonetheless, the USGA has remained at the forefront on issues of golf equipment standards.

## 2. THE SPRING-LIKE EFFECT

The most recent conflict between the USGA and golf manufacturers arose from the interpretation of Rule 4-1e, Appendix II, which states that the "material and construction of the club shall not have the effect at impact of a spring."<sup>33</sup> In June 1998, the USGA announced that the rule would be clarified through the implementation of a test devised to measure the spring-like effect of clubs.<sup>34</sup> The USGA's concern was that the advent of new materials in the construction of golf clubs had begun to impart a trampoline effect on golf clubs, with a resulting increase in shot distance.<sup>35</sup> Previously, no tool was available to measure this effect. While the USGA indicated that virtually all existing clubs would pass the proposed test, manufacturers expressed concern as to the rule's effect on future innovations in golf club construction.<sup>36</sup>

Thus, golf equipment manufacturers, whose stock prices dropped as a result, met the USGA announcement with apprehension.<sup>37</sup> As one

<sup>33</sup> Press Release, United States Golf Association, USGA Proposes Conformance Test for "Spring-Like" Effect in Golf Clubs (June 17, 1998). Rule 4-1e in Appendix II, in its entirety, states: "The material and construction of the face shall not have the effect at impact of a spring, or impart significantly more spin to the ball than a standard steel face, or have any other effect which would unduly influence the movement of the ball."

<sup>34</sup> Jaime Diaz, *The Buzz Bomb; Loose Talk by the New USGA President has an Entire Industry on Edge*, SPORTS ILLUSTRATED, June 8, 1998, at G24 (evaluating methods undertaken by new USGA president Buzz Taylor).

<sup>35</sup> The theoretical effect has been expressed as follows:

[A] trampoline effect occurs when a clubface bends inward at impact with a golf ball, then reverts to its original position, propelling the ball farther than it would have gone had the clubface been rigid.

"The basic theory is that most of the energy lost at impact is lost in the golf ball squashing up against the face," said Art Chou of the Chou Golf, a club design consultant. "If you can minimize the amount of deformation the ball goes through, you maximize the energy transfer at impact. When the face gives a little bit, the ball is deforming less. It allows the ball to retain more of its own energy." Ergo, the ball travels farther.

John Strege, *What's a Trampoline Effect?* GOLF WORLD, June 5, 1998.

<sup>36</sup> T.R. Reinman, *Investors Applaud as USGA Retrieves Golf Club Gauntlet*, SAN DIEGO UNION-TRIBUNE, June 18, 1998, at C1; *USGA Won't Declare Illegal Any Golf Clubs That Have Already Been Approved*, THE FINANCIAL POST, June 18, 1998, at 69; Frederick Rose, *USGA Plan Won't Bar Old Gear*, THE WALL STREET JOURNAL EUROPE, at 9; Claudia Rosett, *USGA Sets Limits on Use of Some Clubs, But Allows Big-Headed Drivers in Play*, THE WALL STREET JOURNAL, June 18, 1998, at A6; *Big Bertha Gets Off With a Warning*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, June 22-28, 1998, at 3.

<sup>37</sup> Some manufacturers were of the opinion that if the USGA took such steps it would "no longer be able to govern the game with consent of those it governs." Ely Callaway, founder of Callaway Golf,

investment analyst commented, “[i]f a governing body tells a leading-edge technology company that they can’t improve technology, it puts them out of business.”<sup>38</sup> Meanwhile, the PGA Tour was hesitant to intervene in the matter, as many of the affected manufacturers were major sponsors in supporting the Tour’s new television package.<sup>39</sup> Undaunted, the USGA proceeded with the distribution of the proposed test procedure, and solicited comments from manufacturers on the proposal.<sup>40</sup> On September 28, 1998, the process, which commenced nearly ten months earlier, continued with a notice and comment review of the proposed test protocol.<sup>41</sup> At the open forum, manufacturers had an additional opportunity to address the USGA proposal. John Solheim, President of Karsten Manufacturing, succinctly presented the equipment industry’s position:

Golf is hundreds of years old. Innovation in golf is hundreds of years old. . . .

The USGA repeatedly states that one of its responsibilities is to protect the “traditions of the game.” That, of course, means different things to different people. However, one of the widely agreed upon beliefs in the golf community is that innovation is one of the important traditions of golf. The rules of golf have always left room for equipment innovation. . . .

If the USGA restricts innovation, it will artificially restrict competition. Golfers will no longer receive the best possible equipment and will incorrectly perceive that all golf drivers are the

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quoted in John Strege, *Living on Borrowed Time? The USGA Could be Ready to Take Some Titanium-Faced Drivers Out of Play*, GOLF WORLD, May 29, 1998. Compare with Daniel Kaplan, *Bertha’s Got Bounce — Too Much; Popular Callaway Line of Titanium-Faced Clubs May be Banned by PGA*, STREET & SMITH’S SPORTSBUSINESS JOURNAL, May 18-24, 1998, at 5 (citing opinion that rule changes could benefit manufacturers by necessitating purchases of new, compliant clubs).

<sup>38</sup> Steve Eubanks, *Market Economics; USGA Action Could Affect More Than Just Golf Companies*, GOLF WORLD, June 5, 1998.

<sup>39</sup> Tim Rosaforte, *No Rush to Judgment*, GOLF WORLD, June 5, 1998. The PGA Tour’s executive vice president of competitions, Bill Calfee, stated that the Tour’s focus was different from the USGA’s in that the Tour concentrated on the effect of technology on the best players, at the highest level of competition. He continued, “We care about the game, and that includes the manufacturers.” *Id.*

<sup>40</sup> Press Release, United States Golf Association, USGA Distributes Details of Proposed Test for “Spring-Like” Effect in Golf Clubs (July 13, 1998).

<sup>41</sup> Press Release, United States Golf Association, USGA Holds Open Forum on Spring-Like Effect Test Protocol (Sept. 29, 1998); Opening Comments of Gordon Brewer, chairman of the USGA’s implements and ball committee, at USGA Open Forum on Spring-Like Effect Test Protocol, in Basking Ridge, NJ available at [http://www.usga.org/test\\_center/transcript/opening\\_proceedings.html](http://www.usga.org/test_center/transcript/opening_proceedings.html).

same and there is nothing new or improved. The lack of excitement from the game will decrease interest in golf. . . .

If the USGA adopts this proposed rule, it will hurt manufacturers, golfers, golf, and, most of all, the USGA. Some golfers will buy equipment that [the USGA is] trying to prohibit. In short, golfers will begin to ignore the USGA's . . . rules limiting innovation. This will lead to a loss of respect for the USGA.<sup>42</sup>

Despite the concerns voiced by manufacturers, and their related threats of legal action, the USGA has proceeded with the implementation of the new clubface test.<sup>43</sup> Thus, the lines in the sand had been drawn for the next legal confrontation between golf's governing bodies and its equipment manufacturers.<sup>44</sup>

### B. NCAA Rules for Aluminum Bats

Since 1974, the NCAA has approved the use of aluminum bats in collegiate baseball.<sup>45</sup> The move to aluminum was predicated on its sizable cost savings over traditional wood bats. The widespread use of aluminum in collegiate and amateur baseball even prompted some experts to predict that,

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<sup>42</sup> Submissions of John Solheim, President of Karsten Manufacturing, at USGA Open Forum on Spring-Like Effect Test Protocol, in Basking Ridge, NJ, available at [http://www.usga.org/test\\_center/transcript/karsten.html](http://www.usga.org/test_center/transcript/karsten.html). Another view advanced in the industry is that rule changes should be limited to professional golfers, with the amateur game left unaltered. The rationale is that amateurs can still benefit from equipment improvements that would increase their enjoyment of the sport. See Dan Crawford, *Q&A with James R. Baugh*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Sept. 14-20, 1998, at 28-30 (interview with president of Wilson Sporting Goods Co.). This position is supported by the view of some equipment manufacturers that two distinct golf equipment markets exist, one consisting of professional golfers, the other comprising the rest of golfers. See Lombardo, *supra* note 18.

<sup>43</sup> Press Release, United States Golf Association, USGA to Strengthen Equipment Standards (Nov. 2, 1998); John Holmes, *USGA Proceeds with New Ball and Club Tests*, at <http://golf.com/news/view.cgi?19981102145523.tor>. In addition to the clubface test, the USGA announced new standards for golf balls, including an update to the current overall distance standard (ODS).

<sup>44</sup> "With respect to litigation, we have faced this matter before and that doesn't influence how we go about doing our business." David Fay, Executive Director, USGA, at USGA Press Conference with Buzz Taylor, President, USGA, and Trey Holland, VP, USGA, at [http://www.usga.org/test\\_center/fay\\_buzz\\_conference.html](http://www.usga.org/test_center/fay_buzz_conference.html).

<sup>45</sup> Peter Gammons, *End of an Era; What Would the Babe Think? The Crack of the Wooden Bat is Being Replaced by the Ping of Aluminum. And by the End of the Next Decade, the Ping is Likely to be Heard in the Majors*, SPORTS ILLUSTRATED, July 24, 1989, at 17.

eventually, professional baseball would undergo the transition as well.<sup>46</sup> Over the past two decades, the advent of lighter metal bats, constructed from new aluminum alloys, increased the speed and power that hitters could generate. In response, the NCAA prescribed maximum length-to-weight unit differentials for bats.<sup>47</sup> In limited instances, the NCAA, citing safety considerations, rejected bat models that did not comply with its specifications.<sup>48</sup> Then, in May 1998, the NCAA, seeking to establish more specific performance standards, joined the Sporting Goods Manufacturers Association (SGMA) and other governing bodies of amateur baseball in an extensive research program on aluminum bats.<sup>49</sup>

However, the NCAA Baseball Rules Committee did not await the results of the joint research program. In August 1998, the Committee announced that it had voted to recommend "a maximum batted-ball exit velocity and a change in the size and weight specifications of nonwood baseball bats beginning with the 1999 intercollegiate season."<sup>50</sup> The new rules were designed to limit the performance of metal bats to the level of their wooden counterparts. The NCAA executive committee subsequently approved the changes, but pushed back the implementation date to August 1, 1999, making the rules effective for the 2000 season.<sup>51</sup>

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<sup>46</sup> *Id.* By 1997, bat sales totaled \$82.1 million, with aluminum bats accounting for 90% of bats sold. Bill King, *NCAA May Disable High-Tech 'Lumber'; Potent Metal Bats Changing the College Game so Radically that Manufacturers Forced on the Defensive*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Sept. 14-20, 1998, at 22.

<sup>47</sup> For example, in 1988, the NCAA baseball committee instituted a maximum differential of five — dictating that a thirty-four-inch-long bat could weigh no less than twenty-nine ounces. See Press Release, National Collegiate Athletic Association, *NCAA Joins SGMA in Baseball Testing Procedure* (May 29, 1998); Ed Guzman and Kirk Johnson, *Baseball: More Hits, More Runs, And More Concerns; High-Tech Bats Overpower the Game*, N.Y. TIMES, Aug. 23, 1998, at 8:1.

<sup>48</sup> Robert Williams, *NCAA Rejects One Bat Model*, OMAHA WORLD HERALD, Dec. 21, 1995, at 33 (reporting on NCAA rejection of C405 bat model based on failure in tests of maximum bat performance factor (BPF)). According to Ted Breidenthal, staff liaison with the NCAA Baseball Rules Committee, the NCAA keys on three issues: "The first is safety, risk minimization. The second is competitive balance in terms of offense vs. defense. The third is protecting the game's integrity." Carolyn White, *Standards for Bats to be Set*, USA TODAY, Aug. 5, 1998, at 12C.

<sup>49</sup> NCAA Press Release (May 29, 1998), *supra* note 47. Major League Baseball and Rawlings Sporting Equipment Co. also recently agreed to fund the development of a new bat-testing lab, with the aim of constructing metal bats that perform like wood. Peter J. Howe, *Removing the Bash From Metal Bats; Umass Engineer Asked to Quell College Long Ball*, BOSTON GLOBE, Oct. 15, 1998, at B1.

<sup>50</sup> Press Release, National Collegiate Athletic Association, *NCAA Committee Recommends Baseball Bat Performance Standard, New Specs for 1999* (Aug. 6, 1998).

<sup>51</sup> Guzman and Johnson, *supra* note 47; *Baseball: Changes Seen for Metal Bats*, N.Y. TIMES, Aug. 13, 1998, at C2; Lon Eubanks, *NCAA Mutes the Bats; College Baseball: Changes in Specifications Will Limit Home Run Potential Beginning with the 2000 Season*, L.A. TIMES, Aug. 13, 1998. The rule changes adopted were: (a) a maximum batted-ball speed that a bat could produce of ninety-three mph (previously no limit); (b)

Easton Sports, Inc., a leading manufacturer of aluminum bats, responded by filing a \$267 million antitrust suit against the NCAA.<sup>52</sup> Easton claimed that the rules changes would render \$140 million worth of bats in its inventory obsolete, and that two years would be required for the company to adapt to the new requirements.<sup>53</sup> Easton also alleged collusion between the NCAA and the only manufacturer whose metal bats complied with the new standards.<sup>54</sup> In establishing its claim, Easton asserted that the anti-competitive effects of the new rules were:

- (a) It will reduce the quality of baseball bats in the relevant market, and deprive purchasers in the relevant market of the benefits of quality competition.
- (b) It will require all college players to abandon the baseball bats they currently own, and purchase all new baseball bats, with the likely additional expense of at least \$25,000,000.00. This is the equivalent of a substantial increase in the price of baseball bats.

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a maximum diameter of 2 5/8 inches (a decrease of 1/8 inch); and (c) a maximum length-to-weight differential of three (i.e. a thirty-four inch bat must weigh at least thirty-one ounces).

<sup>52</sup> The claim was later amended to \$237 million following the NCAA's decision to implement the rule changes for the 2000 season. Steve Rock, *Bat Manufacturer Amends Complaint Against NCAA*, KANSAS CITY STAR, Sept. 11, 1998, at D6; Complaint for Damages and Preliminary Injunctive Relief, *Easton Sports, Inc. v. NCAA*, No. 98-CV-2351 (D. Kan. 1998) (hereinafter *Easton Complaint*).

<sup>53</sup> Eubanks, *supra* note 51; *NCAA Approves Changes in Bats; Organization Now Must Fight \$267 Million Suit*, AUSTIN AMERICAN-STATESMAN, Aug. 13, 1998, at C3; Ed Guzman, *Baseball; New Rules for Metal Bats Alarm a Maker*, N.Y. TIMES, Aug. 8, 1998, at C3; King, *supra* note 46. Another manufacturer, Rawlings Sports, ceased production of 2 3/4 inch barrel bats in response to the NCAA rule change. The company was forced to "dump" the non-compliant bats in its inventory, with losses estimated at \$400,000. Daniel Kaplan, *Rawlings Takes a Hit Over New NCAA Bat Rule*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Sept. 21-27, 1998, at 14.

<sup>54</sup> *NCAA Approves Changes in Bats; Organization Now Must Fight \$267 Million Suit*, AUSTIN AMERICAN-STATESMAN, Aug. 13, 1998, at C3; *Easton Complaint*, *supra* note 52, at 10. Incidentally, the same manufacturer, Baum Research and Development Co. ("Baum"), also designed the bat-testing machine used by the NCAA.

In fact, the current rash of litigation was initiated by Baum, and its principal, Steve Baum, with a suit filed against the NCAA, the SGMA, Hillerich & Bradsby Co., Easton Sports, Inc. and Worth, Inc. See *Baum Research and Development Co. v. Hillerich & Bradsby Co.*, No. 98-72946 (E.D. Mich. 1998). Baum, a manufacturer of wood composite bats, contended that the named defendants conspired to prevent the NCAA from prescribing limits on the performance of aluminum bats. As counsel for Hillerich & Bradsby Co. stated, Baum "ironically argues that the antitrust laws were violated because the NCAA did not sufficiently limit competition among metal bat manufacturers in making better metal bats for college play." Third Party Movant Hillerich & Bradsby Co.'s Notice of Motion and Motion to Quash Subpoenas; Memorandum of Points and Authorities in Support Thereof at 1-2, No. 98-CV-8640 (C.D. Cal. 1998) (emphasis added). The NCAA's new aluminum bat rule was passed subsequent to the filing of the Baum suit. *Id.* at 4. This litigation history presents one possible basis for *Easton's* conspiracy allegation against the NCAA.

- (c) It will substantially inhibit research and development, innovation and future competition to improve the quality of baseball bats.
- (d) The NCAA's action with regard to baseball and other sports are often followed by other sanctioning bodies . . . These sanctioning bodies are likely to follow the NCAA's actions. If they do so, these same anticompetitive effects will be felt by their players.<sup>55</sup>

The SGMA echoed Easton's discontent with the NCAA's actions, calling the Baseball Rules Committee's recommendations unwarranted, and expressing concern that the NCAA disregarded its recent agreement to conduct joint research on the subject.<sup>56</sup> Critics of the rules changes asserted that no legitimate safety concerns existed, and that the NCAA's actions were precipitous and in restraint of trade.<sup>57</sup> Still recovering from the "restricted-earnings" verdict,<sup>58</sup> the NCAA now faced another antitrust challenge to its rule-making authority.

### III. ANTITRUST IMPLICATIONS

#### A. Introduction

Sports organizations, professional and amateur, are not exempt from the application of federal antitrust law.<sup>59</sup> Only Major League Baseball enjoys antitrust immunity; "[o]ther professional sports operating interstate — football, boxing, basketball, and presumably, hockey and golf — are not so exempt."<sup>60</sup> In particular, courts have held both professional golf and collegiate athletics to be within the scope of the Sherman Act.<sup>61</sup> The

<sup>55</sup> *Easton Complaint*, *supra* note 52, at 20.

<sup>56</sup> *SGMA Calls NCAA's Recommendation to Outlaw All Existing Aluminum Bats Unwarranted*, BUSINESS WIRE, Aug. 11, 1998.

<sup>57</sup> Guzman and Johnson, *supra* note 47; *Easton Complaint*, *supra* note 52, at 12-15.

<sup>58</sup> See *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631.

<sup>59</sup> *Scura*, *supra* note 5, at 158; *Gunter Harz Sports, Inc., v. USTA*, 511 F. Supp. 1103, 1114 (1981), *aff'd*, 665 F. 2d 222 (8th Cir. 1982) ("Non-profit voluntary associations which sanction and regulate professional sporting tournaments, races and other contests have been held subject to the antitrust laws in the exercise of their rule-making authority.").

<sup>60</sup> *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972).

<sup>61</sup> Peter J. Carton, Jr., *Sports Self Governance: Is it the Noblest Form or Arbitrariness?*, 1 SETON HALL J. SPORT L. 95, 98 (1991); *NCAA*, 468 U.S. 85; *Deesen v. Prof'l Golfers' Ass'n of Am.*, 385 F.2d 165 (9th Cir. 1966); *Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973). The court in

applicability of antitrust law reinforces the belief that competition enhances consumer welfare in *all* sectors of the economy. Claims as to the unique nature of the business – essentially claims that “competition does not work well in the sports industry” – can consequently be regarded as inconsistent with the foundations of antitrust policy.<sup>62</sup> Therefore, some have argued that the sports industry should be subjected to the same level of scrutiny as other segments of the economy. If other values are deemed more virtuous than competition, then a legislative solution should be sought. Thus, Professor Lazaroff concludes:

One could argue that the psychological, social, and economic benefits people derive from having a local baseball team outweigh the industry's and society's interest in free and open competition. However, it would require legislative action to give effect of law to that value judgment. It is not for litigants or judges to argue that competition itself is unreasonable. The antitrust laws should not be warped by strained interpretations to achieve results they were never intended to produce.<sup>63</sup>

Congress has yet to enact that value judgment. Consequently, antitrust law has continually been warped to address the unique aspects of the sports industry. Self-regulatory rule enforcement is an essential element of governance for both professional sports leagues and sports associations that oversee the operation of non-league activities.<sup>64</sup> So long as these rules relate to the organization's commercial or business activities, or have an effect on the business activities of competitors, antitrust legislation may operate to restrict rule-making authority.<sup>65</sup> Sports equipment manufacturers, who allegedly are harmed by equipment limitations, thus have a tool to confine the actions of sports' governing bodies. In the absence of legislative protection, adaptability of the law is essential to ensure the continued viability of professional and amateur athletics. Under Section 1 of the Sherman Act, the law's pliability is achieved through both the standard of

*Blalock* substantiated its application of antitrust law to the activities of the Ladies PGA by reference to the Supreme Court's dicta in *Flood*.

<sup>62</sup> Daniel E. Lazaroff, *Antitrust Analysis and Sports Leagues: Re-examining the Threshold Questions*, 20 ARIZ. ST. L. J. 953, 983 (1988).

<sup>63</sup> *Id.* at 987-88 (footnotes omitted).

<sup>64</sup> Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 731, n.4 (1987).

<sup>65</sup> *Smith v. NCAA*, 139 F.3d 180, 185-86 (3rd Cir. 1998) (holding NCAA eligibility rules primarily seek to ensure fair competition in collegiate athletics and thus are outside the scope of the Sherman Act).

analysis chosen and the consideration of a wide range of justifications for the impugned conduct. Under Section 2 of the Sherman Act, the court's deferential consideration of the organization's motives and rationales serves a similar purpose. Therefore, despite the objections of Professor Lazaroff, judicial tolerance has proven vital for sports associations in the face of potential antitrust liability.

### B. *Some Preliminary Questions*

An initial question facing sporting goods manufacturers is how best to frame their antitrust claims. This strategic concern arises due to the deference that most courts extend to self-regulatory rule enforcement. As will be discussed below, a rule of reason analysis under Section 1 tends to operate in favor of defendants in the sports industry. Thus, to escape strict rule of reason scrutiny, potential plaintiffs possess two alternatives. First, many plaintiffs present both group boycott and conspiracy issues under Section 1 in an attempt to drive the analysis of the court to general antitrust principles.<sup>66</sup> Second, some plaintiffs claim violations of the Section 2 prohibition against monopolization.<sup>67</sup> Despite these strategies, the path to a successful claim is fraught with obstacles. Therefore, at this initial stage, contemplation of another potential impediment is required.

Since Section 1 violations require an agreement or conspiracy between two or more parties, the threshold question of whether the sports organization is within the ambit of the section must also be addressed. Some professional leagues have asserted a "single entity" defense to Section 1 liability, claiming that their conduct is unilateral and not within the scope of concerted activity prohibited by Section 1.<sup>68</sup> Professional leagues argue that the league product is a result of joint cooperation, and thus conceive of the league as an indivisible unit. However, sports leagues have had limited success with the single entity defense as a means to avoid

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<sup>66</sup> Carton, *supra* note 61, at 106.

<sup>67</sup> *Id.* For example, Karsten's complaint against the USGA incorporated both these approaches. Under § 1, Karsten alleged the conduct of the PGA, USGA and their members constituted an illegal contract, combination and conspiracy to boycott its products. Under § 2, Karsten alleged that the USGA and R&A constituted a monopoly power with respect to the determination of the Rules of Golf and the nature of golf equipment approved for play. Therefore, the claim proceeded, in failing to use their power fairly and equitably with respect to the Ping Eye2 irons ban, the USGA and R&A caused economic harm to Karsten in violation of § 2 of the Sherman Act. *Id.* at n.113.

<sup>68</sup> Lazaroff, *supra* note 62, at 954-55; Rosenbaum, *supra* note 64, at 740-48. See generally Myron C. Grauer, *The Use and Misuse of the Term "Consumer Welfare": Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under Section 1 of the Sherman Act*, 64 TUL. L. REV. 71 (1989).

antitrust investigation.<sup>69</sup> Team members of sports leagues do not possess the complete unity of interest required of single entities — either because they have the ability to produce a product without the league,<sup>70</sup> or because individual teams within a league compete with each other in many respects.<sup>71</sup>

The uncertainty encountered with the single entity defense remains a concern even where league structures are not prevalent. The USGA and PGA, for example, have structures that more closely resemble a single entity. Therefore, some courts have concluded that the PGA and one of its member sections were incapable of conspiring under Section 1 of the Sherman Act.<sup>72</sup> On the other hand, the NCAA, which consists of hundreds of member schools, has a far more limited ability to seek immunity for its unilateral conduct.<sup>73</sup> Regardless of the viability of the single entity defense, Section 1 claims will continue to be instituted against governing sports bodies. For, as was the case with the suit initiated by Easton against the NCAA, manufacturers can readily insinuate conspiracies or agreements between the association and other entities in the sports industry.<sup>74</sup>

Finally, it is important to note at the outset that manufacturers seeking to challenge equipment limitations established by a sports association face a double hurdle. First, even within the sports industry, courts appear to be most deferential to sports associations. This may be due to the judiciary's recognition of the non-economic purposes that many of these organizations pursue.<sup>75</sup> Second, courts have begun to recognize the beneficial effects of standard setting, including conveying information about the product, regulating quality, reducing inefficient variety, and ensuring compatibility.<sup>76</sup> Thus, courts will be averse to dismissing standards outright despite their facially anticompetitive effects.<sup>77</sup> These two factors pose serious

<sup>69</sup> Rosenbaum, *supra* note 64, at 782-83. The conception of a league as a single entity is relevant with respect to the rule of reason analysis under § 1, however. As a single unit, leagues can argue that their rules improve their "league product" and thus stimulate interbrand competition in the entertainment market. *Id.* at 749 n. 82. In addition, under § 2, conceiving of a league as a single entity, competing against other forms of entertainment, decreases the likelihood of a finding that a particular league possesses sufficient monopoly power to invoke antitrust liability. *Id.* at 744 n.60. See Bauer, *supra* note 4, at 276.

<sup>70</sup> Lazaroff, *supra* note 62, at 958-60 (reminiscing to the barnstorming teams earlier in the 20th century).

<sup>71</sup> *Id.* at 966.

<sup>72</sup> *Seabury Management, Inc. v. Professional Golfers' Ass'n of Am., Inc.*, 878 F.Supp. 771, 777 (D.Md. 1994), *aff'd in part, rev'd in part*, 52 F.3d 322 (4th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995).

<sup>73</sup> This was confirmed by the Supreme Court's treatment of the NCAA in *NCAA*, 468 U.S. 85.

<sup>74</sup> See text accompanying note 54.

<sup>75</sup> Neal R. Stoll and Shepard Goldfein, *Sports Association Equipment Curbs*, NEW YORK LAW JOURNAL, Oct. 16, 1990, at col. 1.

<sup>76</sup> Gates, *supra* note 8, at 597.

<sup>77</sup> *Id.* at 597-98, 613.

impediments to successful claims by manufacturers. It is therefore unsurprising that rules governing the standardization of playing equipment are usually upheld.<sup>78</sup> Nonetheless, threats of antitrust litigation proceed — and the mere potential of liability continues to influence the activities of sports' governing bodies.

### C. Section 1: Restraint of Trade

Section 1 of the Sherman Antitrust Act prohibits conspiracies<sup>79</sup> or concerted group activity designed to restrain trade among those who would, absent an agreement, be competitors.<sup>80</sup> The section extends beyond explicit "agreements" to cover both tacit and other non-traditional arrangements. For example, in *Gunter Harz Sports Inc. v. United States Tennis Federation*, discussed below, the court held that the adoption of International Tennis Federation rules by the United States Tennis Association constituted an agreement under Section 1.<sup>81</sup> The categorization of the impugned conduct has a significant effect on the initial step in the Section 1 analysis, the determination of the appropriate standard of review.

## 1. THE CHOICE OF *PER SE* OR RULE OF REASON ANALYSIS

Business activities subject to Section 1 may encounter two varying standards of review. Some types of concerted conduct are so contrary to public policy that they are treated as *per se* illegal. They are held to be unlawful restraints of trade without an investigation as to possible justifications or procompetitive effects.<sup>82</sup> In general, a narrow range of practices is subject to the *per se* rule, including group boycotts, price fixing,

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<sup>78</sup> Bauer, *supra* note 4, at 287.

<sup>79</sup> Conspiracy claims require proof of agreement the members with respect to the restraining conduct. In the past, such claims have been rejected against the USGA, since golf's governing body does not force its members to enforce its interpretations of the Rules of Golf in tournaments conducted by its members. Rather, the USGA governs solely through the consent of its constituents. *Weight-Rite*, 766 F.Supp. at 1108-09.

<sup>80</sup> Rosenbaum, *supra* note 64, at 735. § 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy in the restraint of trade or commerce among the several states . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished.

15 U.S.C. § 1 (1982).

<sup>81</sup> *Gunter Harz*, 511 F. Supp. at 1115.

<sup>82</sup> Carton, *supra* note 61, at 100; Rosenbaum, *supra* note 64, at 735-37.

tying arrangements, and concerted refusals to deal.<sup>83</sup> Application of the *per se* rule is restricted to naked restraints of trade, where the conduct has "a pernicious effect on competition and lack[s] any redeeming virtue."<sup>84</sup> Therefore, courts often resort to a *rule of reason* test, where the procompetitive justifications and anticompetitive harms of the impugned activity are considered. The illegality of the restraint is assessed by its overall effect on competition.<sup>85</sup>

Courts have resisted subjecting activity in the sports industry to a *per se* rule. The preference for rule of reason scrutiny is often justified by the unique qualities of the professional and amateur sports regimes.<sup>86</sup> Additionally, the judiciary's unfamiliarity with particular organizational structures often necessitates an inquiry into the effects of the restraints imposed. Courts thus prefer the rule of reason test when confronted with sports industry business practices.<sup>87</sup> A rule of reason inquiry permits a court to unveil the valid business purposes and procompetitive virtues behind allegedly restraining conduct.<sup>88</sup> Accordingly, unlike *per se* condemnation, a rule of reason approach affords courts with invaluable flexibility while undertaking its antitrust analysis.<sup>89</sup>

<sup>83</sup> Carton, *supra* note 61, at 100; Rosenbaum, *supra* note 64, at 735-36; Lazaroff, *supra* note 62, at 971 n. 80; Scura, *supra* note 5, at 155.

<sup>84</sup> *Northern Pac. Ry.*, 356 U.S. at 5; *E.A. McQuade Tours, Inc. v. Consol. Air Tour, Man. Com.*, 467 F.2d 178, 187 (5th Cir. 1972).

<sup>85</sup> Lazaroff, *supra* note 62, at 972; Rosenbaum, *supra* note 64, at 736-37.

<sup>86</sup> Professional leagues often argue that they are unique in their resemblance to a single entity, to the extent that cooperation among members is a prerequisite for increasing the attractiveness of the "league product." Thus, facially restrictive practices can possess redeeming qualities for competition in the wider entertainment market. In addition, this unique structure prompts practices that are outside the traditional *per se* categories, i.e. group boycotts by firms with market power disadvantaging their competitors. Stoll & Goldfein, *supra* note 75. In the case of many restraints imposed by sports leagues, the affected parties are not competitors, but other parties (e.g. player restraints, equipment limitations). Bauer, *supra* note 4, at 278 n.67.

<sup>87</sup> See Scura, *supra* note 5, at 156 n.39; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 8-9 (1984).

<sup>88</sup> See Rosenbaum, *supra* note 64, at 779-80; Lazaroff, *supra* note 62, at 962-64. However, Easterbrook suggests that courts are ill equipped to make economic pronouncements on the business activity of market actors. Thus, even the rule of reason may be an inadequate tool for the assessment of the antitrust implications of restraints of trade. Easterbrook, *supra* note 87, at 12.

<sup>89</sup> Some courts have advocated an intermediate test, a "quick look" rule of reason approach. This truncated approach inquires into the procompetitive justifications prior to condemnation of facially anticompetitive restraints. If such a justification is advanced, a full-blown rule of reason analysis is undertaken. However, due to the special nature of most restraints in the sports industry, the "twinkling of an eye" approach is usually rejected in favor of a traditional rule of reason inquiry. James A. Keyte, *What Is It and How Is It Being Applied: The "Quick Look" Rule of Reason*, 11 ANTITRUST 21, 21-22 (Summer 1997). Some commentators have questioned whether any substantive difference exists between *per se* or

Only in limited instances, where the conduct of the sports association can be characterized as a naked restraint of trade, will courts resort to *per se* illegality. In *Blalock v. Ladies Professional Golf Association*, the court concluded that suspension of a golfer due to alleged cheating was tantamount to a total exclusion from the professional golf market and constituted a "naked restraint of trade."<sup>90</sup> However, the invocation of the *per se* rule has not been extended beyond such egregious player restrictions. Further, since *Blalock*, even restraints on player rights have attracted the more flexible rule of reason analysis. Subsequent decisions have distinguished *Blalock* and rejected *per se* treatment where "the challenged rule is facially neutral and designed to enhance the game's integrity."<sup>91</sup>

The need for flexibility is no more apparent than with respect to sports association equipment regulations. Rules governing play of the game itself constitute a basic element of the administration of organized sport. The necessity for collective action and rule making has prompted courts to eschew the application of the *per se* rule in this context.<sup>92</sup> Where horizontal restraints on competition are vital to the availability of the product, courts will adopt a rule of reason analysis. Therefore, the *per se* rule has not been applied to NCAA rule-making authority or USGA interpretation of the Rules of Golf.<sup>93</sup> This position has been accepted by the majority of courts since the Supreme Court's decision in *NCAA*, where the Court explained:

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because of the probability that these practices are anticompetitive is

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quick look treatment. See Gary R. Roberts, *supra* note 9, at 2646. For further on the applicability of the quick look rule of reason, see Keyte, at 23-25 and Law, 134 F.3d at 1020-21.

<sup>90</sup> *Blalock*, 359 F. Supp. at 1265-66. The court distinguished *Deesen*, another case of exclusion from professional golf, by observing that the body imposing the exclusion was composed of non-competitors of the plaintiff. Additionally, the plaintiff had the option to participate in tournaments through qualification as a golf teacher. In *Blalock*, no such opportunity existed for the plaintiff. *Id.* at 1267-68.

<sup>91</sup> *Brant*, 631 F.Supp. at 75, 77. The court in *Brant* distinguished *Blalock* in that the LPGA by-laws in that case effectively prevented the plaintiff from participating in *any* tournaments for a one-year period, thus constituting a naked restraint of trade. Moreover, the court questioned the general application of the *per se* rule in the sports industry, where cooperation is required for administration of the sport.

<sup>92</sup> See Carton, *supra* note 61, at 100-01. "In an industry which necessarily requires some interdependence and cooperation, the *per se* rule should not be applied indiscriminately. In some sporting enterprises a few rules are essential to survival." *Hatley v. Am. Quarter Horse Ass'n*, 552 F.2d 646, 652 (5th Cir. 1977), quoted in *Gunter Harz*, 511 F. Supp. at 1116. See also *Brenner v. World Boxing Council*, 675 F.2d 445, 454 (2d Cir. 1982), cert. denied, 459 U.S. 835 (1982).

<sup>93</sup> *Weight-Rite Golf Corp. v. USGA*, 1990 WL 145594 \*2 (M.D. Fla.); *Brant v. United States Polo Ass'n*, 631 F.Supp. 71, 75 (S.D. Fla. 1986).

so high . . . Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule in this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.<sup>94</sup>

However, for some courts, this pronouncement has not resolved the problem. The *per se* rule's inadequacy, coupled with concern for the rule of reason's inability to consider non-economic justifications, has led them to develop alternative approaches.

One judicial approach seeks to incorporate one of the exceptions to *per se* invalidity. In *Blalock*, the court considered whether sufficient procedural protections could save condemnation of self-regulatory rules. In reviewing *Silver v. New York Stock Exchange*,<sup>95</sup> the Court concluded that where no statutory scheme justifying concerted action existed, the exemption was inapplicable.<sup>96</sup> Absent such legislative authority, no degree of procedural protections could save otherwise *per se* illegal activity. Nonetheless, other courts have also attempted to integrate the *Silver* exception — this time as a prerequisite for the rule of reason analysis.<sup>97</sup> However, this approach has not canvassed significant support among the judiciary, which has preferred the discretion afforded through application of the rule of reason analysis itself.<sup>98</sup>

Courts continue to adopt a rule of reason analysis due to the cooperative requirements of organized sports. Novelty was merely one factor favoring a rule of reason. Nevertheless, antitrust litigation in the sports industry is no longer novel. Sports regulation often has restraining effects, so consideration of procompetitive virtues is vital in maintaining the legitimacy of sport's

<sup>94</sup> NCAA, 468 U.S. at 100-01. See also *Law*, 134 F. 3d at 1017.

<sup>95</sup> *Silver v. NYSE*, 373 U.S. 341 (1963).

<sup>96</sup> *Blalock*, 359 F. Supp. at 1266-67.

<sup>97</sup> *Denver Rockets v. All-Pro Mgm.*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971). The *Denver Rockets* test requires, (1) a legislative mandate "or otherwise" for self-regulation, (2) that the collective action be (a) intended to accomplish an end consistent with the policy justifying self-regulation, (b) reasonably related to that goal, and (c) no more extensive than necessary, and (3) procedural safeguards ensuring the restraint is not arbitrary and which offer a basis for judicial review.

<sup>98</sup> However, with respect to the sports industry, the traditional rule of reason analysis often falls short. Thus, some courts have incorporated the reasoning of *Silver* and *Denver Nuggets* into their rule of reason inquiry. For example, see *Gunter Harz*, 511 F.Supp. 1103.

governing bodies.<sup>99</sup> Departures from a rule of reason inquiry restrain the court's ability to assess the impugned conduct. Any constraints on the presentation of justifications jeopardize not only the rule-making authority of sports associations, but also the sports themselves. This is particularly true where the rules govern basic conditions of play, including the nature of the game or the equipment used.<sup>100</sup> Considering the added element of standard setting present in equipment regulations, and its potential procompetitive effects,<sup>101</sup> it is unlikely that courts will condemn sports associations' rules of play outright.

For the foregoing reasons, antitrust scrutiny of rule-making authority in the sports industry is best conducted under a real of reason test. Non-profit entities, including the NCAA, USGA and PGA, provide the strongest case for a flexible standard of review. This is particularly so for the NCAA and USGA, where economic motives for the limitation of sporting equipment technology are non-existent.<sup>102</sup> Therefore, while the structure of organized sport cannot immunize it from Section 1 antitrust liability through single entity status, the rule of reason permits incorporation of many of the unique characteristics that embody the industry.<sup>103</sup> However, some academics suggest the special case of sports justifies further judicial deference:

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<sup>99</sup> See *M&H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 979-80 (1st Cir. 1984).

<sup>100</sup> See Bauer, *supra* note 4, at 284-85; *Law*, 134 F.3d at 1018-19.

<sup>101</sup> When "private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages." *Allied Tube & Conduit Corp. v. Indian Head, Inc.* 486 U.S. 492, 501 (1988).

<sup>102</sup> The Court in *M&H Tire* reached a similar conclusion with respect to a racing association which promulgated a "single-tire" rule to ensure all competitors raced on the same rubber compound:

The fact, as here, that the combining group is not drawn from people who compete economically among themselves, is a further ground for rule of reason rather than *per se* analysis: such a combination is less likely to have been generated by an anti-competitive design — some other motive is at work which must be weighed against any incidental anti-competitive effects flowing from the combination.

*M&H Tire*, 733 F.2d at 978 n.2.

Thus, the court concluded:

We recognize that if a regulation is adopted by an independent sanctioning organization with no financial stake in the outcome, a court will have maximum assurance that the regulation is to protect fair competition within the sport. But it does not follow that the absence of such an organization absolutely precludes either a rule of reason analysis, or a successful result under that analysis.

*Id.* at 982-83.

<sup>103</sup> Bauer, *supra* note 4, at 277.

Not only should these characteristics provide a sufficient basis to avoid *per se* invalidity, they should also be enough to overcome liability under the rule of reason. There is no point in recognizing that certain industries ought to be treated differently if in fact these genuine reasons for granting special treatment are ultimately ignored.<sup>104</sup>

## 2. MARKET DEFINITION

Before embarking on a rule of reason inquiry, the relevant market must be defined. Market definition is critical to assessing the economic effects of any restraint of trade.<sup>105</sup> As a result, failure to properly define the relevant product market will pose a serious obstacle to success in an antitrust claim.<sup>106</sup> In defining the market, the general principle is that two products are in the same market "if purchasers of the products view them as being reasonably interchangeable for the purpose for which they are produced, price, use and qualities considered."<sup>107</sup> This interchangeability may be established by examining cross-elasticity of demand between the products or other indicia of substitutability, including evidence of consumer or supplier responses to price changes. However, due to the non-essential and non-functional nature of sports industry products, traditional approaches to market definition prove more difficult to apply.<sup>108</sup>

Therefore, some courts allude to the unique aspects of the product in defining the relevant market. For example, in *Philadelphia World Hockey Club v. Philadelphia Hockey Club*,<sup>109</sup> where a new entrant challenged the established

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<sup>104</sup> Rosenbaum, *supra* note 64, at 781. In contrast, other commentators have concluded that application of the rule of reason is tantamount to overcoming liability. See Albert Foer, *The Political-Economic Nature of Antitrust*, 27 ST. LOUIS U. L.J. 331, 337-38 (1983) ("With only slight exaggeration, there is really only one thing one needs to know about the rule of reason: when the rule is applied, the defendant virtually always wins.").

<sup>105</sup> Market definition issues will be revisited in connection with monopolization offences under § 2 of the Sherman Act. See *infra* Part III(D). Market definition is key in sports industry antitrust cases because of the rule of reason approach's prominence. In other industries, where a *per se* rule may apply, market definition considerations may not arise. See James L. Seal, *Market Definition in Antitrust Litigation in the Sports and the Entertainment Industries*, 61 ANTITRUST L.J. 737, 743 (1993).

<sup>106</sup> See *Weight-Rite*, 766 F.Supp. at 1109.

<sup>107</sup> Seal, *supra* note 105, at 737-38.

<sup>108</sup> *Id.* at 740-41. The products' non-essential nature may prompt consumers to forgo consumption, rather than substitute, despite a broad choice of alternatives (i.e. in the larger sports/entertainment market).

<sup>109</sup> *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F.Supp. 462 (E.D. Pa. 1972).

league's reserve clause, the court concluded that the relevant market consisted solely of major league professional hockey. The evidence before the court indicated that major league professional hockey generated higher team revenues and player salaries than other forms of hockey. Consumers were prepared to pay a premium for games played by National Hockey League players, and thus semi-professional or amateur players could not be considered within the same relevant market.<sup>110</sup> A proper approach to market definition, as conducted by the court in *Philadelphia Hockey Club*, must be contextual. Consideration must be given to the impugned conduct, the applicable liability rules, and the available relief. Otherwise, the definition may be of minimal utility in resolving the antitrust issues encountered.<sup>111</sup>

The usual controversy with respect to market definition issues in the sports industry centers on the sports-entertainment distinction. If a sports league competes with the wider entertainment market, an intraleague restriction will have a minimal anticompetitive impact on the relevant market under the rule of reason approach. But, if the market is more narrowly defined to exclude both other forms of entertainment and other sports, then the potential market effects are multiplied.<sup>112</sup> Some commentators advocate the latter approach to market definition as "more consonant with existing antitrust policy and precedent."<sup>113</sup> With respect to the product market, it is asserted that sports leagues' treatment by consumers and advertisers merits this narrower, submarket approach. The narrow relevant market definition is supported by the minimal available evidence, which suggests relatively inelastic cross-elasticity of demand between one sport and another or between sports and other entertainment products.<sup>114</sup>

In the context of sporting goods manufacturer claims, the measure of harm varies tremendously depending on the characterization of the market. Thus, for example, if the market is conceived as consisting solely of professional golfers, a USGA equipment limitation will affect a minute percentage of sales.<sup>115</sup> However, if all golfers, professional and amateur, constitute the relevant market, then a USGA pronouncement could have devastating effects for manufacturers. Under the rule of reason, market

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<sup>110</sup> See Seal, *supra* note 105, at 760-61.

<sup>111</sup> *Id.* at 745. For example, Seal challenges the court's approach in *NCAA*, where inadequate consideration was given to the NCAA's domination over the collegiate athletics market. Regardless of the NCAA's position in the television market, its policies restricting the output of college football games injured the member schools. *Id.* at 753-56.

<sup>112</sup> See Lazaroff, *supra* note 62, at 975.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 978.

<sup>115</sup> In fact, some golf equipment manufacturers acknowledge that the professional and amateur player golf markets are separate. See Lombardo, *supra* note 18.

definition dictates the extent of anticompetitive effects. The narrower the definition, the more acute the harm, and the greater the potential for sports association liability.

### 3. THE RULE OF REASON

The rule of reason inquiry centers on the net competitive effect of the restraint. It involves an extensive consideration of factors relating to the nature of the activity, the reason for its imposition, and the intended purposes.<sup>116</sup> The classic pronouncement of the rule of reason approach was delivered by the Supreme Court in *Chicago Board of Trade v. United States*:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.<sup>117</sup>

However, this decree provides minimal practical guidance in the application of the test.<sup>118</sup> Some courts have adopted a more explicit framework.<sup>119</sup> First, the plaintiff must prove significant anticompetitive effects in a relevant market. Second, upon establishment of the *prima facie* case, the defendant must justify the restraint through procompetitive effects in a relevant market. Finally, if the defendant meets this burden, the onus reverts to the plaintiff, who must show that similar benefits could be achieved through a less restrictive alternative.<sup>120</sup>

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<sup>116</sup> See Scura, *supra* note 5, at 154-55; Brant, 631 F.Supp. at 75-76.

<sup>117</sup> Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

<sup>118</sup> As Professor Roberts has commented: "This often recited gibberish is so lacking in substantive content that it constitutes little more than a religious ritual that courts many times have invoked to disguise a result that is of dubious merit." Gary Roberts, *supra* note 9, at 2635 n.14.

<sup>119</sup> Law, 134 F.3d at 1020.

<sup>120</sup> See Gary Roberts, *supra* note 9, at 2635-36.

A predominant approach to the rule of reason analysis is that of the Supreme Court in *National Society of Professional Engineers v. United States*,<sup>121</sup> under which the court balances the restraint's procompetitive and anticompetitive effects. If the net effect, in economic terms, is one of lessened competition, the restraint is found to violate Section 1 of the Sherman Act. However, in sports industry cases, some courts have rejected the *Professional Engineers* methodology.<sup>122</sup> Since only economic criteria are considered under this approach, non-commercial or non-economic motives that drive sports associations' regulation are ignored. Therefore, for example, professional league restraints, which ensure competition among its members and enhance the league itself as a product, would seldom be justifiable.<sup>123</sup> Equipment limitations, which may have no economic procompetitive merits, would similarly fail the *Professional Engineers* balancing test.<sup>124</sup> In fact, as Professor Roberts notes, if restricted to economic criteria, all sports association rules are in jeopardy.<sup>125</sup>

In response to these concerns, an alternative approach to the rule of reason analysis has developed. In *Gunter Harz*, a manufacturer initiated an antitrust claim against the USTA for its adoption of an International Tennis Federation rule effectively banning "double-strung" tennis rackets.<sup>126</sup> The rule was enacted, after considerable investigation, with the intent of eliminating rackets that induced excessive spin on the ball.<sup>127</sup> The court rejected *per se* condemnation of the USTA's conduct, and formulated a four-part test for the rule of reason inquiry, imputed from the reasoning of *Silver*. In *Gunter Harz*, the inquiry of the court focused on:

- (1) whether the collective action is intended to accomplish an end consistent with the policy justifying self-regulation; (2) whether the

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<sup>121</sup> Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

<sup>122</sup> See Carton, *supra* note 61, at 102.

<sup>123</sup> See Rosenbaum, *supra* note 64, at 745-48.

<sup>124</sup> See Carton, *supra* note 61, at 103-04. Another criticism of this approach is the lack of guidance as to the balancing process itself. For example, how are procompetitive and anticompetitive economic effects to be weighed against one another? What is a sufficiently procompetitive justification? See Rosenbaum, *supra* note 64, at 737.

<sup>125</sup> Professor Roberts concludes:

[I]f the NCAA rules are evaluated under § 1's rule of reason with the purely economic analysis applicable to every other industry, as Board of Regents and Law both say they should be, virtually no substantive NCAA rule can survive. If limited solely to an assessment of their competitive effects (i.e., impact on consumer welfare), these rules will surely be found illegal.

Roberts, *supra* note 9, at 2672.

<sup>126</sup> *Gunter Harz*, 511 F.Supp. at 1107.

<sup>127</sup> *Id.* at 1109-13.

action is reasonably related to that goal; (3) whether such action is no more extensive than necessary; and (4) whether the association provides procedural safeguards which assure that the restraint is not arbitrary and which furnish a basis for judicial review.<sup>128</sup>

After examining the regulation's rationale, the procedural protections afforded, and the evidence presented as to the effects of the banned equipment, the court concluded that the USTA's efforts to protect the "character" of the game of tennis, through its adoption of the ITF rule, did not violate Section 1 of the Sherman Act. The court assumed a deferential position, and merely required evidence upon which the USTA and ITF could have reasonably concluded the rule was necessary and related to its stated purposes. The court was not prepared to substitute its independent judgment for that of the sport's governing bodies.<sup>129</sup>

Unlike *Professional Engineers*, the approach of the *Gunter Harz* court permits defendants to present non-economic factors to justify their regulations.<sup>130</sup> For the sports industry, this opportunity is vital to success under the rule of reason analysis. Additionally, the broad range of factors meriting consideration under the *Gunter Harz* approach accords with the wider latitude that courts have granted to associations in both the standard-setting and sports industry contexts.<sup>131</sup> In particular, as discussed above, the unique characteristics of sports associations were insufficient to immunize it from antitrust scrutiny, but did prevent *per se* condemnation.<sup>132</sup> Since the traditional rule of reason approach similarly fails to acknowledge the special requirements of the industry, a more deferential analysis is appropriate. Allegations against governing entities such as the NCAA and USGA present the most powerful case for judicial deference through the consideration of

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<sup>128</sup> *Id.* at 1116.

<sup>129</sup> *Id.* at 1121.

<sup>130</sup> Another alternative suggested is derived from the common law ancillary restraint doctrine, which takes into account for the uniqueness of some businesses. Under this doctrine, "[i]f the restraint is merely ancillary to some other legitimate business purpose and is not intended to either harm the market or the field of competition, the court can then feel satisfied that the restraint is merely a function of a unique business arrangement where certain practices are recognized as harmless to the workings of a free market." Rosenbaum, *supra* note 64, at 738. This approach is non-commercially based in that it accounts for the needs of a particular industry at a given point in time. Therefore, in a sports industry case, rules could be justified on the league's or association's need to maintain the competitive aspect of the game itself. *Id.* at 738-39.

<sup>131</sup> Gates, *supra* note 8, at 584-85, 640-41; *M&H Tire*, 733 F.2d at 985.

<sup>132</sup> Bauer, *supra* note 4, at 289.

non-economic justifications.<sup>133</sup> Further, where the challenges relate to rules dictating participant play, the case is again strengthened. For, in such instances, concerns over the economic motivations of the governing body are minimal.<sup>134</sup>

#### 4. APPLICATION OF THE RULE

In sports industry cases, it has been argued that a traditional rule of reason approach fails to account for the business's unique nature. Therefore, some courts have applied a specialized test to evaluate the effects of the restraint. However, due to the inherently commercial nature of modern-day professional sports, and an unwavering allegiance to the ideology of competition underlying the Sherman Act, other courts have adhered to the balancing test extracted from *Professional Engineers*. An evaluation of the antitrust implications of sports association equipment rules must account for both these approaches. Thus, this Part will first review the judicial approach under the balancing test, and will consider the courts' view of the potential procompetitive and anticompetitive effects proffered by litigants. This Part will then consider the ramifications of the *Gunter Harz* approach, and how it may be applied in the context of the current NCAA and USGA equipment rule controversies.

##### *a. Balancing Procompetitive and Anticompetitive Effects*

Under the balancing approach, the plaintiff must first demonstrate the anticompetitive effects of the restraint. This is predicated upon proof of market power possessed by the defendant. For without market power, no harm can be inflicted unto competition from an agreement or conspiracy not

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<sup>133</sup> Professor Roberts warns against over-extending this deferential approach. His concern arises due to the Supreme Court's dictum in *NCAA*, suggesting that most NCAA regulations are intended to foster athletic competition and thus enhance public interest in intercollegiate sports. Roberts heralds this view as overly presumptuous:

*It seems unwarranted for a court to assume the majority of NCAA rules would survive a rule of reason balance without any record evidence going to whether any particular rule or group of rules . . . in fact caused the public to be more attracted to intercollegiate athletics, and without any discussion of how to weigh procompetitive effects against demonstrable significant anticompetitive effects.*

Gary Roberts, *supra* note 9, at 2657.

<sup>134</sup> *Id.* at 291. For example, concern with USGA equipment rules should be limited, as none of the members of the Executive Committee have any commercial relationship with any manufacturers, and no manufacturer can become a member of the USGA. *Weight-Rite*, 1990 WL 145594 \*2.

to compete.<sup>135</sup> Injury must be to competition in general and not merely to a particular competitor. To satisfy this requirement the plaintiff can show a multitude of harms: price increases, output restraints, increased barriers to entry, constraints on technology, diminished consumer choice, etc.

In *Weight-Rite*, the court rejected the plaintiff's assertion of restrained competition in the golf shoe industry resulting from the USGA ban on its product. *Weight-Rite's* expert evidence contended that the USGA rule interpretation restricted the sale of its shoes in USGA member club pro shops. This, it was argued, prevented new entry into the market and reinforced the concentrated market structure.<sup>136</sup> The court found the evidence insufficient:

At most, Plaintiffs have presented evidence from which a fact finder could find that the USGA has the power to substantially decrease the marketability of certain types of golf shoes and that the marketability of Plaintiffs' shoe (as currently designed and manufactured) has been substantially diminished. Evidence that a single competitor has been removed from a relevant product market, in and of itself, is insufficient to establish a violation of the rule of reason.<sup>137</sup>

To establish competitive harm, a plaintiff's focus must shift from personal injury to the effects of the restraint on all competitors. Thus, for example, with respect to equipment limitations, emphasis could be placed on the impact on innovation.

In *M&H Tire*, the court rejected a claim of lessened incentives to innovate. However, in that case several distinctive factors impeded the argument's effectiveness. First, the racing association's single-tire rule applied to a limited number of tracks. With the availability of other potential users, the plaintiff still had an incentive to innovate. Second, the designation of the single manufacturer occurred yearly, so incentives existed for the plaintiff and other manufacturers to innovate and compete for the position in subsequent racing seasons.<sup>138</sup> However, in many instances, where the standards set are not temporary, anticompetitive effects can be significant. Standard setting fixes technology at its current state and inhibits further

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<sup>135</sup> Gary Roberts, *supra* note 9, at 2638. In certain instances, including naked restraints on price or output, *proof* of market power is not necessary, for it can be inferred from the conduct itself. *Id.* at 2638-39.

<sup>136</sup> *Weight-Rite*, 1990 WL 145594 \*3; *Weight-Rite*, 766 F.Supp. at 1110-11.

<sup>137</sup> *Weight-Rite*, 766 F.Supp. at 1111.

<sup>138</sup> *M&H Tire*, 733 F.2d at 987-88.

innovation by introducing barriers to innovation.<sup>139</sup> These concerns are evident in the assertions leveled by manufacturers against the NCAA and USGA concerning the current rules revisions.<sup>140</sup>

To counter the alleged harmful competitive effects of their restraints, defendants in the sports industry have presented a wide array of justifications for their rule-making authority. The primary procompetitive assertion by sports' governing bodies is that their rules maintain parity within the sport itself, and thus enhance consumer enjoyment of the sports product. Both the NCAA and USGA have responded in this manner in their current equipment rule confrontations. Courts, in many instances, have accepted this justification. The promotion of competitive balance has been held a procompetitive benefit in the context of intercollegiate athletics,<sup>141</sup> professional golf,<sup>142</sup> and auto racing.<sup>143</sup> However, the claim of a positive correlation between a sport's parity and consumer welfare is not unassailable. First, questions may exist as to the extent that a particular rule truly enhances competition between participants. Nonetheless, while courts may review expert evidence evaluating a rule's effect, deference to the sport's governing body prevails.<sup>144</sup> Second, the relationship between enhanced parity and increased consumer welfare is unclear. Restrictions that improve competition *may* increase the attractiveness of the sports product to consumers. Yet, antitrust law presumes that free market operations will produce optimal prices, output *and* quality. Claims that restraints are required to maximize consumer welfare should only be accepted after considerable investigation.<sup>145</sup>

Once the anticompetitive and procompetitive effects have been advanced, the court must then weigh their relative merits. Minimal practical guidance is provided by the jurisprudence.<sup>146</sup> Since market restraints run counter to the ideological underpinnings of antitrust law, a mere balance between harmful and beneficial effects should be insufficient to justify restrictive conduct. Consequently, courts are likely to uphold the activity only when the anticompetitive effects are significantly outweighed by the

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<sup>139</sup> Gates, *supra* note 8, at 601. Other economic barriers associated with standards include increased market risk and misallocation of R&D funds. *Id.* at 606-07. On the other hand, positive effects of standards include the minimization of consumer transaction costs through quality assurance and the creation of efficiencies through compatibility requirements. *Id.* at 598.

<sup>140</sup> For example, see *Easton Complaint*, *supra* note 52, at 20.

<sup>141</sup> NCAA, 468 U.S. at 117; *Law*, 134 F.3d at 1023-24.

<sup>142</sup> *Deesen*, 358 F.2d at 170.

<sup>143</sup> *M&H Tire*, 733 F.2d at 986, 989.

<sup>144</sup> *Gunter Harz*, 511 F.Supp. at 1111.

<sup>145</sup> Gary Roberts, *supra* note 9, at 2668-69.

<sup>146</sup> *Id.* at 2656; Easterbrook, *supra* note 87, at 13.

procompetitive virtues.<sup>147</sup> In equipment rule cases, where the economic harm may be minimal<sup>148</sup> (if a wide market definition is adopted), and the procompetitive benefit substantial (if the court accepts the importance of preserving "the game"), the defendant will likely meet this burden.

The final step for the court is to determine whether the stated benefits could have been achieved through a less restrictive alternative (LRA). The practical difficulty is that, where the asserted benefit is maintaining parity in play, the range of alternatives can be infinite. Strict application of the LRA doctrine could jeopardize any proposed rule.<sup>149</sup> If no reasonable alternative exists, this problem is eliminated.<sup>150</sup> However, in most instances, some range of options does exist. In those cases, sports associations must select among the alternatives. Typically, performance standards, such as those recently implemented by the NCAA and USGA, are the least restrictive alternative.<sup>151</sup> In fact, such standards may encourage competition — competitors innovate to implement the best approach to satisfy the established standard. Presumably, the choice of such standards would satisfy the rule of reason's LRA requirement. Courts can only require the sports association decision to be reasonable, given the available alternatives. Otherwise, all standard setting will become susceptible to automatic review by the judiciary.<sup>152</sup>

### *b. The Gunter Harz Rule of Reason Analysis*

The concern with excessive judicial interference was clearly one motivation for the *Gunter Harz* court's alternative approach to the rule of

<sup>147</sup> *Id.*

<sup>148</sup> Lazaroff, *supra* note 62, at 986.

<sup>149</sup> Gary Roberts, *supra* note 9, at 2670. Roberts questions if the LRA doctrine has any meaning whatsoever. For example, must the alternative be of the same nature as the challenged rule? Can aluminum bat limitations be replaced with alterations to the dimensions of the playing field?

<sup>150</sup> In *M&H Tire*, the racing association desired to promote parity by requiring all drivers to race on a single rubber compound. At trial, the plaintiff conceded that this could only be accomplished by specifying a single brand of tire. *M&H Tire*, 733 F.2d at 984-85.

<sup>151</sup> Gates, *supra* note 8, at 651. The inferior alternative is specification standards, which operate to fix a given design and thus discourage innovation.

<sup>152</sup> The Fifth Circuit reflected this concern in noting:

[I]t is not enough . . . that the plaintiff was harmed because the defendant refused without justification to promote, approve, or buy the plaintiff's product. Neither anticompetitive animus nor the other elements of a § 1 claim can be inferred solely from the incorrectness of a single business decision by a standard-setting trade association. . . . An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability.

Consol. Metal Prod., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 297 (5th Cir. 1988), *quoted in* Gates, *supra* note 8, at 635.

reason analysis. Following this inquiry, sanctioning organization rules will be upheld under the four-part test so long as they further the organization's goals and are not applied in a discriminatory, arbitrary or capricious manner.<sup>153</sup> The court's application of the test in *Gunter Harz* reinforces this limited scope of review. First, it concluded that the collective action of the USTA and ITF was intended to "accomplish the legitimate goals of preserving the essential character and integrity of the game of tennis as it had always been played, and preserving competition by attempting to conduct the game in an orderly fashion."<sup>154</sup> Second, the court concluded that the USTA's and ITF's actions were reasonably related to those goals. It found that the evidence available to the defendants with respect to the effect of double-strung rackets was sufficient for them to reasonably decide that the ban was necessary for the preservation of the game.<sup>155</sup> Third, the court held that the actions of the USTA were no more extensive than necessary. The court observed that there was a rational basis from which the organization could have concluded that inaction might have harmful effects on the game of tennis. The rule drawn in response was constructed narrowly to address those specific concerns, and thus satisfied the third requirement under the rule of reason analysis.<sup>156</sup>

Finally, the court assessed the procedural protections afforded by the USTA. It concluded that the notice and comment procedures instituted were sufficient. Consideration and incorporation of suggestions from any interested parties, including sporting goods manufacturers, satisfied the court's concern that the enactment of the rule was not arbitrary.<sup>157</sup> However, the court noted that the mere inclusion of procedural safeguards would never be determinative. In this vein, other courts have also cautioned against excessive emphasis on the due process features of a rule-making body.<sup>158</sup> Nonetheless, when incorporated as only one element of a rule of reason

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<sup>153</sup> *Gates, supra* note 8, at 641.

<sup>154</sup> *Gunter Harz*, 511 F.Supp. at 1117.

<sup>155</sup> *Id.* at 1119.

<sup>156</sup> *Id.* at 1121.

<sup>157</sup> *Id.* at 1121-24.

<sup>158</sup> In *Northwest Wholesale Stationers*, the Supreme Court clarified the relevance of procedural protections in the context of *per se* violations of § 1:

[T]he absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.

*N.W. Wholesale Stationers, Inc. v. Pac. Stationary and Printing Co.*, 472 U.S. 284, 293 (1985), quoted in *Brant*, 631 F.Supp. at 78. See also, *Gates, supra* note 8, at 616-17.

analysis, a review of the available procedures will assist in assessing the organization's conduct.

Under the *Gunter Harz* approach, most non-arbitrary equipment rules would survive the rule of reason analysis. To the extent that the rules are implemented to preserve the character of the game, the courts will acquiesce to the rule-making authority of the sanctioning organizations. However, some proactive steps should be taken to ensure judicial deference. Therefore, both the USGA and NCAA have incorporated substantial notice and comment procedures into their rule-making process.<sup>159</sup> Consequently, courts will continue to give wide latitude to sports associations:

[N]o court has the right to step in and dictate to a sophisticated group of officials, duly elected, in a sanctioning organization which sanction sports . . . Such rule making functions must be delegated to the powers of the governing body of that group and a court should interfere only if it finds that the powers were exercised in an unlawful, arbitrary or malicious fashion and in such a manner as to affect the property rights of one who complains . . .

A membership organization . . . as a voluntary organization or one of a social nature of sports organization must be left to legislate its own rules and its own guidelines for participation of its members for the purposes for which it was created so long as that legislation is not done in an unreasonable manner and without malice or intention to harm a single member or segment of membership. Such membership organizations have the right to adopt such rules to protect their very existence.<sup>160</sup>

#### D. Section 2: Monopolization

The purpose of Section 2 of the Sherman Act is to prevent harmful monopolies.<sup>161</sup> Therefore, its attention is directed to a single firm's illegal acquisition or maintenance of monopoly power. By limiting unlawful

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<sup>159</sup> For example, see *supra* text accompanying notes 40-43.

<sup>160</sup> STP Corp. v. United States Auto Club, Inc., 286 F.Supp. 146, 151 (S.D. Ind. 1968), quoted in *Gunter Harz*, 511 F. Supp. at 1117-18.

<sup>161</sup> Section 2 of the Sherman Act provides:

Every person who shall monopolize, or attempt to monopolize, or combine to conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and upon conviction thereof, shall be punished.

15 U.S.C. § 2 (1982).

monopolization, antitrust law seeks to maximize consumer welfare through competitive economic forces.<sup>162</sup> To sustain a successful Section 2 monopolization claim, two elements are required: monopoly power and exclusionary conduct. Monopoly power, in the absence of anticompetitive conduct, is insufficient to sustain a claim under Section 2.

If the challenged activity cannot be justified by legitimate business purposes, the exclusionary conduct requirement is likely satisfied.<sup>163</sup> This question of what constitutes anticompetitive conduct was addressed in *Eureka Urethane v. Professional Bowling Association*.<sup>164</sup> In *Eureka*, the PBA refused to sanction the plaintiff's bowling ball for televised tournament play because it bore a beer manufacturer's logo. The action was initiated as a result of objections by NBC, one of the PBA's broadcasters, to the "free" advertising use of the ball permitted. The court, in rejecting *Eureka's* Section 2 claim, held that rules designed to protect advertising revenue were a valid exercise of business judgment.<sup>165</sup>

Nevertheless, even if established, exclusionary conduct alone is insufficient to substantiate an unlawful monopolization claim. Without market power, the conduct can have no anticompetitive effects and will not attract antitrust liability. Therefore, questions of market definition arise again. Understandably, in a monopolization claim, plaintiffs will seek to construct a narrow market definition to emphasize a sports association's market power.<sup>166</sup> In the sports industry, definition of the relevant product market is typically most contentious. With respect to sports association equipment rules, market definition is uncertain. Clearly, sanctioning organizations have monopoly power with respect to the administration of the rules of the game. Nevertheless, for manufacturers' claims, market power must be shown in a relevant product market. As the *Weight-Rite* court commented, at most the effect of a USGA equipment regulation is to diminish the marketability of the manufacturer's product.<sup>167</sup> For it is likely that, at least with respect to the broad golf equipment market, the USGA does not possess sufficient market power for antitrust liability pursuant to Section 2.

Nonetheless, monopolization claims have been initiated against the USGA by manufacturers, but not pursued.<sup>168</sup> However, participants have

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<sup>162</sup> Rosenbaum, *supra* note 64, at 750-51; Lazaroff, *supra* note 62, at 955.

<sup>163</sup> Stoll & Goldfein, *supra* note 75.

<sup>164</sup> *Eureka Urethane, Inc. v. Prof'l Bowling Ass'n*, 746 F.Supp. 915 (E.D. Mo. 1990).

<sup>165</sup> Stoll & Goldfein, *supra* note 75; Gates, *supra* note 8, at 643.

<sup>166</sup> Rosenbaum, *supra* note 64, at 753-54; *Seabury*, 878 F.Supp. at 780.

<sup>167</sup> *Weight-Rite*, 766 F.Supp. at 1111.

<sup>168</sup> *Id.*

litigated against the PGA, claiming unlawful monopolization.<sup>169</sup> In *Deesen v. The Professional Golfers' Association of America*,<sup>170</sup> the plaintiff, who had failed to qualify under the PGA's eligibility rules, claimed the PGA and its members had conspired to monopolize the professional golf tournament business. While acknowledging that the PGA possessed market power, the court, in rejecting Deesen's claim, focused on the lack of anticompetitive purpose behind the PGA eligibility rules.<sup>171</sup> The court held that no evidence had been presented which indicated that the PGA had used its tournament sponsor status "to preclude sponsorship of tournaments by others, to exclude golfers from access to PGA sponsored tournaments, or to suppress or eliminate competition in professional tournament golf."<sup>172</sup>

Underlying this conclusion by the court is the lack of motivation for a sanctioning body to engage in the sort of anticompetitive behavior asserted by sporting goods manufacturers. The USGA, a non-profit entity with no manufacturer members, has minimal incentive to curtail competition in the golf equipment industry. The NCAA, an organization comprising hundreds of universities and colleges, similarly lacks an unlawful motivation to exclude particular equipment from play. In assessing the viability of both Section 1 and Section 2 claims, courts have implicitly acceded to this reality. However, the potential for liability, and the associated costs of litigation, continues to restrain the rule-making authority of sanctioning bodies. Perhaps a clear standard of partial immunity could reduce the costs associated with the administration of professional and amateur sports. Consideration of the approaches adopted by other jurisdictions may provide a point of departure for a revised conception of U.S. antitrust law in the sports industry context.

### E. *The Canadian Approach*

The potential effects of equipment standards established by sports associations extend beyond the borders of the United States. For example, the Rules of Golf, as administered by the USGA and the R&A, are equally applicable in other countries, including Canada. Administration of a global game predicated an awareness of the antitrust obligations abroad. Thus,

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<sup>169</sup> Another monopolization claim against the PGA involved a trade show promoter objecting to PGA restrictions on the use of its trademark and logo asserted. *Seabury*, 878 F.Supp. at 771. The claim was unsuccessful on the § 2 grounds for two reasons. First, the plaintiff had considerable difficulty in defining the relevant market, which made estimation of the PGA's market share (a proxy for its market power) impossible. *Id.* at 780-81. Second, the district court concluded that protection of licensing and use of a trademark is not an improper exercise of monopoly power. *Id.* at 782.

<sup>170</sup> *Deesen v. PGAA*, 358 F.2d 165 (9th Cir. 1966).

<sup>171</sup> *Id.* at 171.

<sup>172</sup> *Id.*

while substantive similarities exist between U.S. and Canadian antitrust law,<sup>173</sup> sports associations will encounter significant differences. At the general level, broadly drafted statutes and their judicial interpretations drive the U.S. regime. In contrast, the *Competition Act*, the principal source of Canadian antitrust law, is extremely detailed and comprehensive.<sup>174</sup> More importantly, application of antitrust laws has been pursued with less zeal in Canada. This may be explained by a reduced sense of commitment to the ideal of preserving and encouraging free competition,<sup>175</sup> or by the historical constitutional constraints on federal government involvement.<sup>176</sup> Nonetheless, with its goals of maintaining and encouraging competition in order to promote the efficiency and adaptability of its economy, Canadian competition law is positioned to address the implications of sports association rules.<sup>177</sup>

The substantial difference between American and Canadian law in the sports context is the specific *Competition Act* provisions covering amateur and professional sport.<sup>178</sup> Amateur sport is exempt from the Act under Section 6:

**Amateur sport:**

(1) This Act does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport.

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<sup>173</sup> Paul Collins & D. Jeffrey Brown, *National Antitrust Laws in a Continental Economy: A Comparison of Canadian and American Antitrust Laws*, 65 ANTITRUST L.J. 495, 497-99 (1997). See: Richard Janda and Daniel Martin Bellemare, *Canada's Prohibition Against Anti-Competitive Collusion: The New Rapprochement With U.S. Law*, 38 MCGILL L.J. 620, 652, 676 (1993) (summarizing Canadian approach and comparing U.S. § 1 analysis to Canadian partial rule of reason test under § 45); D. Martin Low, *International Cooperation in the Enforcement of Competition Laws: Recent Canada - United States Criminal Experience*, in CANADIAN BAR ASSOCIATION, COMPETITION LAW SECTION CONFERENCE 381 (Aylmer, Quebec, 1997) (highlighting Canada-U.S. procedures in antitrust matters, including a discussion of the August 1995 cooperation agreement between the countries).

<sup>174</sup> Collins & Brown, *supra* note 173, at 497-99.

<sup>175</sup> R.J. ROBERTS, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES 3 (2nd ed. 1992)

<sup>176</sup> Collins & Brown, *supra* note 173, at 499-501.

<sup>177</sup> Ralph A. Winter, *Market Power and "Substantial Lessening of Competition" in Canadian Competition Law: A Primer*, in CANADIAN BAR ASSOCIATION, COMPETITION LAW SECTION CONFERENCE 45 (Aylmer, Quebec, 1997).

<sup>178</sup> Davies, Ward & Beck, COMPETITION LAW IN CANADA (Juris) §§ 1.04[8], 8.10; R.J. Roberts, *supra* note 175, at 408-09.

Definition of "amateur sport"

(1)(2) For the purposes of this section, "amateur sport" means sport in which the participants receive no remuneration for their services as participants . . .<sup>179</sup>

(3) Professional sports are covered by the Act, under Section 48 . . . : (5) Conspiracy relating to professional sport . . . : (7) Every one who conspires, combines, agrees or arranges with another person:

(a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Matters to be considered:

(2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to

(a) whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

Application:

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section

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<sup>179</sup> R.S.C. 1985, c. C-34, s. 6.

does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.<sup>180</sup>

Section 48 was enacted primarily to control unreasonable restrictions on the ability of players joining leagues from choosing which team they wished to join.<sup>181</sup> To date, judicial consideration of the section has been minimal.<sup>182</sup>

As a result of the lack of judicial consideration of these sections, questions remain as to their scope.<sup>183</sup> In particular, it is unclear whether rules regulating sports equipment fall within the ambit of Section 48, or whether resort to the general prohibitions of Section 45 (conspiracy) and 78 to 79 (abuse of dominant position)<sup>184</sup> is necessary. Section 48 would appear to apply only if the equipment rules were considered "unreasonable terms or conditions imposed" on participants. However, manufacturers, and not participants, are typically the aggrieved parties in such claims.<sup>185</sup> Section 48(3) would then appear to apply, and criminal charges against the sports organization would be initiated pursuant to Section 45.<sup>186</sup>

A Section 45 offence has been summarized as consisting of four key elements: "(1) an agreement; (2) an anticompetitive purpose; (3) an "undue"

<sup>180</sup> R.S.C. 1985, c. C-34, s. 48.

<sup>181</sup> R.J. Roberts, *supra* note 175, at 409.

<sup>182</sup> Davies, Ward & Beck, *supra* note 178, at § 8.10.

<sup>183</sup> The amateur/professional distinction is merely one preliminary matter meriting consideration. Some entities, because of the nature of their involvement in the sport, are likely to be excluded from the definition of "amateur." The USGA, with its sponsoring of professional tournaments, is in this category. More questionable is the situation of entities such as the NCAA, where scholarships and other benefits could be considered some form of remuneration. However, given that the primary goals of the NCAA are the advancement of collegiate athletics and competition, a strong argument exists that § 6 was enacted precisely with groups such as the NCAA in mind.

<sup>184</sup> Section 78 includes a non-exhaustive list of anticompetitive acts. The "common element of the acts . . . is conduct that is predatory, exclusionary, and disciplinary toward a competitor or competitors." Collins & Brown, *supra* note 173, at 532-33. See Winter, *supra* note 177, at 56.

<sup>185</sup> However, this is not always the case. For example, the litigants in the Ping Eye2 case included professional golfers who claimed they could incur losses if unable to play with their preferred clubs. See *Gilder v. PGA Tour*, 936 F. 2d 417 (9th Cir. 1991).

<sup>186</sup> Section 45(1) of the *Competition Act*, R.S.C. 1985, c. C-34, states:

Every one who conspires, combines, agrees or arranges with another person:

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

lessening of competition; and (4) intent."<sup>187</sup> In general, the Act's requirements are similar to Section 1 of the Sherman Act. However, it is distinct from the U.S. approach in that no *per se*-rule of reason dichotomy is created. All actions are measured in relation to a single "undueness" standard.<sup>188</sup> Consideration under Section 45 necessitates an inquiry into the effects of the impugned conduct. As such, it is akin to a rule of reason approach in U.S. antitrust law.

As discussed above, in the context of sports association equipment regulations, U.S. courts have customarily adopted a deferential rule of reason analysis. A brief review of Canadian legislation reveals that, in general, sports associations can expect to encounter similar scrutiny from Canadian regulatory authorities. However, an important difference in the Canadian approach is the exemption for amateur sports and the special provisions for professional sports. This added measure of certainty, at least in certain situations, under the Canadian system confers a significant advantage for sports associations.<sup>189</sup> With respect to amateur athletics, it insulates governing bodies from litigation filed solely for strategic purposes. Despite the deference shown to sports entities in the U.S., litigation is always fraught with risk, and more importantly, expense. In the past, potential or actual suits have forced the USGA and PGA to settle with manufacturers and thus compromise their rule-making authority. Thus, judicial deference has proven insufficient. Limited immunity, such as that bestowed upon Canadian amateur sports, is a superior alternative.<sup>190</sup>

#### IV. CONCLUSION

The goal of modern antitrust law is the maximization of consumer welfare. This is accomplished by ensuring free and unrestricted competition, which yields the optimal price and output levels. The fundamental question is whether this purpose is furthered through the imposition of antitrust law on the sports industry. Particularly in the context of sports association equipment rules, courts have been averse to a strict application of antitrust

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<sup>187</sup> Collins & Brown, *supra* note 173, at 514.

<sup>188</sup> *Id.* at 519.

<sup>189</sup> The is exemplified by the paucity of cases found in the Canada, relative to the United States, involving allegations of anticompetitive behavior by entities in the sports industry.

<sup>190</sup> Given the U.S. experience, in particular regarding the NCAA case, complete immunity is an unrealistic alternative. However, limited immunity in the context of sports association equipment rules does not appear to be too great an affront to the principles of unrestrained competition. Thus, while the Canadian position may seem extreme, it does illustrate that the U.S. approach is not the only manner in which the subject has been addressed.

requirements under Sections 1 and 2 of the Sherman Act.<sup>191</sup> Most equipment rules have been upheld, often because they are of fundamental importance.<sup>192</sup> However, judicial deference is far from certain.

Under Section 1, many sports associations may be treated as single entities, unable to conspire or agree to restrain trade.<sup>193</sup> However, the NCAA, for example, has not received such treatment. In addition, allegations of agreements or conspiracies with third parties, e.g. other manufacturers, may yet have Section 1 implications. Once within the ambit of the section, deference is the norm. Nonetheless, if a plaintiff can present evidence to dissuade judicial deference, potential liability awaits.<sup>194</sup> Section 2 monopolization claims pose a similar dilemma. In the case of equipment rule challenges, difficulties exist both in defining the market and in classifying the impugned conduct as exclusionary. However, at least in some cases, findings of liability are not unattainable.<sup>195</sup>

Several concerns arise from the current antitrust treatment of sports association equipment rules. First, judicial recognition of the uniqueness of the sports industry is inconsistent. For Section 1, it is sufficiently unique to avoid *per se* treatment, but not the rule of reason analysis. Under the rule of reason balancing test, when solely economic effects are weighed, the special structure of the sports industry is ignored. With respect to monopolization claims, defendants seek to deny their unusual characteristics to avoid a narrow market definition. However, in this context, courts have concluded that sports are not interchangeable with other forms of entertainment, and have cited their unique aspects in support.<sup>196</sup> These inconsistencies have caused the second difficulty with current approaches, excessive uncertainty. Despite legitimate intentions, and minimal anticompetitive harms, sports associations continually encounter threats of litigation. Variations in judicial treatment have allowed threats of litigation to become a very powerful bargaining chip.<sup>197</sup>

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<sup>191</sup> Gates, *supra* note 8, at 643.

<sup>192</sup> Bauer, *supra* note 4, at 287.

<sup>193</sup> Rosenbaum, *supra* note 64, at 821.

<sup>194</sup> Carton, *supra* note 61, at 107.

<sup>195</sup> Rosenbaum, *supra* note 64, at 821. In the sports industry, liability is more probable in relation to input markets, including the professional player market, rather than output markets. In the latter case, the sports product is required to compete in the general entertainment market, where its market share is minimal.

<sup>196</sup> *Id.* at 822.

<sup>197</sup> Carton, *supra* note 61, at 108.

In response to this dilemma, some commentators have concluded that antitrust law is unable to deal with the certain aspects of the sports industry.<sup>198</sup> However, modern sports have become too commercial, and too integrated with other markets in the economy, to permit broad antitrust immunity.<sup>199</sup> Conversely, a clear rule, granting limited immunity for sports association equipment and playing rules, would not endanger consumer welfare.<sup>200</sup> Rather, a clear rule would confer two benefits: it would legitimate sanctioning organization rules, thus avoiding protracted litigation; and, it would save valuable judicial resources currently squandered on such cases.<sup>201</sup> Unlike other rules, equipment standards in the sports industry are inherently subjective, based on the governing body's conception of the character or

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<sup>198</sup> Gary Roberts, *supra* note 9, at 2673. Professor Roberts posits that educational motives behind NCAA conduct unduly complicate the antitrust analysis. He concludes:

Preserving some modicum of educational integrity in the academy is simply not reconcilable with maximizing consumer welfare in the sports entertainment marketplace. Thus, the NCAA is an entity of self-regulating competitors who govern a schizophrenic industry driven by inherently conflicting values. To evaluate its rules under a statute concerned only with maximizing competition or consumer welfare in a purely commercial context will produce extraordinary results that will do great violence to the historic academic values (and the value of the product) of the higher education industry.

<sup>199</sup> Consequently, Professor Roberts does not advocate complete immunity for the NCAA. "[I]mmunizing big-time intercollegiate athletics from the constraints of antitrust law when it is so much a commercially driven enterprise will do violence to the values of competition and consumer welfare, and allow athletic programs to profit by the uncontrolled exploitation of student-athletes and consumers." *Id.* at 2673-74.

<sup>200</sup> In a broader context, Easterbrook has suggested a series of sequential filters to prevent excessive judicial inquiry into business activity. He suggests that the filters would shift the focus of antitrust from ascertaining the actual effects of conduct, which courts are ill equipped to do, to determining whether the conduct harms competition or consumers. Easterbrook, *supra* note 87, at 17. The two initial filters would require the plaintiff to prove (a) the defendant has market power (i.e. the ability to harm competition), and (b) that the defendant can be enriched by harming competition (i.e. so that there exists an incentive for the conduct). *Id.* After these two filters, if the restraint is naked, it remains *per se* illegal. However, if these requirements are not satisfied, Easterbrook suggests obviously harmless restraints would be dismissed. *Id.* at 30. The remaining filters inquire into the distribution and production of firms in the market, the potential effects on output, and the identity of the plaintiff in the antitrust suit. Only when all the filters have been passed does the court embark on the rule of reason inquiry. *Id.* at 17-18. With respect to sporting goods manufacturers, the limitation with Easterbrook's approach is that the potential for strategic litigation by manufacturers remains. In contrast, with a rule of limited immunity, once certain elements exist (i.e. rule relates to play of game, is not aimed at particular manufacturer, etc.) any challenge to the rule can be summarily dismissed.

<sup>201</sup> Scura, *supra* note 5, at 157 n.43. "The task, then, is to create simple rules that will filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury." Easterbrook, *supra* note 87, at 17.

traditions of the game, or of parity and athletic competition.<sup>202</sup> Judicial intervention is inappropriate. Limited immunity would finally recognize the uniqueness of the sports industry.<sup>203</sup> For, in the end, it remains a game.

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<sup>202</sup> Gates, *supra* note 8, at 643-44. "Sporting association standards generally fall into the category of 'purely subjective by necessity.'" *Id.* at 648.

<sup>203</sup> Success of any such proposal is predicated on accurately defining the range of rules that will be granted limited immunity. In general, the category should include sporting association and league equipment and playing rules enacted for the purpose of ensuring parity or preserving the character of the game. These rules inflict minimal anticompetitive harm, and constitute an essential element for proper administration of organized athletics.

