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Dealing a Duty: Why Casino Markers Should Establish a Legal Duty of Care to Patrons

Davis S. Vaughn[1]

INTRODUCTION

Stacy Stevens thought her husband, Scott, was leaving the house for a job interview.[2] As Scott loaded a bag into his Jeep with the help of his daughter, Stacy felt like things were looking up.[3] Scott was attending therapy and seemed to be in a good mood that day.[4] But a few hours later, Stacy received a phone call that would forever change the lives of her and her family.[5]

Scott Stevens lied to his wife earlier that morning.[6] Instead of going to a job interview, he left the house and drove straight to the Mountaineer Casino.[7] With almost $14,000 in his checking account, Stevens was ready–and desperate–to win.[8] The Mountaineer Casino had become Stevens's home away from home.[9] The casino supplied him with free drinks, free meals, complimentary hotel rooms, and even allowed him to gamble using markers.[10] Over

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1. Davis S. Vaughn, J.D. December 2017, University of Mississippi School of Law. Mr. Vaughn is an attorney with Bradley Arant Boult Cummings LLP in Birmingham, Alabama. He would like to thank Professor Ronald J. Rychlak for his expertise and guidance throughout the article writing process and Professor Kris Gilliland for her direction and assistance in researching this topic.

2. John Rosengren, *How Casinos Enable Gambling Addicts*, THE ATLANTIC, Dec. 2016, https://www.theatlantic.com/magazine/archive/2016/12/losing-it-all/505814/.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* The Mountaineer Casino is located outside of New Cumberland, West Virginia, approximately twenty-two miles from the Stevens's home. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* A "marker" is a:

> preprinted form, resembling a bank check or draft, that a gambler with preapproved credit signs while on the casino floor in order to obtain tokens or chips to play a casino game, If the player wins, he can redeem the marker with an equivalent amount of chips, and he can then exchange the remainder of the chips for cash. A losing player can redeem the marker with any remaining casino chips he

the next four hours, Scott Stevens lost $10,000.[11] He left the casino, wrote a five-page letter to his wife, and drove to the field where his children played soccer.[12]

Once parked, he called J. Timothy Bender, an attorney representing Stevens on embezzlement and tax evasion charges.[13] Over the previous six years, Stevens embezzled almost $4 million from his employer, who terminated him as a result.[14] As Stevens spoke with his attorney, he reached into his bag, pulled out a shotgun, informed Mr. Bender he was going to kill himself, and hung up.[15] Mr. Bender frantically tried to contact Stacy, but it was too late.[16] Instead of facing the reality of years in jail and a ruined marriage, Scott Stevens succumbed to the disease of gambling.[17]

Stacy Stevens did not fully comprehend the extent of her husband's addiction "until the afternoon three police officers showed up at her front door with the news of [his] death."[18] Through her shock and grief, she began fervently studying gambling addiction.[19] She quickly realized her husband was not alone; between three and four million Americans are "pathological gamblers."[20] More alarming than the sheer number of pathological gamblers is the fact that one in five gambling addicts attempt suicide.[21] Armed with this knowledge and a desire to prevent similar tragedies from happening to other families, Stacy Stevens contacted attorney Terry Noffsinger and filed a lawsuit against both Mountaineer Casino and International Game Technology.[22]

Stacy Stevens argued that Mountaineer Casino "knew about her husband and [knew] about the harm that can befall gambling addicts [and thus] 'had a duty to protect Scott Stevens from *itself* . . . yet no attempts were made to intervene.'"[23] On June 15, 2016, the West Virginia Supreme Court of Appeals rejected her argument and held that "no duty of care under West Virginia law exists on the part of manufacturers of video lottery terminals, or the casinos in which the terminals are located, to protect users from compulsively gam-

---

> may have, and pay the balance with cash or by personal check. If the marker is not paid within 30 days by cash, check or casino chips, the casino presents the marker for payment, as a check or draft, to the bank designated by the player on the initial application for casino credit.

Carnival Leisure Industries v. Aubin, 53 F.3d 714, 717 n.1 (5th Cir. 1995).

11. Rosengren, *supra* note 2. Mr. Stevens was playing "his favorite slot machine in the high-limit area: Triple Stars, a three-reel game that costs $10 a spin." *Id.*

12. *Id.* In Mr. Stevens letter, he wrote, "Out family only has a chance if I'm not around to bring us down any further . . . I'm so sorry that I'm putting you through this." *Id.*

13. *Id.*

14. *Id.* Scott was a former chief operating officer at Louis Berkman Investment, where he had check writing and cashing privileges.

15. *Id.*

16. *Id.*

17. *Id.* Scott lost approximately $4.8 million over his six-year gambling addiction. Additionally, Scott "drained [the couples] 401(k) of $150,000, emptied $50,000 out of his wife's and daughters' ETrade accounts, maxed out his credit card, and lost all of a $110,000 personal loan he'd taken out from PNC Bank." *Id.*

18. *Id.*

19. *Id.*

20. *Id.* John Rosengren pointedly remarks, "Gambling is a drug-free addiction. Yet despite the fact that there is no external chemical at work on the brain, the neurological and physiological reactions to the stimulus are similar to those of drug or alcohol addicts . . . Like drug addicts, they develop a tolerance, and when they cannot gamble, they show signs of withdrawal such as panic attacks, anxiety, insomnia, headaches, and heart palpitations." *Id.*

21. *Id.* The National Council on Problem Gambling notes that this high suicide rate is "the highest among addicts of any kind." *Id.*

22. Terry Noffsinger had previously filed, and lost, two lawsuits against casinos. *Id.; see* Williams v. Aztar Ind. Gaming Corp., 351 F.3d 294 (7th Cir. 2003); Caesars Riverboat Casino v. Kephart, 934 N.E.2d 1120 (Ind. 2010); *see also* Complaint at 1, Stevens v. MTR Gaming Grp., Inc., No. 5:14-cv-104, 2015 WL 11439045 (Aug. 7, 2014) (hereafter "Stevens Complaint"). International Game Technology is the manufacturer of the slot machine, Triple Stars, which was Scott Stevens avenue of addiction. Rosengren, *supra* note 2.

23. *Id.; see also* Stevens Complaint, *supra* note 22, at 8 ("Such duty is that of reasonable care to avoid causing [Scott Stevens], his estate, and his family mental, physical, and economic injuries or harm.").

bling."[24] Specifically, the court referenced West Virginia's law allowing problem gamblers to "self-exclude" from casinos.[25] In other words, because West Virginia shifts the duty of care in recognizing a gambling problem from casinos to casino patrons, the casino itself has no legally recognized duty of care to its patrons.

Unfortunately, West Virginia is one of many states that have adopted self-exclusion statutes.[26] This approach is fundamentally flawed and results from decades of lobbying by the casino industry to induce states to pass legislation protecting the gambling industry instead of protecting patrons.[27] Casinos have artfully manipulated state legislatures across the country to buy into the belief that gambling addiction is perpetuated not by casinos but by individual choices.[28] While this may be true in some circumstances, casinos plainly enable problem gamblers when they provide patrons with funds to gamble through issuing markers. These casinos provide patrons an avenue to gamble and therefore must have a legal duty of care to these individuals.

Part I of this article examines the Scott Stevens case and the background of how casinos use markers to promote problem gamblers and simultaneously side-step liability with state self-exclusion statutes. Part II discusses how self-exclusion programs are unsuccessful at preventing compulsive gambling and shift the duty of care away from casinos. Part III argues that casinos that allow patrons to use markers should have a legal duty of care. Part IV examines the legal, economic, and social consequences of this new duty. Ultimately, this article concludes by supporting people like Stacy Stevens, who now spends her time advocating for increased accountability and liability for casinos.[29]

I. BACKGROUND

A. *STEVENS V. MTR GAMING GROUP, INC.*

Stacy Stevens's lawsuit against Mountaineer Casino and International Game Technology set forth six claims by which she sought compensatory and punitive damages.[30] The

24. *See* Stevens v. MTR Gaming Grp., Inc., 788 S.E.2d 59 (W. Va. 2016).

25. *Id.* at 65. "A person who 'has realized that he or she has a compulsive gaming disorder' may 'request [ ] in writing to be excluded from the casino and/or all of the state's four pari-mutuel racetracks.'" *Id.* (quoting W. Va. Code R. § 179-9-128.1.e. (2008)).

26. As of August 2016, the following twenty states have adopted some form of a self-exclusion program, either on a statewide or individual casino level: Delaware (29 Del. C. § 4834), Florida (Rule 61D-14.020, F.A.C.), Illinois (Ill. Admin. Code, Tit. 86, pt. 3000, §3000.745), Indiana (IC 4-33-4-3), Iowa (I.C.A. § 99F.4.), Kansas (K.A.R. § 112-112-4), Louisiana (LA Rev. Stat. § 27.27.1.), Maine (8 M.R.S. § 1003), Maryland (Md. Code Ann., State Govt. Law, § 9-1A-24), Massachusetts (M.G.L., Ch.23K, § 45), Michigan (MCL 432.225), Mississippi (13 Miss. Admin. Code Pt. 3, Ch. 10, R.10), Missouri (Mo. Rev. Stat. § 313.813), Nevada (NAC 5. 170.), New Jersey (N.J.S.A. 5:12-71), New Mexico (NMSA 1979 § 60-2E-34.1), New York (9 NYCRR § 5117.6), Pennsylvania (4 Pa. Cons. Stat. § 1516), Rhode Island (RI Lottery Rule 20.2), and West Virginia (WV CSR § 179-8-126). *See* American Gaming Association, "Responsible Gaming Regulations & Statutes," Aug. 2016, https://www.americangaming.org/sites/default/files/research_files/Responsible%20Gambling%20Regulations-WEB.pdf.

27. *See, e.g.*, Andy Rhea, *Voluntary Self Exclusion Lists: How They Work and Potential Problems*, 9 GAMING L. REV. 462 (2005); William N. Thompson, Robert W. Stocker, II & Peter J. Kulick, *Remedying the Lose-Lose Game of Compulsive Gambling: Voluntary Exclusions, Mandatory Exclusions, or an Alternative Method?*, 40 J. MARSHALL L. REV. 1221 (2007);

28. Rosengren, *supra* note 2. Geoff Freeman, the president and CEO of the American Gaming Association, argues that compulsive gamblers "should have the responsibility to put themselves on a list not to be here." *Id.* Therefore, Freeman states, "[t]here is no liability to the casino." *Id.*

29. *Id.*

30. *See Stevens*, *supra* note 24, at 61. Stacy Stevens' six counts were as follows:

> "Count I contends that MTR breached its duty of care to Mr. Stevens by failing to deny him access to the casino in light of his psychological infirmities. Count IV more or less recasts the Count I negligence allegations against both MTR and IGT in the context of a premises liability claim, wherein Mr. Stevens is asserted to have been a business invitee. Counts II and III, also naming both

West Virginia Supreme Court of Appeals certified three questions brought by Stacy Stevens's six allegations, with the "threshold question" being "whether a duty was owed" to Scott Stevens by the casino.[31] In analyzing this question, the Court stated that "[r]esolution of the first question before us depends on whether a cognizable legal duty may be identified as arising from the facts as alleged in the complaint."[32]

In its analysis, the court noted that "[t]he ultimate test of the existence of a duty to use care [was] found in the foreseeability that harm may result if it is not exercised."[33] In other words, "one who engage[d] in affirmative conduct, and thereafter realize[d] or should [have] realize[d] that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm."[34] However, the court cautioned that "the existence of duty also involve[d] policy considerations underlying the core issue of the scope of the legal system's protection."[35] Thus, the court was bound to "evaluate such pertinent factors as 'the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing the burden on the defendant.' "[36]

Applying this legal analysis to the facts at hand, the court concluded that Stevens failed to establish a legal duty.[37] Relying on policy and the West Virginia legislature, the court drew several conclusions. The court stated that "[slot] machines exist in West Virginia for the express purpose of providing an economic boon to the State and its political subdivisions in the form of increased public revenues, to the citizenry in the form of enhanced employment opportunities, and to the racetrack industry for the additional benefit of the dependent local economies."[38] Further, the court reasoned that "the State has plainly weighed the societal costs of [slot] machines—specifically including their contribution to compulsive gambling and the potential consequences thereof—against their economic benefits, and it has nonetheless elected to make them available to the public."[39] Finally, the court stated that "the remedies provided by the [l]egislature to attenuate the social harm that can be occasioned by video lottery terminals, that is, the establishment of a fund and administrative scheme to assist compulsive gamblers, together with the creation of an exclusion list . . . are intended to be exclusive."[40] Therefore, the court ruled that "the Legislature's determination that no duty of care is owed generally to compulsive gamblers precludes the possibility here that a more specific, special relationship may exist regarding such persons whereby the issue of causation must be considered."[41]

MTR and IGT, compromise products liability claims. In County II, Ms. Stevens insists that the machines were defectively designed and not reasonably safe for their intended use, in part because they should have been programmed with available technology to permit players to lock themselves out after having expended a certain amount of time or money. Count III alleges that the defendants rendered the video terminals use defective by failing to adequately warn Mr. Stevens that the machines were inherently dangerous. Count V accuses MTR and IGT of intentionally inflicting emotional distress on Mr. Stevens, while Count VI seeks recovery from the defendants pursuant to the West Virginia Wrongful Death Act."

31. *Id.* at 62.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 63.
36. *Id.*
37. *Id.* at 66. ("We hold that no duty of care under West Virginia law exists on the part of manufacturers of video lottery terminals, or the casinos in which the terminals are located, to protect users from compulsively gambling. Consequently, an action in negligence against the manufacturer or casino may not be maintained for damages sustained by a user of the terminals as a result of his or her gambling.")
38. *Id.* at 65–66.
39. *Id.* at 66.
40. *Id.*
41. *Id.*

Ultimately, the *Stevens* decision aligns with other courts that have addressed whether a casino owes patrons a duty of care.[42] Accordingly, casinos are shielded from this duty because states have passed "comprehensive" statutes that provide alternative avenues for compulsive gamblers to seek help.[43] Yet, it is this analysis and rationale that continue to place casinos' bottom lines ahead of protecting people. As discussed below, this absence of a duty allows casinos to prey on vulnerable gamblers by using markers.

B. THE BANK OF CASINOS: HOW CASINOS USE MARKERS TO PROMOTE PROBLEM GAMBLERS

In 2006, Jenny Kephart spent "an entire night gambling at Caesars Riverboat Casino, drinking strong alcoholic beverages provided for free."[44] When Ms. Kephart ran out of money, the casino "offered her a counter check, basically a promissory note, to enable her to keep playing."[45] Ms. Kephart signed the check and lost the money.[46] This happened five more times.[47] At the end of the night, she "racked up $125,000 in debt owed to the casino."[48] When she could not repay the marker, the casino filed a lawsuit.[49] Ms. Kephart countersued, claiming that the "casino knew of the patron's pathological addiction and took advantage of the addiction for gain."[50]

Ms. Kephart's countersuit was dismissed. The Indiana Supreme Court ruled that because the state of Indiana adopted a self-exclusion program, she could not advance any counterclaim as she did not self-exclude from the casino.[51] Therefore, the Court held that "the [Indiana] Legislature has abrogated any common law claim that casino patrons might otherwise have against casinos for damages resulting from enticing patrons to gamble and lose money at casino establishments."[52] After Ms. Kephart's suit was dismissed, the casino's original suit was settled confidentially.[53]

Jenny Kephart's story is just one example of how casinos use markers to encourage patrons to gamble beyond their means and into addiction. Richard Daynard, a law professor and former president of the Public Health Advocacy Institute, once stated, "[t]he business plan for casinos is not based on the occasional gambler. The business plan for casinos is based on the addicted gambler."[54] Experts say that "casinos should be aware that when they extend credit to losing patrons, they are by definition enabling problem gamblers."[55]

In fact, "[a]ny gambler who seeks credit for continued gambling has automatically fulfilled one (and perhaps three) of the ten diagnostic criteria established by the American Psychiatric Association for 'pathological gambler' (as well as for 'problem gambler')."[56] As Professor John Warren Kindt argues, "any gambling facility granting credit (particularly

42. *Id.* at 63. (The Court also noted that "[n]o other jurisdiction has found that a duty of care to exist under analogous circumstances.")
43. *Id.*
44. *See* Kephart, *supra* note 22, at 1122.
45. *Id.* (This was the Caesars Riverboat version of a marker.)
46. *Id.*; *see supra* note 10 (definition of markers).
47. *See* Kephart, *supra* note 22, at 1122.
48. *Id.*
49. *Id.*
50. *Id.*
51. Rosengren, *supra* note 2.
52. *See* Kephart, *supra* note 22, at 1124.
53. *Id.*
54. Rosengren, *supra* note 2.
55. *Id.*
56. *Id.* (The ten diagnostic criteria are:

Persistent and recurrent maladaptive gambling behavior as indicated by five (or more) of the following:

over $200) to a [gambler] has actual or constructive knowledge that the gambler is problematic."[57] Yet, casinos frequently use markers to entice customers to gamble, even to the point of addiction.[58]

In Las Vegas, the gambling capital of the United States, "as much as 40 percent of wagering volume occurs on credit."[59] In fact, offering markers is "a key marketing tool on the [Las Vegas] Strip."[60] A gambler's first marker "triggers an application process and a bank inquiry akin to taking out a personal loan."[61] However, subsequent markers "involve little paperwork other than a check of the person's gambling history."[62] Casinos typically offer lax repayment policies in order to "avoid antagonizing players and keep them coming back."[63]

Further, casinos actively track player pain points.[64] For example, if a player strikes a machine in frustration or slumps over in discouragement, a host might "swoop in and offer a voucher for some free credit, a drink, or perhaps a meal in the restaurant."[65] Hosts are often instructed to use encouraging words such as, "You'll win it back."[66] Lissy Friedman, an

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> (1) Is preoccupied with gambling (e.g., preoccupied with reliving past gambling experiences, handicapping or planning the next venture, or thinking of ways to get money with which to gamble)
> (2) Needs to gamble with increasing amounts of money in order to achieve the desired excitement
> (3) Has repeated unsuccessful efforts to control, cut back, or stop gambling
> (4) Is restless or irritable when attempting to cut down or stop gambling
> (5) Gambles as a way of escaping from problems or of reliving a dysphoric mood (e.g., feelings of helplessness, guilt, anxiety, depression)
> (6) After losing money gambling, often returns another day to get even ("chasing" one's loses
> (7) Lies to family members, therapists, or others to conceal the extend of involvement with gambling
> (8) Has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling
> (9) Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling
> (10) Relies on others to provide money to relieve a desperate financial situation caused by gambling.)

See Justin E. Bauer, *Self-Exclusion and the Compulsive Gambler: The House Shouldn't Always Win*, 27 N. ILL. U. L. REV. 63, (2006); *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 671 (4th ed., text rev. 2000).

57. John Warren Kindt, *"The Insiders" for Gambling Lawsuits: Are the Games "Fair" and Will Casinos and Gambling Facilities Be Easy Targets for Blueprints for RICO and Other Causes of Action?*, 55 MERCER L. REV. 529, 593 (2004).

58. *See* Liz Benston, *Casinos burned by gamblers who skip out on markers*, The Las Vegas Sun, Jan. 30, 2011, https://lasvegassun.com/news/2011/jan/30/taking-casinos-ride/.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Rosengren, *supra* note 2.

65. *Id.*; *see also* John Rosengren, *"The Casino Trap,"* Oct. 2016, http://www.aarp.org/money/scams-fraud/info-2016/casino-traps-older-patrons.html ("[The casino] gave [a patron] so much personal attention and TLC that you get the false impression these people—who are milking away all of your money—actually care about you.").

66. Rosengren, *supra* note 2. *See* Jarred Carter, Andrew Cavanaugh, Elizabeth Olveda & Meredith Ragany, *Gambling Compulsion: Neurobiology Meets Casinos*, May 23, 2009, https://neuroanthropology.net/2009/05/23/gambling-and-compulsion-play-at-your-own-risk/.

> While the "tricks of the trade" that casinos use to keep gamblers betting are well-documented (such as absence of clocks or natural lighting, complimentary drinks and endless amenities), one of the most intriguing focuses of the casino atmosphere is its encouragement of engaged decision-making . . . casinos go to great lengths to convince gamblers that they are making rational, reasonable choices with their money while betting.

attorney at the Public Health Advocacy Institute, opined, "To me, that is the most vile and venal example of the casino's intention to trap and keep captive problem and addictive gamblers."[67]

C. STATES ADOPT SELF-EXCLUSION STATUTES

Casinos have masterfully avoided owing any duties to problem gamblers through lobbying states to adopt self-exclusion statutes.[68] A self-exclusion program is "a mechanism by which a patron petitions to be physically removed from the casino if he is discovered on the premises."[69] Typically, to request self-exclusion:

> a patron will have to appear in person in any office of the state gaming board or commission, which is also located on the premises of each gaming facility. The patron must provide information about his age, appearance, address, social security number, and his picture will be taken and placed in the security office of the facility. The duration of the self-exclusion program varies from state to state and ranges from one year to a lifetime exclusion. The patron then must sign a state-designed form that summarizes terms and conditions of the program. The state's gaming commission will then provide his information to all casinos within the state for implementation.[70]

These self-exclusion programs can be traced back to the state of Missouri, which in 1996 promulgated the first statewide self-exclusion program.[71] Attempting to address the problem of compulsive gambling, casino industry leaders and state legislatures "formulated a concept of physically banning from gaming facilities those players who are unable to control their gambling addiction."[72] Most states that allow casino gambling followed Missouri's approach and enacted statewide self-exclusion programs.[73] The one commonality amongst state self-exclusion programs is that "the individual who seeks to be self-excluded must be the person seeking and obtaining the self-exclusion."[74] Spouses like Stacy Stevens, parents, brothers, and sisters "do not have the power or authority to initiate or impose self-exclusion on an individual."[75]

II. SELF-EXCLUSION PROGRAMS ARE UNSUCCESSFUL AND SHIFT ALL DUTY AWAY FROM CASINOS

The nationwide attempt by states to curtail problem gambling through self-exclusion statutes has largely failed.[76] The primary reason for this failure is that casinos have no legal

67. Rosengren, *supra* note 2.

68. *See supra* note 26; *see also* Rhea, *supra* note 27, at 462 (for a more detailed background on self-exclusion statutes).

69. Irina Slavina, *Don't Bet on It: Casino's Contractual Duty to Stop Compulsive Gamblers From Gambling*, 85 CHI.KENT L. REV. 369, 371 (2010).

70. *Id.* at 371–72.

71. *See* Joseph M. Kelly & Alex Ingelman, *Compulsive Gambling Litigation: Casinos and the Duty of Care*, 13 GAMING L. REV. 386 (2009).

72. *See* Slavina, *supra* note 52, at 369.

73. *Id.*; *see supra* note 26 (for list of self-exclusion states).

74. *See* Thompson et. al, *supra* note 27, at 1245.

75. *Id.* ("This is consistent with case law that has declared that commercial casinos cannot be required to ban a person from the casino at the request of a family member.")

76. Bauer, *supra* note 56; Thompson et. al, *supra* note 27. *See* Ashley Grace, *Why One Size Doesn't Fit All: A Critique of Casino Voluntary Self-Exclusion Programs and Recommendations for Improvement*, 82 UMKC L. REV. 233, 236 (2013); Keith C. Miller, *The Utility and Limits of Self-Exclusion Programs*, 6 UNLV GAMING L.J. 29, 31 (2015); Stacey A. Tovino, *Gaming Disorder, Vulnerability, and the Law: Mapping the Field*, 16 HOUS. J. HEALTH L. & POLICY 163, 178–80 (2016).

duty or incentive to enforce self-exclusion programs. Both the lack of a legal duty and lack of an incentive to enforce will be addressed in turn.

First, courts have held that casinos have no legal duty to actually enforce self-exclusion statutes. For example, in *Merrill v. Trump Indiana, Inc.*, the Court of Appeals for the Seventh Circuit ruled that although the plaintiff placed himself on the Indiana voluntary self-exclusion list, no duty of care arose on the part of the casino to ensure that the plaintiff would actually be excluded.[77] The *Merrill* Court held that, at most, "the rules impose upon [casinos] a duty to the state through the gaming commission, not to a self-requesting evictee."[78] Further, the district court in *Merrill* stated that because the "Indiana legislature has procured such comprehensive statutes and regulations to create and control the riverboat gaming industry, which do not include the duty in question, the Court finds that public policy would not favor imposing a duty on the casino to evict a known compulsive gambler."[79]

This failure to impose a duty on casinos to exclude problem gamblers, even when patrons self-exclude, goes against common sense. As Professor John Warren Kindt noted:

> With hundreds to thousands of surveillance cameras in each casino watching virtually every chip and slot machine, the duty to monitor pathological and problem gamblers would seem to be a natural obligation of the premises and could become a recognized legal duty by early twenty-first century—regardless of whether the pathological or problem gambler had alerted any specific gaming facility.[80]

Yet, despite the technology and ability to monitor patrons, courts like *Merrill* have held that casinos owe "no higher duty to their patrons than any other business."[81] This means that even an individual who recognizes that he or she has a gambling problem and attempts to self-exclude is entirely responsible for any future casino gambling. Essentially, casinos are off the hook in any potential lawsuit.

Second, from a casino's perspective it makes little sense to voluntarily enforce self-exclusion statutes since compulsive gamblers bring in money. While some casinos can be fined by the state's gaming commission for allowing self-excluded patrons onto the premises, these fines often pale in comparison to the amount of money lost to the casinos by compulsive gamblers.[82] This means casinos can simply allow self-excluded patrons into the casino, expecting the gamblers' losses to outweigh any potential fine. Valorie Lorenz, author of *Compulsive Gambling: What's It All About*, remarked on the lack of incentive to enforce self-exclusion: "[i]f a self-excluded gambler goes to a casino, it's okay for them to lose money, but once they start winning, a worker taps the gambler on the shoulder and says, 'You're being arrested for trespassing.'"[83] Lorenz further stated that all someone has to do is "[g]o to any casino, and the gamblers will tell you this is happening with regularity."[84]

Self-exclusion statutes do not effectively prevent problem gamblers from entering casinos and instead shift all duty and accountability away from casinos. Gambling addiction is increasing rapidly across the world.[85] The inherent flaws of self-exclusion programs con-

77. *See* Merrill v. Trump Indiana, Inc., 320 F.3d 729, 732 (7th Cir. 2003).

78. *Id.* (notably, the West Virginia Supreme Court in the *Stevens* decision cited to the Seventh Circuits rational in *Merrill*); *See also supra* note 24.

79. *See* Merrill v. Trump Indiana, Inc., No. 2:99-cv-292, 2002 WL 1307304, at *5 (N.D. Ind. May 9, 2002).

80. *See* Kindt, *supra* note 52, at 541.

81. Merrill, 320 F.3d at 732.

82. *See* Rhea, *supra* note 27, at 464; *see also* VALERIE C. LORENZ, COMPULSIVE GAMBLING: WHAT'S IT ALL ABOUT? (Tate Publishing, 2014).

83. *See* Rhea, *supra* note 27, at 464.

84. *Id.*

85. Bauer, *supra* note 56, at 64.

tribute to the growing cycle of gambling addiction and the negative societal effects that stem from this addiction.[86]

III. CASINOS THAT ALLOW PATRONS TO USE MARKERS SHOULD HAVE A LEGAL DUTY OF CARE

Recall Jenny Kephart's case, where Caesars casino gave Jenny $125,000 in markers but was held to owe no legal duty to her. Justice Brent E. Dickson's dissent in the *Kephart* decision argued:

> [T]he result in this case is particularly disturbing. The Court today holds that a gambling casino may with impunity entice a person the casino knows to be a pathological gambler by offering free casino transportation from Tennessee to the Indiana casino, providing her with a free hotel room, food, and alcohol, and then extending her credit to gamble at the casino, where she not surprisingly suffers $125,000 in casino gambling losses. These facts call for application of the well established principle of Indiana common law that business owners must use reasonable care to protect their customers while on the business premises.[87]

As attorney Justin Bauer argued, "casinos derive a vast amount of their revenue from compulsive gamblers. As the law currently stands, however, the casinos get to derive this benefit without any subsequent burden to consequence. It is unjust for this to continue."[88]

Following the reasoning of Justice Dickson and attorney Justin Bauer, casinos that allow patrons to use markers should have a legally recognized duty of care to these patrons. The marker goes beyond letting a patron gamble for a weekend or failing to exclude a known compulsive gambler. The marker represents a conscious decision by the casino to engage in a business transaction with an individual who, as noted above, demonstrates signs of gambling addiction. The marker increases the likelihood of addiction, thereby increasing the likelihood of negative personal and societal consequences. Bauer further articulates that "casinos are exploiting the gamblers disease for their personal gain. The casino is in the best position to prevent the harm these people suffer, and as such, should be held responsible when they fail to take the necessary action."[89]

IV. DEALING A DUTY: RAMIFICATIONS AND CONSEQUENCES

Establishing a legal duty of care when a casino provides a marker to a patron naturally creates consequences. Casinos could ultimately be found legally responsible for a breach of this duty of care if that breach causes a patron to suffer damages. This could lead to some casinos suffering economic losses since a casino might choose not to provide markers in order to avoid litigation exposure. If markers are no longer popular within casinos, problem gambling and the negative societal implications could decrease. The legal, economic, and social potential outcomes will be addressed in turn.

The first obvious consequence of this new duty on casinos would be legal liability. Negligence lawsuits require a plaintiff to typically establish four elements: (1) the existence of a duty or a standard of care (2) breach of that duty or standard of care (3) legal causation and (4) damages.[90] By creating this duty, a potential plaintiff in a lawsuit against a casino only checks off the first box. In other words, a plaintiff would still be required to prove the

86. *Id.* at 74–77.
87. Kephart, *supra* note 22, at 1126.
88. Bauer, *supra* note 56, at 93–94.
89. *Id.*
90. *See, e.g.*, Sanchez *ex rel.* Sanchez v. Wal-Mart Stores, Inc., 221 P.3d 1276, 1280 (Nev. 2009).

remaining three elements of any negligence claim. However, establishing a duty allows the plaintiff to at least jump through the first hoop and present legal arguments that a casino's breach caused damages.

Other countries have taken the lead in holding casinos accountable for aiding compulsive gamblers and have permitted lawsuits to proceed under the negligence theory. For example, the Appeals Court of Austria awarded Christian Hainz over $600,000 after Mr. Hainz lost over $3,000,000 in over 100 visits at the Casinos Austria company casinos.[91] The Austrian court agreed with Mr. Hainz's claim that "the casino had an obligation to review his financial situation and refuse his or any other player's entry if the player's solvency was in question."[92] Additionally, the Ontario Lottery and Gaming Corporation in Canada recently awarded Lisa Dickert damages against a casino for failing to exclude her from the casino.[93] Ms. Dickert went to a casino just weeks after placing herself on a self-exclusion list.[94] She spent fifty-two hours gambling, and totaled her car on the way home.[95] Dickert's attorney successfully argued that the casino's actions were "like a drunk tossing his keys on the bar and the bartender pouring another drink and giving his keys back."[96]

Attorney Terry Noffsinger, who served as counsel for both Jenny Kephart and Stacy Stevens, remarked on the difficulty of litigation against casinos due to the lack of a duty to patrons. He expressed amazement over the fact that "not one time [w]as the evidence [ ] alleged in [the] complaint [ ] tested in a court of law with sworn testimony and a trial and a ruling."[97] This is because casinos can have lawsuits swiftly dismissed for failure to establish that the casino breached any duty to the patron.

Noffsinger believes that the movement to hold casinos liable for problem gambling is growing.[98] According to Professor John Warren Kindt, it will require that courts allow discovery and access to private industry documents to truly stop problematic gambling.[99] Kindt stated that "[t]he industry knows if any court gets to the point of discovery, they're in real trouble" and that "they know what they've got in their marketing plans and their documents: that one-to-two thirds of their income comes from the roughly 10 to 20 percent of their customers who are pathological or problem gamblers."[100]

The casino industry could suffer economically if they no longer grant markers, as a result of a duty and the subsequent potential for legal liability.[101] However, the potential economic losses are justifiably offset by the positive social consequences. If casinos no longer grant markers, patrons would have fewer avenues to get money to gamble. Less gambling inevitably means less gambling addiction. Less gambling addiction means less financial crimes, depression, divorces, and suicides.[102]

Justin Bauer realized that "[c]ompulsive gambling is a problem that will not vanish any time in the near future. Due to the vast number of people that this disease affects, a proper solution needs to be formulated soon to curb and prevent its devastating [e]ffects."[103]

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91. *See* Rhea, *supra* note 27, at 464–65.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See* Rosengren, *supra* note 2.
98. *Id.*
99. *Id.*
100. *Id.*
101. Casinos would have to undertake a cost-benefit analysis, weighing the costs of litigation with the costs of distributing and collecting markers. Admittedly, the casino industry is more than just the Sheldon Adelson's of the world. There are many low-to-middle-class workers who depend on the casino industry for their livelihood. If casinos bottom line decreases, layoffs, even closures, could be foreseeable.
102. *See* Rosengren, *supra* note 2.
103. *See* Bauer, *supra* note 56, at 93.

Establishing a legal duty when a casino grants a patron a marker accomplishes both the need to curb the effects of gambling addiction and the goal of accountability and responsibility of the casino to the patron.

CONCLUSION

Scott Stevens was an addict, and Mountaineer Casino knew it. Jenny Kephart was an addict, and Caesars casino knew it. Despite this knowledge, both casinos used markers to enable these addicts to continue spiraling downward. In Ms. Kephart's case, this meant financial turmoil. In Mr. Stevens's case, it meant severe depression, which ultimately ended in suicide. He left behind a family that is now penniless and fatherless. Of course, Ms. Kephart and Mr. Stevens share much of the blame for how their lives played out. However, the casinos have a stake in the blame as well. By holding casinos that grant markers legally accountable with a duty of care, courts will take a step in the right direction of minimizing the effects of gambling addiction.

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Leveling the Playing Field for Sports Agents: How the Two-Hat Theory and the Model Rules of Professional Conduct Collide

Zach Schreiber*

INTRODUCTION

The role of a sports agent has an image of glamour that many sports fans want.[1] What starts out as a child's dream to hit the game-winning home run in the World Series turns practical once they realize they do not possess the astonishing athleticism, drive, and coordination to reach the peak of the sport. In fact, only 1% (men's basketball) to 4.6% (men's ice hockey) of high school athletes are privileged enough to have the opportunity to play in the National Collegiate Athletic Association's ("NCAA") Division 1 in one of the four major sports.[2] From there, only 1.1% (men's basketball) to 9.1% (men's baseball) of NCAA Division 1 players are skilled enough to play professionally.[3] With this information, young boys and girls with a passion for sports must turn to other career paths to be able to participate in the games they love.[4]

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1. Andrew Brandt, *An Agent's Life Isn't All Glamour*, ESPN (Nov. 27, 2012), http://www.espn.com/nfl/story/_/id/8681968/nfl-agent-life-all-glamour.

2. *NCAA, 2017 Probability of Competing Beyond High School Figures and Methodology* (Mar. 10, 2017), http://www.ncaa.org/sites/default/files/2015-16RES_Probability_Chart_Web_20170314.pdf. The four major sports in the United States are Basketball, Baseball, Football, and Ice Hockey.

3. *Id.*

4. Neal Pollack, *The Cult of the General Manager*, SLATE (Aug. 29, 2005), http://www.slate.com/articles/sports/sports_nut/2005/08/the_cult_of_the_general_manager.html.

An agent's role in professional sports is of vital importance. Tom Cruise, in his classic 1996 film about the trials and tribulations of a struggling NFL agent, *Jerry Maguire*, coined two of the most famous – and realistic – quotes that epitomize the sports agent field.[5] "Show me the money!" exemplifies the typical role that an agent plays, while "help me, help you" illustrates the struggles that an agent can face when dealing with clients on a day-to-day basis.[6] Whether in basketball, football, or any other sport, athletes need an advocate to handle their contract negotiations, resolve conflicts with their teams, and facilitate sponsorship and other financial opportunities.[7] While the players focus on their craft, the agent's responsibility is to handle off-the-court matters for the athlete and ensure that they are maximizing their earning potential in the limited window they have to receive an income for playing a sport.[8]

People turn to licensed professionals every day to ensure life's most vital matters are handled competently.[9] Doctors, who handle your physical and mental health, and accountants, who handle your finances, both require additional schooling and certifications.[10] While the National Football League Players Association ("NFLPA"), the labor union for players in the National Football League ("NFL"), requires that all agents obtain a graduate degree before applying for certification, there are no standards for the area of study of the graduate degree.[11] Attorneys, who frequently handle contract negotiations and dispute resolution, are required to gain admission to the bar to prove competency.[12] So why do athletes regularly turn to non-attorneys to handle their business ventures? Is it because athletes feel that being a successful sports agent requires more than a legal education?[13] Do athletes feel that a knowledge of the law does not provide enough support in terms of marketing, public relations, and social media?[14] Alternatively, do the coaches, mentors, and support networks of young athletes not understand the value an attorney provides?

This paper explores the challenges that attorney-agents face in the competition for clients. Part I explains the landscape of sports-agent regulations, describing proposed and enacted laws, league requirements, and other systems in place to police the industry. Part II discusses the challenges that attorney-agents face and the uphill battle against non-attorney agents recruiting the same players for representation. In particular, it addresses how the Model Rules of Professional Conduct put attorney-agents at a disadvantage through conflict of interest and solicitation rules. Part III discusses potential theories proposed to sidestep these restrictions for attorney-agents, specifically the two-hat theory, and also suggests potential reforms to enable attorney-agents to compete on a level field against non-attorney agents in a business where the scales should be tipped the other way.

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5. Rotten Tomatoes, *Jerry Maguire Quotes* (last visited Mar. 22, 2017), https://www.rottentomatoes.com/m/jerry_maguire/quotes/.

6. *Id.*

7. Lori Nickel, *Player Managers: Agents Show Clients More Than Money*, MILWAUKEE WISCONSIN JOURNAL SENTINEL (Oct. 23, 2012), http://archive.jsonline.com/sports/packers/player-managers-agents-show-clients-more-than-money-hk7asik-175532421.html.

8. Brandt, *supra* note 1.

9. New York State Department of Labor, *Occupations Licensed of Certified by New York State* (last visited Mar. 22, 2017), https://labor.ny.gov/stats/lstrain.shtm.

10. *Id.*

11. National Football League Players Association, *NFLPA Regulations Governing Contract Advisors* 3 (Aug. 2016), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/RegulationsAmendedAugust2016.pdf.

12. *Id.* The competency of attorneys to handle a wide range of work on behalf of their clients is abundant. For purposes of this article, I listed the tasks applicable to attorneys as a list of every task an attorney might handle would be impossible to compile accurately.

13. Darren Heitner, *Why Pick A Non-Attorney Agent Over an Attorney-Agent?*, SPORTSAGENTBLOG (Nov. 9, 2010), http://sportsagentblog.com/2010/11/09/why-pick-a-non-attorney-agent-over-an-attorney-agent/

14. *Id.*

PART I: CURRENT REGULATION OF BOTH ATTORNEY AND NON-ATTORNEY SPORTS AGENTS

The sports agent industry has often been tarnished with black marks.[15] Perhaps part of the reason that sports agents' reputations have suffered is the same reason that attorneys are perceived in a poor light.[16] Many decry unscrupulous attorneys as fast-talkers, money-chasers, and shysters.[17] Likewise, rogue sports agents have become associated with attempts to take advantage of an athlete's newfound or forthcoming wealth.[18] For example, in 2013, former NFL agent Terry Watson, who is not – and never was – an attorney, was charged with fourteen felony counts for attempting to financially induce college football players from the University of North Carolina to sign with him for representation.[19]

Watson was charged with athlete-agent inducement and felony obstruction of justice, the former being a direct violation of the agent inducement laws of North Carolina.[20] He provided cash, plane tickets, and other miscellaneous benefits to college players, with the ultimate goal of signing them, thereby receiving a significant commission off of their future earnings in the NFL.[21] Of note, Watson provided one prospect, Greg Little, with $18,200 in cash between May 2010 and October 2010.[22] All of these benefits, whether financial or otherwise, are in violation of North Carolina's laws regulating athlete-agents.[23]

In April 2017, Watson ultimately pled guilty, and received probation, a $5,000 fine, and a six-to-eight month suspended jail sentence.[24] North Carolina's enacted version of the Uniform Athletes Agent Act[25] requires that sports agents "register with the Secretary of State, and prohibits them from providing 'anything of value' to a student-athlete not under contract."[26] Watson's story demonstrates an example of state enforcement against sports agents, albeit a rare one.[27] Unfortunately, these violations of client solicitation laws are widespread.[28]

A. PROFESSIONAL SPORTS LEAGUE REQUIREMENTS

To become a licensed sports agent, one must apply through the respective sports league unions.[29] Usually, the certification process is governed by the leagues' respective

15. *See* Peter Keating, *How to Scam an Athlete*, ESPN (Apr. 22, 2011), http://www.espn.com/espn/news/story?id=6408849. *See also* Darren Heitner, *Football Agent Terry Watson Facing 14 Felony Counts for Violating North Carolina Agent Law,* FORBES (Oct. 9, 2013), https://www.forbes.com/sites/darrenheitner/2013/10/09/football-agent-terry-watson-facing-14-felony-counts-for-violating-north-carolina-athlete-agent-law/#6e2f201853eb.

16. Forrest Wickman, *Churn That Bill, Baby!*, SLATE (Mar. 26, 2013), http://www.slate.com/articles/life/explainer/2013/03/dla_piper_overbilling_how_did_lawyers_get_such_a_bad_reputation_forrest.html.

17. *Id.*

18. Heitner, *supra* note 15.

19. *Id.*

20. *Id.* For further information on these laws, *see infra* Part I.b.

21. *Id.*

22. *Sports Agent Terry Watson Faces 14 Felony Counts in UNC Scandal*, WRAL SPORTS (Oct. 9, 2013), http://www.wralsportsfan.com/sports-agent-connected-to-unc-scandal-charged/12976259/.

23. *Id.*

24. Scott Polacek, *Former Agent Terry Watson Pleads Guilty to Giving Cash to EX-UNC Players*, BLEACHER REPORT (Apr. 17, 2017).

25. *See infra* Part I.b.

26. WRAL Sports, *supra* note 23.

27. *Id.*

28. *See id*; ESPN News Services, *Josh Luchs Says He Paid Players*, ESPN (Oct. 13, 2010), http://www.espn.com/college-football/news/story?id=5678493; *Confessions of an Agent*, SPORTS ILLUSTRATED (Oct. 18, 2010), http://www.si.com/more-sports/2010/10/12/agent; *see also* Robert F. Orr & Jill C. Walters, *How College Sports Agents Become Felons*, US LAW (Spring/Summer 2014), https://web.uslaw.org/wp-content/uploads/2014/04/Justice-Robert-F.-Orr-and-Jill-C.-Walters-USLAW-Magazine-Article.pdf.

29. *See generally* National Football League Players Association, *supra* note 11.

player's associations.[30] However, the unions' vetting processes are somewhat suspect.[31] While the NFLPA requires a certain level of experience and academic achievement of its agents, the scope of permissible activities is unrelated to the degree requirements and standards it sets forth.[32] The NFLPA states that:

> "The activities of Contract Advisors which are governed by these Regulations include: the pro- viding of advice, counsel, information or assistance to players with respect to negotiating their individual contracts with Clubs and/or thereafter in enforcing those contracts; the conduct of individual compensation negotiations with the Clubs on behalf of players; and any other activity or conduct which directly bears upon the Contract Advisor's integrity, competence or ability to properly represent individual NFL players and the NFLPA in individual contract negotiations, including the handling of player funds, providing tax counseling and preparation services, and providing financial advice and investment services to individual players."[33]

To obtain a certification in the NFL one is required to pay a $2,500 non-refundable application fee, obtain an undergraduate and a post-graduate degree in any subject, and attend a two-day seminar with a written exam.[34] However, the NFLPA retains the right to waive the degree requirements if one possesses equivalent negotiation experience.[35] Similarly, the NBA Players Association requires a $100 application fee, passage of a written exam, and a degree from a four-year college.[36]

League union regulations do not include the ethics rules established for attorneys.[37] In fact, to represent professional athletes one does not need to be an attorney at all.[38] While the NFL requires a graduate degree, the NBA does not.[39] The question, then, is how do the leagues ensure that their players are represented by qualified agents?

B. THE UNIFORM ATHLETE AGENTS ACT

Several laws have been proposed and enacted to combat these types of violations.[40] The Uniform Law Commission created the Uniform Athlete Agents Act ("UAAA") and proposed its passage in every state to achieve consistent regulation of sports agents nationwide.[41]

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30. *Id.*
31. *See generally id.*
32. *See* National Football League Players Association, *supra* note 11.
33. *Id.*
34. *Id.*
35. *Id.*
36. National Basketball Player's Association, *Becoming An Agent*, http://nbpa.com/becoming-an-agent/ (last visited Mar. 27, 2017).
37. *See infra* Part II.
38. *See* National Football League Players Association, *supra* note 11; National Basketball Player's Association *supra* note 37.
39. *See* National Football League Players Association, *supra* note 11; National Basketball Player's Association *supra* note 37.
40. *See* 15 U.S.C. § 7801. *See also* Marc Edelman, *Will the New Uniform Athlete Agents Act Continue to Pander to the NCAA?*, FORBES (Jun. 4, 2013), https://www.forbes.com/sites/marcedelman/2013/06/04/will-the-new-uniform-athlete-agents-act-continue-to-pander-to-the-ncaa/#74d458412b39.
41. Edelman, *supra* note 41. *See* Uniform Law Commission, *About Us*, http://www.uniformlaws.org/Narrative.aspx?title=about%20the%20ULC (last visited Mar. 27, 2017) ("The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), established in 1892, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.").

First ratified in 2000, the UAAA requires all agents who wish to represent athletes to register with the secretary of state in each state they wish to recruit college players, represent clients, or conduct business, such as negotiating a contract with a professional team.[42] This burdensome requirement, which is loosely enforced and rarely checked, would require an agent residing in New York who wants to represent a basketball player from Kentucky and negotiate his contract with a team in Los Angeles to register with three separate states before being able to make contact with the player.[43] Moreover, it requires agents to notify college athletic departments immediately upon entering into an agreement with a student-athlete.[44] Additionally, the Act provides a private cause of action for NCAA member schools to sue agents that fail to do so.[45] While the UAAA is a proposed uniform act, it has been ratified, in part or in whole, by forty of the fifty U.S. states and in the U.S. Virgin Islands as of April 2017.[46]

In 2013, the Uniform Law Commission announced plans to amend the UAAA.[47] By 2015, the Uniform Law Commission approved the proposed changes during its annual meeting.[48] These changes included a broader definition of who qualifies as an agent, and a higher recommended financial penalty for violations.[49] There were also changes to how agents register with states, and a heightened requirement for notification by agents, such as informing universities before contacting athletes or their representatives.[50] The goal of this revision, in part, was to achieve uniformity amongst the states.[51] The chairman of the revision committee, Dale G. Higer remarked that "[m]any states have amended the old act, and it's getting so it's not as uniform as it should be."[52] The UAAA sought to hold all agents to the same nationwide standards, but there has also been sharp criticism of the Act.[53]

The original Act never protected the clients.[54] While it does require agents to register with the universities and state departments, it does not give the athlete-clients "any special cause of action to recover money from either their agents or their schools if either engage in wrongdoing."[55] The agent-client relationship should be the most protected, but it is the NCAA member institutions that proposed the Act for their own protection.[56] The original version of the Act was proposed by the President of Florida State University, Sandy D'Alemberte, after his school was reprimanded for violations of the NCAA's amateurism rules.[57] Further, many of the UAAA's drafters have "direct ties" to the NCAA, and not one member of the drafting committee was a recent college athlete.[58]

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* In this article, the author states that forty-three states have enacted UAAA. However, since the article was written, several states have changed their laws. For an up-to-date account of UAAA's validity in each state, *see* Uniform Law Commission, *Athlete Agents Act*, http://www.uniformlaws.org/Act.aspx?titleathlete%20Agents%20Act (last visited Mar. 23, 2017).
47. Edelman, *supra* note 41.
48. *Revisions to Sports Agent Act That Protects NCAA Athletes Get Approved*, ESPN (Jul. 15, 2015), http://www.espn.com/college-football/story/_/id/13263390/law-commission-approves-changes-strengthen-uniform-athlete-agents-act.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *See* Edelman, *supra* note 41.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

While the UAAA was intended to protect the sanctity of the agent-client relationship, that goal was never realized.[59] Punishments for illegal solicitation and violations vary from state to state.[60] For example, in North Carolina, it is a class I felony, which carries a maximum sentence of 15 months for each count and up to a $25,000 fine.[61] While these punishments seem like a significant deterrent, agents are not being punished for violating ethical principles.[62] In fact, the UAAA is in place to police agent activity to protect the purity of "amateurism" as it relates to the NCAA's member institutions and does not do enough to safeguard the prospective and current clients that need it.[63]

C. THE SPORTS AGENT RESPONSIBILITY AND TRUST ACT

Several years after the UAAA's passing, many states realized it had glaring inadequacies.[64] As the need for new and modernized legislation grew, Congress formed a committee to draft federal sports-agent laws.[65] In 2004, Congress enacted legislation to regulate the way in which sports agents can solicit and interact with prospective clients, entitled the Sports Agent Responsibility and Trust Act ("SPARTA").[66] SPARTA puts the regulation of sports agents directly under the authority of the Federal Trade Commission ("FTC").[67] According to the FTC, SPARTA:

> "prohibits certain conduct by sports agents relating to the signing of contracts with student athletes. It makes it unlawful for an agent to directly or indirectly recruit a student athlete by giving any false or misleading information, making a false promise or representation, or providing anything of value to a student athlete, or anyone associated with the athlete, before he or she has entered into an agency contract."[68]

Compared to the UAAA, SPARTA is seen as a stronger law to protect the interests of client-athletes.[69] By placing violations of the Act under the jurisdiction of the FTC, regulation of sports agents can be directly enforced by a governmental body.[70] In theory, government oversight, as opposed to private causes of action, should be a cause of concern for those agents who regularly break rules to obtain new clients.[71] However, SPARTA's limitations come from the penalties allowed to be brought down under it.[72] The FTC's maximum civil penalty under SPARTA is just $11,000.[73]

While SPARTA does have unique differences from the UAAA, it has been met with minimal acclaim.[74] Similarly to the UAAA, SPARTA does nothing to regulate the relation-

59. *See* Revisions to Sports Agent Act That Protects NCAA Athletes Get Approved, *supra* note 49.
60. *Id.*
61. *Id.*
62. *Id.*
63. *See* Edelman, *supra* note 41.
64. Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform its Sports Agent Laws to Conform with True Agency Principles*, 4 Harv. J. Sports & Ent. L. 145, 176 (2013).
65. *Id.* at 176.
66. 15 U.S.C. § 7801 (2004).
67. Darren Heitner, *SPARTA – Not the Greek City*, SPORTSAGENTBLOG (Feb. 15, 2006), http://sportsagentblog.com/2006/02/15/sparta-not-the-greek-city/.
68. Fed. Trade Comm'n, *Sports Agent Responsibility and Trust Act*, https://www.ftc.gov/enforcement/statutes/sports-agent-responsibility-trust-act (last visited Mar. 27, 2017).
69. Heitner, *supra* note 68.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. Edelman, *supra* note 65.

ship between the agent and the client.[75] Further, SPARTA did not correct the UAAA's mistake, and failed to "implement a civil cause of action for student-athletes who are harmed by their agents."[76] One scholar even went so far as to say that SPARTA's failure to protect clients from unscrupulous agents "was even more troubling because the drafters of SPARTA were advised of the importance of granting [clients] a remedy shortly before passing the act."[77] While the UAAA and SPARTA both intended to prevent the shady dealings of certain sports agents, they have mainly protected the NCAA's member institutions and done little, if anything, to protect the athletes themselves.[78]

PART II: ATTORNEY-AGENT RESTRICTIONS UNDER THE MODEL RULES OF PROFESSIONAL CONDUCT

While the UAAA and SPARTA proved ineffective in regulating the ethics of sports agents, other avenues of industry oversight exist.[79] Non-attorneys have far more freedom than attorney-agents to operate through different channels, as there is no single body to set binding ethics rules for sports agents.[80]As a result, attorney-agents face an uphill battle to stay competitive while still working within the confines of the American Bar Association's Model Rules of Professional Conduct, which most states have adopted through statute or court rule.[81] These rules regulate a wide scope of issues ranging from conflicts of interest[82] to public service.[83]

A. THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

The Model Rules contain provisions that are directly applicable to attorney-agents.[84] For example, Model Rule 1.5(a) requires an attorney to "not. . .charge or collect an unreasonable fee or an unreasonable amount for expenses."[85] While the Rules do not specifically define what "reasonable" means, attorney-agents who loan or advance money to prospective clients in exchange for a usurious return could be deemed to have violated this rule.[86] While unlikely, it is also possible that a court could find that a 4% commission on a $100,000,000 contract could be unreasonable, depending upon how much time was spent on the negotiation.[87] However, the time, labor, and investment that is spent on recruiting a prospective

75. *Id.* at 179 (citing 15 U.S.C. §§ 7803-7807 (2004)).

76. *Id.*

77. *Id.* (citing Sports Agent Responsibility and Trust Act: Hearing on 108 H.R. 361 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 108th Cong. 4, 12-13 (May 15, 2003) (statement of Scott Boras)).

78. Steve Yanda, *Laws Restricting Improper Agent Contact with NCAA Athletes Seen as Ineffective*, WASH. POST (Jul. 23, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR2010072205898.html.

79. *See* Edelman, *supra* note 65 (explaining why the UAAA and SPARTA were inefficient); *see also* MODEL RULES OF PROF'L CONDUCT (2016) (the model rules, adopted in whole or in part by many states, regulating the ethics of attorneys).

80. *See generally* Edelman, *supra* note 65.

81. *Id. See* MODEL RULES OF PROF'L CONDUCT (2016). *See also* Press Release, Communications Office of the New York Courts, New Attorney Rules of Professional Conduct Announced (Dec. 16, 2008), http://www.courts.state.ny.us/press/pr2008_7.shtml.

82. MODEL RULES OF PROF'L CONDUCT r. 1.6 (2016).

83. MODEL RULES OF PROF'L CONDUCT r. 6.1 (2016).

84. MODEL RULES OF PROF'L CONDUCT r. (2016).

85. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (2016).

86. *See generally* Edelman, *supra* note 65.

87. Darren Heitner, *NBA Agents Face Major Increase In Due – Upwards of $15,000*, FORBES (Jun. 16, 2015), https://www.forbes.com/sites/darrenheitner/2015/06/16/nba-agents-face-major-increase-in-dues-upwards-of-15000/#7d537272472; *see* MODEL RULES OF PROF'L CONDUCT 1.5(a) (2016).

client, as well as providing training and care during the offseason, would likely make a violation of Rule 1.5 hard to find.[88]

Nevertheless, the Rules do provide loose guidelines in regards to what can be considered when determining reasonableness.[89] Billing "the fee customarily charged in the locality for similar legal services," as stated under Rule 1.5(a)(3), would likely allow an agent's fees to be considered reasonable, since it is regulated by the unions and predefined.[90] In addition, Rule 1.5(b) states that "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."[91] As all players sign a standard representation agreement upon signing with an agent, the fee structure is clearly defined and approved by the player upon signing of such an agreement.[92]

In the NBA, agents receive a relatively modest fee for a player's first contract if he is a first-round draft pick.[93] Under the NBPA's Standard Player Agent Contract, first round draft picks pay an even lower commission rate because their contracts are slotted under the NBA's Collective Bargaining Agreement.[94] Therefore, it is doubtful that an ethics charge could be brought for fees, at least against young players.[95] However, when Mike Conley of the Memphis Grizzlies recently signed what at the time was the largest contract in NBA history (five years and nearly $153,000,000) his agent earned a fee of at least $15,000,000, or approximately 1%.[96] While 1% might not seem unreasonable, an argument could be made in a complaint that $15,000,000 for what might have only been a week's worth of work is unreasonable under the Model Rules, even though it is reasonable under the NBPA's agent regulations.[97]

In addition to the rules regarding the reasonableness of fees, Model Rule 1.7 restricts attorneys from representing competing interests without "full disclosure" and "informed consent."[98] The rule states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[99] As it pertains to attorney-agents, there are two sides to this rule that are worth exploring.[100] First, there is the classic example of an attorney-agent representing both sides in a negotiation. For example, if an attorney-agent represents the player and the team in a salary negotiation, this could be considered a direct conflict of interest and a violation under the ABA's Model Rules.[101] However, this is com-

88. *See* Edelman, *supra* note 65.

89. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (2016).

90. *Id.* at 1.5(a)(3); *see* Nat'l Basketball Player's Ass'n, *Standard Player Agent Contract* (on file with author).

91. MODEL RULES OF PROF'L CONDUCT r. 1.5(b).

92. *See* Nat'l Basketball Player's Ass'n, *supra* note 91; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2016).

93. Mark Deeks, *How Agents Make Money Out Of Rookie Contracts*, SHAMSPORTS (Sept. 26, 2014), http://www.shamsports.com/2014/09/how-agents-make-money-out-of-rookie.html.

94. *Id; see also* Nat'l Basketball Player's Ass'n, *supra* note 91; *see also* Nat'l Basketball Ass'n, *Collective Bargaining Agreement* (Jan. 19, 2017), http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf (last visited Mar. 27, 2017).

95. *See generally* Edelman, *supra* note 65.

96. Eric Freeman, *Mike Conley and Grizzlies Agree to the Biggest NBA Contract Ever*, YAHOO! (July 1, 2016), http://sports.yahoo.com/news/mike-conley-and-grizzlies-agree-to-the-biggest-nba-contract-ever-014649732.html. While agents are allowed to charge up to a 4% fee on an NBA contract, it is standard for the highest paid players to only pay 1%; *see* Nat'l Basketball Player's Ass'n, *supra* note 95.

97. *Id.*

98. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016); *see* Edelman, *supra* note 65.

99. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016).

100. *See* Bryan Blair, *Conflicts of Interest: What Coaches Should Know About Their Representation*, HOOPDIRT (July 13, 2015), https://hoopdirt.com/conflicts-of-interest-what-coaches-should-know-about-their-representation/.

101. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016).

monplace in professional sports.[102] There are many agencies that represent both professional athletes, as well as coaches, general managers, and other executives.[103] This is likely a conflict of interest because no matter how impartial an agent remains, he or she is working to the detriment of one client by benefiting another.[104] While it is true that the players may or may not be in direct competition – depending on the given situation – in a salary-capped league, any amount of compensation one player receives necessarily limits the amount of compensation another can receive.[105] However, a way around this rule is informed consent.[106] If both clients fully understand that the attorney represents both sides, then it would not be a violation of the rule.[107] Informed consent is defined as "[a]ssent to permit an occurrence. . . . that is based on a complete disclosure of facts needed to make the decision intelligently, such as knowledge of the risks entailed or alternatives."[108]

On the one hand, the management-client can easily infer that the agent represents a certain player if he is the one handling his contract, and therefore informed consent might be implied by beginning to enter into negotiations.[109] However, on the other hand, a player-client might not know who else his agent represents, and therefore might not know that the agent also represents the management side when negotiating a salary.[110] Another concern worth raising, even if the agent does disclose that he represents the other side, is whether the clients fully understand the inherent risks in consenting to a conflict of interest.[111]

In the NBA, players sign representation agreements with an agent directly, and not with an agency.[112] Therefore, some of the larger sports agencies have created what is known as a "Chinese Wall."[113] In order to avoid a direct conflict of interest, the agency allows one agent to represent the player, and have a separate practice operating under the same roof for management and coaches.[114] For example, Jeff Schwartz, the founder of Excel Sports Management, represented Jason Kidd during his NBA playing career.[115] When Kidd became a head coach, Schwartz enlisted one of his employees, Hal Biagas, to handle Kidd's coaching representation.[116] While it is against NBPA regulations, and the Model Rules, to represent both sides in a negotiation, the NBPA has taken the stance that the "Chinese Wall" satisfies their rule.[117]

In addition to Rule 1.7's restriction on representing both sides of a negotiation, the rule also could present a violation for representing multiple players competing for the same

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102. *Compare Basketball*, priority sports, http://www.prioritysports.biz/basketball (last visited Mar. 27, 2017) ; *see also Coaches, Front Office & Broadcasters*, priority sports, http://www.prioritysports.biz/coaches (last visited Mar. 27, 2017).

103. *Id.*

104. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016).

105. *See* Zach Lowe, *Double Dribble: The Conflict of Interest Concern With Agents Representing Players and Coaches*, GRANTLAND (July 13, 2015), http://grantland.com/the-triangle/double-dribble-the-conflict-of-interest-concern-with-agents-representing-players-and-coaches/.

106. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016).

107. *Id.*

108. *Informed Consent*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Informed+Consent (last visited Apr. 14, 2017).

109. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016).

110. *See generally* Lowe, *supra* note 106 (explaining how new management of the National Basketball Player's Association was aware of, and attempting to address concerns related to conflicts of interest with NBA agents).

111. *See* Blair, *supra* note 101.

112. *See* Nat'l Basketball Player's Ass'n, *supra* note 95.

113. Lowe, *supra* note 106.

114. *Id.*

115. *Id.*

116. *Id.*

117. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2016); Nat'l Basketball Players Ass'n, *NBPA Regulations Governing Player Agents*, at Art. 3(b)(6) (on file with author); Lowe, *supra* note 106.

contract.[118] While this might be the weaker argument as it relates to conflicts of interest, there is certainly the possibility of it coming into play.[119] While the NBPA regulations "expressly state that an agent who represents one or more players on the same team has not. . . violated its proscriptions against conflicts of interest,"[120] the ABA's position is well-defined.[121] Richard Nichols, a professor of sports law at the University of California, Hastings, has said that it is "extremely dangerous" for attorneys to represent multiple clients in the same league.[122] Under the ABA's Model Rules of Professional Conduct, a lawyer who represents two or more players competing for the same job "is, as defined by the professional code of ethics, unable to zealously represent each of those clients in their respective quests to secure that same job."[123] In sports with salary caps, hard caps in particular, there is the "Zero-Sum Conflict."[124] This conflict arises when there is a limited pool of money, which must result in a zero-sum.[125] If an agent represents two players in a zero-sum negotiation, any increase in salary the agent negotiates for one player would likely result in less available salary for the other, and a violation of the ABA's Rules might arise.[126]

A third way in which attorney-agents are restricted by the Model Rules is in regard to the solicitation of clients.[127] Model Rule 7.3(a) states that "[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. . . ."[128] In practice, this rule makes it an ethics violation for an attorney-agent to do what every other agent in the business is already doing.[129] A significant portion of an agent's time is spent recruiting new clients, and you will not find a successful agent, attorney or otherwise, who does not solicit clients in person, in direct opposition to Rule 7.3.[130] Professional football representation epitomizes the 80/20 rule.[131] There are nearly 1,000 certified NFL agents, and just under 1,800 players in the NFL.[132] As of 2012, 25% of the agents represented 78% of the players.[133] Furthermore, 42% of certified player agents represented no players at all.[134] Agents who forego recruiting and soliciting clients risk falling into that group.[135]

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118. Jack Marshall, *The Unforgivable Conflict of Interest: Sports Agents, Robbing Their Ignorant Clients*, ETHICS ALARMS (Jan. 16, 2014), https://ethicsalarms.com/2014/01/16/the-unforgivable-conflict-of-interest-sports-agents-robbing-their-ignorant-clients/.

119. Edelman, *supra* note 65.

120. Mark Dorman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 Tex. Rev. Ent. & Sports L. 37, 52 (2003) (citing Kenneth Shropshire & Timothy Davis, The Business of Sports Agents 88 (2003)).

121. *Id. (citing* Richard M. Nichols, *Agent, Lawyer, Agent/Lawyer. . .Who Can Best Represent Student Athletes?*, Ent. & Sports Law, (1996), at 1, 24).

122. Richard M. Nichols, *Agent, Lawyer, Agent/Lawyer . . . Who Can Best Represent Student Athletes?*, Ent. & Sports Law 1, 25 (1996).

123. *Id.*

124. Marshall, *supra* note 119. A salary cap is a limit on the amount of money a team may spend on their players. A hard cap is a strict limit, whereas some sports institute a "soft cap." For a more detailed explanation of salary caps, *see* Alan M. Levine, Note, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 Fordham Intell. Prop. Media & Ent. L.J. 243 (1995).

125. Marshall, *supra* note 119.

126. *Id.*

127. Edelman, *supra* note 65.

128. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2016).

129. *See* Brandt, *supra* note 1.

130. *See id. See also* MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2016).

131. Brandt, *supra* note 1. For an explanation of the 80/20 rule, *see* David Lavinsky, *Pareto Principle: How to Use it to Dramatically Grow Your Business*, FORBES (Jan. 20, 2014), https://www.forbes.com/sites/davelavinsky/2014/01/20/pareto-principle-how-to-use-it-to-dramatically-grow-your-business/#3f7f51673901.

132. Brandt, *supra* note 1.

133. *Id.*

134. *Id.*

135. *See generally id.*

These three Model Rules constitute restrictions faced by attorney-agents, and can cause significant hardship to an attorney should a sanction be levied.[136] However, an issue faced by sports agents is that regulation through professional associations cannot serve a consistent purpose when all agents are not under the same authority.[137] Attorney-agents can be sanctioned by a court, and a non-attorney-agent can do as he or she pleases.[138] Moreover, it is possible that attorney-agents – at least those who are successful – would prefer to surrender their license than comply with a stricter ethical requirement than their competition.[139] One example of this line of thinking is Drew Rosenhaus, one of the most successful football agents.[140] Having negotiated over $2 billion in NFL contracts, Rosenhaus attended Duke Law School but is not licensed to practice law in any state.[141]

Another question is whether a law firm can serve as a sports agency. Under Model Rule 5.4, "a lawyer or law firm shall not share legal fees with a non[-]lawyer."[142] Therefore, a sports agency that is owned by a non-attorney would not be allowed to merge with a law firm, should that non-attorney retain equity.[143] However, there is a history of law firms engaging in the sports representation business.[144] One structure is that of Wilentz, Goldman & Spitzer, a mid-sized law firm in the northeastern United States.[145] David Pepe, a shareholder in the firm, practices at Wilentz in both sports law and personal injury.[146] Additionally, Pepe is the vice president of Pro Agents, Inc., a baseball agency based out of New Jersey.[147] Under this system of separate entities, Pepe has clearly distinguished between his agency and his law practice – assuming there is not overlap with other services provided – thus allowing a law firm to be involved in the representation of professional athletes.[148]

A different example is that of Williams & Connolly, one of the preeminent law firms in the country.[149] "[P]erhaps best known for its role in several Washington political scandals, including its representation of. . . . President Bill Clinton during his impeachment trial," Williams & Connolly established a lucrative practice of representing professional athletes.[150] Jim Tanner, who has since left to start his own agency, is an attorney who started his legal career as a corporate lawyer at Skadden, Arps, Slate, Meagher & Flom, and worked his way to Williams & Connolly after the sports practice was started by Lon Babby, another attorney who left to become the General Manager of the NBA's Phoenix Suns.[151] In a law firm-esque approach to the business, Williams & Connolly broke from custom, and billed clients by the hour, instead of a flat percentage fee like every other agency.[152] This practice can often be less expensive for the athlete, and harmonizes well with the rest of the 250-plus

136. Edelman, *supra* note 65.
137. *Id.*
138. *Id.*
139. *Id.*
140. Lynn Lashbrook, *Do You Need a Law Degree to Become a Sports Agent?*, SPORTS MANAGEMENT WORLDWIDE, http://www.sportsmanagementworldwide.com/content/do-you-need-law-degree-become-sports-agent.
141. *Id.*
142. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2016).
143. *Id.*
144. *See* Peter Lattman, *Lawyer Leaves Williams & Connolly to Start Sports Firm*, N.Y. TIMES (Oct. 15, 2013), https://dealbook.nytimes.com/2013/10/15/lawyer-leaves-williams-connolly-to-start-new-sports-firm/.
145. *Compare* David P. Pepe, WILENTZ, GOLDMAN & SPITZER, http://www.wilentz.com/david-p-pepe (last visited Apr. 17, 2017) and *Pro Agents Team*, PRO AGENTS, INC., https://www.proagentsinc.com/pro-agents-team/ (last visited Apr. 17, 2017).
146. *See* David P. Pepe, *supra* note 146.
147. *See* Pro Agents Team, *supra* note 146.
148. *Compare* David P. Pepe, *supra* note 146 and Pro Agents Team, *supra* note 146.
149. Lattman, *supra* note 145.
150. *Id.*
151. *Id.*
152. *Id.*

lawyer firm's billing practices.[153] While this is not the norm, firms regularly represent clients as sports agents, usually with one group of the firm's practice specializing in sports representation.[154] Nevertheless, the ABA Model Rules have provided a challenge for attorney-agents who wish to practice law in some capacity, yet do not want to risk punishment for "keeping up with the joneses."[155]

PART III: LEGAL THEORIES AND SUGGESTED SOLUTIONS TO LEVEL THE PLAYING FIELD

As a trained lawyer, there is no sense in an attorney-agent being put at a disadvantage.[156] However, when the ABA's Model Rules of Professional Conduct are applied to attorney-agents, that is exactly what happens.[157] Mark Levin, the NFLPA's Director of Salary Cap and Agent Administration, has even gone so far as to say that "[a]ll things considered equal, athletes should select an attorney versus a non-attorney, who is probably more competent at deciphering complex contract language."[158] There have been several legal theories that have been proposed to help attorney-agents play by the same rules.[159] However, each offers its own set of challenges.[160] This section will discuss some of these proposals.[161]

A. THE TWO-HAT THEORY

One prominent legal concept to protect attorney-agents from discipline under the ABA's Model Rules is the so-called "two-hat theory."[162] This notion contends that an attorney-agent, when in the course of his business as a sports agent, is wearing his "agent hat", and therefore is not held to the standards of professional conduct as an attorney.[163] However, when practicing law, as defined by a state court, he or she would switch to their "attorney hat."[164] While this theory has been discussed at length by multiple scholars in different journals, it has consistently been dismissed as inapplicable.[165] For example, *In re Pappas* found that an attorney, who was also a certified public accountant (CPA), was guilty of violating a number of provisions in the state code of ethics governing attorney conduct after he botched a business deal involving some of his clients.[166] Specifically, Pappas violated Arizona Code of Professional Responsibility Rule 29(a), which states that:

> "[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his

153. *Id.*

154. *See generally* Ashby Jones, *A Chat With Jim Harbaugh's Lawyer: Weil Gotshal's Jeff Klein*, WALL ST. J. (Dec. 30, 2014), https://blogs.wsj.com/law/2014/12/30/a-chat-with-jim-harbaughs-lawyer-weil-gotshals-jeff-klein/.

155. Edelman, *supra* note 65.

156. Darren Heitner, *Should a Sports Agent Go to Law School?*, SPORTS AGENT BLOG (Jan. 9, 2006), http://sportsagentblog.com/2006/01/09/should-a-sports-agent-go-to-law-school/.

157. *See* Part II *supra.*

158. *See* Dorman, *supra* note 121 at 38 (citing Interview with Mark Levin, Director of Salary Cap & Agent Administration Division, NFLPA, Washington D.C. (April 8, 2003)).

159. *See* David S. Caudill, *Sports and Entertainment Agents and Attorney-Agents: Discourses and Conventions Concerning Crossing Jurisdictional and Professional Borders*, 43 Akron L. Rev. 697, 706 (2010).

160. *Id.*

161. *See id.*

162. Jeremy J. Geisel, Comment, *Disbarring Jerry Maguire: How Broadly Defining "Unauthorized Practice of Law" Could Take the Lawyer Out of "Lawyer-Agent" Despite the Current State of Athlete Agent Legislation*, 18 Marq. Sports L. Rev. 225, 238 (2007). *See also* Caudill, *supra* note 160.

163. *See* Geisel, *supra* note 163.

164. *See id.*

165. *See id.*

166. *In re* Pappas, 768 P.2d 1161 (Ariz. 1988).

> professional judgment therein for the protection of the client, unless the client has consented after full disclosure."[167]

Although the attorney was working in his role as a CPA, and therefore wearing his "accountant hat", as opposed to his "attorney hat", the court refused to distinguish between the defendant's two roles and held him to the attorney ethics code.[168]

For an attorney-agent, a selling point in a recruiting meeting could be the very fact that they are an attorney. Thus, to hold themselves out as an attorney, yet not be bound by the attorney ethical guidelines would defeat the very purpose of those guidelines.[169] Therefore, it is widely held that an attorney, regardless of what capacity they are working in, is held to the ethical standards of their state ethics code, and that the "two-hat theory" is inappropriate as applied to attorney-agents.[170]

B. POTENTIAL TO INCREASE PLAYERS ASSOCIATION SCRUTINY

Another scheme that better protects the interests of clients is to have stronger regulation, particularly ethical regulation, of non-attorney agents.[171] Some have suggested that the players' unions should enact new, more restrictive agent regulations that are similar to the ABA's to "level the playing field for attorney-agents."[172] If a regulatory scheme was put into place that matched the non-attorney-agents ethics standards to those imposed on attorneys by their state courts, attorney-agents would be able to operate in an environment where they would not have to compromise the ABA's Model Rules to remain competitive.[173] However, as Professor Walter Champion notes, "[the] ethical code of a well-established profession may not perfectly fit into the emerging, evolving, and dynamic relationships that are inherent in the sports arena."[174]

However, this arrangement could prove unfeasible.[175] An attorney-agent's ability to recruit athlete-clients is limited under the solicitation rules of the ABA.[176] While both attorney-agents and non-attorney-agents are prohibited from paying athletes to represent them, experts suggest that "the possibility of legal action by appropriate governing bodies or by clients exists to avoid the contracts or to withhold fees against the attorney[-]agent, whereas no such consequence is present for the non-attorney[-agent]" when it comes to any claim of malpractice.[177] While the players' associations could certainly increase scrutiny on the ethical maneuvers of its non-attorney-agents, this solution will likely not be effective in the long term.[178] A landscape in which agents do not represent multiple clients, nor have the ability to recruit college athletes as prospective clients, would leave every agent wanting.[179]

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167. *Id.* (citing Code of Professional Responsibility, Definitions § 1, *reprinted in* Rule 29(a)).
168. *Id.*
169. *Id.*
170. *See* Geisel, *supra* note 163 at 239 (citing Cuyahoga County Bar Ass'n v. Glenn, 649 N.E.2d 1213 (Ohio 1995); *In re* Horak, 224 A.D.2d 47 (N.Y. App. Div. 1996); Wright v. Bonds, No. 96-55586, 1997 U.S. App. LEXIS 16811, at *2 (9th Cir. July 3, 1997) (discussing other cases, similar to *Pappas*, wherein various "courts have specifically ruled that attorney-agents were acting as attorneys in their role in representing professional athletes").
171. *See* Dorman, *supra* note 121 at 39.
172. *Id.*
173. *Id.*
174. *Id.* (citing Kenneth Shropshire & Timothy Davis, The Business of Sports Agents 88 (2003)).
175. *Id.* at 49.
176. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2016). *See* Dorman, *supra* note 121 at 49.
177. Kenneth Shropshire & Timothy Davis, The Business of Sports Agents 88, 97 (2003)
178. Caudill, *supra* note 160 at 706.
179. *Id.*

C. PRACTICAL STEPS ATTORNEYS CAN TAKE

Lastly, there are smaller, perhaps more practical steps that an attorney-agent can take to avoid repercussions under the ABA's Model Rules.[180] As an attorney-agent, he or she will always be held to a higher standard, but with that comes the practical and reputational advantages of having a law degree.[181] The benefits of an athlete hiring an attorney to handle their representation gives that athlete the advantage of an agent who can more skillfully interpret the rules of a league's respective collective bargaining agreement as it relates to player contracts. Further, there are more avenues for research into a prospective attorney-agent's history, either through bar associations or online research.[182]

Additionally, athlete-clients allow themselves more recourse if a scenario arises in which the attorney-agent has been negligent.[183] For example, because attorney-agents must comply with the ABA Model Rules of Professional Conduct, a client could file a complaint should the attorney-agent commit malpractice. Moreover, that attorney-agent will likely have malpractice insurance should a lawsuit arise out of the dispute.[184] One example took place surrounding attorney-agent Brian Overstreet.[185] Overstreet, an NFL agent from Houston-based E. Overstreet Sports Management, was fired by his client, Tarell Brown, after Brown failed to obtain a $2 million bonus.[186] Under Brown's contract, he was scheduled to receive the bonus simply for attending a preseason workout program, but he never appeared, and therefore did not receive the bonus.[187] Brown claims that Overstreet never informed him of the bonus clause, and therefore blames his agent for the breach of duty he was owed.[188] While this case has yet to play out in a court of law, it is certainly possible that Overstreet's legal malpractice insurance could come in handy, should Overstreet be found legally responsible for the oversight.[189]

Another important measure that an attorney-agent can take is to ensure a well-written, clearly-defined standard representation agreement.[190] While the NBPA, for example, provides a form agreement that all agents and athletes must use,[191] this agreement does not cover marketing and sponsorship representation, nor does it cover representation in any other league throughout the world.[192] These agreements should define the services that the

180. Dorman, *supra* note 121 at 70.

181. *See* Heitner, *supra* note 13; Heitner, *supra* note 157.

182. Heitner, *supra* note 157.

183. *Id.*

184. *Id.* Every state court system has varying regulations regarding attorneys and malpractice insurance. For further information, *see* Karen Rubin, *Do You Know Your Rule on Malpractice Insurance Disclosure?*, THE LAW FOR LAWYERS TODAY (May 21, 2015), http://www.thelawforlawyerstoday.com/2015/05/do-you-know-your-rule-on-malpractice-insurance-disclosure/.

185. Darren Heitner, *How Much Will 49ers Cornerback Tarell Brown's Blunder Cost His Former Agent?*, FORBES (July 27, 2013), https://www.forbes.com/sites/darrenheitner/2013/07/27/how-much-will-49ers-cornerback-tarell-browns-blunder-cost-his-former-agent/#4e742ace7315.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Dorman, *supra* note 121 at 71.

191. *See* Nat'l Basketball Player's Ass'n, *supra* note 95.

192. *See id.* For professional basketball players, the NBA is just one of many different professional leagues throughout the world. The NBA's standard player representation agreement only covers representation of athletes as it pertains to the NBA, and therefore agents and athletes must enter into a separate agreement to govern representation in leagues outside of the NBA. For a more comprehensive list of the multitude of professional basketball leagues worldwide, *see* EUROBASKET, http://www.eurobasket.com (last visited Mar. 29, 2017).

attorney-agent will provide to the athlete, and the description of services should not be general in nature.[193] The attorney-agent should limit their services, in writing, to:

> "(i) [P]roviding advice regarding (but not actively soliciting) income producing opportunities offered to the athlete;
> (ii) [N]egotiating, documenting, and closing contracts relating to such offers;
> (iii) [R]epresenting the athlete in disputes before the applicable. . . [players' association or league] regulatory bodies having jurisdiction over the athlete; and
> (iv) [A]ssisting in the collection and enforcement of the athlete's contracts."[194]

By limiting their services in such a way, the attorney-agent can ensure that he has made a concerted effort to disclose the nature of his or her services and to fully inform the client about the type of agreement they are about to enter.[195]

D. CONCLUSION

Attorney-agents are undoubtedly held to a higher standard of ethics than non-attorney-agents.[196] However, there are certain qualities that an attorney can bring to a negotiation, and the benefits of having an attorney as your agent have been widely discussed.[197] The intent of this article is not to paint a picture of gloom for attorney-agents. On the contrary, by pointing out the challenges that attorney-agents face in the field of professional sports representation, this article seeks to facilitate the open discussion of potential changes to sports agent regulation. While there have been statutes passed to attempt to rectify some of the issues surrounding sports agents, it is the position of this article that the UAAA and SPARTA do not go far enough.[198]

The challenges surrounding the ABA's Model Rules of Professional Conduct also cause an imbalance for attorney-agents.[199] While the rules are certainly important to ensure proper ethical regulations of attorneys, they pose a challenge when attorney-agents need to compete with non-attorney-agents in the ultra-competitive marketplace for clients. While unlikely, if the players unions of the respective leagues incorporated the ABA's Model Rules into their agent regulations, this could be a large step in the right direction. However, the issues of conflict of interest and solicitation will always be a part of the agent representation business. While some players associations have said that a "Chinese Wall" is sufficient to avoid a conflict, there will continue to be situations in which agents represent more than one player on a team, or an agency represents both sides in a negotiation.[200]

Ultimately, there are ways in which the landscape can change. Amending the UAAA, SPARTA, or enacting new legislation that protects clients directly via a statutory cause of action, could help level the playing field. Further, if the players associations increased scrutiny on the agents they certify, or tighten the ethical standards in their regulations, this could also help to ensure a fair and safe process for athletes. While there are dishonest agents who operate in the shadows, there are also many strong, smart, and ethical sports agents who work hard day in and day out to advocate for their clients. Therefore, both attorney-agents and non-attorney-agents should welcome these proposed changes to the current regulatory

193. Dorman, *supra* note 121 at 71 (citing Sara Lee Keller-Smith & Sherri A. Affrunti, *Going for the Gold: The Representation of Olympic Athletes*, 3 Vill. Sports & Ent. L.J. 443, 481 (1996)).

194. *Id.* (citing Sara Lee Keller-Smith & Sherri A. Affrunti, *Going for the Gold: The Representation of Olympic Athletes*, 3 Vill. Sports & Ent. L.J. 443, 462-63 (1996)).

195. *Id.*

196. Heitner, *supra* note 157.

197. *See* Heitner, *supra* note 13; Heitner, *supra* note 157.

198. *See* Part I *supra.*

199. *See* Part II *supra.*

200. Lowe, *supra* note 106.

scheme because, just like in sports, competition is vital to success, as long as it is fair and everyone is on a level playing field.

Clarett's Shadow: How a 14-Year-Old Case Will Impact NBA Age Rule Bargaining

Sam C. Ehrlich*

Shortly before the Golden State Warriors' five game series win over the Cleveland Cavaliers in the 2017 NBA Finals, National Basketball Association (NBA) commissioner Adam Silver made headlines by stating that the NBA and National Basketball Players Association (NBPA) would revisit the possibility of changing the league's 2005 age eligibility rule for incoming players.[1] The rule, colloquially known as the "one-and-done" rule, requires players to generally wait at least one year after high school before entering the NBA. The rule has been controversial due to the perceived notion that it forces high school players to wait a year until they can earn a living playing in the NBA.[2]

The one-and-done rule requires American players to be at least 19 years of age and at least one NBA season removed from high school to be eligible as an "early entry player" in the NBA Draft.[3] The rule leaves high school players with two options: either sit out a year after high school before entering the draft or spend at least one year playing college sports or in an international professional league to continue showcasing their talents while they await draft eligibility.[4] Through this rule the NBA effectively splits the difference between the age rules in other American professional leagues. The National Football League (NFL) re-

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1. Greg Logan, *Age limit for NBA Draft to be Discussed*, NEWSDAY (June 2, 2017, 1:59 AM), http://www.newsday.com/sports/basketball/nba-commissioner-adam-silver-wants-minimum-age-for-draft-raised-to-20-1.13701973. *See infra* note 8.

2. Coleman Collins, Pablo S. Torre, & Eamonn Brennan, *The one-and-done conundrum*, ESPN.COM (June 16, 2016), http://www.espn.com/nba/story/_/id/16237629/ten-years-nba-one-done-rule-no-less-controversial. *But see* Jason Zengerle, *In Defense of the One-and-Done*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/opinion/nba-draft-tony-bradley.html.

3. NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT, art. X, § (b)(i-ii) (2017), *available at* http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf (hereinafter "NBA CBA"). International players must be at least twenty-two (22) years of age. *Id.*

4. For an analysis of the cause-and-effect influence of the NBA age rule on "one-and-done" players in college basketball, *see, e.g.*, Jordan Michael Rossen, Note, *The NBA's Age Minimum and Its Effect on High School Phenoms*, 8 VA. SPORTS & ENT. L.J. 173 (2008). *See also* Matt Norlander, *One-and-done rule lives on, but that's not such a bad thing for college hoops*, CBS SPORTS (Dec. 15, 2016), http://www.cbssports.com/college-basketball/news/one-and-done-rule-lives-on-but-thats-not-such-a-bad-thing-for-college-hoops/. At least two American players have decided to play internationally for a year before entering the NBA draft rather than play in college. Brandon Jennings of the Washington Wizards played in Italy, at least in part due to concerns about his ability to qualify academically for Division I collegiate programs. Lance Pugmire, *Prep star commits to Italian team*, LOS ANGELES TIMES (Jul. 17, 2008), http://articles.latimes.com/2008/jul/17/sports/sp-jennings17. *See also* Chris Brassard, *Exchange Student*, ESPN (May 19, 2009), http://www.espn.com/espnmag/story?section=magazine&id=3715746. Similarly, 2017 Oklahoma City Thunder draftee Terrance Ferguson forwent a scholarship offer at the University of Arizona to play for a year in Australia in order to provide for his mother. Terrin Waack, *Terrance Ferguson's path to the NBA goes through Australia*, CHICAGO TRIBUNE (May 16, 2017, 11:45 AM), http://www.chicagotribune.com/sports/basketball/bulls/ct-spt-0517-terrance-ferguson-nba-draft-bulls-20170516-story.html.

quires players to wait three years after high school.[5] The National Hockey League (NHL) allows all players 18 years or older to be selected in their draft.[6] While Major League Baseball (MLB) allows players to be drafted either directly following high school graduation or, after going to college, once the player turns 21 or completes his junior year.[7]

Until recently, NBA authorities have consistently rationalized their desire for a higher age rule based on the perceived lack of maturity and professional readiness of teenage players. However, the effect of the one-and-done rule on college sports and young basketball players has been undeniable.[8] The initial consequences of the rule were minimal, for example, only two college freshmen were selected in the 2006 NBA Draft. However, the number of one-and-done players has risen substantially in the past ten years due to the forced requirement on players to wait at least one year before entering the NBA draft.[9] Collegiate coaches, like Kentucky's John Calipari, have used the NBA age rule as a sales tactic, specifically recruiting highly-touted players with the promise to train them specifically to be high

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5. NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N., COLLECTIVE BARGAINING AGREEMENT art. 6, § 2(b) (2011), *available at* https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf (hereinafter "NFL CBA 2011-20").

6. NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT art. 8.4 (2012), *available at* http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf. Notably, the NHL differs from other leagues in that players can still be drafted without losing NCAA eligibility; teams retain rights to that player until 30 days after they leave college. *See* Steven Goldstein, *More NHL prospects are electing to play in college*, CHICAGO TRIBUNE (June 24, 2015), http://www.chicagotribune.com/sports/hockey/blackhawks/ct-college-hockey-nhl-spt-0628-20150623-story.html. *See also* Bill Meltzer, *NFL, NBA, MLB and NHL Drafts - What's the Difference?*, PHILADELPHIA FLYERS.COM (June 19, 2017), https://www.nhl.com/flyers/news/nfl-nba-mlb-and-nhl-drafts—-whats-the-difference-i-philadelphia-flyers/c-289984864.

7. MAJOR LEAGUE BASEBALL, MAJOR LEAGUE RULES 22-23, 44 (2015) (on file with author). *See* Bryan Kelly, Note, *NBA-Age Restrictions: Should the NBA Follow In the Footsteps of Major League Baseball?*, 7 PACE. INTELL. PROP. SPORTS & ENT. L.F. 236 (2017). In stark contrast to other leagues, Major League Soccer (MLS) does not have an age rule; Ghanaian prodigy Freddy Adu famously started his MLS career when he was just 14-years-old. *See* Jack Bell, *14-Year-Old Signs Contract With Major League Soccer*, N.Y. TIMES (Nov. 18, 2003), http://www.nytimes.com/2003/11/18/sports/soccer/14yearold-signs-contract-with-major-league-soccer.html; *Throwback Thursday: Freddy Adu makes his pro debut (10 years ago today)*, SPORTS ILLUSTRATED (Apr. 3, 2014), https://www.si.com/soccer/planet-futbol/2014/04/03/throwback-thursday-freddy-adu-debut-mls-usmnt. While no team has drafted a 14-year-old since Adu—likely in part because Adu performed well below expectations—MLS still occasionally signs and plays teenagers; most recently, FC Dallas signed 17-year-old Paxton Pomykal from their under-18 development team to their active roster in September 2016, Rick Gosselin, *FC Dallas won't repeat mistakes made with Freddy Adu while developing 17-year-old Paxton Pomykal*, DALLAS NEWS (June 26, 2017), https://sportsday.dallasnews.com/soccer/soccer/2017/06/26/fc-dallas-repeat-mistakes-mls-made-freddy-adu-bringing-along-17-year-old-paxton-pomykal.

8. *N.B.A. Commissioner Is Ready for Change in 'One-and-Done' Rule*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/sports/basketball/adam-silver-nba-draft-one-and-done.html. In his State of the NBA press conference prior to the 2017 NBA Finals, Silver stated of the age rule:

> My sense is it's not working for anyone. It's not working for the college coaches and athletic directors I hear from. They're not happy with the current system. And I know our teams aren't happy either, in part because they don't necessarily think the players who are coming into the league are getting the kind of training that they would expect to see.

Id.

9. Colt Kesselring, *The NBA One-and-Done Era, Visualized*, HERO SPORTS (Feb. 21, 2017), http://herosports.com/news/one-and-done-rule-list-college-basketball-nba-visualized. In total, 95 "one- and-done" players have been selected in NBA Drafts since 2006. *Id.* Another eight declared for the Draft—thereby losing their collegiate eligibility—and went undrafted. *Id.* Fourteen college freshman were selected in the 2016 Draft, and three freshman declared for the 2016 Draft and went undrafted. *Id.* The 2017 Draft saw an even bigger increase in the amount of "one-and-done" players picked: a record 16 of the 30 first round picks were college freshman, including 10 of the first 11 players selected. David Aldridge, *No winners or losers here — just 4 thoughts to consider in wake of 2017 Draft*, NBA.COM (June 26, 2017, 11:49 AM), http://www.nba.com/article/2017/06/26/morning-tip-four-thoughts-2017-nba-draft.

draft picks after just one year of collegiate play.[10] However, recent comments from Commissioner Silver have led to speculation that the NBA may be willing to rethink their position, and renegotiate the rule.[11]

The rekindling of these discussions is far from the first time that age rules have been debated, either in private or in public. During negotiations for the 2017-2024 NBA Collective Bargaining Agreement (CBA), the age rule was a major discussion point for the two bargaining units. While the NBA sought to raise the minimum age from 19 to 20, the union looked to lower the age of eligibility to 18.[12] Both the parties have gone back and forth on this rule since it was first included in the 2006 NBA CBA, with the positions of the parties staying relatively constant in recent years.[13] Ever since it was instituted in 2006 the fairness of the rule has also been hotly debated in popular media[14] and in academia.[15]

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10. *See* Reid Forgrave, *John Calipari's New Sales Pitch: Become a One-and-a-Half-and-Done Player*, BLEACHER REPORT (Jan. 11, 2017), http://bleacherreport.com/articles/2686351-john-caliparis-new-sales-pitch-become-a-one-and-a-half-and-done-player. The results of this approach speak for itself; since Calipari was hired as Kentucky's head men's basketball coach in 2009, Kentucky has had eighteen freshman drafted by NBA teams. Kesselring, *supra* note 9. During this same period, Kentucky has had a staggering 249-53 win-loss record (good for a .825 winning percentage), appeared in four Final Fours, and won a National Championship in 2012. *Kentucky Wildcats School History*, SPORTS REFERENCE (last visited June 22, 2017), http://www.sports-reference.com/cbb/schools/kentucky/.

11. *See* Kristian Winfield, *NBA commissioner Adam Silver: 'I'm rethinking our position' on NBA age minimum*, SBNATION (June 1, 2017), https://www.sbnation.com/2017/6/1/15724976/adam-silver-nba-age-minimum-college-basketball-nba-draft. *See infra* Part IV.

12. Logan, *supra* note 1. No consensus on a change was reached; the two sides agreed to postpone discussions in order to avoid a work stoppage. *Id.*

13. *See* Tim Reynolds, *NBPA attorney: Union anticipates clash on age limit*, NBA.COM (Mar. 5, 2015, 4:16 PM), http://www.nba.com/2015/news/03/05/nbpa-on-age-limit.ap/ (quoting NBPA general counsel Gary Kohlman commenting on the "total complete hypocrisy of the age rule.") According to Kohlman:

> If [basketball players] were white and hockey players they would be out there playing. If they were white and baseball players they would be out there playing. Because most of them are actually African-American and are in a sport and precluded from doing it, they have to go into this absurd world of playing for one year.

Id. See also Adam Silver: NBA age minimum of 20 'would be better for basketball', SPORTS ILLUSTRATED (Nov. 24, 2014); *Stern wants NBA age limit raised to 20*, ESPN.COM (Apr. 13, 2005), http://www.espn.com/nba/news/story?id=2035132.

14. *See, e.g.*, Dick Vitale, *One-and-done rule hurts hoops more than it helps*, USA TODAY (Feb. 15, 2011, 3:14 PM), https://usatoday30.usatoday.com/sports/college/columnist/vitale/2011-02-14-one-and-done-rule_N.htm; Grant Hughes, *Why the NBA's 1-and-Done Rule Is Causing More Harm Than Good*, BLEACHER REPORT (Aug. 8, 2013), http://bleacherreport.com/articles/1723163-why-the-nbas-one-and-done-rule-is-causing-more-harm-than-good; Nicole Auerbach & Jeffrey Martin, *One and done, but never as simple as it sounds*, USA TODAY (Feb. 17, 2014, 7:43 PM), https://www.usatoday.com/story/sports/ncaab/2014/02/17/college-basketball-nba-draft-early-entry-one-and-done-rule/5552163/; Pat Garofalo, *The NBA Age Limit Is (March) Madness*, U.S. NEWS (Mar. 27, 2015, 1:15 PM), https://www.usnews.com/opinion/blogs/pat-garofalo/2015/03/27/nba-age-limit-is-march-madness; Cari Grieb, *Justise Winslow silences NBA age limit supporters, including his father*, SPORTINGNEWS (Mar. 8, 2016), http://www.sportingnews.com/nba/news/justise-winslow-heat-rookie-rickie-age-limit-one-and-done/7ch05v4zrgi519l1q1y8hmnoh; Tom Ziller, *The NBA age minimum isn't serving its purpose*, SB NATION (Mar. 14, 2016, 10:35 AM), https://www.sbnation.com/2016/3/14/11212146/nba-age-minimum-limit-draft-college-basketball-march-madness.

15. *See, e.g.*, Loftus C. Carson, II & Michelle A. Rinehart, *The Big Business of College Game Day*, 12 TEX. REV. ENT. & SPORTS L. 1, 3-4 (2010); Nitin Sharma, Note, *An Antitrust and Public Policy Analysis of the NBA's Age/Education Policy: At Least One Road Leads to Rome*, 7 RUTGERS J. L. & PUB. POL'Y 481 (2010); Benjamin S. Weisfelner, Note, *Reverse Slam Dunk: Making the Case that the National Basketball Ass'n's Minimum Age Requirement Violates State Discrimination Laws*, 21 SETON HALL J. SPORTS & ENT. L. 203 (2011); Brian Lovell, Note, *Eighteen Years Old and Ready for Driving, Cigarettes and War, but not Basketball: Why the NBA is Committing a Foul on the Age Eligibility Rule*, 26 J. CIV. RTS. & ECON. DEV. 415 (2012). The rule has also been scrutinized through quantitative analysis, with two papers finding that the rule does not tend to help basketball players both in performance or in their economic potential. *See* Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113 (2004); Ryan Rodenberg & Jun Woo Kim, *Testing the On-Court Efficacy of the NBA's Age Eligibility Rule*, 8 J. QUANTITATIVE ANALYSIS IN SPORTS (June 8, 2012), https://doi.org/10.1515/1559-0410.1426.

Age rules in sports have also been tested in the courtroom in two high-profile cases since leagues first started instituting such rules in the 1960s. In *Haywood v. NBA*, the NBA's rule prohibiting players from signing with clubs less than four years after they have graduated from high school was found by the Supreme Court to be illegal *per se* under the Sherman Act as an illegal group boycott.[16] Most recently, in *Clarett v. NFL* a similar rule promulgated by the NFL was found to be legal, so long as it was collectively bargained.[17]

However, the *Clarett* case had an interesting wrinkle to it. Unlike the current NBA age rule, the NFL age rule was at the time not memorialized in the NFL/NFL Players Association (NFLPA) Collective Bargaining Agreement. Instead, the NFL rule was merely "identified in a contemporaneous side letter" between the two entities as one of an unknown number of provisions that the NFLPA agreed not to sue over.[18] As such, the *Clarett* case was somewhat unique in that the legal issues focused not on the legality of eligibility rules themselves, but instead on how these eligibility rules were—and should be—negotiated between the league and players.

Indeed, Second Circuit judge (and now Supreme Court justice) Sonia Sotomayor made it clear in her opinion that "the major source of the parties' factual disputes" is not the age rule itself, but instead "the relationship between the challenged eligibility rules and the current collective bargaining agreement."[19] As such, the decision in the *Clarett* case turned on whether eligibility rules are mandatory subjects of bargaining that would thus be covered by the non-statutory labor exemption.[20]

In that spirit, this article probes not the legality of age rules,[21] but instead looks to the interests and legal positions of the various parties who are involved and affected by age rules in sports. Beyond the briefs filed by the plaintiff, player, and the defendant, NFL, the *Clarett* case featured briefs filed by *amicus curiae* with a wide variety of divergent—and sometimes conflicting—interests. These *amicus* briefs included filings by other professional sports leagues—specifically the NBA, Women's National Basketball Association (WNBA), and NHL,[22] the National Collegiate Athletic Association (NCAA),[23] Congressman John

16. 401 U.S. 1204 (1971).

17. 369 F.3d 124 (2nd Cir. 2004), *cert. denied*, 544 U.S. 961 (2004).

18. Brief for Nat'l Football League Players Ass'n as Amicus Curiae 3, Clarett v. NFL, 369 F. 3d 124 (2nd Cir. Apr. 16, 2004) (No. 04-0943). *See infra* notes 131-132 and accompanying text.

19. Clarett, 369 F.3d at 126.

20. *Id.* at 139.

21. Even before *Clarett* placed age rules within the purview of the non-statutory labor exemption, legal scholarship was heavy with analysis of whether sport age rules are legal with or without this protection. *See, e.g.*, Robert B. Terry, *Application of Antitrust Laws to Professional Sports' Eligibility and Draft Rules*, 46 MO. L. REV. 797 (1981); Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375 (1984); David G. Kabbes, *Professional Sports' Eligibility Rules: Too Many Players on the Field*, 1986 U. ILL. L. REV. 1233 (1986). The legality of these rules has also been heavily debated in *Clarett*'s wake. *See, e.g.*, Nicholas E. Wurth, Note, *Legality of an Age-Requirement in the National Basketball Association after the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 103 (2005); Michael McCann and Joseph S. Rosen, *Legality of Age Restrictions in the NBA and NFL*, 56 CASE W. RES. L. REV. 731 (2006); Tyler Pensyl, Note, *Let Clarett Play: Why the Nonstatutory Labor Exemption Should Not Exempt the NFL's Draft Eligibility Rule from the Antitrust Laws*, 37 U. TOL. L. REV. 523 (2006); Ryan M. Rodenberg, *The NBA's Latest Three Point Play - Age Eligibility Rules, Antitrust, and Labor Law*, 25 ENT. & SPORTS LAW. 14 (2008); Jack N. E. Jr. Pitts, Note, *Why Wait: An Antitrust Analysis of the National Football League and National Basketball Association's Draft Eligibility Rules*, 51 HOWARD L.J. 433, 478 (2008).

22. Brief for NBA, WNBA, and NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, 369 F. 3d 124 (2nd Cir. Apr. 9, 2004) (No. 04-0943). *See infra* Part II(B)(i). [MLB did not participate as amici in this case, presumably because of their unique status as exempt from antitrust scrutiny based on the precedent set in the infamous *Federal Baseball* case.] *See generally* Fed. Baseball Club of Baltimore v. Nat'l League, 259 U.S. 200 (1922) (exempting professional baseball from antitrust laws because it is not engaged in interstate commerce); Flood v. Kuhn, 407 U.S. 258 (1972) (affirming baseball's exemption from the Sherman Act based on *stare decisis* despite finding that baseball now engages in interstate commerce). [This is particularly relevant given that drafted professional baseball players are not members of the MLB Players Association until they are placed on an MLB 40-

Conyers,[24] and the NFLPA.[25] Through an analysis of the positions of these parties in their *Clarett* filings, their interests as stakeholders in professional sports eligibility rules can be revealed as the debate over these rules begins to unfold once more. As leagues and unions change their interests and the structures of their leagues change through collective bargaining, new potential avenues to challenge these age rules may emerge that may not be bound by the precedent set in *Clarett*.

Part I of this Article reviews the positioning of litigants and *amici* in *Clarett v. NFL*, both through the filings of the plaintiff and the NFL and the *amicus* briefs filed by the NBA, WNBA, and NHL, the NCAA, Congressman Conyers, and the NFLPA. Part II of this Article summarizes the Second Circuit's opinion in *Clarett* through the frame of these stakeholder interests. Part III of this Article analyzes the renewed discussions between the NBA and NBPA regarding the one-and-done rule, and looks back to the *Clarett* case to predict how the various stakeholders of eligibility rules may look to influence the latest round of age rule negotiations in the NBA. As this Article shows, the interests and positions taken by the parties and *amici* in *Clarett* may both guide understanding of the issue and possibly also provide a new avenue for players to challenge age rules by focusing on both what the stakeholders to such actions say and do not say about their implementation.

I. THE FACTUAL BACKGROUND OF *CLARETT*

A. THE LEAD UP TO *CLARETT*

Prior to becoming the plaintiff in the *Clarett* case, Maurice Clarett was a star running back at the Ohio State University.[26] After an illustrious high school career that ended with being named Ohio Mr. Football by the Associated Press and USA Today's high school offensive player of the year, Clarett graduated high school early and began classes at Ohio State in January 2002, hoping to get a head start on his football career.[27] This decision paid off for Clarett, as he became the first freshman running back at Ohio State to open the season as the starter since 1943.[28] His freshman year was filled with memorable moments including two touchdowns against archrival Michigan and a game-winning score in double-overtime in the 2003 Fiesta Bowl against Miami.[29]

Despite these highlights, Clarett's freshman year was not an altogether positive experience for either him, his teammates, or his coaches. In October 2002, Clarett received dozens

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man roster. This is often not until years after they are drafted—assuming, of course, that these players ever even reach that summit.] *See generally* Miranda v. Selig, 860 F.3d 1237 (9th Cir. 2017) (denying an attempt by non-union minor league baseball players to sue MLB under the Sherman Act on the basis that their claim was covered by baseball's antitrust exemption). [MLS, another league with special protection from antitrust laws, also did not participate as amici in *Clarett*.] *See infra* note 90 and accompanying text.

23. Brief for the NCAA as Amicus Curiae Supporting Petitioner, Clarett v. NFL, 369 F. 3d 124 (2nd Cir. Apr. 13, 2004) (No. 04-0943). *See infra* Part II(B)(ii).

24. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, 369 F. 3d 124 (2nd Cir. Apr. 16, 2004) (No. 04-0943). Conyers filed based on his interest as "the most senior Member serving on the U.S. House Committee on the Judiciary, which has jurisdiction over the antitrust laws." *Id.* at 1. *See infra* Part II(B)(iii).

25. Brief for NFLPA as Amicus Curiae, *supra* note 18. *See infra* Part II(B)(iv). Unlike the other *amicus curiae* briefs, the NFLPA did not file to directly support either party. *See infra* notes 128 and accompanying text. The American Football Coaches Association (AFCA) also filed an amicus brief; however, the AFCA brief will not be discussed in this Article. *See* Brief for AFCA as Amicus Curiae Supporting Petitioner, Clarett v. NFL, 369 F. 3d 124 (2nd Cir. Apr. 12, 2004) (No. 04-0943).

26. *Timeline: The rise and fall of Maurice Clarett*, ESPN.COM (Sept. 18, 2006), http://www.espn.com/nfl/news/story?id=2545204.

27. *Id.*

28. *Id.*

29. *Id.*

of pieces of hate mail from Ohio State fans after telling ESPN the Magazine that he was considering leaving college early for the NFL.[30] Clarett also clashed with Ohio State officials after the athletic department allegedly refused to let him fly home for the funeral of a friend and accused administrators of lying when they said he did not file the necessary paperwork to secure financial aid for the trip.[31] In July 2003, an Ohio State teaching assistant accused Clarett of receiving preferential treatment, after he apparently still passed a class when a professor gave him an oral makeup exam after he had walked out of a midterm.[32]

Clarett's game-winning touchdown in the 2003 Fiesta Bowl would be his last game in Ohio State scarlet and grey. In July 2003, Ohio State confirmed that the NCAA was investigating Clarett for his claim that more than $10,000 in clothing, CDs, cash and stereo equipment was stolen in the prior April from a 2001 Chevrolet Monte Carlo that Clarett had allegedly borrowed from a local dealership.[33] On September 9, 2003, Clarett was charged with misdemeanor falsification for allegedly lying on the police report about the July 2003 theft.[34] The next day, Clarett was suspended by his school for the 2003 season for receiving extra benefits worth thousands of dollars, and for lying to investigators during the two-and-a-half-month investigation into Clarett's finances by Ohio State and NCAA officials.[35]

Clarett was allowed to keep his athletic scholarship at Ohio State during his suspension, but instead opted to turn professional.[36] But because he was still one year away from eligibility under the NFL's age rule, Clarett filed a lawsuit against the NFL in September 2003 seeking money damages for his inability to file for the 2003 Draft and, more importantly, an order "declaring the [NFL age rule] unlawful" and making Clarett eligible either for the supplemental draft[37] or the next standard college draft.[38] In his complaint, Clarett claimed that playing football professionally "is the only means by which [he could] profit from his athletic ability," and that had he been eligible for the 2003 Draft, "it is almost certain he would have been selected in the beginning of the First Round and would have agreed to a contract and signing bonus worth millions of dollars."[39]

After abbreviated discovery, both Clarett and the NFL filed for summary judgment. Clarett claimed that the eligibility rule violated the Sherman Act as a matter of law, and even if not, the rule could not apply to Clarett because it was not in the NFL Bylaws. Thus, the rule could not be incorporated into the NFL CBA and the non-statutory labor exemption

30. *Id.*

31. *Id.*

32. *Id*; Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES (July 13, 2003), http://www.nytimes.com/2003/07/13/sports/colleges-when-values-collide-clarett-got-unusual-aid-in-ohio-state-class.html.

33. *Report: Pricey electronics, cash taken from car*, ESPN.COM (July 30, 2003, 11:16 AM), http://assets.espn.go.com/ncf/news/2003/0729/1587062.html.

34. Joe Drape & Mike Freeman, *Clarett Faces A Charge And May Transfer*, N.Y. TIMES (Sept. 10, 2003), http://www.nytimes.com/2003/09/10/sports/college-football-clarett-faces-a-charge-and-may-transfer.html.

35. Mike Freeman, *Buckeyes Suspend Clarett For Year*, N.Y. TIMES (Sept. 11, 2003), http://www.nytimes.com/2003/09/11/sports/football-buckeyes-suspend-clarett-for-year.html.

36. *Id.*

37. A supplemental draft is available for players who were not eligible for the previous draft for whatever reason but become eligible between that draft and the next succeeding NFL regular season. *See* NATIONAL FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE (1970, rev. 2006), *available at* http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf. As an example, Clarett's fellow Ohio State alumnus Terrelle Pryor was made available in a supplemental draft in the summer of 2011 after he too chose to enter the NFL after being suspended by Ohio State and the NCAA following the 2011 draft. Michael David Smith, *Terrelle Pryor will be in Monday's supplemental draft*, PRO FOOTBALL TALK (Aug. 18, 2011), http://profootballtalk.nbcsports.com/2011/08/18/terrelle-pryor-will-be-in-mondays-supplemental-draft/. Unlike Clarett, Pryor had already played for Ohio State for three years and thus did not have to sue to gain eligibility. *Id.*

38. Complaint at ¶ 44, Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. Sep. 23, 2003), 2003 WL 22469936.

39. *Id.* at ¶¶ 29-31.

could not protect the NFL from Clarett's claim.[40] The NFL countered by stating that the rule had indeed been incorporated into the CBA, and therefore the non-statutory labor exemption must apply based on judicial precedent.[41]

B. THE DISTRICT COURT DECISION

At the District Court of the Southern District of New York, Judge Shira Scheidlin framed her analysis around the reality of the situation: Clarett, who by "little doubt" was an "NFL-caliber player who would be drafted if he were eligible to participate in the process," had only the NFL's eligibility rule standing between him and "the opportunity to play in the NFL next year."[42] However, in order to play in the NFL, Scheidlin stated that Clarett would have to "first overcome the two affirmative defenses asserted by the NFL: (1) that the Rule is immune from the antitrust laws, and (2) that Clarett lacks standing to bring an antitrust claim."[43]

Addressing the NFL's immunity defense first, Scheidlin noted that if the NFL was correct that their age rule was protected by the non-statutory labor exemption, the exemption would "provide[ ] a complete defense to Clarett's suit."[44] However, Scheidlin did not agree with the NFL's assessment of the exemption's applicability to their age rule. Citing *Brown v. Pro Football, Inc.*, Scheidlin noted that the Supreme Court adapted the non-statutory labor exemption from the "national labor policy favoring free and private collective bargaining, which require good-faith bargaining over wages, hours, and working conditions."[45] Scheidlin interpreted this precedent to mean that while the court "recognized the primacy of collective bargaining in the workplace," this primacy came with limitations.[46] The exemption must only apply to "traditionally mandatory subjects of collective bargaining" and thus can only "shield from antitrust scrutiny conduct that is *mandated* under the labor laws."[47]

Scheidlin disagreed with the NFL's contention that eligibility rules were a mandatory subject of bargaining. Addressing the three cases relied upon by the NFL, *Wood v. NBA*,[48] *NBA v. Williams*,[49] and *Caldwell v. American Basketball Association*,[50] in turn, Scheidlin found that each case involved provisions that "govern the terms by which those who *are drafted* are employed," not "job *eligibility*."[51]

Further, Scheidlin held that the non-statutory labor exemption could not apply to eligibility rules at all, since the rule "*only* affects players . . . who are complete strangers to the

40. *See* Plaintiff's Reply Brief, Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. Oct. 31, 2003), 2003 WL 23220602. On the second point, Clarett claimed that the only NFL bylaw relating to draft eligibility were in the 1992 Bylaws, which had been recently replaced in 2003 by a set of bylaws that did not contain the three-year rule. *Id.* at ¶¶ 17-25.

41. *See* Mem. of the NFL (1) in Opp'n to Pl.'s Mot. for Summ. J. and (2) in Supp. of the NFL's Cross-Mot. for Summ. J. (Non-Statutory Labor Exemption), Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. Oct. 31, 2003), 2003 WL 23220600.

42. Clarett v. NFL, 306 F. Supp. 2d 379, 388 (S.D.N.Y. 2004).

43. *Id.* at 390.

44. *Id.*

45. *Id.* at 391 (citing Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996) (emphasis removed)).

46. *Id.*

47. *Id.* at 392 (citing Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 679-80 (1965).

48. 809 F.2d 954 (2nd Cir. 1987) (holding that three provisions challenged by the plaintiff, the exclusive right to bargain with a draft choice for a year, the first-year player salary cap, and a limitation on player incorporation for tax purposes, were all protected by the non-statutory labor exemption).

49. 45 F.3d 684 (2nd Cir. 1995) (issuing a declaratory judgment that the college draft, a right of first refusal restriction on free agency, and the league's revenue sharing and salary cap framework were all protected under the non-statutory labor exemption).

50. 66 F.3d 523 (2nd Cir. 1995) (holding that the non-statutory labor exemption applied to a dispute where a player claimed he had been wrongfully discharged due to his activities as president of the players union).

51. *Clarett*, 306 F. Supp. 2d at 394-95.

bargaining relationship."[52] While Scheidlin found that there was "no dispute that collective bargaining agreements, and therefore the nonstatutory labor exemption, apply to both prospective and current employees," Clarett—and other players in his situation—could not be subject to this principle since he was excluded from being subject to the terms of the CBA by virtue of his exclusion from the draft, and thus NFL employment.[53] While employees who are hired after the CBA is enacted "are nonetheless bound by the terms because they step into the shoes of the players who did engage in collective bargaining," those who are "categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain."[54] Clarett's eligibility for NFL employment, according to Scheidlin, "was not the union's to trade away."[55]

Scheidlin also held that the NFL had not shown that their age rule engaged through arm's length negotiation, since the rule had been adopted well before the NFLPA's formation.[56] Scheidlin found that the league offered "no evidence that the Rule was addressed during collective bargaining agreements prior to 1993," and the 1993 agreement by the union to "not *bargain over* or *challenge* the Rule" in "no way demonstrate[d] that the Rule itself arose from, or was agreed to during, the process of collective bargaining."[57]

Finding that the non-statutory labor exemption did not apply, Scheidlin then turned to Clarett's antitrust claims. Scheidlin held that Clarett had standing to make such a claim since he alleged that the eligibility rule constituted a "'group boycott' that restrains trade in the NFL labor market by erecting a barrier to market entry."[58] As such, the age rule harmed Clarett's ability to compete in the "narrow" market for player services, and thus it was an unreasonable restraint of trade under the Rule of Reason and the Sherman Act.[59] Based on her finding that the age rule was an illegal restraint on Clarett's ability to market his services as a professional football player, Scheidlin granted Clarett's motion for summary judgment and ordered that Clarett be eligible to participate in the 2004 NFL draft.[60]

II. STAKEHOLDER INTERESTS AT THE SECOND CIRCUIT

A. THE NFL'S INTERESTS ON APPEAL

At a Super Bowl news conference held just prior to the district court's ruling, NFL commissioner Paul Tagliabue was asked whether the league had any discussions with Clarett regarding a settlement.[61] Tagliabue responded firmly in the negative, stating that it was "a pretty direct point of what the rule is and Maurice Clarett's status falls under the rule."[62] Tagliabue went on to say that the system that the NFL had was "working" and that

52. *Id.* at 395.
53. *Id.* at 395-96.
54. *Id.*
55. *Id.* at 395.
56. *Id.* at 396.
57. *Id.*
58. *Id.* at 397.
59. *Id.* at 402-11.
60. *Id.* at 410-11. Scheidlin did not grant Clarett's request for damages relating to his exclusion from the 2003 draft, instead ordering a conference to be held on the issue. *Id.* at 411. While Clarett had filed his lawsuit in September 2003—well after the 2003 Draft (held on April 26-27), Clarett claimed in his complaint that he "was interested in entering the 2003 National Football League Draft but was prevented from doing so by the Rule." Complaint at ¶ 24, Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. Sep. 23, 2003), 2003 WL 22469936. As such, Clarett had requested "lost income as a result of being declared ineligible for the 2003 Draft" as part of his prayer for relief. *Id.* at ¶ 44.
61. Barry Wilner, *NFL Commissioner Issues Warning on Stunts*, WASHINGTON POST (Jan. 30, 2004, 6:02 PM), http://www.washingtonpost.com/wp-dyn/articles/A64289-2004Jan30.html.
62. *Id.*

it "is easy to identify players who were helped by staying in school and were developing their skills."[63] Unsurprisingly, following the district court's ruling the NFL immediately vowed to appeal the decision, saying in a statement that the ruling was "inconsistent in numerous respects with well-established labor and antitrust law" and that the league fully expected that the age rule would be upheld by the higher courts.[64]

Even beyond their stated interests in helping players by keeping them in school to continue developing their skills, the NFL's rationale for appealing the district court decision was simple: the league wanted to retain their eligibility rule while also protecting their collective bargaining agreement under the non-statutory labor exemption. A victory for Clarett—and the trial court's ruling—would force the league to accept ineligible players for the NFL draft, and effectively neuter the age rule.

At the same time, the NFL's briefing shows that the league had other interests as well. In their original motion for summary judgment at the trial court level based on Clarett's antitrust claims, the league discussed the purposes of various rules in the CBA, including club roster limits, limitations on the number of selections in each draft, the requirement that a drafted player only negotiate with the club that drafted him, the "Rookie Allocation" limitations that set forth maximum amounts that clubs may pay drafted players each year, and the overall league salary cap.[65] Beyond the league's antitrust arguments, the NFL's main focus was simple: they wanted to retain control of the market. The NFL argued in this brief that the market for the services of professional football players was "regulated by a collective bargaining agreement," where as a result of roster limits and draft pick selection limits, "actual output is consistently at its limit."[66] The trial court's opinion, which would open the floodgates for additional players to enter the draft, would force the NFL to lose this control, and possibly have to create more draft selections or more roster spots to accommodate the additional players, lest there be otherwise draft-pick-worthy players signed as undrafted free agents or unable to stay on an NFL roster.

An additional interest of the NFL was the health and safety of its players. At the trial court the NFL submitted a declaration of a physician, Jordan D. Metzl, M.D., to support the proposition that the eligibility rule was necessary to keep players safe.[67] The NFL argued that barring "players who are less mature physically and psychologically . . . from heightened risks of injury in NFL games" served to protect the NFL's product "from the adverse consequences associated with such injuries" and "protecting from injury and self-abuse other adolescents who would over-train—and use steroids—in the misguided hope of developing prematurely the strength and speed required to play in the NFL."[68]

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63. *Id.*

64. Larry Neumeister, *Judge Says Clarett Can Be in NFL Draft*, WASHINGTON POST (Feb. 5, 2014, 2:10 PM), http://www.washingtonpost.com/wp-dyn/articles/A16090-2004Feb5.html.

65. Mem. In Support of the NFL's Mot. for Summ. J. (Antitrust Injury) at 4, Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), 2003 WL 23220580.

66. *Id.* at 5.

67. Mem. of the NFL (1) in Opp'n to Pl.'s Mot. for Summ. J. and (2) in Supp. of the NFL's Cross-Mot. for Summ. J. (Non-Statutory Labor Exemption) at 6, Clarett v. NFL, *supra* note 40.

68. *Id.* This argument would later be repeated by the NBA in their own argument for a higher minimum age. *See infra* note 219 and accompanying text. It is also worth noting that under the 2002-2008 CBA, NFL players could not become unrestricted free agents (and thus reap the benefits of an unrestricted open market for their services) until after their fifth accrued NFL season. NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N., COLLECTIVE BARGAINING AGREEMENT art. XIX, § 1(a) (2002) (on file with author). Prior to their fifth season—but only after their third season—players could become restricted free agents, which would grant the player's original team the right of first refusal and/or draft pick compensation from the player's new team, if he signed with a new team. *Id.* at art. XIX, § 2. The age of NFL players' peak performance varies by position but generally is around 26-years-old for quarterbacks and often lower for other, more physical positions like running back. *See generally* Ty Schalter, *When Does Age Catch Up to NFL Players?*, BLEACHER REPORT (June 27, 2013), http://bleacherreport.com/articles/1686669-when-does-age-catch-up-to-nfl-players. Perhaps uncoincidentally, play-

In one fell swoop, the trial court ruling went against all of these interests. Scheidlin's holding that eligibility rules were not covered under the non-statutory labor exemption as they were not mandatory subjects of bargaining eliminated the NFL's power to negotiate eligibility rules entirely, as any enforcement of the age rule would suddenly be ripe for an antitrust challenge in the same vein as Clarett's.[69] The ruling also narrowed the scope of the non-statutory labor exemption, as it prevented the NFL and NFLPA from promulgating rules that were not within the realm of "wages, hours, and working conditions."[70] Further, Scheidlin's ruling also prevented the NFL from enforcing the other terms of the NFL Constitution that the union agreed not to challenge, as those would also not be products of "arms-length bargaining" since they came from the same source as the overturned age rule.[71]

But by also holding that the rule could not be covered by the non-statutory labor exemption because it "*only* affects players . . . who are complete strangers to the bargaining relationship," Scheidlin also effectively cut off the NFL's power to control which players entered the market.[72] This portion of Scheidlin's opinion perhaps hurt the NFL more than any other portion of the decision, as its rules—even if they were collectively bargained and included in the CBA—suddenly could only affect players who are already established members of the NFLPA and not include entry rules involving incoming and potential players.

While not many portions of the NFL CBA—even post-*Clarett*—affect non-union members, some examples do exist, mostly within similar contexts of eligibility to play in the NFL. For example, Article 20, Section 1 of the 2011-2020 CBA contains a rule preventing clubs from signing "any player who in the same year has been under contract to a Canadian Football League . . . club at the end of that CFL club's season."[73] More importantly, this holding may have also applied to players in the opposite situation as *Clarett*: retired players who played in an era before the CBA, or during 1987-1992 when there was no CBA in place, many of whom recently sued the NFL for failing to properly warn and prevent concussions.[74] In response to these suits, the NFL has argued that the players' claims are preempted by the CBA under § 301 of the Labor Management Relations Act.[75] But if the trial court ruling had not been appealed, preemption could arguably not even be on the NFL's radar as a defense to these players' claims, since they, like Clarett, would be "complete strangers to the bargaining relationship."[76]

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ers are generally about 21-years-old when they complete their third year of college, meaning that if they enter the NFL following this year, they will reach unrestricted free agency at 26-years-old. This means that running backs like Clarett will play the entirety of their prime seasons before reaching unrestricted free agency. By contrast, had Clarett been allowed to enter the 2004 Draft when he was 20-years-old, he would have reached unrestricted free agency right in the middle of his prime years at 25-years-old. *See generally id*; *See also Maurice Clarett Career Stats*, NFL.COM (last visited July 20, 2017) (listing Clarett's birthday as October 29, 1983).

69. Clarett v. NFL, 306 F. Supp. 2d 379, 391-92 (S.D.N.Y. 2004).

70. *Id.* at 391.

71. *Id.* at 396.

72. *Id.* at 395.

73. NFL CBA 2011-20, *supra* note 5, at art. 20, § 1.

74. *See generally* Michael McCann, *What's next for each side after the NFL's concussion settlement*, SPORTS ILLUSTRATED (Apr. 18, 2016), https://www.si.com/nfl/2016/04/18/nfl-concussion-lawsuit-settlement-retired-players.

75. *See* Mem. of Law of Def. NFL and NFL Properties LLC in Support of Mot. to Dismiss the Master Administrative Class Action Complaint on Preemption Grounds, In re NFL Players' Concussion Injury Litig., No. 2:12-md-02323, 842 F. Supp. 2d 1378 (J.P.M.L. 2012); *See also* Michael Telis, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO L.J. 1841 (2014).

76. *Clarett (S.D.N.Y.)*, 306 F. Supp. 2d at 395. At the same time, for many of these players this would be a difficult sell since, aside from the players who had retired before the formation of the NFLPA in 1956, the players were likely part of the "bargaining relationship" at some point in their careers, even if they were only members of the NFLPA while it was technically decertified and merely a "professional association" from 1989 to 1993. *See History*, NATIONAL FOOTBALL LEAGUE PLAYERS ASS'N (last visited July 20, 2017), https://www.nflpa.com/about/history.

Clearly, at the trial court the NFL had lost much beyond simply being forced to allow Clarett to enter the 2004 Draft. As such, they had a strong interest in appealing the decision and reclaiming their power and control at the Second Circuit.

B. THE *AMICUS* BRIEFS

i. THE NBA, WNBA, AND NHL

Unsurprisingly, the NBA, WNBA, and NHL *amicus* brief was written in support of their fellow professional sports league, and in favor of the Second Circuit reversing the district court opinion that ruled league eligibility rules illegal.[77] While the leagues conceded that their interests were similar to those of the petitioner NFL, they were careful not to repeat the arguments made by the NFL in their own filing and instead looked to present "additional arguments for the reversal of the district court opinion" in their own interest.[78]

The leagues' interest in this case was simple: each league had eligibility rules similar to the NFL, and thus, the district court decision invalidating these rules would subject the leagues to "similar antitrust challenges to the eligibility, and possibly other, provisions of their collective bargained agreements regarding terms of entry."[79] For example, the leagues suggested that the WNBA's fundamental gender-based eligibility requirement may also be open to antitrust challenge "on the same grounds as the NFL's experienced-based provision."[80] Further, the leagues argued that since other CBA provisions are "directly affected by the age and experience of players who may become employed in the league and the length of time it typically takes for players of that age and experience level to develop and improve to higher levels of skill," striking down the eligibility rules would cause the entirety of league CBAs to "unravel."[81]

The leagues based their arguments supporting the legality of eligibility rules on two fundamental points. First, the league argued that age- and experience-based eligibility rules constitute agreements concerning mandatory subjects of collective bargaining, as required by the non-statutory labor exemption.[82] Arguing that there is "no fixed list of the 'terms and conditions of employment' that are considered mandatory subjects of bargaining," the leagues contended that collective bargaining exists to settle all aspects "of the relationship between the employer and employees," including aspects "affecting individuals outside the employment relationship."[83] Instead, the leagues argued that the non-statutory labor exemption was "intended to strike a balance between the national labor policy favoring collective bargaining . . . and the national antitrust policy promoting unrestrained business competition."[84]

While the leagues acknowledged the NFL's argument that the non-statutory labor exemption should cover both mandatory and permissive subjects of bargaining, they felt that this was the wrong approach to analyzing eligibility rules.[85] Instead, the leagues argued that

77. Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett (2nd Cir.), *supra* note 22.

78. *Id.* at 1.

79. *Id.* at 5-8. The leagues did not address one major key distinction between their own eligibility rules and the NFL's age rule: that their eligibility rules were expressly included in their respective CBAs, while the NFL's were not. *See supra* note 18 and accompanying text.

80. *Id.* at 8, n. 3.

81. *Id.* at 4-5, 8 (citing Wood v. NBA, 809 F.2d 954, 962 (2nd Cir. 1987)).

82. *Id.* at 9.

83. *Id.* at 11 (citing Allied Chemical & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971); Local 24, Int'l Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 294-95 (1959)).

84. *Id.* at 12 (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975)).

85. *Id.*

the court did not even need to decide that issue to overturn the district court ruling, as "[a]ge- and experience-based eligibility rules, like the NFL rule at issue here, are integral to, and vitally affect, the terms and conditions of employment for current players, and thus concern mandatory subjects of collective bargaining."[86] The leagues contended that these eligibility rules were similar in that aspect to the college draft, entry level player salaries, the allocation of compensation between veteran and entry level players, or the service time that players must have before reaching free agency, which have all been held to be mandatory subjects of bargaining.[87] Because they are integral to the conditions of employment for current players, the leagues argued, eligibility rules must be included within the sphere of the non-statutory labor exemption even if the exemption is held to only cover mandatory subjects of bargaining.

While the leagues' interest in expanding the non-statutory labor exemption's scope to include eligibility rules is apparent on this first point of analysis, another major interest of the leagues in this litigation—and indeed in most sports antitrust litigation—is evident in their second argument. On the second point, the *amicus* leagues argued that for the purposes of labor negotiations with players unions, the courts should treat professional sports leagues as single entities, and are thus exempt from antitrust scrutiny under the precedent of *Copperweld Corp. v. Independence Tube Corp.*[88] In the context of their overall brief, this second point raised by the leagues stood in stark contrast to their much smaller claim that eligibility rules should be covered by the non-statutory labor exemption, as single entity status would confer onto the leagues a broad antitrust exemption well beyond collective bargaining.

The leagues' quest for single entity status in this filing was by no means the first time they have argued for a court to apply this exemption to their dealings, both in collective bargaining and otherwise.[89] The leagues cited several cases in their briefs where courts had recently considered whether sports leagues should be treated as single entities under the *Copperweld* exemption.[90] The leagues' goal here was likely strengthened by the recent vic-

86. *Id.* at 12-13.

87. *Id.* at 13. *See* Caldwell v. American Basketball Ass'n, 66 F.3d 523, 529 (2nd Cir. 1995) (holding that "circumstances under which an employer may discharge or refuse to hire an employee" are a mandatory subject of bargaining); Wood v. NBA, 809 F.2d 954, 962 (2nd Cir. 1987) (holding that a salary cap, college draft, and player corporation rules are all mandatory subjects of collective bargaining); Powell v. NFL, 930 F.2d 1293, 1302-03 (8th Cir. 1989) (holding that NFL restrictions on free agency are mandatory subjects of bargaining); White v. NFL, 836 F. Supp. 1458, 1501 (D. Minn. 1993) (holding that NFL college draft, free agency rules, and salary cap provisions are mandatory subjects of bargaining).

88. *Id.* at 10. *See* Copperweld v. Indep. Tube Corp., 467 U.S. 752 (1984) (finding a parent company is incapable of conspiring with its wholly owned subsidiary for the purposes of Section 1 of the Sherman Act since they are a "single entity" despite the separate incorporation.)

89. Six years after *Clarett* was decided, this issue would reach the U.S. Supreme Court in *Am. Needle v. NFL*, 560 U.S. 183 (2010), where the court considered whether the NFL was a single entity for the purposes of licensing teams' intellectual property. In this case, the Supreme Court held that NFL teams are each "a substantial, independently owned, and independently managed business," and thus the league cannot be found to be a single entity. *Id.* at 196. This substantial loss for the NFL was compounded by the fact that the NFL, as respondents to the petition for certiorari, argued in favor of the Supreme Court granting certiorari—*despite having prevailed at the Seventh Circuit*—reasoning that the Court should take the case to expand the appellate court's narrow ruling granting the NFL single entity status for licensing intellectual property and find instead that the NFL and other professional leagues are a single entity for all aspects of their operations. Brief for the NFL Respondents at 4, Am. Needle v. NFL, 560 U.S. 183 (U.S. Jan. 21, 2009) ("The NFL Respondents are taking the unusual step of supporting certiorari in an effort to secure a uniform rule that . . . recognizes the single-entity nature of highly integrated joint ventures . . . ") This action perhaps speaks to the persistent and somewhat quixotic nature of the leagues' quest to find a court to grant them this classification. For a more thorough look at the leagues' unending quest for single entity status, *see generally* Gabriel Feldman, *The Puzzling Persistence of The Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court's Opportunity to Reject a Flawed Defense*, 2009 WIS. L. REV. 835 (2009).

90. Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22, at 19-22. *See* Chi. Prof. Sports Ltd. P'ship v. NBA, 95 F. 3d 593, 599-600 (7th Cir. 1996); Brown v.

tory for Major League Soccer (MLS)—a league absent from this *amicus* filing—in convincing the courts to grant them their own single entity classification based on their unique corporate structure as a single limited liability corporation, which unlike its older counterparts had team "operator-investors" rather than owners of individual clubs and centralized operations like hiring players and distributing profits and losses.[91] Further, the more traditionally organized leagues had secured some measure of a victory themselves less than a decade earlier in *Chicago Prof. Sports Ltd. Partnership v. NBA*, where the Seventh Circuit posited that there was "no reason why a sports league *cannot* be treated as a single firm," while declining to explicitly do so themselves.[92]

While the leagues in this *amicus* brief were careful to limit this bid for single entity status solely to the collective bargaining setting, the creation of this precedent would likely allow for the application of similar status in other contexts. This is clear by how the leagues argued throughout their entire brief; the word "single" appears sixteen times within their brief, specifically in the context of describing themselves as providing a "single entertainment product"[93] or as bargaining as a "single unit" with the unions to create a CBA.[94] Along these lines, the leagues argued that as a multiemployer bargaining unit, they are protected from antitrust scrutiny because they "still 'act as a single entity'" and thus "should be treated as a single entity for purposes of negotiating with respect to" CBA provisions like age- and experience-based eligibility rules.[95] According to the leagues, if the court disagreed and held otherwise, the precedent created would "subvert the ability of multiemployer bargaining units to adopt common positions regarding permissive subjects of bargaining and to negotiate about such subjects with their respective unions."[96]

Pro Football, Inc., 518 U.S. 231, 248-50 (1996) (conceding "that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival" while finding that the non-statutory labor exemption was a better application to the employer conduct at issue); NBA v. Williams, 45 F.3d 684 (2nd Cir. 1995) (finding that the NBA teams' actions as a multiemployer bargaining unit did not violate the Sherman Act's prohibition on concerted action between competitors).

91. Fraser v. MLS, 97 F.Supp.2d 130, 135-39 (D. Mass. 2000), *aff'd*, 284 F.3d 47 (1st Cir. 2002), *cert. denied*, 537 U.S. 885 (2002). The First Circuit on appeal declined to address the single entity ruling while affirming the District Court decision in a whole, stating that while the case for applying single entity status "had not been established," it was unnecessary due to a jury verdict in favor of the MLS on other antitrust issues. Fraser v. MLS, 284 F. 3d 47, 56 (1st Cir. 2002).

92. 95 F.3d at 599-600.

93. Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22, at 3. ("The NHL is an economically integrated business venture principally engaged in the production and marketing of a *single entertainment product*, NHL Hockey, based on competition among its thirty member clubs") (emphasis added). The brief also included similar—though not as pointed—statements about the NBA and WNBA leagues. *Id.* at 2-3 ("The NBA is an economically integrated professional sports league, comprised of twenty—nine member teams, principally engaged in the production and marketing of an entertainment product known as NBA Basketball. . . . The WNBA, created in 1996, is a professional sports league principally engaged in the production and marketing of an entertainment product—WNBA Basketball—based on athletic competition among its teams.").

94. *Id.* ("NBA teams bargain as a *multiemployer bargaining unit* with the National Basketball Players Association . . . the union representing present and future NBA players. . . . The NHL therefore collectively bargains *as a single unit* with the National Hockey League Players' Association . . . the exclusive bargaining representative of all present and future NHL player employees.") (emphasis added). *See* NLRB v. Truck Drivers Local No. 449, 353 U.S. 87 (1957) (holding that a temporary lockout by a multiemployer bargaining unit was lawful under the National Labor Relations Act).

95. Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22, at 22-23.

96. *Id.* at 23. Congressman John Conyers, writing as another *amicus curiae* to the *Clarett* action, disagreed strongly with this notion. *See infra* notes 116-18 and accompanying text.

ii. THE NCAA

The stated interests and positions of the NCAA in its *amicus* brief filed on behalf of the NFL were unsurprising. The NCAA stated that while it had "no interest in whether Mr. Clarett plays in the NFL in 2004 or 2005," it had "a substantial interest in encouraging all student-athletes to pursue and complete their education."[97] This "factual interest" was coupled with an additional "legal interest" of "immunizing eligibility rules from antitrust challenge," as the NCAA felt that the district court's purported "fundamental misapplication of the antitrust laws to the NFL's eligibility rules" could have "sweeping adverse consequences for all league sports governing bodies, including the NCAA."[98]

In its *amicus* brief, the NCAA argued that the District Court decision was "counterproductive to the NCAA's procompetitive goals and to the collective best interests of its student-athletes" as it would enable the possibility of "long-lasting detrimental effects to those who leave college early . . . never realizing the benefits of a college education, and never achieving success as professional football players."[99] While citing various statistics showing the low percentage of high school student-athletes that end up playing in the NFL, the NCAA argued that the NFL age rule preserved the "benefit of an education as an alternative when their professional ambitions or careers end" and thus should be held as legal.[100]

Beyond these public-policy-based, "factual" rationales, the NCAA also posed several legal concerns regarding the district court's finding against the NFL age rule. The NCAA argued that in the context of organized league sports, eligibility rules are akin to other rules of "athletic competition" which have been held not to be subject to antitrust scrutiny.[101] Further, the NCAA cited previous legal victories in antitrust cases implicating their own legal victories and argued that these cases established a precedent whereby both amateur and professional league eligibility rules have been "uniformly rejected because the antitrust laws simply do not apply."[102]

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97. Brief for the NCAA as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 23, at *v*.

98. *Id.* at *v-vi*.

99. *Id.* at 4-5.

100. *Id.* at 5-6

101. *Id.* at 9 (citing Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712 (6th Cir. 2003); Toscano v. PGA Tour, Inc., 201 F.Supp.2d 1106 (E.D. Cal. 2002)). The Sixth Circuit in *Plymouth Whalers* held that the market for player services is a market for "athletic competition" rather than economic competition, and thus this market is afforded no protection by antitrust laws. *Plymouth Whalers*, 325 F.3d at 720. *Plymouth Whalers* was something of an odd ruling that ran counter to the decisions of other circuit courts who have held that markets for professional player services *are* under the purview of antitrust laws. *See* Mackey v. NFL, 543 F. 2d 606, 618 (8th Cir. 1976) ("We hold that restraints on competition within the market for players' services fall within the ambit of the Sherman Act."); Smith v. Pro Football, Inc., 593 F.2d 1173, 1185-86 (D.C. Cir. 1978) (holding that the NFL Draft—before it was collectively bargained and thereby protected by the non-statutory labor exemption—was "significantly anticompetitive in its *effect*" because it "inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."). *See also* Haywood v. NBA, 401 U.S. 1204 (1971) (upholding a district court stay allowing a basketball player to play in the NBA while suing the NBA on the grounds that the age rule keeping him from playing in the NBA constituted an illegal group boycott."). Notably, the NCAA did not cite any of this other precedent that ran counter to its base legal argument, including their own antitrust defeat in *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (holding that a restraint on coaches' salaries is an illegal restraint of trade under Section 1 of the Sherman Act).

102. Brief for the NCAA as Amicus Curiae Supporting Petitioner, *supra* note 23, at 11-13 (citing Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998); Bowers v. NCAA, 9 F.Supp.2d 460 (D. NJ. 1998)). *See also* Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert denied*, 508 U.S. 908 (1993) (holding that NCAA eligibility rules, including the rule removing eligibility for players who enter the NFL draft, are lawful under the Sherman Act "because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education."). As the NCAA acknowledged, the Third Circuit's decision in *Smith*—which is mainly a Title IX case—was reversed by the Supreme Court on grounds aside from the eligibility rule in question; namely the question of whether the NCAA as an organization

In naming these previous rulings holding other eligibility rules to be legal, the NCAA had one clear argument: that courts both have and should "leave the eligibility line-drawing in the hands of the league sports governing bodies."[103] While the NCAA acknowledged that if eligibility rules are allowed there is "an inherent risk of excluding someone arguably worthy of inclusion," decisions of who should be allowed to play sports should be left in the hands of the leagues and governing bodies involved, not the courts.[104] The NCAA argued that the leagues and governing bodies are the parties best equipped to make these decisions.[105]

iii. CONGRESSMAN JOHN CONYERS

The professional sports leagues and players were joined in their *amicus* brief filing by Michigan Democratic Congressman John Conyers, who at the time was the Ranking Democrat on the House Committee on the Judiciary.[106] In his statement of interest, Conyers noted that the Judiciary Committee has jurisdiction over antitrust laws, and that he himself has "played a leading role in every major antitrust bill that ha[d] been considered by the Committee and enacted into law" since he became the ranking member of the Committee in 1995.[107] Conyers also stated that he has had a direct impact in the shaping of antitrust and labor laws in sports, introducing various bills to Congress to partially repeal baseball's antitrust exemption, including the bill that later became the Curt Flood Act.[108]

On this basis, Conyers diverged from the other *amici* in this case, siding with Clarett in favor of the Second Circuit affirming the District Court decision. The crux of Conyers's brief centered around the non-statutory labor exemption, and the argument that by exempting the NFL's age rules from antitrust scrutiny under this exemption, the Second Circuit would "severely undermine the operations of the antitrust laws."[109] Conyers forcefully argued that the age rule did not fall under this exemption and in fact failed under all three elements of the non-statutory labor exemption as set forth thirty years earlier by the Eighth Circuit in *Mackey v. National Football League*.[110] Conyers argued that the NFL's age rule cannot be exempted under the non-statutory labor exemption because "[the rule] is not a mandatory subject of collective bargaining; Clarett is a stranger to the collective bargaining

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by itself is bound by Title IX due to its receipt of membership dues from public institutions. *See* NCAA v. Smith, 525 U.S. 459 (1999). *Bowers* upheld the *Smith* finding that "eligibility rules are not related to the NCAA's commercial or business activities . . . [and that] the Sherman Act does not apply to the NCAA's promulgation of eligibility requirements." 9 F.Supp.2d at 497 (citing *Smith*, 139 F.3d at 185-86).

103. Brief for the NCAA as Amicus Curiae Supporting Petitioner, *supra* note 23, at 16.

104. *Id.* at 15.

105. *Id.*

106. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24. Conyers became the chair of the House Committee on the Judiciary since 2006. *Ranking Member*, THE HOUSE COMMITTEE ON THE JUDICIARY DEMOCRATS (last visited June 19, 2017), https://democrats-judiciary.house.gov/about/ranking-member. Conyers served as chair of the House Committee on the Judiciary in the 110th and 111th sessions of Congress (2006-11) while the Democrats controlled the House of Representatives and reverted back to the ranking member after the Republican Party took control of the House in the 2010 midterm elections.

107. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 1-2.

108. *Id.* at 2. *See* Baseball Fans and Communities Protection Act of 1995, H.R. 45, 104th Cong. (1996); H.R. 21, 105th Cong. (1997); Curt Flood Act of 1998, 15 U.S.C. § 26b (1998).

109. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 4.

110. *Id.* at 6. *See* Mackey, 543 F.2d at 614 (8th Cir. 1976) (requiring rules exempted under the nonstatutory labor exemption to meet the following elements: (1) the restraint on trade "primarily affects only the parties to the collective bargaining relationship;" (2) the agreement "concerns a mandatory subject of collective bargaining;" (3) the agreement "is the product of bona fide arm's-length bargaining.") *See also* Local Union No. 189 v. Jewel Tea, 381 U.S. 676, 729-30 (1965).

agreement; and the age-eligibility requirement was not the subject of arms-length bargaining."[111]

Based on a report by the Congressional Research Service (CRS),[112] Conyers further argued that the age rule was further illegal under prior precedent. The rule and its justifications are similar to the NBA rule invalidated in the *Haywood* case thirty years earlier, as there were no pro-competitive benefits to the rule that "would justify its retention."[113] According to Conyers, the CRS also "expressed scepticism [sic] that the non-statutory labor exemption could be used to immunize the anti-competitive group boycott" that is the age rule, because while "many commentators express the opinion that the antitrust laws are less appropriate than are the labor laws for addressing restrictions that might best be included within collective bargaining agreements," when such restrictions affect non-parties to the agreement, no case law supports the proposition that such activity is covered under the exemption.[114]

In general, Congressman Conyers was far less concerned about how an NFL victory in *Clarett* would affect Clarett, the NFL, or even the professional sports industry as a whole, and much more concerned about how that victory would affect the wider landscape of antitrust jurisprudence. In arguing against a widening of the non-statutory labor exemption to allow for eligibility rules, Conyers argued that this would "constitute an invitation to find conflicts between the antitrust laws and other laws where none needs to exist" that would stand in stark contrast to the "narrow view of antitrust exemptions" held on multiple occasions by the Supreme Court.[115] Further expanding on this point, Conyers contended that "extending the non-statutory labor exemption mandatory subjects of collective bargaining, as advocated by the NFL, would defeat in nearly all aspects the application of the antitrust laws" and "conflict with Congress' circumscribed view of the exemption."[116]

Conyers also took issue with the NFL's argument that subjecting the age rule to antitrust laws would "burden, and potentially destabilize, multi-employer bargaining units by

111. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 6. On the third point, Conyers added in a footnote that "it is particularly noteworthy that the *amicus* brief of the [NFLPA] included no indication whatsoever that the NFLPA engaged in any arms-length bargaining regarding the age-eligibility draft rule." *Id.* at 6-7, n. 1. *See infra* notes 131-32 and accompanying text.

112. *See* JANICE E. RUBIN, CONG. RESEARCH SERV., ANTITRUST IMPLICATIONS OF THE NFL'S 3-YEAR ELIGIBILITY RULE (2002).

113. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 7-8. Notably, this CRS report included the following analysis: "[It] has [been] suggested that at least one of the reasons for the four-year college rule is that collegiate athletics provides a more efficient and less expensive way of training young professional basketball players than the so-called 'farm team' system, which is the primary alternative. *Even if this were true, it would not, of course, provide a basis for antitrust exemption.*" *Id.* at 8 (quoting Rubin, *supra* note 111, at 3-4, n. 12) (alteration in original). This is of particular interest given that part of the debate surrounding the NBA's one-and-done rule is whether lowering the age rule and allowing young players to train in the NBA's G League minor league system would be better for players than raising the age rule and forcing them to play in college. *See, e.g.*, Tom Ziller, *Kill the NBA age minimum. The G League is ready to replace college*, SBNATION (June 2, 2017), https://www.sbnation.com/2017/6/2/15728454/nba-draft-age-minimum-gleague-adam-silver; Kevin O'Connor, *The Future of the NBA Could Be the G-League*, THE RINGER (June 6, 2017), https://theringer.com/nba-draft-adam-silver-age-limit-ben-simmons-51cc9cfbc034. *See infra* Part IV.

114. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 9.

115. *Id.* at 10. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963) ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) ("[I]t is a cardinal principle of construction that repeals by implication are not favored."); Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726 (1973) ("When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.").

116. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 11.

imposing antitrust liability on their members reaching agreement with a union on subjects (e. g., eligibility rules) as to which under the labor laws, they are separately, 'free to agree.'"[117] Conyers felt that if the court were to accept that argument, it would "give parties to multi-employer agreements an antitrust immunity that was never intended by Congress or the courts, and that is not enjoyed by comparably situated employers" and "insulate misconduct that was never intended to be exempt from the antitrust laws."[118] This would "create an unwarranted incentive to engage in multi-employer collective bargaining."[119]

Based on his brief, Conyers had one clear interest in mind: protecting antitrust law from what he felt was encroaching weakness, both by labor law through the non-statutory labor exemption, and through expansion of the single-entity doctrine. Even beyond the NFL's arguments, Conyers saw fit to address the NBA, WNBA, and NHL's argument that "'professional sports leagues should be treated as single entities when they engage in collective bargaining with their players' unions and thus exempt from the antitrust laws."[120] Conyers strongly disputed this notion, arguing that affirming this principle would "totally subordinate the antitrust laws to the labor laws" and further compound the dangers of the NFL's arguments.[121] Conyers also addressed the single-entity portion of this claim, arguing that "[n]o court ha[d] ever found the single entity defense to insulate professional sports leagues from antitrust liability" and if they did, it would allow "league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects."[122]

Whereas the NCAA argued that decisions to implement age rules should, like other terms of the employment, be left to the leagues' sports governing bodies and unions to settle on their own,[123] Conyers argued that these decisions should be left to Congress, as "Congress is fully capable of legislatively addressing any unique antitrust needs of the NFL or the other professional sports leagues where policy demands so warrant."[124] Citing the Sports Broadcasting Act of 1961 as an example where the leagues were able to convince Congress that its goal of exempting broadcasting pooling agreements from the Sherman Act was a worthy cause, Conyers argued that if the NFL and other leagues wanted certain activity exempt from antitrust scrutiny, they would need to convince Congress to enact legislation on their behalf.[125] By contrast, Conyers cited various other cases where the NFL and other

117. *Id.* at 12 (citing Brief for Petitioner Nat'l Football League at 18, Clarett v. NFL, 369 F. 3d 124 (Apr. 7, 2004)).

118. *Id.* at 12-13.

119. *Id.* at 13.

120. *Id.* at 15 (citing Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL at 19, *supra* note 22).

121. *Id.*

122. *Id.* at 15-17 (citing N. Am. Soccer League v. NFL, 670 F.2d 1249, 1257 (2d Cir. 1982)). *See generally* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984) (the origins of the single-entity defense). Contrary to Conyers' filing, a court did in fact find one sports league—Major League Soccer (MLS)—to be a single entity a few years earlier in *Fraser v. MLS*, 97 F.Supp.2d 130, 135-39 (D. Mass. 2000). *See supra* note 90. The District Court decision in *Fraser* was rendered on April 19, 2000 (and affirmed by the First Circuit on March 20, 2002)—just under four years prior to Conyers' amicus brief filing on April 14, 2004. It is unknown whether Conyers intentionally left out this case for some undisclosed reason or if he simply had not heard of this decision before filing his amicus brief, but it is worth noting that Conyers' contention that "[n]o court has ever found the single entity defense to insulate professional sports leagues from antitrust liability" was incorrect even back in 2004.

123. *See* Brief for the NCAA as Amicus Curiae Supporting Petitioner, *supra* note 23, at 16. *See also supra* notes 102-103 and accompanying text.

124. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 19.

125. *Id.* at 19-20. *See* Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295. *See also* United States v. NFL, 196 F. Supp. 445 (E.D. Pa. 1961) (holding that broadcast pooling agreements were illegal restraints of trade under the Sherman Act; this holding was later overturned by the Sports Broadcasting Act); 15 U.S.C. §§ 1291-1295

leagues had *failed* in their burden to convince Congress to insulate its rules from antitrust scrutiny, including an attempt to apply the single entity defense to franchise relocation and, notably, to provide leagues with an antitrust exemption for restricting the eligibility of college-aged players.[126]

Specifically pointing to the latter example—an instance where the professional sports leagues asked Congress to exempt eligibility rules and Congress declined to do so—Conyers argued that it would be wrong for the judiciary to "extend the non-statutory labor exemption beyond its current contours" to cover eligibility rules.[127] Stating that it is "telling that Congress has specifically considered and failed to approve efforts to . . . provide the sports leagues with an exemption for restricting the eligibility of college-aged individuals," Conyers affirmed his belief that Congress "can and will enact specific exemptions from the antitrust laws when they are justified," and that until Congress can decide whether or not such exemptions are in the public's best interest, it would be "inappropriate" for the judiciary to act to do so first.[128]

iv. THE NFL PLAYERS ASSOCIATION

The NFL Players Association—an entity which collectively bargains with the NFL and also represents players like Clarett—is an organization that is understandably split between the interests of both the petitioner and respondent in this action. As such, the NFLPA filed a brief on behalf of *neither* party, titling it simply as "Brief of *Amicus Curiae* National Football League Players Association," without an indication of which party—if any—they were filing to support.[129]

(1966) (amending the Sports Broadcasting Act to allow for the merger of the NFL with the American Football League).

126. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 20-21. The effort to exempt franchise relocation from antitrust laws came about because of a NFL loss in *L.A. Mem'l Coliseum Comm. v. NFL*, 726 F.2d 1381 (9th Cir. 1984), where the Ninth Circuit held that the NFL could not block NFL franchises from relocating to new and better markets and stadia. The effort to exempt restrictions on the eligibility of college-aged players came about after University of Georgia star Herschel Walker left for the NFL with one year of eligibility remaining. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 20-21. Senator Arlen Specter introduced legislation to provide for an antitrust exemption for eligibility restrictions in the 98th Congress, but the legislation did not make it past the Senate Judiciary Committee. *Id. See* Collegiate Student Athlete Protection Act of 1983, S. 610, 98th Cong. (1983) (which would "[e]stablish[ ] an antitrust exemption for a joint agreement among persons engaged in or conducting professional football, baseball, basketball, soccer, or hockey which is designed to encourage student-athletes to complete their undergraduate education before becoming professional athletes.") *See also* Collegiate Student Athlete Protection Act of 1983, H.R. 3040, 98th Cong. (1983) (the same bill introduced in the House of Representatives by Georgia Democrat Druie Barnard, Jr.).

127. Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 21.

128. *Id.* Conyers also pointed out that Congress had "recently created an antitrust modernization commission to review and make recommendations regarding issues such as" eligibility rules in professional sports. *Id. See also* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273 (2002) (codified as amended in scattered sections of 5 U.S.C., 7 U.S.C., 8 U.S.C., 15 U.S.C., 18 U.S.C., 21 U.S.C., 28 U.S.C., 30 U.S.C., 40 U.S.C., 42 U.S.C., and 50 U.S.C.). The duties of the Commission included "[examining] whether the need exists to modernize the antitrust laws and identify related issues." *Id.*; Antitrust Modernization Commission Act of 2002, 15 U.S.C. 1 § 11053(1).

129. Brief for NFLPA as Amicus Curiae, *supra* note 18. By contrast, e.g., the Conyers brief was titled "Brief of John Conyers, Jr., Member of Congress as Amicus Curiae *in Support of Affirmance*." Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24 (emphasis added). Per Rule 29(a)(4) of the Federal Rules of Appellate Procedure, parties filing briefs in a case as amicus curiae must on the cover of their briefs "identify the party or parties supported and indicate whether the brief supports affirmance or reversal." FEDERAL RULES OF APPELLATE PROCEDURE Rule 29(a)(4) (2016), *available at* http://www.ca2.uscourts.gov/clerk/case_filing/rules/pdf/FRAP_with_forms_eff_12-1-16.pdf. As such, amicus briefs at the Court of Appeals are generally filed in support of either the petitioner or the respondent, and clearly indicate

This failure on the part of the NFLPA to take a side is reflected in the tenor of the arguments articulated in its brief. The NFLPA essentially took both sides in the matter, arguing first that since the union agreed to the eligibility rule, it should be covered by the non-statutory labor exemption.[130] However, the union argued that if the court finds that the rule is not covered by the non-statutory labor exemption, then the NFL violated antitrust law and the eligibility rule should be held as an illegal restraint of trade under the Rule of Reason.[131]

The NFLPA's first argument—essentially in favor of the NFL—was complicated by two major points that were key elements of *Clarett* at the district court level and on appeal. First, the union conceded that the eligibility rule challenged by Clarett was actually not part of the collective bargaining agreement, but instead "identified in a contemporaneous side letter between the NFLPA and the NFL."[132] However, the NFLPA stated that the rule was still a legitimate collectively-bargained policy and thus protected under the non-statutory labor exemption. As in the 1993 CBA, the NFLPA "agreed to waive its right to bargain over, and agreed not to sue over, certain provisions of the NFL Constitution and Bylaws in effect as of those times," and those provisions "included a draft eligibility rule."[133]

The second interesting component in the NFLPA's brief was the union's argument that Clarett, despite not being part of the union, was still held to the non-statutory labor exemption prohibiting him from challenging the eligibility rule on antitrust grounds.[134] In a section bluntly titled "The District Court Incorrectly Concluded that 'Clarett's Eligibility

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from the beginning which side the brief is intended to support. For example, in *Clarett* the petitioner NFL was joined by amicus curiae NBA, WNBA, and NHL, the NCAA, and the American Football Coaches Association, while the respondent Clarett was joined by Congressman Conyers. *See* Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22; Brief for the NCAA as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 23; Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24. The exception, of course, is at the merits stage of a Supreme Court action, where amici are permitted to file "in support of neither party," or essentially to tell the court that both parties are wrong and that the court should consider the case from another angle not presented by either party to the action. *See* RULES OF THE SUPREME COURT OF THE UNITED STATES Rule 37(3)(a) (2013), *available at* https://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf. *See, e.g.,* Brief for College Sports Council as Amicus Curiae in Support of Neither Party, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (U.S. Aug. 19, 2004) (No. 02-11303) (for an example of an amicus brief in support of "neither party" in a sports-related case heard before the Supreme Court).

130. Brief for NFLPA as Amicus Curiae, *supra* note 18, at 3-12.

131. *Id.* at 12-26.

132. *Id.* at 3.

133. *Id.* The NFLPA did not spend much time in the brief on this argument—this section of their brief was exactly three sentences long not including citations—but the eligibility rule's absence from the CBA was a key element to Clarett's arguments. *See* Pl.'s Mem. in Opp'n To Def. NFL's Mot. For Summ. J. (Antitrust Injury) at 9, Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y. Dec. 10, 2003), 2003 WL 26053421 (arguing that the non-statutory labor exemption cannot "shelter . . . anticompetitive conduct such as the eligibility Rule, which was not negotiated and is not part of the CBA"). The district court, which found in its opinion that "it seems quite clear that the first version of the Rule could not have arisen from the collective bargaining process," took this argument even a step further, holding that that if the NFLPA had agreed to waive its rights to challenge the rule instead of actually negotiating the rule, it could not have been negotiated through arms-length bargaining and thus it could not fall under the purview of the non-statutory labor exemption. Clarett v. NFL, 306 F. Supp. 2d 379, 396 (S.D.N.Y. 2003). *See* Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976) ("Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining."); *but see* Local 210, Laborers' Int'l Union of N. Am. v. Labor Relations Div. Associated Contractors of Am., 844 F.2d 69, 80, n. 2 (2nd Cir. 1988) (declining to adopt to *Mackey* test while believing "that the agreement in the instant case could satisfy such a test.") This was also a point raised by Congressman Conyers in his amicus filing. *See supra* notes 109-110 and accompanying text.

134. Brief for NFLPA as Amicus Curiae, *supra* note 18, at 9-12.

Was Not The Union's To Trade Away,'" the union took issue with the District Court's conclusion that the union did not have the power to restrict Clarett's eligibility.[135]

According to the union, not only did this finding "ignore the inextricable relationship between NFL draft eligibility and NFL players' wages, terms, and conditions of employment discussed above" but it was also "contrary to the wealth of precedent for the proposition that unions and employers may agree to restrictions that disadvantage future employees."[136] Comparing eligibility rules to hiring halls, the union contended that the non-statutory labor exemption even covers restraints that deprive individuals outside of the bargaining relationship from employment, so long as the practice "vitally affects union members."[137]

However, just after the union defended the legality of the eligibility rule within the context of the non-statutory labor exemption, it sharply pivoted, claiming that if the court "does not find that the non-statutory labor exemption applies, it must then consider the antitrust analysis of the district court below."[138] And where the union found the NFL's position legally sound within the context of *labor* law, they felt that the NFL's *antitrust* argument was "inconsistent," and "would create a dangerous precedent" if adopted by the Second Circuit.[139]

Above all, the NFLPA had significant issues not only with the NFL's interpretation of antitrust law as applied to eligibility rules but also with the NFL's portrayal of "a false picture of the NFL player market and a 'hard' salary cap that does not exist."[140] Intriguingly, these are both items that would seemingly call into question the NFLPA's negotiating power and the market they had established for their players in their most recent round of collective bargaining. The NFLPA's arguments on these points seem to support this notion, as its arguments seem almost defensive in nature, seeking to avoid a situation where the Second Circuit establishes precedent based on an economic reality that the union did not feel existed.

First, the NFLPA sharply disagreed with the NFL's contention in its brief that the age rule "has no adverse impact on output or price in any relevant market" since it is undisputed that according to the NFL CBA, "aggregate player compensation is 'limited' by a 'hard' salary cap and an entering player salary pool, so that, for both rookies and veterans, aggregate player compensation 'is consistently at the limit.'"[141] The NFLPA pushed back strongly against this notion, stating that "this economic premise, and thus the very foundation of the NFL's analysis of the antitrust merits, is a myth."[142] Explaining both that nuances in the salary cap allow for higher or lower compensation of players in certain situations and that "NFL clubs can use substantially different player salary strategies from year to year, in terms of the amount of salary that they push into the future for salary cap purposes,"

135. *Id.* at 9 (quoting *Clarett* (S.D.N.Y.), 306 F. Supp. 2d at 396 ("But Clarett's eligibility was not the union's to trade away.")). *See supra* note 54 and accompanying text.

136. *Id.* at 10. The union cited five cases to support this notion, including *Wood v. NBA*, 809 F.2d 954, 960 (2nd Cir. 1987), *Powell v. NFL*, 711 F. Supp. 959 (D. Minn. 1989), and three other cases unrelated to sports. *See also* Ford Motor Co. v. Nat'l Labor Rel. Bd., 441 U.S. 488, 502 (1979); Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176 (1971); Local 32 Am. Fed'n of Gov't Emps. v. Fed. Labor Rel. Auth., 774 F.2d 498, 503 (D.D.C. 1985).

137. Brief for NFLPA as Amicus Curiae, *supra* note 18, at 9-12 (citing Fibreboard Paper Prods. v. Nat'l Labor Rel. Bd., 379 U.S. 203, 210-11 (1964)). The union did not expand on how they felt that NFL's eligibility rule "vitally affects union members." *Id.*

138. *Id.* at 12.

139. *Id.*

140. *Id.* at 12-13.

141. *Id.* at 14-15 (citing Brief of Appellant NFL at 34, Clarett v. NFL, 369 F. 3d 124 (2nd Cir. Apr. 7, 2004)).

142. *Id.* at 15.

the union stated firmly that the NFL's economic premise—that "all teams in the NFL pay its players the same amount each year"—was "wrong."[143]

The NFLPA also disagreed strongly with the NFL's portrayal of how antitrust law can be applied to professional sports on several points. For example, the NFL had stated in their brief that it was "beyond dispute" that including more players on the labor market "would drive prices (here, compensation for player services) *down*, not up."[144] However, the union felt that this was a "gross oversimplification and distortion of the labor market in the NFL," as professional athletes—unlike other products—are "not fungible so that one player is not necessarily interchangeable for another, and that a simple increase in supply will not necessarily decrease the price paid to players for their labor."[145] Further, the NFLPA also disagreed with the NFL's assessment of the availability of certain Sherman Act tests to professional sports, stating that the NFL's claim that the *per se* test cannot be used in the sports context had "no support in either law or logic,"[146] and their assertion that the quick-look Rule of Reason tests are inapplicable to sports had the law "precisely backwards."[147]

The NFLPA also attempted to defend their territory in the context of antitrust standing for professional athletes—a key issue in the district court opinion.[148] Responding to the NFL's claim that Clarett suffered no antitrust injury since there was no harm to competition, the union pointed out that Clarett was harmed "because he was excluded from the market" derived through the "exclusion of a category of potential participants in the NFL draft," an injury that the union claimed was both an "injury of the type the antitrust laws were intended to prevent" and an injury "that flows from that which makes [the NFL's] act unlawful."[149]

While the NFLPA did not attempt to rectify their positioning of the age rule as legal under labor law yet illegal under antitrust law, this divide is explained by context. The NFLPA's position can be justified by their parallel division of interests: as a collective bargaining unit alongside the NFL they have an interest in far-reaching labor law that allows them to retain effective rights to bargain with the NFL without judicial exposure. However, the NFLPA still seeks to keep the NFL's vulnerability to antitrust laws intact in case the need arose to utilize the courts to defend against future actions by the NFL. In a sense, the union sought to protect the fruits of their bargaining rights—even when the policies bar-

143. *Id.* at 15-17.
144. *Id.* at 17 (citing Brief of Appellant NFL at 35, Clarett v. NFL, *supra* note 140).
145. *Id.* at 18 (emphasis removed).
146. *Id.* at 20-21.
147. *Id.* at 21-26.
148. *Id.* at 26-30. *See* Clarett v. NFL, 306 F. Supp. 2d 379, 397-404 (S.D.N.Y. 2004).
149. Brief for NFLPA as Amicus Curiae, *supra* note 18, at 28-29 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).

gained are not written into the CBA[150]—while simultaneously preserving the right to sue the NFL if those negotiations were to break down in the future.[151]

III. THE SECOND CIRCUIT DECISION AND ITS IMPACT ON AMICI

Writing for a unanimous panel, Second Circuit judge Sonia Sotomayor retreated from just about every conclusion reached by the Southern District of New York, finding that the NFL age rule was immune from antitrust scrutiny under the non-statutory labor exemption.[152] Sotomayor based the panel's decision on their agreement with the NFL's argument that under federal labor law the league, "as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment and the rules of the sport without risking antitrust liability."[153] This policy favoring the collective bargaining process, according to the Second Circuit, necessarily "precludes the application of the antitrust laws to its eligibility rules."[154]

While Clarett—and Conyers as an *amici*—argued that the age rule was not a mandatory subject of bargaining as required for application of the non-statutory labor exemption, the Second Circuit disagreed, finding that the rule did fall into this category.[155] Noting that since "the unusual economic imperatives of professional sports raise 'numerous problems with little or no precedent in standard industrial relations,'" courts have recognized "that many of the arrangements in professional sports that, at first glance, might not appear to deal with wages or working conditions are indeed mandatory bargaining subjects," the Second Circuit found that the eligibility rule could not be separated from other terms of the CBA, as the elimination of the rule "might well alter certain assumptions underlying the collective bargaining agreement between the NFL and its players' union."[156]

The Second Circuit also found that since eligibility rules "affect the job security of veteran players," they must be considered as a part of the full deal negotiated between the

150. This interest has become particularly relevant in two recent lawsuits filed against the NFL and NFLPA as co-defendants by players suspended for violating the NFL's collectively bargained policies prohibiting performance enhancing substances and drugs of abuse. In these lawsuits, the player-plaintiffs have charged the union with violating the duty of fair representation by engaging in illegal secret side deals with the NFL to change terms of these drug testing policies without revising the text of the policies or even disclosing the terms of the agreed-upon revisions to the players. *See generally* Pennel v. Nat'l Football League Players Ass'n, No. 5:16-cv-02889 (N.D. Ohio 2016); Johnson v. Nat'l Football League Players Ass'n, 1:17-cv-05131 (S.D.N.Y. 2017), *transferred from*, No. 5:17-cv-00047, 2017 WL 2882119 (N.D. Ohio Jul. 6, 2017). The *Pennel* case was settled by the NFL and NFLPA about one week after its filing when the NFL agreed to reduce Pennel's suspension from ten games to four games with no indication as to why such a reduced suspension was warranted. Joseph Bonham, *Mike Pennel Settles for Four-Game Suspension*, TOTAL PACKERS (Dec. 6, 2016), https://www.totalpackers.com/2016/12/mike-pennel-settles-four-game-suspension/. *Johnson* is, as of this writing, still ongoing after transfer to the Southern District of New York. Johnson v. Nat'l Football League Players Ass'n, No. 5:17-CV-0047, 2017 WL 2882119 (N.D. Ohio 2017) (ruling that . *See* Sam C. Ehrlich, *A More Perfect (NFL Players) Union: Secret "Side Deals," the NFLPA, and the Duty of Fair Representation*, 44 OHIO N.U. L. REV. 33 (2018).

151. This interest too would become relevant in 2011, once the league locked out the players following the expiration of the 1993 CBA when after an impasse in collective bargaining negotiations the NFLPA decertified and sued the NFL on antitrust grounds. *See* Brady v. NFL, 779 F. Supp. 2d 992 (D. Minn. 2011) (enjoining the NFL from locking out the players following the NFLPA's decertification and disclaimer of their status as the bargaining agent for professional football players on the basis that the lockout was a group boycott and an unreasonable restraint of trade under the Sherman Act), *vacated*, 644 F. 3d 661 (8th Cir. 2011).

152. Clarett v. NFL, 369 F. 3d 124, 125 (2nd Cir. 2004). The Second Circuit left the district court's antitrust holdings untouched and purposefully expressed no "opinion on the district court's legal conclusions that Clarett alleged a sufficient antitrust injury to state a claim [n]or that the eligibility rules constitute an unreasonable restraint of trade in violation of the antitrust laws." *Id.* at 125, n. 1.

153. *Id.* at 130.

154. *Id.*

155. *Id.* at 140-41.

156. *Id.* at 140 (quoting Wood v. NBA, 809 F. 2d 954, 961 (2nd Cir. 1987)).

league and union.[157] Comparing the NFL's age rule to traditional hiring hall arrangements,[158] the Second Circuit rejected Clarett's argument that eligibility rules cannot be immune to antitrust concerns because of their effect on players outside the union, stating that courts have long held that mandatory subjects of bargaining may concern "prospective rather than current employees."[159] Further, the Second Circuit found that Clarett is "no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set" and the league and union have the right to "agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices."[160]

The Second Circuit also addressed and rejected the argument that the eligibility rule's absence from the written CBA terms invalidated it, stating that any "threat to the operation of federal labor law" is "no way diminished" by this absence, as the age rule—along with the other rules and policies that the NFLPA agreed not to challenge—were "well known to the union" and presented to the union during collective bargaining negotiations.[161] Thus, the Second Circuit reasoned, "the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted."[162] Even though this left the NFL "in control of any changes to the eligibility rules," the complete waiver over control of these terms was not enough to completely invalidate the possibility that they were bargained, as "the union representative might not have regarded any difference of opinion with respect to the eligibility rules as sufficient to warrant the expenditure of precious time at the bargaining table in light of other important issues."[163]

In the end, the Second Circuit reversed the district court's decision, including the stay granted to Clarett to enter the 2004 NFL Draft.[164] Later that year, Clarett filed a petition for certiorari to the Supreme Court, arguing that the Second Circuit's decision "directly and unabashedly contravenes the decision of the Eighth Circuit in *Mackey*" by allowing the nonstatutory labor exemption "to shield plainly anticompetitive conduct that restrains the rights

157. *Id. See* Fibreboard Corp. v. Labor Bd., 379 U.S. 203, 210-15 (1964) (recognizing union members' "vital concern" in preserving jobs for union members).

158. *See* Associated Gen. Contractors of Am., Houston Chapter, 143 N.L.R.B. 409, 412, *enforced*, 349 F.2d 449 (5th Cir. 1965).

159. *Clarett* (2nd Cir.), 369 F. 3d at 140-41.

160. *Id.* at 141.

161. *Id.* at 142.

162. *Id.*

163. *Id.*

164. *Id.* at 143. During oral argument on April 19, 2004—just five days before the Draft on April 24-25—the Second Circuit granted the NFL's motion to stay the district court's ruling granting Clarett eligibility to enter the 2004 Draft. Docket, Clarett v. NFL, 369 F. 3d 124 (2nd Cir. 2004). Immediately following this ruling, Clarett filed an emergency petition to the Supreme Court to vacate the stay, but was denied on April 22, 2004 by both Justice Ginsburg and Justice Stevens, who each cited the NFL's "commitment promptly to conduct a supplemental draft in the event that the Distirct Court's judgment is affirmed." Docket, Clarett v. NFL, No. 03A870 (2004), *available at* https://www.supremecourt.gov/search.aspx?filename=/Docketfiles/03a870.htm. No amicus briefs were filed for this petition for emergency stay. *Id.*

of prospective employees to practice their trade."[165] Clarett's appeal was denied on April 4, 2005.[166]

The Second Circuit's decision was a major win both for the NFL and for the *amici* who filed on the league's side. Based on the case, the NFL and other leagues—including the NBA, WNBA, and NHL—were granted a much wider non-statutory labor exemption that now clearly covered eligibility rules, including age rules. While the leagues were not explicitly granted the single-entity status that the NBA, WNBA, and NHL asked for in their amicus brief,[167] they were given a significant win by the Second Circuit's application of *NBA v. Williams* in its *Clarett* opinion. The court explained that by that precedent, multi-employer bargaining units, "a process by which employers band together to act as a single entity in bargaining with a common union," are a "long-accepted and commonplace means of giving employers the tactical and practical advantages of collective action."[168]

This in turn was a rebuke to Congressman Conyers, who had sought in his brief to prevent a widening of the non-statutory labor exemption to include multi-employer bargaining units and terms considered previously to be outside the definition of mandatory subjects of bargaining.[169] While Conyers' fears about broad single-entity protection for sports leagues were not implicated, the Second Circuit did grant something like that status for multi-employer bargaining units, and also failed to abide by the "narrow view of antitrust exemptions" that Conyers felt that Supreme Court precedent justified.[170] However, Conyers is likely relieved to know that *Clarett* has not often been applied outside of professional sports, and in fact the broader precedent of the decision has been limited by later courts in other contests.[171]

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165. Petition for Writ of Certiorari at *15, Clarett v. NFL, 544 U.S. 961 (Dec. 30, 2004), 2004 WL 3057836 (referring to Mackey v. NFL, 543 F. 2d 606 (8th Cir. 1976)). *See also* Brief for the Respondent in Opposition, Clarett v. NFL, 544 U.S. 961 (Mar. 4, 2005), 2005 WL 539742. Again, no certiorari stage amicus briefs were filed either in support or in opposition to Clarett's petition. Clarett added in his petition for certiorari that following the District Court ruling, he and new co-plaintiff Michael Williams hired agents, exhausting their eligibility to return to college football under NCAA rules. *Id.* at *3. Williams, a sophomore wide receiver at the University of Southern California, joined the case following the Second Circuit decision after he had hired an agent and declared for the upcoming draft following the District Court ruling in favor of Clarett. *See* Sal Paolantonio, *NFL still goal for Clarett and Williams*, ESPN.COM (Apr. 28, 2004), http://www.espn.com/nfl/columns/story?columnist=Paolantonio_sal&id=1791416.

166. Clarett v. NFL, 544 U.S. 961 (2004). 19 days later, Clarett was drafted in the third round of the 2005 NFL Draft by the Denver Broncos. *New team, new life: Troubled back Maurice Clarett looks forward to starting anew with Broncos*, BILLINGS GAZETTE (Apr. 24, 2005), http://billingsgazette.com/sports/new-team-new-life-troubled-back-maurice-clarett-looks-forward/article_e2b9e935-c379-5a16-b1e7-2a0cd80d162f.html. At the NFL Combine two months before the draft, Clarett clocked times of 4.82 and 4.72 seconds in the 40-yard-dash and quit in the middle of a workout. *Id.* His selection in the third round was considered a surprise, especially after he was released a month later by the Broncos towards the end of the 2005 preseason. Josh Katzowitz, *NFL combine: Maurice Clarett flamed out, blew out career in 2005*, CBS SPORTS (Feb. 17, 2014), http://www.cbssports.com/nfl/news/nfl-combine-maurice-clarett-flamed-out-blew-out-career-in-2005/; John Clayton, *Broncos to release Maurice Clarett*, ESPN.COM (Aug. 29, 2005), http://www.espn.com/nfl/news/story?id=2145372. Clarett later spent three-and-a-half years in prison on robbery charges, and never played a preseason or regular season game in the NFL. *Id.*

167. *See* Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22, at 19-22. *See also supra* notes 87-91 and accompanying text.

168. *Clarett* (2nd Cir.), 369 F. 3d at 136 (citing NBA v. Williams, 45 F.3d 684, 688-93 (2nd Cir. 1995)).

169. *See* Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 11-13. *See also supra* notes 114-118 and accompanying text.

170. *Clarett* (2nd Cir.), 369 F. 3d at 136; Brief for Congressman John Conyers, Jr., as Amicus Curiae Supporting Respondent, Clarett v. NFL, *supra* note 24, at 10. *See* supra note 114 and accompanying text.

171. *See, e.g.*, Reed v. Advocate Health Care, No. 06-C-3337, 2007 WL 967932, at *3 (N.D. Ill. 2007) (limiting *Clarett*'s application to situations "where a group of employers negotiates collectively with a union representing all of the group's employees," not "alleged multi-employer conduct occurring outside the context of any collective bargaining scenario"); Am. Steel Erectors v. Local Union No. 7, 536 F. 3d 68, 79 (1st Cir. 2008) (citing *Clarett* in more limited fashion, holding that the case stands for the principle that "the applicability of the nonstatutory exemption is strongest where the alleged restraint operates primarily in the labor market and has only tangential effects on

The Second Circuit decision was also a major victory for the NCAA, as the age rule—which essentially forced young football players to play in the NCAA before the NFL—was kept completely intact. Further, the Second Circuit's conclusive placement of eligibility rules under the protection of the non-statutory labor exemption as a mandatory subject of bargaining accomplished the NCAA's goal of "immunizing eligibility rules from antitrust challenge," thereby allowing all other leagues to retain similar rules.[172]

The big winner of the Second Circuit decision, however, is the NFLPA. The NFLPA looked to split the difference between bolstering the non-statutory labor exemption and protecting its own rights under antitrust law, and it received everything it wanted. The Second Circuit's opinion in *Clarett* expanded the non-statutory labor exemption by including eligibility rules as mandatory subjects of bargaining, but also dismissed the argument raised by Clarett that collectively bargained terms that are not actually in the CBA cannot be protected by labor law favoring collective bargaining.[173] This allows the NFLPA to be much more flexible in utilizing its bargaining power and allows the union to make deals with the league that can be similarly held in "contemporaneous side letters" and not included within the express terms of the CBA or other collectively bargained policies.[174]

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the business market.") *But see* United Rentals Highway Techs., Inc. v. Indiana Constructors, Inc., 518 F.3d 526, 531, (7th Cir. 2008) (interpreting *Clarett* to state that "collective bargaining agreements . . . are held not to violate the Sherman Act, to avert too sharp a clash between antitrust and labor policies . . . even though such agreements affect the prices and output of goods and services, just as sellers' cartels do, by driving wages above competitive levels"); Brooklyn Downtown Hotel LLC v. New York Hotel and Motel Trades Council, AFL-CIO, No. 15 Civ. 1578, 2017 WL 1192179, at *5 (S.D.N.Y. 2017) (quoting *Clarett* to hold that "[a] provision can qualify as a mandatory bargaining subject if it has a 'tangible effect[ ] on the wages and working conditions' of employees.").

172. *See supra* note 97 and accompanying text. In a sense, the NCAA was also preemptively given protection for its own eligibility rules in case the courts or the National Labor Relations Board ever grants student-athletes employment status, so long as they negotiate their current eligibility rules in the new student-athlete collective bargaining agreement that would come as a result. At the moment, however, this likely not a concern for the NCAA. *See, e.g.,* Northwestern University and College Athletes Players Association (CAPA), 362 N.L.R.B. 167 (2015) (declining jurisdiction in a case where a group of college athletes asked the Board to certify them as a union); Berger v. NCAA, 843 F.3d 285 (7th Cir. 2016) (finding that a group of former women's track-and-field athletes were not employees for the purposes of the Fair Labor Standards Act); Dawson v. NCAA, No. 16-cv-05487, 2017 WL 1484179 (N.D. Cal. 2017) (finding that a former college football player was not an employee for the purposes of the Fair Labor Standards Act). *But see* Berger, 843 F.3d at 294 (Hamilton, J., concurring) ("I am less confident, however, that our reasoning should extend to students who receive athletic scholarships to participate in so-called revenue sports like Division I men's basketball and FBS football"). The *Dawson* case was been appealed to the Ninth Circuit, with oral arguments scheduled for October . Dawson v. NCAA, No. 17-15973 (9th Cir. May 12, 2017). *See also* Sam C. Ehrlich, *The FLSA and the NCAA's Potential Terrible, Horrible, No Good Very Bad Day*, 39 LOY. L.A. ENT. L.J. (forthcoming 2018).

173. Sotomayor's opinion was quite decisive on this point, stating that:

> Clarett would have us hold that by reaching this arrangement rather than fixing the eligibility rules in the text of the collective bargaining agreement or in failing to wrangle over the eligibility rules at the bargaining table, the NFL left itself open to antitrust liability. Such a holding, however, would completely contradict prior decisions recognizing that the labor law policies that warrant withholding antitrust scrutiny are not limited to protecting only terms contained in collective bargaining agreements. . . . The reach of those policies, rather, extends as far as is necessary to ensure the successful operation of the collective bargaining process and to safeguard the "unique bundle of compromises" reached by the NFL and the players union as a means of settling their differences. It would disregard those policies completely to hold that some "particular quid pro quo must be proven to avoid antitrust liability," . . . or to allow Clarett to undo what we assume the NFL and its players union regarded as the most appropriate or expedient means of settling their differences.

Clarett (2nd Cir.), 369 F.3d at 142-43 (citations omitted) (quoting Wood v. NBA, 809 F.2d 954, 961 (2nd Cir. 1987)). This would later be supported by *US Soccer Fed., Inc. v. US Women's Nat'l Soccer Team Players Ass'n*, 190 F.Supp.3d 777, 785 (E.D. Ill. 2016), where the court stated that "a collective bargaining agreement may be partly or wholly oral and a written collective bargaining agreement may be orally modified."

174. Brief for NFLPA as Amicus Curiae, *supra* note 18, at 3. *See supra* notes 132-133 and accompanying text. The NFLPA has continued to make such deals, but the union has arguably—at least according to two lawsuits—gone too far in doing so by allegedly making deals with the league that contradict written terms of collectively

In an additional win for the NFLPA, the Second Circuit refused to discuss Clarett's antitrust claim, leaving the players' victory at the district court intact as dicta.[175] By not reversing the district court's holding that the NFL could violate antitrust law by implementing the age rule against Clarett and other players, the Second Circuit left the antitrust landscape unbroken in the exact way that the union had argued for in its *amicus* brief.[176] Further, Sotomayor's refusal to grant or consider a broader single entity status for professional sports leagues also helped the union, as the union retained the right to decertify and sue the NFL later if it so wished.[177]

The *Clarett* opinion effectively preserved the leagues' and unions' rights to promulgate age rules by affirmatively placing these rules within the coverage and protection of the non-statutory labor exemption. This allows other leagues, including the NBA, WNBA, and NHL, to keep their eligibility rules intact without fear of ineligible players successfully challenging the rules under *Haywood*. Most of these leagues have taken advantage of this opportunity, and the discussion of age rules has generally changed from if they are legal to if they are fair to each of the various involved stakeholders.

IV. *CLARETT*'S LESSONS AND ITS IMPACT ON NBA AGE RULE NEGOTIATIONS

As the NBA and NBPA restart negotiations over the age-based eligibility rule, their discussions will be shaped by *Clarett* in several ways. The obvious influence of *Clarett* on these discussions is that the parties will not have to worry about the legality of the age rule, as any challenge to the revised rule will be precluded by *Clarett*'s precedential effect.

However, the NBA age rule discussions have the potential to draw much more from the *Clarett* case than simply subject matter and legal protection. This can be seen by analyzing stakeholder interests in the rule change, and how an altered age rule would impact the various parties affected by the decision. For example, the NBA, an *amicus* party to the *Clarett* action,[178] has made it known that it wishes to raise the age minimum from 19 to 20, requiring players to spend two years playing in either college or international leagues before joining the NBA.[179] Commissioner Silver and the NBA have justified their position on this issue by explaining that players who join the NBA directly out of high school are generally too immature, and that their time in college often grants them their first opportunities to act

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bargained drug testing policies and keeping these deals secret from players challenging drug suspensions. *See generally* Pennel v. Nat'l Football League Players Ass'n, No. 5:16-cv-02889 (N.D. Ohio 2016); Johnson v. Nat'l Football League Players Ass'n, 1:17-cv-05131 (S.D.N.Y. 2017), *transferred from*, No. 5:17-cv-00047, 2017 WL 2882119 (N.D. Ohio Jul. 6, 2017). *See also supra* note 150.

175. Clarett (2nd Cir.), 369 F. 3d at 125, n. 1 (stating that because the age rule is covered by the non-statutory labor exemption, "we do not express an opinion on the district court's legal conclusions that Clarett alleged a sufficient antitrust injury to state a claim or that the eligibility rules constitute an unreasonable restraint of trade in violation of the antitrust laws.").

176. *See supra* notes 137-150 and accompanying text.

177. As they unsuccessfully attempted to do in 2011. *See* Brady v. NFL, 779 F. Supp. 2d 992 (D. Minn. 2011), *vacated*, 644 F. 3d 661 (8th Cir. 2011). *See also supra* note 151.

178. *See supra* Part II(B)(i).

179. Adam Kilgore, *Adam Silver wants to blow up the NBA's age-limit rule*, WASHINGTON POST (June 1, 2017), https://www.washingtonpost.com/news/sports/wp/2017/06/01/adam-silver-wants-to-blow-up-the-nbas-age-limit-rule/. The NBA has been pushing for a higher age minimum for years. *See, e.g., Adam Silver: NBA age minimum of 20 'would be better for basketball'*, *supra* note 13; Howard Beck, *N.B.A. Commissioner Stern Wants to Preserve Age Limit for Players*, N.Y. TIMES (June 5, 2009), http://www.nytimes.com/2009/06/05/sports/basketball/05stern.html ("[Former NBA Commissioner David] Stern has expressed a desire to raise the age limit to 20 in the next round of collective bargaining"); Howard Beck, *N.B.A. Draft Will Close Book on High School Stars*, N.Y. TIMES (June 28, 2005), http://www.nytimes.com/2005/06/28/sports/basketball/nba-draft-will-close-book-on-high-school-stars.html ("[Former NBA Commissioner David] Stern lobbied for years for an age minimum of 20, saying he wanted his league's scouts and executives out of high school gyms.")

as leaders— a necessary skill for professional basketball players according to team personnel.[180]

The NBA's argument on this point was previewed in their *Clarett amicus* brief where they, alongside the WNBA and NHL, argued that "[i]ntegral to the negotiations over the terms of conditions of employment for players is the level of experience, skill, emotional maturity, and physical development the parties to the negotiations anticipate entry level players will possess when beginning their employment."[181] In tying their filing to the NFL and the notion that eligibility rules were covered under "hours, wages, and working conditions,"[182] the NBA reasoned that age rules "directly affect" other CBA terms, including "negotiation and agreements over entry level players' salaries, the allocation of player compensation between veteran and entry level players, and the amount of time that must elapse before new players acquire free agency rights."[183]

In this regard, it is easy to infer why the NBA would prefer a higher age rule. If a player's rookie contract covers the first four years of his career, as it does for first round picks under the current CBA,[184] the team would want those four years to cover the prime of the player's career. This ensures that the player's best potential earning seasons are covered under the NBA's rookie scale, which limits compensation through its terms and by allowing teams to avoid competing for the players on the open market. As NBA players generally reach peak performance around the age of 24- to 25-years-old,[185] it follows that an age rule of 20, which allows teams to sign players to rookie scale contracts through their peak season, is a prime interest for NBA clubs as it was for the NFL in *Clarett*.[186]

Just as the NBA's interests mirror the NFL's interests in *Clarett*, the NBPA's interests in these discussions closely align with Clarett's, as well as the interests of potential draftees. The NBPA has pushed for a lower age minimum of 18, enabling players to enter the draft straight out of high school. The union has rationalized this position by arguing that the age rule is unjust as it deprives players of the option to attend college or immediately pursue a professional career.[187]

Oddly, the union's position is contrary to the interests of many of their representatives. Most NBPA leaders are veteran players, some of whom would be fighting with the influx of

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180. Sam Amick, *Adam Silver Q&A: New boss wants NBA age limit raised*, USA TODAY (Feb. 13, 2014, 11:57 PM), https://www.usatoday.com/story/sports/nba/2014/02/13/adam-silver-commissioner-qa-age-limit/5458701/ ("[I]ncreasingly, I've been told by many NBA coaches that one of the issues with the younger guys coming into the league is they've never had an opportunity to lead.") *See also supra* note 8 and accompanying text.

181. Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22, at 4.

182. Clarett v. NFL, 306 F. Supp. 2d 379, 391 (S.D.N.Y. 2004) (citing Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996) (emphasis removed)). *See supra* note 44 and accompanying text.

183. Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22, at 4.

184. NBA CBA, *supra* note 3, at art. VIII, § 1. Players drafted after the first round are signed to contracts "covering no fewer than three (3) Seasons (not including any Option Year)." *Id.* at art. VIII, § 2.

185. David J. Berri & Martin B. Schmidt, STUMBLING ON WINS: TWO ECONOMISTS EXPOSE THE PITFALLS ON THE ROAD TO VICTORY IN PROFESSIONAL SPORTS (2010); David Berri, *NBA Players age like milk*, THE WAGES OF WINS JOURNAL (last visited Jul. 20, 2017), http://wagesofwins.com/nba-players-age-like-milk/.

186. *See supra* note 67.

187. Michael Cunningham, *NBA union wants lower age limit for draft*, ATLANTA JOURNAL-CONSTITUTION (Mar. 6, 2015, 12:09 PM), http://www.ajc.com/sports/nba-union-wants-lower-age-limit-for-draft/E15kOGgt7eS1P1BKChM3GJ/. In 2015, NBPA attorney Gary Kohlman compared the rights of young basketball players to others in the workforce:

> Capitalism means that if you're 17, 18 years old and you're a geek and you want to drop out of college and invent Apple or something else, you can do it. In this country, you can do that. And there's nothing stopping you from doing it. If you're an unbelievable blues singer at 17, 18, 19 years old, you can go out and make a fortune.

Id. For another, more forceful quote by Kohlman about the injustices of the age rule, *see also supra* note 13.

younger talent for valuable roster spots.[188] However, the union may reconcile this divergence of interests based on two primary factors. First, most younger players require more training, and may not be as immediately ready for NBA action as a player who spent a year in a highly competitive NCAA program or a professional league abroad.[189] Second, and in light of the first factor, the allowance of younger players may correspond with the development of the NBA Developmental League ("D-League," now called the "G League" for title sponsor Gatorade) into a true minor league, which would be a big win for veteran players hungry for additional roster spots both for their younger competition and themselves.[190]

The concept of a NBA minor league is not a novel development, as the D-League was founded in 2001. However, the construction of the D-League has changed radically over the past few years.[191] At its inception the D-League was a small, eight-team regional league that functioned more as a "final grasp for players clinging to a dream of playing professional basketball" than a legitimate developmental league for young talent.[192] However, the newly rebranded G League has evolved to become much more developmentally-focused, with the league featuring 26 teams that will act as affiliates of NBA teams in the 2017-18 season.[193]

The concurrent timing of NBA Commissioner Adam Silver's "rethinking" of the age rule and the G League's development into a true minor league system is likely not a coincidence.[194] Indeed, the July 1, 2017 CBA between the NBA and NBPA introduced a new concept to the NBA Standard Player Contract: two-way contracts that allot players a prorated lower salary for each day that they are playing in the G League.[195] This salary will start at $75,000 for the 2017-18 year and rise in each year of the CBA's effect, finishing at $92,241 for the 2024-25 season.[196] The addition of this contract language to the new CBA

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188. *See* Liz Robbins, *Age Limit: One Player's Path Is Another Player's Roadblock*, N.Y. TIMES (Mar. 27, 2005), http://www.nytimes.com/2005/03/27/sports/basketball/age-limit-one-players-path-is-another-players-roadblock.html. Shortly before the passage of the current age rule, longtime NBA player Grant Hill summed up this attitude, stating:

> I always thought that it was the purpose of the union to protect its members, not potential members. I think if anyone gets left out, it's the older players, guys who put equity into this league, card-carrying members paying their dues to the union. I would hope they would be protected. *Id.*

189. *See* Spencer Haywood, *NCAA players are not ready for NBA after just one season*, NEW YORK DAILY NEWS (Mar. 30, 2014), http://www.nydailynews.com/sports/college/haywood-one-and-done-ain-article-1.1739354 (an opinion piece—written, somewhat ironically, by the plaintiff of the pre-*Clarett* case that originally overturned age eligibility rules as illegal restraints of trade—arguing that most college freshman in the NBA are not ready for the NBA). *But see* Shannon Ryan, *Enough already: High school stars should be able to go directly to NBA*, CHICAGO TRIBUNE (Apr. 13, 2015), http://www.chicagotribune.com/sports/college/ct-smack-ryan-spt-0414-20150413-story.html; Shehan Jeyarajah, *NBA's one-and-done rule needs to go*, SEC COUNTRY (last visited Jul. 5, 2017), https://www.seccountry.com/sec/sec-basketball-one-done-nba.

190. There is, of course, a possible third latent factor in the NBPA's positional analysis surrounding the age rule: that the lower age rule is merely a high-value bargaining chip rather than a truly important negotiation point. *See* Collins, et al., *supra* note 2 ("For all the bluster around an age limit, the policy mostly functions as a bargaining chip for the NBPA: It's something to be swapped, not defended."). An unnamed NBA team executive had a forceful quote about veteran players' attitudes towards lowering the age rule for prospective players: "I never understood why players would even give a s—- about those guys." *Id.*

191. Michael McCann, *The G-League: 12 Takeaways On NBA's New Deal*, SPORTS ILLUSTRATED (Feb. 14, 2017), https://www.si.com/nba/2017/02/14/nba-gatorade-g-league-deal-adam-silver-takeaways.

192. Kareen Copeland, *D-League Getting Respect as Legit NBA Minor League System*, U.S. NEWS (Feb. 23, 2017), https://www.usnews.com/news/sports/articles/2017-02-23/d-league-getting-respect-as-legit-nba-minor-league-system.

193. O'Connor, *supra* note 112.

194. Winfield, *supra* note 11. *See also supra* note 8.

195. NBA CBA, *supra* note 3, at art. II, § 11. *See also* McCann, *supra* note 190.

196. NBA CBA, *supra* note 3, at art. II, § 11(a)(ii)(B). Teams can also convert existing contracts to two-way contracts prior to the start of the regular season. *Id.* at art. II, § 11(i)(iii). The base salary for players in the G League only (without NBA contracts) is $7,000 per month for the 2018-19 season, or $35,000 for the full five-month season with additional bonuses through affiliate player bonuses and NBA call-ups. *NBA G League An-*

has led several commentators to speculate that the NBA foresees the G League becoming a true minor league system, similar to those found in MLB or the NHL.[197]

However, the implications of such a system would cause the NBA to clash with the interests of another *amicus* party to the *Clarett* suit: the NCAA. It is unquestioned that a large portion of NCAA revenue is derived from men's basketball, which brings in millions of dollars per year.[198] It is feasible that many of the NCAA's top players would forego their time in college if they had the option to enter the draft and build their skills in their team's minor league system. Many one-and-done players in college basketball are not interested in obtaining a college education. For example, former Louisiana State forward Ben Simmons, who was drafted by the Philadelphia 76ers as first overall pick following only one year at LSU, completely stopped attending classes the day that LSU's basketball season ended.[199]

Given this, if the NBA creates a full-fledged minor league system with a lower age rule, college sports would undoubtedly be weakened. While "part of the impetus for the age minimum was to have older, more experienced, more mature players in the league," the age rule creates a "symbiotic relationship between the NBA and NCAA" as it induces "the best 17- and 18-year-olds to make the one-year rental agreement with college basketball" thus "uplifting college basketball's national viability."[200] If the age minimum is lowered, high school stars who previously would have been one-and-done players may simply opt to enter the G League, earning a $35,000 salary and developing under the NBA's coaching systems.[201]

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nounces Player Salaries for 2018-2019 Season, NBA G LEAGUE (Apr. 17, 2018), https://gleague.nba.com/news/nba-g-league-announces-player-salaries-2018-2019-season/.

197. *See* O'Connor, *supra* note 112; McCann, *supra* note 190; Copeland, *supra* note 191.

198. *See* Cork Gaines & Diana Yukari, *The NCAA Tournament is an enormous cash cow as revenue keeps skyrocketing*, BUSINESS INSIDER (Mar. 17, 2017, 2:43 PM), http://www.businessinsider.com/ncaa-tournament-makes-a-lot-of-money-2017-3.

199. Matt Norlander, *Adam Silver changes stance on age-limit rule and that's bad news for college hoops*, CBS SPORTS (June 1, 2017), http://www.cbssports.com/college-basketball/news/adam-silver-changes-stance-on-age-limit-rule-and-thats-bad-news-for-college-hoops/; *See also* Joe Nocrea, *One-and-Done System Gets a Documentary. Call it a Farce.* N.Y. TIMES (Oct. 30, 2016), https://www.nytimes.com/2016/10/31/sports/basketball/ben-simmons-one-and-done-nba-draft.html; Kyle Neubeck, *Ben Simmons admitted he didn't attend classes at LSU. Why should he?*, SB NATION (Oct. 20, 2016), https://www.libertyballers.com/2016/10/20/13347848/ben-simmons-class-attendance-lsu-one-and-done-nba. Even NBA commissioner Adam Silver has acknowledged this problem with college basketball, stating:

> Even the so-called one-and-done players, I don't think it's fair to characterize them as going to one year of school. What's happening now, even at the best schools, they enroll in those universities — some great universities — and they attend those universities until either they don't make the tournament, and the last game therefore of their freshman season, or to whenever they lose or win in the NCAA Tournament, that becomes their last day. So in essence it's a half-and-done, in a way.

Norlander, *supra* note 198. At the same time, Norlander acknowledges that the "poster program for the one-and-done era," John Calipari's Kentucky, "has gone year after year after year with exceptional collective GPAs." *Id.*

200. *Id.*

201. *Id.* Norlander also speculates that if the NBA *raises* its age rule to 20, "you'll have more players opting for the international route in an effort to make money," since they'll have an extra year before they are able to join the NBA. *See supra* note 4. The age minimum for the G League is, in fact, lower for the G League than the NBA; players may enter the G League at 18-years-old rather than 19. *Frequently Asked Questions: NBA G League,* NBA G LEAGUE, https://gleague.nba.com/faq/. The effect of this new competition for the NCAA has already had an effect: top recruit Darius Bazley recently announced that he would forgo college to play in the G League upon graduation which some commentators have speculated may "open the floodgates" to other players taking a similar path to the NBA. Sam Fortier, *As high school star skips college for NBA's G League, others remain skeptical*, THE WASHINGTON POST (Apr. 9, 2018), https://www.washingtonpost.com/sports/highschools/as-high-school-star-skips-college-for-nbas-GLeague-others-remain-skeptical/2018/04/09/c55389ec-3bfa-11e8-a7d1-e4efec6389f0_story.html?noredirect=on&utm_term=.20e68d72980a; Shams Charania, *First high school-to-G League prospect: 'I'm aware this might start a trend'*, YAHOO! SPORTS, https://sports.yahoo.com/first-high-school-G League-prospect-im-aware-might-start-trend-194136804.html (Mar. 29, 2018, 3:41 PM).

This leads to three readily apparent options for the NBA moving forward. First, the NBA could cede to the NBPA's demand for a lower age rule. This would enable high school graduates to immediately join the NBA Draft, skip college completely, and deprive NCAA teams of many of their best young recruits. Second, the NBA could hold firm to their position in favor of a higher age rule, and, if the league can get the NBPA to agree, force players to wait an additional year before entering the NBA and the D-League minor league system. Finally, the NBA could compromise and create a hybrid system similar to the NHL's approach, where players are drafted as early as their high school graduation and may choose when to sign a professional contract with the NBA team. However, the drafting team would maintain rights to their recruited player until after he graduates from college.[202]

The best option is the subject of much contention. Young players will certainly be hoping for option one or option three, as either would place the choice of attending college or directly entering the NBA in their hands. On the other side of the court, the NCAA would hope for option two, or maintaining the status quo, so that young players continue to be pushed towards college basketball while awaiting NBA draft eligibility.

Critically for the NBA, the second option may in fact create another avenue to challenge eligibility rules as an illegal restraint of trade. So far, we have seen two antitrust lawsuits regarding eligibility rules in professional sports. *Haywood* established that eligibility rules, defended on their own without the cover of a collective bargaining agreement, are a *per se* violation of the Sherman Act.[203] *Clarett*, on the other hand, established that eligibility rules are a mandatory subject of bargaining, and are thus protected by the non-statutory labor exemption if and when they are collectively bargained.[204]

But a third potential claim could arise if the NBA were to stand firm to their goal of raising their age minimum to 20, a lawsuit that challenges the NBA and NBPA's protection of college basketball. By bargaining for this higher age minimum, while simultaneously removing other considerations beyond accommodating the NCAA's interests, the NBA and NBPA could be inviting the possibility of a lawsuit filed against the NBA, NBPA, *and NCAA* as co-defendants alleging that the three entities colluded to deprive players of the choice between college and minor league basketball.[205]

If the NBA and NBPA are successful in their efforts to establish the G League as a viable developmental league for young players, most of the NBA's rationale supporting its age rule would essentially be rendered moot. The argument supposing that players straight out of high school are not emotionally or physically prepared for the NBA would be countered by teams simply placing young recruits in the G League to start their career. These

202. Another similar option is for the NBA to adopt the draft model utilized by MLB, where players may be drafted out of high school but must wait until either after their junior year or when they turn 21 to reenter the draft. *See supra* note 7. However, NBA clubs will likely be reluctant to invite the possibility of wasting draft picks on high school players who decline to sign in favor of college, given that the NBA has only two draft rounds compared to MLB's forty rounds. *See generally* J.J. Cooper, *The MLB Draft is Dramatically Different from NBA, NFL Drafts*, BASEBALL AMERICA (June 12, 2017), http://www.baseballamerica.com/draft/how-the-mlb-draft-is-different/#uBaX3dTxyL1CB2wB.97.

203. 401 U.S. 1204 (1971).

204. 369 F. 3d 124, 140-141 (2nd Cir. 2004).

205. This would not be the first time the NBA and NCAA worked together: the two entities jointly created a youth basketball initiative called "iHoops" in 2009. *NCAA, NBA join forces to form iHoops, a youth initiative*, NBA.COM (June 9, 2009, 8:49 PM), http://www.nba.com/2009/news/06/09/ihoopsrelease/index.html [https://web.archive.org/web/20090614075607/http://www.nba.com:80/2009/news/06/09/ihoopsrelease/]; *iHoops.com Launches*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (Oct. 26, 2009), http://www.ncaa.com/news/basketball-men/article/2009-10-26/ihoopscom-launches. *See generally* Paul Pogge, *Full Court Press: Problem Plaguing Youth Basketball in the United States and an Aggressive Plan to Attack Them*, 8 U. DENV. SPORTS & ENT. L.J. 4, 4, n. 4 (2010). iHoops was integrated into USA Basketball in December 2012. John Lombardo, *iHoops To Be Integrated Into USA Basketball; NBA And NCAA To Continue Funding*, SPORTS BUSINESS DAILY (Dec. 7, 2012), http://www.sportsbusinessdaily.com/Daily/Issues/2012/12/07/Leagues-and-Governing-Bodies/iHoops.aspx.

young players would then be able to mature just as they would outside of the NBA's purview, while earning at least $75,000 per year as they prepare for NBA play.

Clarett, of course, would be a monumental barrier against the success of this claim, establishing that potential players cannot challenge eligibility rules, even prior to being drafted into the league.[206] These players, despite not belonging to the union that has bargained away their rights, would still be unable to challenge these rules on antitrust grounds due to the non-statutory labor exemption. But, *Clarett* could be circumvented if these players could show that NCAA lobbying influenced the adoption of a higher age rule to protect its profits from college basketball. Including the NCAA, a non-party to the NBA collective bargaining agreement, in this lawsuit could potentially be a workaround to the *Clarett*'s barriers by sidestepping the non-statutory labor exemption.

Proving that the NCAA acted to influence these negotiations in violation of antitrust rules would be no small feat. While *Clarett* did not establish multiemployer collective bargaining as a single entity action as the NBA, WNBA, and NHL requested,[207] it did grant the leagues and unions protection for this bargaining under the non-statutory labor exemption.[208] Thus, the key issue for a hypothetical plaintiff would be demonstrating that even beyond the obvious agreement between the NBA and NBPA, the league or union worked *with the NCAA* to establish the higher age requirement. To do so, the plaintiff would be required to show evidence of a concerted action between multiple parties "sufficient to carry its burden of proving that there was such an agreement."[209]

However, showing that such an agreement exists could prove challenging. In *Monsanto v. Spray-Rite Service Corp.*, the Supreme Court required that plaintiffs show "substantial *direct* evidence" that the parties agreed to the restraint in concert with each other.[210] Along the same lines, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Supreme Court held that to survive summary judgment, an antitrust plaintiff must "present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[211]

However, this high bar may not be required in all instances. In *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, the Third Circuit held that "an antitrust plaintiff can establish concerted action through the defendants' behavior standing alone."[212] This case established a three-prong rule for showing "consciously parallel behavior," whereby a plaintiff can prove by inference that defendants worked in concert with each other by showing "(1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision making process; and (3) certain 'plus' factors," including direct evidence, motive, and economic data.[213]

Based on this test, the lessons of *Clarett* may help a plaintiff of such a lawsuit more than they hurt. Through its *amicus* filing in *Clarett*, the NCAA stated conclusively why it wanted the Second Circuit to overturn the district court decision: it had a "factual" interest in

206. *Id.* at 140 ("Clarett, however, argues that the eligibility rules are an impermissible bargaining subject because they affect players outside of the union. But simply because the eligibility rules work a hardship on perspective rather than current employees does not render them impermissible.")

207. Brief for the NBA, the WNBA, and the NHL as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 22, at 22-23. *See supra* notes 87-95.

208. 369 F. 3d at 140-141.

209. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763 (1984).

210. *Id.* at 763-64.

211. 475 U.S. 574, 575 (1986) (citing *Monsanto*, 465 U.S. at 764).

212. 998 F. 2d 1224, 1242 (3rd Cir. 1993), *cert. denied,* 510 U.S. 994 (1993).

213. *Id.* at 1242-46 (citing Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 208 (3rd Cir. 1980)); *see also* Merck-Medco Managed Care, LLC v. Rite Aid Corp., 201 F.3d 436, 1999 WL 691840, at *8 (4th Cir. 1999) (applying *Petruzzi's IGA* conscious parallelism test in the Fourth Circuit).

"encouraging all student-athletes to pursue and complete their education,"[214] and a "legal" interest in ensuring that eligibility rules were left "in the hands of the league sports governing bodies."[215] In this filing, the NCAA made it very clear that it had a strong interest in allowing the leagues to be able to negotiate eligibility rules without interference, both for the reasons stated, and the unstated, but obvious, reasons regarding the massive revenue it receives each year through college basketball.[216]

But through the development of the G League into a minor league, the NBA is potentially working *against* the interests of the NCAA by introducing an alternative route towards professional basketball. In fact, some commentators have speculated that the NBA's goal in shaping the G League into a developmental league may be to "make a move on the college game" both in terms of adding revenue, and by allowing their teams to better control the development of their young players.[217]

This conflict in interests between the professional leagues and the NCAA was not an issue that affected the *Clarett* case. In fact, the NBA finds itself in a very different position than the NFL did in *Clarett*. The NFL did not, and still does not, have a minor league system,[218] so the NCAA happily defended the NFL's right to craft eligibility rules with the knowledge that this right would likely never be used to lower the age rule and hurt its college football product. Similarly, until the expansion of the G League, the NCAA would undoubtedly feel the same were the NBA's age rule ever challenged in court, as until recently it has been to the NCAA's benefit.

But with the expansion of the G League and the introduction of two-way contracts, the NCAA and NBA suddenly find themselves with contrasting interests. In fact, while the overall sense, as previously established, is that the league would be better served with a higher age rule, in many ways it makes little sense for the NBA to support a higher age rule—in the same way that it makes little sense for the NBPA for push for a lower age rule.[219] The league has stated in the past that the age rule was designed so that players coming into the league were more mature both on and off the court.[220] But Commissioner

214. Brief for the NCAA as Amicus Curiae Supporting Petitioner, Clarett v. NFL, *supra* note 23, at *v*. *See supra* note 96 and accompanying text.

215. *Id.* at 15-16. *See supra* notes 102-104 and accompanying text.

216. *See supra* note 197 and accompanying text.

217. O'Connor, *supra* note 112. *See also* Ziller, *supra* note 112 (stating that the G League "is ready to replace college"); Avi Agarwal, *How the G League is the solution to the one-and-done rule*, iSPORTSWEB (June 19, 2017), http://www.isportsweb.com/2017/06/19/G League-solution-one-done-rule/. On the other hand, *see* McCann, *supra* note 190 (speculating that "unless salaries climb in the D-League, it seems unlikely that many top prospects would pass up a year of playing in a top college basketball program—and being showcased on national TV—for a year in a much less visible G League.")

218. This, however, may be changing. *See* Jason La Canfora, *NFL owners, coaches say a developmental league is needed and here's what's brewing*, CBS SPORTS (June 7, 2016), http://www.cbssports.com/nfl/news/nfl-owners-coaches-say-a-developmental-league-is-needed-and-heres-whats-brewing/; Harry Lyles Jr., *Spring football league to be introduced in 2017 for veteran free agents*, SBNATION (Dec. 22, 2016), https://www.sbnation.com/2016/12/22/14065006/nfl-spring-developmental-league-april-2017; Rachel Martin, *Does The NFL Need A Minor League System? Our Commentator Thinks So*, NATIONAL PUBLIC RADIO (Jan. 18, 2017, 5:00 AM), http://www.npr.org/2017/01/18/510383942/does-the-nfl-need-a-minor-league-system-our-commentator-thinks-so. If this new developmental league embarks on a similar path as the NBA D-League/G League, it could affect NCAA football similarly to how the G League now may affect college basketball. *See* Tom Pelissero, *New developmental league could mark shift for college football, NFL*, USA TODAY (Jan. 11, 2017, 5:02 AM), https://www.usatoday.com/story/sports/nfl/2017/01/11/pacific-pro-football-league-developmental-college-ed-mccaffrey/96416744/.

219. *See supra* note 188-189.

220. *See* Steve Kerr, *The Case for the 20-Year-Old Age Limit in the NBA*, GRANTLAND (May 8, 2012), http://grantland.com/features/steve-kerr-problems-age-limit-nba/ (the now head coach of the Golden State Warriors arguing well before the G League was expanded to what it is today—that a higher age rule would make the NBA's business stronger). *See also* Haywood, *supra* note 188. *But see* Ryan, *supra* note 188.

Silver himself recently confirmed that the players' time in college has little effect on their draft stock, and, in fact, more often *hurts* players' draft potential, when he stated:

> Selfishly, while I love college basketball and I'm a huge fan of college basketball, I worry about potential stunted development in the most important years in players' careers. Because the coaches in college don't have the same control they used to, because these guys know they're out of there. And it's amazing, there's very little movement. If you look at the draft projections for these players going into their first year in college, it holds fairly true. Maybe there's a little bit of movement, but these young men, they're followed so closely from the time they're 13 or 14 on.[221]

With the introduction of a minor league system, a lower age rule would give NBA clubs control over this maturation process before they enter the NBA, while simultaneously giving them hands-on training in their own development system and style.[222] This seems, on its face, to be a far superior option for the clubs than merely waiting to see how players behave in college.

While teams would risk paying for latently immature players who would have demonstrated their lack of maturity in college, the risk is much smaller with the introduction of two-way contracts.[223] Further, the risk already exists that top prospects are "spoiled" in college, either by being placed in an environment where they are given everything they want,[224] or by being pushed too hard in pursuit of an NCAA championship that they are damaged by the time they reach the NBA.[225] Indeed, this sentiment was reinforced by Commissioner Silver himself when he publicly voiced concern about "potential stunted development in the most important years in players' careers."[226]

As such, little reason exists for the NBA to advocate for a higher age rule other than to protect the NCAA, which is both in sharp contrast to the best interests of the players, and, unlike *Clarett*, may be in violation of antitrust law.

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221. Norlander, *supra* note 198. *See also* Tom Ziller, *Age Minimum Hasn't Limited NBA Draft Busts, And Extending It To 20 Won't Help*, SBNATION (May 30, 2011), https://www.sbnation.com/nba-draft/2011/5/30/2197120/nba-draft-busts-age-minimum; Michael Lee, *The Merits of NBA's 'One-and-Done' Rule Are Subject to Debate*, WASHINGTON POST (June 24, 2009, 1:02 AM), http://www.washingtonpost.com/wp-dyn/content/article/2009/06/23/AR2009062302079.html.

222. The NBA's interest in a lower age rule was summed up by SBNation basketball commentator Tom Zeller, who wrote:

> [The G League] allows the NBA to have a stronger hand in player development without forcing teams to lock up roster spots and salary slots for young prospects who aren't ready for the big leagues. Prospects would be able to bypass the college charade and get truly professional training (albeit in less glamorous conditions than experienced by full-on NBA or high-level college players).

Ziller, *supra* note 112.

223. *See supra* notes 194-195 and accompanying text.

224. *See, e.g.*, Scott Cacciola, *Shoes, Shirts, You Name It, College Basketball Players Get It. Free.*, N.Y. TIMES (Mar. 25, 2017), https://www.nytimes.com/2017/03/25/sports/ncaa-march-madness-shoes-adidas-nike.html.

225. *See, e.g.*, Mike Singer, *10 Players Who Hurt Their NBA Draft Stock in 2013 NCAA Basketball Tournament*, BLEACHER REPORT (Apr. 9, 2013), http://bleacherreport.com/articles/1597348-10-players-who-hurt-their-nba-draft-stock-in-2013-ncaa-basketball-tournament; Dan Diamond, *What Does the NCAA Owe Kevin Ware?*, FORBES (Mar. 31, 2013, 11:13 PM), https://www.forbes.com/sites/dandiamond/2013/03/31/what-does-the-ncaa-owe-kevin-ware/; Sam Vecenie, *NBA could be next for Clemson star who was 'Kevin Ware before Kevin Ware'*, CBS SPORTS (May 19, 2016), http://www.cbssports.com/college-basketball/news/nba-could-be-next-for-clemson-star-who-was-kevin-ware-before-kevin-ware/.

226. Norlander, *supra* note 198. *See supra* note 220 and accompanying text.

CONCLUSION

Based on Commissioner Silver's recent "rethinking" of the NBA age minimum,[227] it appears that the NBA is finally ready to consider a rule that has been controversial since its implementation.[228] But if the league and union finally do come to agree on a new age rule, future players looking to enter the NBA will be bound by this rule's new terms, despite their lack of negotiating power in determining the rule. After a failed certiorari petition and fourteen years without challenge, *Clarett* is settled law, and the Second Circuit's finding that such rules are within the context of the non-statutory labor exemption is, for now, beyond reproach.

But since *Clarett* was decided in 2004, the leagues and unions have evolved, changing the context surrounding the negotiation of eligibility rules. An analysis of the filings in *Clarett*, from parties to the litigation and the various *amici*, provides a glimpse into how these parties regard eligibility rules, and what benefits and detriments they derive from such rules. This, in turn, provides a useful preview of the careful balance of interests that the NBA, NBPA, NCAA, and other stakeholders must manage as age rules once again come into the forefront of discussion in the coming months.

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227. *See* Winfield, *supra* note 11.

228. *See supra* note 2 and accompanying text; *see also supra* notes 14-15 and accompanying text.


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