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THE NBA'S AGE REQUIREMENT SHOOTS AND MISSES: HOW THE NON-STATUTORY EXEMPTION PRODUCES INEQUITABLE RESULTS FOR HIGH SCHOOL BASKETBALL STARS

Brian Shaffer*

I. INTRODUCTION

The cameras flash as Michael Jordan jukes his defender and jumps to take the shot. The crowd is going wild, doing its best to distract Jordan and prevent him from delivering another game winning basket. The ball leaves Jordan’s hands and elegantly slips into the hoop, giving Jordan and the Chicago Bulls another NBA championship.¹ These are the moments that boys and girls dream of when they are shooting hoops in their driveway. Very few, however, have the skills and determination to make these dreams come true.

Bill Walker certainly had these types of aspirations. Walker was a high school basketball phenom at North College Hill High School in Cincinnati, Ohio.² He teamed

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* J.D. Candidate, Santa Clara School of Law, 2008; Comments Editor, Santa Clara Law Review, Volume 48; B.S. Managerial Economics, University of California, Davis, 2003. First, I would like to thank the editors of the Santa Clara Law Review for their outstanding work on this comment. Second, I would like to thank my parents for fostering my love of sports and the law. Third, I would like to thank my brother for always pushing me to succeed. Finally, I would like to thank Tami Puno for her love and support.


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with O.J. Mayo\textsuperscript{3} to comprise one of the most talented tandems in the state of Ohio.\textsuperscript{4} Walker's dreams of playing in the National Basketball Association (NBA) were within his sights, as many scouting agencies predicted that he would be a high selection in the NBA draft after his senior season.\textsuperscript{5} However, Walker soon found out that his entry into the NBA would be temporarily delayed. In the summer of 2005, the NBA and the National Basketball Players Association (NBPA) agreed to a collective bargaining agreement\textsuperscript{6} (CBA) that instituted eligibility restrictions on players entering the league.\textsuperscript{7} The new rules required players entering the league to be both nineteen years old and at least one year removed from their high school graduation.\textsuperscript{5}

Walker received more bad news. The Ohio High School Athletic Association declared him ineligible to play on his high school team because he had already played eight semesters of high school basketball.\textsuperscript{9} With the NBA off the table, Walker accelerated his high school curriculum and graduated early.\textsuperscript{10} He enrolled at Kansas State University and the National Collegiate Athletic Association (NCAA) declared him eligible to play in the 2006-2007 season.\textsuperscript{11} Walker made an instant impact with Kansas State, leading the team to important victories over the University of

\begin{itemize}
  \item Most pundits agree that Mayo is even more talented than Walker and predict that Mayo will be a very high draft pick when he becomes eligible. See id.
  \item See id.
  \item \[C\]ollective bargaining means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession." 5 U.S.C. § 7103(a)(12) (2006).
  \item Id.
  \item See id.
  \item See id.
\end{itemize}
Southern California and the University of New Mexico. Walker was third on the team in scoring at 11.3 points per game, and second in rebounding at 4.5 per game.

Then disaster struck. On January 6, 2007, in a game at Texas A & M, Walker ruptured the anterior cruciate ligament (ACL) in his left knee. He underwent surgery and faced an arduous six to eight month rehabilitation period. Given the nature of the injury, it is questionable if Walker will ever return to his previous form.

Walker arguably had the skills to play in the NBA, yet the NBA's new age requirement forced him to play elsewhere until the age of nineteen and until one year had passed since his high school graduation. Under the old rule, Walker could have entered the NBA directly from high school and made millions of dollars. Now these millions could be gone, and Walker may never have another opportunity to realize this level of success.

The unfortunate story of Bill Walker has led some experts to speculate that there will be a legal challenge to the NBA's age requirement. The most likely challenge will be that the rule violates federal antitrust laws. This comment analyzes the potential for success of such a challenge and questions whether the current state of the law provides an equitable solution when applied to the NBA. Part II details the explosion of high school basketball players entering the NBA and outlines arguments for and against the age limitation. This section also provides a background in the applicable antitrust and labor principles that form the current state of the law. Additionally, it explains how the

12. See id.
13. See id.
14. See id.
15. See Katz, supra note 9.
17. NBA, Article X, supra note 7.
18. See Richman, supra note 5.
20. See id.
21. See infra Part II.
22. See infra Part II.
23. See infra Part II.
Second and Eighth Circuits have handled similar cases, including the recent decision in *Clarett v. NFL*, and details the differing legal tests that these circuits utilize. Part III outlines the specific legal question answered in this comment. Part IV analyzes the chances for success of an antitrust suit challenging the NBA age requirement and concludes that, given the current state of the law, the challenge would likely fail. Finally, Part V discusses the inequities in the current law and outlines a solution to resolve these issues.

II. BACKGROUND

A. From the Prom to the NBA: The Rise of the High School Player in the NBA

Prior to the 1990s, high school players entering the NBA were a relatively rare phenomenon. The 1990s, however, saw an explosion of high school talent entering the NBA. This trend began in 1995 when the Minnesota Timberwolves drafted Kevin Garnett from Farragut Academy High School in Illinois. Over the next nine years, several other high school players were drafted into the NBA, including Kobe Bryant, Tracy McGrady, Jermaine O'Neal, LeBron

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25. See infra Part II.
26. See infra Part III.
27. See infra Part IV.
28. See infra Part V.
30. See Jones, supra note 29, at 478-79.
31. Id.
34. See NBA.com, Jermaine O'Neal Bio Page, http://www.nba.com/playerfile/jermaine_oneal/bio.html (last visited Feb. 15,
James, and Amare Stoudamire. All of these players have become top-flight NBA All-Stars and are the faces of the league today.

Unfortunately, not all high school players that enter the NBA draft are guaranteed riches and success. For example, the Detroit Pistons drafted Korleone Young out of Hargrave Military Academy in Virginia with the fortieth pick in the 1998 NBA draft. He played in only three games and was later released by Detroit because of an injury. Young has not played in the NBA since. Leon Smith is another cautionary tale for high school players making the jump to the NBA. The San Antonio Spurs drafted Smith with the twenty-ninth pick in the 1999 draft. Smith was plagued by behavioral and legal problems and was released before the end of his first year in the league. He is a prime example of a player who lacked the maturity to handle the pressure and responsibility of life in professional sports.

B. Go to College Young Man: Arguments in Favor of the Age Limit

Proponents of the age limit assert that it will be beneficial for the NBA, its fans, and the prospective players entering the league. First, the rule is beneficial to the NBA

2008).  
38. Id.  
39. Id.  
40. See id.  
42. See Kevin J. Cimino, Comment, The Rebirth of the NBA – Well, Almost: An Analysis of the Maurice Clarett Decision and Its Impact on the National
and its fans because the age limit will preserve the jobs of veteran players and will lead to better quality of play and a more exciting product.\textsuperscript{43} The NBA has declined in popularity in recent years and many attribute this trend to younger players who lack fundamental basketball skills and maturity.\textsuperscript{44} Second, the rule can benefit prospective players as the age limit will force many of the top high school players to enroll in college for at least one year,\textsuperscript{45} thereby increasing the quality of play in college basketball.\textsuperscript{46} A year in college will also provide time to develop and mature in a college setting and will prepare the players for the everyday rigors of being a professional athlete.\textsuperscript{47} Additionally, the new age limit will curtail the prevalence of NBA scouts at high school gyms and Amateur Athletic Union (AAU) tournaments.\textsuperscript{48} Under the old rule, top players were exposed to NBA scouts as early as age fourteen.\textsuperscript{49} Finally, the age limit may prevent players from throwing away what might be their only opportunity at a college education.\textsuperscript{50}

C. Money, Money, Money: Arguments Against the Age Limit

Opponents of the age limit claim that it is unfair to high school players who have the talent to succeed in the NBA.\textsuperscript{51} First, the age limit restricts a player’s ability to use his skills and talents to earn a living.\textsuperscript{52} The average NBA lottery pick will make $1.6 million per year, plus countless more in endorsement contracts.\textsuperscript{53} If a player chooses to play in the NBA Developmental League (NBDL) or in Europe until he


43. See id. at 864 (comparing the results of the NFL’s age eligibility rule to the prospective result in the NBA).
44. See id. at 865.
45. See id. at 869.
46. See id. at 869-70.
47. See Jones, supra note 29, at 479.
49. Cimino, supra note 42, at 870.
50. Id. at 864.
51. See id. at 862.
52. See id.
53. Clarkson, supra note 19.
meets league eligibility requirements, he will only earn an average of $20,000 to $75,000. Second, these players run the risk of suffering significant injuries that may end their basketball careers. Injuries may cost high school players millions of dollars, as the NBA is one of a few unique career paths with a potential for a million dollar salary. Third, many of the educational benefits of attending college are lost when an athlete leaves for the NBA after only one year of school. Finally, if NBA teams are worried about the quality of their product and their image, they can simply choose not to draft high school players. It does not make sense to completely close the door to players like LeBron James, who clearly benefit the game, the league, and the fans.

D. Article X Marks the Spot: The End of the High School Player in the NBA

After years of advocating for an age requirement, NBA commissioner David Stern reached a new CBA with NBPA in 2005. Article X, the draft eligibility provision, requires:

[T]he player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player . . . , at least one NBA season has elapsed since the player’s graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school) . . .

This provision ushered in a new era of NBA basketball to the detriment of talented high school players. Several commentators have suggested that an antitrust challenge to Article X will be forthcoming. The next sections discuss the background and legal validity of such a challenge.

54. See id.
55. Id.
56. See Jones, supra note 29, at 480.
57. See id.
58. See id. at 476.
59. NBA, Article X, supra note 7.
60. See Clarkson, supra note 19.
E. As Clear As Mud: The Intersection of Antitrust and Federal Labor Law

In order to fully assess a possible challenge to Article X of the CBA, one must understand the interplay between antitrust and federal labor law.61 Confusion, rather than clarity, characterizes the intersection of these broad areas of law.62 On one hand, antitrust law aims to prevent unreasonable restraints on trade.63 On the other hand, labor law encourages unionization, which prevents workers from individually contracting with employers, and thus may restrain trade.64 The discussion below details how courts have carefully navigated this tension by creating exceptions to antitrust law for certain labor-related activities.

1. Antitrust Law: The Defender of Free Trade

The Sherman Antitrust Act provides the basis for an antitrust suit.65 The Act was originally passed in order to curtail the exploitation of economic power by major industrial trusts and railroad companies.66 Section One of the Act declares illegal “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”67 The party asserting an antitrust violation must prove (1) a concerted action between the defendant and a third party, (2) a restraint on trade, and (3) an effect on foreign or interstate commerce.68 Due to the broad language of the Act, courts have formulated two tests to determine if the above elements are satisfied: the rule of reason and the per se rule.69

Under the rule of reason, a court must conduct a complex and detailed analysis of (1) the facts of the business involved, (2) the nature of the restraint, (3) the condition of the business before and after the restraint, and (4) the real and

61. See Jones, supra note 29, at 478.
62. See Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).
63. See Jones, supra note 29, at 488.
64. See id. at 490.
66. Cimino, supra note 42, at 835.
68. Cimino, supra note 42, at 835.
69. Id. at 835-36.
potential benefits of the restraint. In short, if the benefits of the agreement outweigh the restraints on trade, then the agreement is permitted.

The per se rule is an alternative to the difficult and time consuming rule of reason analysis. Acting out of concern for judicial economy, the Supreme Court has concluded that certain activities are per se illegal. These activities include price fixing, tying arrangements, horizontal market divisions, and group boycotts. In essence, these arrangements inherently violate antitrust law and no further analysis is required.


Federal labor law favors unionization of workers because, theoretically, a union is able to negotiate the best deal for its members. Unionization, however, reduces competition because individuals cannot independently negotiate for certain terms of their employment and therefore serves as a restraint on trade. To combat these seemingly contradictory preferences, two exemptions exist that allow unions to legally operate within antitrust prohibitions: the statutory and non-statutory exemptions.

The statutory exemption emerged from the Clayton Act of 1914. The Act exempted organized labor from antitrust analysis if the organized labor did not deviate from its legitimate purpose. The Norris-LaGuardia Act followed the Clayton Act and expressed a clear preference for organized labor by, for example, stripping federal court jurisdiction for

70. Jones, supra note 29, at 488 & n.133 (citing Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238-39 (1918)).
72. See Wurth, supra note 65, at 106.
73. Jones, supra note 29, at 489.
74. See id. at 490.
75. See id.
76. Id.
78. 15 U.S.C. § 17 (2006); see also Jones, supra note 29, at 490.
cases involving labor disputes. The National Labor Relations Act of 1935 soon followed and set forth a federal policy promoting collective bargaining on wages, hours, and other working conditions.

Despite the seemingly broad reach of the statutory exemption, it only extends to labor activities that are unilaterally undertaken by a union. It does not extend to joint actions, negotiations, or agreements between unions and non-labor groups. Recognizing that an additional exception was needed to navigate the conflicting congressional policies favoring both competition and collective bargaining, the Supreme Court created the non-statutory exemption to exempt certain union-employer agreements from antitrust scrutiny.

The non-statutory exception excludes agreements between employers and unions from antitrust analysis so long as the agreement arises "in a labor market characterized by collective bargaining." Collective bargaining is the process of negotiation between representatives of a union and employers regarding the terms and conditions of employment. If the collective bargaining is not shielded by the non-statutory exemption, then a court is free to apply antitrust law by using the rule of reason or per se analysis.

The non-statutory exemption protects the fruits of collective bargaining if the actions taken pursuant to the collective bargaining agreement do not violate federal labor laws. The U.S. Supreme Court first dealt with the non-statutory exemption in Allen Bradley Co. v. Local No. 3, 80. See Milk Wagon Drivers' Union v. Lake Valley Farm Prod., Inc., 311 U.S. 91, 101-03 (1940).

83. Id. Since the CBA was a collaborative negotiation, not a unilateral action, the statutory exemption would not extend to the CBA between the NBA and the NBPA.
84. See id. at 611-12.
85. Clarett v. NFL, 369 F.3d 124, 134 n.14 (2d Cir. 2004) (quoting Mid America Reg'l Bargaining Ass'n v. Will County Carpenters Dist. Council, 675 F.2d 881, 893 (7th Cir. 1982)).
87. Jones, supra note 29, at 492.
88. See id.
International Brotherhood of Electrical Workers. Here, the Court held that the non-statutory exemption does not apply where unions "combine with employers and manufacturers . . . to restrain competition." In United Mine Workers of America v. Pennington, a miners' union agreed with a large coal corporation that the union would demand higher wages from smaller coal operators in an attempt to drive the smaller operators out of the market. The Court held that the non-statutory exemption does not apply when a union agrees to impose a certain wage scale on other bargaining units. In Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, the Court further defined the non-statutory exemption by holding that federal labor policy provides no protection when unions conspire with non-labor groups to obstruct competition.

The Supreme Court has also addressed the non-statutory exemption in the context of professional sports. In Brown v. Pro Football, Inc., a group of NFL practice squad players brought an antitrust suit against the NFL team owners. After negotiations over salary had reached an impasse, the NFL unilaterally implemented a weekly salary. The practice players asserted that the agreement was a restraint on trade and violated antitrust laws. The Court held that the non-statutory exemption applied and ruled in favor of the NFL. Reasoning that various federal labor laws allow employers to take actions after an impasse, the NFL owners' actions were supported by federal labor policy. The Court also held that the non-statutory exception is not limited only

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90. Id. at 798.
92. See id. at 660.
93. See id. at 665.
95. Id. at 622-23.
97. Id. at 233-34.
98. Id. at 235.
99. See id.
100. See id. at 250.
101. See id. at 245.
to the agreements contained in a CBA. Finally, the Court stated that while athletes have a unique and valuable skill set, they are indistinguishable from other organized workers under federal labor law.

F. A Tale of Two Tests: The Second and Eighth Circuits and the Non-Statutory Exemption

A challenge to Article X of the CBA will undoubtedly center on the non-statutory exemption. Since the CBA was a product of collective bargaining, the NBA and the NBPA will likely assert that the non-statutory exemption shields the age limitation from antitrust analysis.

The precise scope of the non-statutory exemption, however, is unclear because it is judicially created. Thus, in order to accurately predict the outcome of an antitrust challenge to Article X, it is necessary to look at how federal courts have interpreted and applied the non-statutory exemption in past challenges to collective bargaining agreements. Most of these cases originated in the Second and Eighth Circuits and two competing tests have emerged. This section explores these tests and discusses the rationale behind the recent decision in Claret v. NFL.

1. The Eighth Circuit and Mackey: A Three Pronged Attack

Mackey v. NFL was one of the first cases to deal with the non-statutory exemption in the professional sports context. A group of current and former NFL players sued the NFL, alleging that the “Rozelle Rule” violated the Sherman Antitrust Act. The “Rozelle Rule” stated that if a player signs a contract with a different team after his current contract expired, the new team was required to pay the former team compensation. If an agreement between the

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103. See id. at 248-50.
104. See Cimino, supra note 42, at 858-59.
105. Jones, supra note 29, at 492.
106. See Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976); see also Claret v. NFL, 369 F.3d 124, 138 (2d Cir. 2004).
107. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976).
108. See id. at 609.
109. See id. at 609 n.1.
two teams was not reached, the NFL commissioner could intervene and award players or draft picks to the former team.\textsuperscript{110} This cumbersome rule caused teams to hesitate before signing free agents and thus severely restricted the free movement of players between teams.\textsuperscript{111} The players alleged that the rule was an illegal restraint on trade because it denied the players the right to freely contract for their services.\textsuperscript{112}

The Eighth Circuit formulated a three-part test to determine if the non-statutory exemption precluded federal antitrust analysis.\textsuperscript{113} To determine if the non-statutory exemption would apply, the court considered whether: (1) the rule affects only the parties to the collective bargaining agreement, (2) the agreement concerns a mandatory subject of collective bargaining, and (3) the agreement is the product of bona fide arm's-length dealing.\textsuperscript{114}

The court quickly disposed of the first prong, confirming that the agreement clearly only affected the players and the teams, who were both parties to the CBA.\textsuperscript{115} The court agreed that the second prong was also satisfied because the "Rozelle Rule" constituted a mandatory subject of collective bargaining under the National Labor Relations Act (NLRA).\textsuperscript{116} The NLRA states that mandatory subjects of collective bargaining include "wages, hours, and other terms and conditions of employment."\textsuperscript{117} The court concluded that the rule restricted the players' ability to move to the highest paying team, thereby depressing player salaries.\textsuperscript{118} Therefore, the agreement related to "wages" and was a mandatory subject of collective bargaining.\textsuperscript{119}

However, the court found that the Rozelle Rule failed the third prong.\textsuperscript{120} In 1968, the year of the first CBA between then NFL and the National Football League Players

\textsuperscript{110} See id.
\textsuperscript{111} See Jones, supra note 29, at 495.
\textsuperscript{112} Mackey, 543 F.2d at 609.
\textsuperscript{113} See id. at 614.
\textsuperscript{114} See id.
\textsuperscript{115} See id. at 615.
\textsuperscript{116} See id.
\textsuperscript{117} 29 U.S.C § 158(d) (2006).
\textsuperscript{118} See Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).
\textsuperscript{119} See id.
\textsuperscript{120} See id. at 616.
Association (NFLPA), the NFLPA was weak and not able to bargain effectively. The court held that “the ‘Rozelle Rule’ was unilaterally imposed by the NFL . . . upon the players in 1963 and has been imposed on the players from 1963 to the present date.” Because there was no arm’s-length bargaining, the non-statutory exemption did not apply. The court conducted a Rule of Reason analysis to conclude that the Rozelle Rule violated federal antitrust laws.

2. The Second Circuit before Clarett: A Different Approach

The Second Circuit has been active in applying the non-statutory exception to professional sports cases. The three cases discussed below set the stage for Second Circuit’s creation of a new standard in Clarett v. NFL. The cases illustrate the Second Circuit’s strict observance of federal labor policy, while avoiding many of the inquiries outlined in Mackey.

In Wood v. NBA, Leon Wood challenged the salary cap provision that required teams to sign first round draft picks to one year, $75,000 contracts if the team had exceeded the maximum allowable team salary. Wood, a first round draft pick of the Philadelphia 76ers, was offered such a contract after the 76ers exceeded the salary limit. Wood alleged that the provision violated antitrust laws because it 1) prevented him from achieving the full market value of his services, and 2) impacted players outside the collective bargaining units. The court held that it was inconsequential that Wood was unable to achieve his full market value because federal labor policy favored

121. The court reiterated that before 1974 the NFLPA was in a relatively weak bargaining position “due to it recent formation and inadequate finances.” Id. at 615.
122. See id. at 615-16.
123. Id. at 616.
124. See Mackey v. NFL, 543 F.2d 606, 616 (8th Cir. 1976).
125. See id. at 623.
127. Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).
128. See id. at 957, 958.
129. Id. at 958.
130. See id. at 959.
131. See id. at 960.
unionization and collective bargaining. The court also rejected Wood's second claim because CBAs often affect parties not included in the bargaining units.

In *NBA v. Williams*, the NBPA refused to negotiate a new CBA until the 1988 CBA expired. The NBA sought a declaration that would allow continued operation of the league under the 1988 CBA until a new agreement was reached. The NBPA alleged that continued operation under the 1988 CBA would violate antitrust laws. The court rejected the NBPA's arguments, stating that "antitrust laws have no application to the collective bargaining negotiations between appellants [players and union] and the NBA teams." The court upheld the lower court's holding that the non-statutory exemption applied and that "antitrust immunity exists as long as a collective bargaining relationship exists."

*Caldwell v. American Basketball Association* also addressed the non-statutory exemption in the professional sports context. Here, Joe Caldwell, a professional basketball player, alleged that the NBA teams had collectively agreed to "blacklist" him from the league in violation of antitrust laws. The court held that federal labor law required a specialized agency, the National Labor Relations Board, to hear such labor related grievances. Since Caldwell chose to bring his claim under the Sherman Antitrust Act, federal labor policy would be subverted if the court granted relief to Caldwell.

The cases above set the stage for the Second Circuit's decision in *Clarett v. NFL*. Many think that Clarett's loss in the Second Circuit prompted the NBA to make a heavy push for an age requirement.

132. See id. at 959 n.2, 959-60.
133. Wood v. NBA, 809 F.2d 954, 960 (2d Cir. 1987).
134. NBA v. Williams, 45 F.3d 684 (2d Cir. 1995).
135. See id. at 686.
136. See id.
137. See id.
138. Id. at 685.
139. Id. at 686.
141. See id. at 526.
142. See id. at 527.
143. See id. at 530.
3. Clarett v. NFL: The Non-Statutory Exemption Stuffs Clarett at the Goal Line

In 2002-2003, Maurice Clarett gained notoriety as one of the best college football players in the country. As the starting running back for national powerhouse Ohio State University, he led the Buckeyes to an undefeated season and a national championship. Clarett’s success, however, was soon tarnished by off-the-field problems. In April 2003, Clarett falsified the price of items that were allegedly stolen from his automobile and pled guilty for failing to aid a law enforcement officer. After an NCAA investigation, Ohio State University suspended Clarett for the 2003 season.

Clarett was still one year away from draft eligibility because the NFL does not allow college athletes to enter the draft until three years after their high school graduation. The combination of the suspension and the draft eligibility rule forced Clarett to sit idle for the 2003 season. Clarett then decided to challenge the NFL’s draft eligibility rules as a violation of the Sherman Act and Clayton Act.

In this suit, the Southern District Court of New York applied the Mackey three-factor test to determine if the non-statutory exception applied to the NFL’s draft eligibility rules. The district court found that the NFL did not satisfy any of the Mackey factors and ruled in favor of Clarett. First, the court held that the rule was not a mandatory subject of collective bargaining because the rule did not make reference to wages, hours, or conditions of employment. Second, the court held that the draft eligibility rule applied to parties outside the CBA. The rule clearly affected Clarett, who was not a part of the bargaining agreement since he was not yet drafted. Finally, the district court held that the draft eligibility rule was not the subject of bona fide arm’s-

144. See Clarett v. NFL, 369 F.3d 124, 125-26 (2d Cir. 2004).
145. Id. at 126.
146. Cimino, supra note 42, at 847.
147. Id.
148. See Clarett, 369 F.3d at 126.
149. See id.
150. Id.
151. Id. at 129.
152. See id. at 133.
154. See id. at 395-96.
length negotiations because the NFL Players Association (NFLPA) had agreed not to challenge the rule.155

The NFL quickly appealed the decision to the United States Court of Appeals for the Second Circuit.156 The Second Circuit rejected the district court’s application of the Mackey test, stating that “it had never regarded the Eighth Circuit’s test in Mackey as defining the appropriate limits of the non-statutory exception.”157 Instead the court focused on whether striking down the draft eligibility rule would “subvert fundamental principles” of federal labor policy.158

Clarett argued that restricting prospective players from negotiating directly with NFL teams served as an undue restraint on the trade of players’ skills and, therefore, violated antitrust laws.159 However, this assertion conflicted with dominant federal labor policy.160 The presence of the NFL players union as the exclusive bargaining representative dramatically altered Clarett’s right to bargain directly with the teams.161 The court stated that the existence of a collective bargaining arrangement allows the NFL to “engage in joint conduct with respect to the terms and conditions of players’ employment as a multi-employer bargaining unit without risking antitrust liability.”162 Due to the dominant federal labor policy in favor of unionization and collective bargaining, the non-statutory exemption preempted Clarett’s antitrust claims.163

The court then justified its decision by addressing and refuting Clarett’s arguments based on the Mackey test. First, the court held that the NFL’s draft eligibility rules were mandatory subjects of collective bargaining.164 The court stated that the eligibility rules were comparable to “conditions for initial employment” and that this alone constitutes a mandatory subject of bargaining.165 Recognizing

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155. See id. at 396.
156. See Clarett v. NFL, 369 F.3d 124, 125, 129 (2d Cir. 2004).
157. Id. at 133.
158. See id. at 133-37.
159. See id. at 138.
160. See id.
161. Id.
163. See id. at 143.
164. Id. at 139-40.
165. Id. at 139.
the unusual economic relationships associated with professional sports, the court found that the rules had tangible effects on the wages and working conditions of current players. It also found that the eligibility rules serve as a form of job security for veteran players.

Second, the court quickly disposed of Clarett’s argument that the eligibility rules affect players outside of the union. The court found that simply because the rule serves as a burden to prospective players does not make the rule objectionable. Moreover, the criteria for employment are rightly determinable by the NFL and the NFLPA.

The court compared Clarett to a “typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications . . . that have been set.” An employer and a union may decide who will be considered for employment as long as their decisions do not run afoul of federal unfair labor practices.

Finally, the court rejected Clarett’s contention that the eligibility rules were not a part of the collective bargaining process. Even though the eligibility rules were not in the CBA, they were included in the NFL Constitution and its bylaws, and if the NFLPA had wanted to bargain over them, they certainly could have. The court also noted that the waiver provision was included in the CBA, even though the eligibility provision was not. Thus, since the NFLPA had the opportunity to bargain over the eligibility provision, even though they did not, then the provision is considered the product of an arms length bargain.


In Clarett, the Second Circuit created a broader test that focused on whether the challenged provision comports with

166. Id. at 140.
167. See id.
169. Id. at 140.
170. See id. at 141.
171. Id.
172. See id.
173. Id. at 142.
175. See id.
federal labor policy and includes, but is not limited to the Mackey factors.\textsuperscript{176} The most significant difference between the Mackey and Clarett tests is the requirement for bona fide arm's-length negotiations.\textsuperscript{177} In Mackey, this prong is only satisfied when the parties explicitly bargain over a provision.\textsuperscript{178} In contrast, Clarett applies the non-statutory exception if it was possible to bargain for the challenged provision.\textsuperscript{179} On this basis, the Clarett test is easier to satisfy than the Mackey test.

III. IDENTIFICATION OF THE LEGAL PROBLEM

If a high school player were to challenge Article X as a violation of antitrust laws, the most significant hurdle the player must cross is the non-statutory exemption. The NBA will undoubtedly assert that Article X was collectively bargained, and, therefore, the non-statutory exemption precludes any antitrust analysis. However, as shown in Mackey,\textsuperscript{180} professional athletes have been successful in the past with antitrust challenges. A challenger could argue that Article X does not satisfy the three-pronged test in Mackey and, therefore, the non-statutory exemption should not apply. The section below will analyze the chances for success of an antitrust challenge under the more restrictive Mackey test and the broader Clarett test.

More generally, some have questioned whether the NBA, a unique labor market, should be treated as the legal equivalent of more traditional industries. The professional basketball labor market is inherently different from most markets because the NBA is the only employer where basketball players can achieve the full market value of their unique talents. This fact has led some commentators to assert that the NBA has an "economic monopoly" on professional basketball.\textsuperscript{181} In the 2006-2007, the minimum salary in the NBA was $412,718,\textsuperscript{182} and the top pick in the

\textsuperscript{176} See Jones, supra note 29, at 505.
\textsuperscript{177} See id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Mackey v. NFL, 543 F.2d 606, 616 (8th Cir. 1976).
\textsuperscript{181} Clarkson, supra note 19.
\textsuperscript{182} Inside Hoops, NBA Minimum Salary, http://www.insidehoops.com/minimum-nba-
NBA draft will earn $3.6 million. If a player is forced to play professionally in another league, he will earn a significantly lesser salary. In comparison, salaries in European basketball leagues normally range from $50,000 to $400,000. The average salary in the National Basketball Developmental League is $35,000, which is 139,000% less than the average NBA salary. There is no other comparable basketball league in the world that pays as much as the NBA.

The extreme salary disparity creates a unique situation that is not characteristic of other labor markets. For example, consider a situation where a steel workers union agrees to a minimum age limitation with local steel mills. A steel worker under the age minimum has an acceptable alternative. He or she can move to a city or region with a different union that does not have an age restriction. There, the steel worker can earn a comparable salary. Dissimilarly, a high school basketball player wanting to enter the NBA does not have a similar option. He cannot move to another region or market and earn a similar salary. The fact that there exists no comparable market to which a potential NBA player can go lends support to the reasonableness of treating the NBA labor market differently.

The following section will first discuss whether a challenge to Article X would be successful under either the Clarett or the Mackey test. Second, these tests will be scrutinized to determine whether they lead to equitable results when applied to the NBA.

IV. ANALYSIS—WOULD A LEGAL CHALLENGE TO ARTICLE X BE SUCCESSFUL?

A. A Challenge to Article X Would Be Slam DUNKed by the 

salaries.shtml (last visited Feb. 15, 2008).
Eighth Circuit and Mackey

If a court were to apply the Eighth Circuit test articulated in Mackey, a challenge to Article X would likely fail for multiple reasons. First, a court would likely find that Article X only affects the parties to the collective bargaining agreement. A challenger to Article X would contend that a high school player wishing to enter the draft is not a party to the CBA or its negotiations, had no representation at the bargaining table, and, therefore, the non-statutory exemption should not apply. The court in Mackey summarily dismissed this issue because the provision in question only affected the players and the teams, both parties to the CBA. The Second Circuit in Clarett stated that as long as the union and employer engage in collective bargaining, it is irrelevant that the agreement affects parties outside the bargaining unit. Since the NBA players have chosen to unionize and engage in collective bargaining, the conditions for employment are decided by the union and the NBA. This argument is strengthened further by the statutory language in the NLRA, which defines “employee” in a manner so as to include people other than those working in the bargaining unit. Therefore, a challenger's argument under this prong will most likely fail.

Second, a court will likely conclude that Article X concerns a mandatory subject of collective bargaining. According to the NLRA, mandatory subjects include wages, hours, and working conditions. In analyzing this prong, the Mackey court looked not only to the form of the agreement, but also to its practical effect. In Mackey, while the Rozelle Rule dealt only with compensation among teams, the effect of the rule was to restrict player movement to other teams and consequently, to depress player salaries. Likewise, in Clarett, the appeals court held that the draft eligibility rules had an effect on the NFL salary cap and the minimum salary

186. See Jones, supra note 29, at 509.
187. Mackey, 543 F.2d at 615.
188. See Clarett v. NFL, 369 F.3d 124, 140-41 (2d Cir. 2004).
189. Id.
191. See id. § 158(d).
192. See Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).
193. See id.
for rookies. Similarly, Article X is tied to the NBA salary cap because the CBA enumerates mandatory salaries for the first three years of a player's career based on the player's draft position. Therefore, Article X will likely be construed as affecting "wages"—a mandatory subject of collective bargaining. Hence, a challenger would lose under this prong.

Finally, a court will certainly determine that Article X was the subject of bona fide arm's-length negotiations. Prior to 2005, NBA Commissioner David Stern was quite vocal in his desire to implement an age requirement. The media widely reported that Stern was vigorously advocating for a twenty year-old age limit. The fact that the parties eventually agreed to a nineteen year old age requirement indicates that this provision was the subject of intense bargaining. Hence, a challenger would likely not satisfy this prong, and would likely not succeed under the Mackey test.

B. A Challenge to Article X Would Be Sacked by the Second Circuit and Clarett

A challenge to the NBA age requirement would immediately start out on bad footing under Clarett. The Clarett court initially focused on the dominant federal labor policy in favor of unionization and collective bargaining. Since the NBA players have unionized under the NBPA, and because the NBA and NBPA have engaged in collective bargaining for many years, a court applying Clarett would lean in favor of applying the non-statutory exception to Article X. Since the first two prongs are identical to the Mackey test, a court will apply them in the same way described in the preceding section and determine that both prongs are satisfied. The expansive third prong in Clarett would only require the possibility of bargaining between the NBA and NBPA over Article X. Given that the age

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194. See Clarett v. NFL, 369 F.3d 124, 139-40 (2d Cir. 2004).
197. See Jones, supra note 29, at 510.
198. See Clarett, 369 F.3d at 133-37.
199. See Jones, supra note 29, at 509.
200. Id.
requirement was a hotly debated topic, it is likely that it resulted from arms length bargaining. Therefore, a challenger would not satisfy this prong.

Unfortunately for high school players like Bill Walker, a legal challenge to Article X is unlikely to succeed given the current state of the law. A court looking to the Second and Eighth Circuits for guidance will almost certainly apply the non-statutory exemption to preclude antitrust analysis. However, the Clarett and Mackey decisions represent the opinions of only two circuits on this issue. Seeing as the trial court initially ruled in favor of Mr. Clarett, another circuit may likewise disagree if presented with a challenge to Article X.

The next section will explain various criticisms of the Clarett and Mackey tests and will propose a slightly different approach fashioned in an effort to reach a more equitable outcome.

V. PROPOSAL

A. Special Treatment for Professional Sports: Why Not?

In Brown v. Pro Football, Inc., the Supreme Court refused to treat professional athletes as "special" when it came to antitrust analysis. However, professional athletes may have a good argument to be treated as legally "special" in antitrust analysis because of their uniquely high earning potential and the limited number of employers.

Just what special treatment the NBA should receive is a difficult question. Given that the Clarett court focused on the three-part test articulated in Mackey, the most appropriate solution is to revise this test to resolve its inherent inequity when applied to the NBA.

B. Problems with the Prongs

While the three-prong test reflects the appropriate focus of the non-statutory exemption, arguably, it is being applied in an overly expansive manner. The suggestions below call

201. See Clarkson, supra note 19.
203. Id.
for (1) a stricter interpretation of the "wages" prong of the Mackey and Clarett test and (2) high school players to not be considered "parties" to the CBA.

1. Make "Wages" Actually Mean "Wages"

In analyzing whether a challenged provision constitutes a mandatory subject of collective bargaining, a court must determine if the provision relates to wages, hours, or conditions of employment.\(^{205}\) In Clarett, the court used a series of inferences to conclude that the NFL eligibility rule was tied to wage conditions. For Article X, proponents argue that the age limit restricts the number of players available to play in the NBA, and therefore keeps veteran players employed and their wages high.\(^{206}\) Furthermore, they assert that rookies are subject to a rookie salary scale, which in turn affects the salary cap.\(^{207}\) These effects on wages, proponents contend, are sufficient to make Article X a mandatory subject of collective bargaining.\(^{208}\)

However, these specific assertions stretch the effects of Article X to an illogical extreme. First, Article X will not limit the number of players available to play in the NBA. Even though NBA teams are not able to draft players directly from high school, they will still draft someone. There are many players in college or overseas who are talented enough to earn a shot to play in the NBA. Article X will not decrease the number of players in the league; it only means that teams will draft players from a different source. Hence, there is no effect on wages. Second, it is irrelevant that rookies are subject to a rookie salary scale. As described, the league will have the same amount of rookies under Article X as the old eligibility rule. Article X has no effect whatsoever on the salary cap, and therefore, should not be interpreted as a mandatory subject of collective bargaining.

More generally, under the existing analysis, courts can make any provision somehow relate to wages. For example, a provision that requires players to wear headbands may increase demand for headbands, which would in turn lead to

\(^{205}\) See Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976).

\(^{206}\) Jones, supra note 29, at 512-13.

\(^{207}\) Id. at 513.

\(^{208}\) Id.
increased headband sales, which would in turn lead to increased revenue for the teams, which would lead to an increase in player salaries. Thus, it appears that courts could manufacture an attenuated affect on wages to satisfy the Mackey and Clarett standards. This kind of judicial juggling is ill suited for such an important legal question.

The easiest solution to this problem is to restrict the expansive interpretation of "wages," "hours," and "conditions" and require a challenged provision to truly concern wages, hours, or conditions of employment. The non-statutory exemption is a powerful tool because it precludes antitrust analysis. The effect of a broad interpretation of the non-statutory exemption serves as an easy out for many practices that have significant anticompetitive effects. Requiring a narrower interpretation of what constitutes a mandatory subject of collective bargaining will ensure that the non-statutory analysis is not a moot exercise.

2. High School Players Should Not Be Considered Parties to the CBA Since They Have Not Yet Entered the League

The courts have taken an expansive view on who is considered a "party" to collective bargaining agreements. In Clarett, the court held that Clarett was a party to the CBA because his interests were represented by the NFL players union. However, this assertion is illogical and unjust to prospective players. In reality, the immediate duty of the NBPA is to the current players in the league. They have the duty to bargain for the best wages and conditions for those currently in the league. Prospective players have an interest in entering the league, which would serve to push some current players out of the league. This creates the following question: Should current players, who have a significant stake in preserving jobs for themselves, have the right to collectively bargain away the employment rights of prospective players who are not represented at the bargaining table? It seems inevitable that the NBPA would sacrifice the interests of prospective players in favor of current and

209. See id. at 511.
211. See Michael A. McCann, Legality of Age Restrictions in the NBA and the NFL, 56 CASE W. RES. L. REV. 731, 757 (2006).
veteran players. It appears that this is exactly what happened when the NBPA agreed to include Article X in the CBA.

A possible solution to this problem is a stricter interpretation of who is considered a “party” to the CBA under the Mackey/Clarett tests. As stated above, it is irrational to think that the NBPA is bargaining to protect the interests of prospective players when their immediate concern must be the welfare of those players already in the league.212 If a court were to hold that high school players are not parties to the CBA, the non-statutory exemption would not apply, as this prong of the Mackey/Clarett test would not be satisfied. This strict interpretation would cause the NBA age requirement to be subjected to the more rigorous antitrust analysis. While not the subject of this paper, under antitrust law, the age requirement could be considered a “group boycott,”213 which is impermissible because of its anticompetitive effects. A strict construction of who is considered a party to the CBA is more desirable because it better reflects the realities of collective bargaining and would lead to more equitable results.

VI. CONCLUSION

As Bill Walker limped around the campus of Kansas State University, he undoubtedly wondered how his future would have progressed if Article X was not passed. Instead of eating crusty hamburgers from the cafeteria, he would be eating filet mignon at a first class restaurant. Instead of riding across campus on a bicycle, he would be driving a Mercedes Benz. Hopefully Walker will be able to recover from his injury and return to his previous form, but it is very possible that the injury might cost him his shot at the NBA.214

212. See supra note 210 and accompanying text.
213. Clarkson, supra note 19, at 1 (quoting Michael McCann, Miss. College Sch. of Law). A group boycott is an agreement among competitors not to deal with another person or business unless the latter refrains from doing business with an actual or potential competitor of the boycotters. See BLACK'S LAW DICTIONARY (8th ed. 2004).
214. Luckily, Walker has seemed to fully recover from his injury. He has appeared to regain some of his explosiveness as he is averaging sixteen points per game and 6.3 rebounds per game thus far during the 2007-2008 basketball season. Kansas State Wildcats -- Bill Walker, ESPN.COM, http://sports.espn.go.com/ncb/player/profile?playerId=34658 (last visited Feb.
Many boast that Article X is beneficial for the league, its fans, and its players, but Article X is a dangerous roll of the dice for high school players like Walker. Unfortunately, a challenge to Article X would likely fail given the precedent in the Second and Eighth Circuits, but hopefully another circuit will see the NBA and Article X differently. If not, then we might miss out on the next basketball phenom. Can you imagine the NBA without LeBron James and Kobe Bryant? I sure cannot.