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# Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape

Marc Edelman\* & C. Keith Harrison\*\*

¶1 During the 2006-07 college basketball season, two young centers dominated their respective competition.<sup>1</sup> At Ohio State University, Greg Oden, a 7'0", 257-pound freshman, born January 22, 1988, burst onto the scene, averaging 15.5 points and 9.7 rebounds per game.<sup>2</sup> After leading Ohio State University to the national championship game, Oden declared himself eligible for the National Basketball Association (NBA) draft.<sup>3</sup> Oden was selected with the first pick overall by the Portland Trailblazers and signed a contract worth \$3.885 million in 2007-08 and \$4.176 million in 2008-09.<sup>4</sup> Oden also signed endorsement contracts with the Nike and Topps companies, worth an estimated minimum of \$10 million per year.<sup>5</sup>

¶2 Meanwhile, at Oklahoma University, Courtney Paris, a 6'4", 250-pound sophomore, born September 21, 1987, also burst onto the basketball scene, averaging an even more dominant 23.6 points and 16.2 rebounds per game.<sup>6</sup> After leading Oklahoma University into the women's National Collegiate Athletic Association (NCAA)

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<sup>1</sup> See Michael David Smith, *Why the Sooners Will Always Have Paris*, N.Y. SUN, Mar. 19, 2007, at 18.

<sup>2</sup> See Jay Posner & Hank Wesch, *San Antonio: A Closer Look at the Region*, SAN DIEGO UNION-TRIB., Mar. 12, 2007, at E15; Biography of Greg Oden, [http://en.wikipedia.org/wiki/Greg\\_Oden](http://en.wikipedia.org/wiki/Greg_Oden) (last visited Jan. 15, 2008).

<sup>3</sup> See Shira Springer, *Oden Declares He'll Enter NBA*, BOSTON GLOBE, Apr. 21, 2007, at 7D.

<sup>4</sup> See Associated Press, *Blazers, Top Pick Oden Ink Contract*, AUGUSTA CHRON., Aug. 3, 2007, at C5.

<sup>5</sup> See *Oden Signs Deal with Nike*, CINCINNATI POST, June 23, 2007, at B4 (stating that Greg Oden's contract with Topps will pay him \$3 million per year and his contract with Nike will pay him an unannounced amount); *Durant Inks \$60 Million Deal with Nike*, OLYMPIAN (Olympia, WA), July 19, 2007, available at <http://www.theolympian.com/basketball/story/166708.html> (last visited Jan. 15, 2008) (stating that Kevin Durant, who is the same age as Oden and was selected immediately after Oden in the 2007 draft, signed a seven-year, \$60 million contract with Nike).

<sup>6</sup> See Lynn Jacobsen, *NCAA Women's Tournament 2007: Board Game*, TULSA WORLD, Mar. 17, 2007, at B1; Joanne Klimovich Harrop, *Women's Players are Getting Bigger – and Better*, PITTSBURGH TRIB. REV., Mar. 18, 2007; Biography of Courtney Paris, [http://en.wikipedia.org/wiki/Courtney\\_Paris](http://en.wikipedia.org/wiki/Courtney_Paris) (last visited Jan. 15, 2008).

tournament, Paris probably would have desired the option to have declared herself eligible for the Women's National Basketball Association (WNBA) draft, much as Oden did for the NBA draft.<sup>7</sup> However, even though Paris was both older and more formally educated than Oden, Paris was prevented from declaring herself for the draft by the WNBA age/education policy, which requires all prospective women's basketball players to wait four years after high school graduation before turning professional.<sup>8</sup> As a result, Paris was left with just two feasible options: stay at Oklahoma University for two more years and graduate, while earning no immediate income, or take the WNBA to court over its age/education policy. Ultimately, she decided to remain in school.

Based on the two drastically different sets of circumstances that existed for Oden and Paris as a result of their respective genders, it is clear that the legal and ethical impact of age/education policies in professional sports, although often portrayed as a men's issue, has an equally great impact upon the rights, behaviors, and responsibilities of female athletes. In fact, the WNBA age/education policy is the only policy in any established professional sports league that precludes a potential class of players from entering the professional leagues until their expected dates of college graduation.<sup>9</sup>

The WNBA's strict age/education policy therefore invokes substantial debate about both its legality and ethicality, not only from a traditional antitrust perspective, but also based on issues related to gender equity.<sup>10</sup> Indeed, that male basketball players are allowed to enter the NBA only one year after graduating from high school, whereas female basketball players have to wait four years before entering the WNBA, highlights the extreme differences in bargaining power between American male and female athletes.

This article discusses the WNBA age/education policy from a legal, cultural, and ethical perspective. Part One of this article discusses the women's basketball landscape in terms of sociology, race, and gender. Part Two discusses the history of women's basketball in America, as well as the history of the WNBA and its age/education policy. Part Three explains the legal issues that underlie an antitrust challenge to the WNBA age/education policy under Section 1 of the Sherman Act. Part Four discusses the likely effect on society if the courts were to overturn the WNBA age/education policy.

#### I. SOCIOLOGICAL LANDSCAPE OF WOMEN'S BASKETBALL IN AMERICA

The limited opportunity for women to perform as professional athletes in a male dominated culture is well documented in terms of the resources devoted to, popularity of, and historical discrimination against women's athletics.<sup>11</sup> Until recently, professional athletics were primarily for men.<sup>12</sup> With the late integration of women into professional sports, the role of the female athlete has developed differently. Organizations such as the NCAA have played a major role in promoting the ideology of the well-rounded,

<sup>7</sup> See Smith, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See C. Keith Harrison, *Analyzing the Legal and Societal Effects of the WNBA's Mandatory Education Policy*, 13 TEX. ENT. & SPORTS L.J. 11 (2004) (Marc Edelman provided legal analysis and drafted substantial sections for this article. His name was withheld from the list of authors at the request of his previous employer, Skadden, Arps, Slate, Meagher & Flom LLP.).

<sup>11</sup> ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM & CONFLICT IN BIG-TIME COLLEGE SPORTS 54 (1999).

<sup>12</sup> JEAN O'REILLY & SUSAN K. CAHN, WOMEN AND SPORTS IN THE UNITED STATES: A DOCUMENTARY READER xi (2007).

traditionally educated female athlete.<sup>13</sup> This ideology contrasts somewhat with the notion of the ruggedly individualistic male athlete.

¶7 The relationship between women in sports and their impact on young girls indicates that image is everything.<sup>14</sup> Since the emergence of women's collegiate and professional sports, young girls have begun to participate in athletics at all-time high rates.<sup>15</sup> While Title IX has been a major factor in cultivating women's athletics over the last thirty years, the age/education policy of the WNBA may contribute to a whole new culture of scholarly women that happen to play basketball.<sup>16</sup> For instance, female student-athletes graduate from college at a higher rate than any other student in American higher education.<sup>17</sup>

¶8 Indeed, women in sports are often the best examples of this synergy between academic and athletic excellence.<sup>18</sup> Specifically with women's basketball, Candace Parker of the Tennessee Volunteers is presently one of the high profile superstars in collegiate athletics, and she is a scholar-athlete as well.<sup>19</sup> Parker is recognized as a VolScholar, which is the University of Tennessee's adapted version of the national program Scholar-Baller™.<sup>20</sup> The fact that Parker is a woman of color (African-American) also exemplifies the growth of opportunities that African-American women now enjoy in college as scholars and athletes. These opportunities have come with struggles, especially for African-American women that experience challenges of both gender and racial discrimination.<sup>21</sup>

¶9 Nevertheless, there is also another side to the synergy between academics and athletics. The WNBA rule inequitably requires prospective women's professional basketball players to first offer their services for four years to a college basketball program, even while their male counterparts are allowed to earn money playing

<sup>13</sup> *Id.* at xii.

<sup>14</sup> Harrison, *supra* note 10, at 11.

<sup>15</sup> O'REILLY & CAHN, *supra* note 12, at xii.

<sup>16</sup> Harrison, *supra* note 10, at 11.

<sup>17</sup> See National Collegiate Athletic Association Home Page, <http://www.ncaa.org> (last visited Jan. 15, 2008).

<sup>18</sup> O'REILLY & CAHN, *supra* note 12, at 71.

<sup>19</sup> University of Tennessee Website, <http://utladyvols.com/home> (last visited Jan. 15, 2008).

<sup>20</sup> Scholar-Baller™ is an innovative movement and program that celebrates the success of both students with a 3.0 grade point average (GPA) or better and those below that GPA who demonstrate gradual academic momentum and significant educational improvement. Eddie Comeaux & C. Keith Harrison, *A Theoretical Model of Scholar Baller Success* (under review and presented at the American Educational Research Association Annual Meeting in Chicago, Ill., Mar. 2007) (manuscript at 3, on file with authors); see also Scholar-Baller™ Home Page, <http://www.scholarballer.org> (last visited Jan. 15, 2008).

<sup>21</sup> In their 1993 article, *The African American Female in Collegiate Sports: Sexism and Racism*, Doris Corbett and William Johnson identify twelve racial and sexual barriers surrounding the involvement of the African-American woman in athletics. These barriers include: (1) limited financial support; (2) physical education teachers who often lack the background to coach competitive teams; (3) lack of administrative support where competitive programs and interest exist; (4) lack of positive opinion leaders as role models who are African-American sportswomen; (5) tendency of White coaches to associate the Black female athletes with only certain sports (e.g., basketball and track and field); (6) discrimination in team selection, particularly in the sports of volleyball and basketball; (7) discrimination in hiring; (8) limited skill-development opportunities; (9) limited coaches' hours; (10) limited officials; (11) intimidation from male coaches and fans; and (12) unwillingness to travel. Considering each of these factors, approximately half of college and professional women's basketball is comprised of African-American women. See generally Doris Corbett & William Johnson, *The African American Female in Collegiate Sports: Sexism and Racism*, in *RACISM IN COLLEGE ATHLETICS: THE AFRICAN AMERICAN ATHLETE'S EXPERIENCE* 199 (Dana D. Brooks & Ronald C. Althouse eds., 1993).

basketball on the professional level.<sup>22</sup> Moreover, one notion of this policy is that talented female athletes must delay their personal gratification and first achieve academic pursuits prescribed to them by society and the corporate sport structure. This reinforces an old and dangerous stereotype of women as being necessarily philanthropic creatures (i.e. caring, passive, and non-aggressive). Conversely, men are allowed to be individualistic.<sup>23</sup> This clash between the educational ideals of female student-athletes and the merits of personal autonomy complicate evaluating the ethics underlying the WNBA age/education policy.

## II. THE HISTORY OF PROFESSIONAL WOMEN'S BASKETBALL

¶10 Founded in 1996, the WNBA consists of fourteen teams, is more mature in terms of age than the NBA, and has an ethnic makeup of approximately sixty percent African-American and forty percent Caucasian players.<sup>24</sup> Based on WNBA statistics, over ninety percent of the players have earned a bachelor's degree from a four-year institution and twenty percent have earned graduate degrees. This culture of education, which in essence requires WNBA players to earn college degrees, is in stark contrast to the WNBA players' peers in the NBA, National Football League (NFL), Major League Baseball (MLB), and the National Hockey League (NHL).

### A. *The Early Struggles of Women's Professional Basketball in America*

¶11 In its early years, American women's professional basketball was filled with various short-lived ventures. After generations of men's professional basketball leagues operating without a female counterpart, two women's professional basketball leagues burst onto the scene in the late 1970s: the Ladies Professional Basketball Association (LPBA) and the Women's Professional Basketball League (WBL).<sup>25</sup> Both leagues were defunct by 1981.<sup>26</sup>

¶12 Both the LPBA and the WBL struggled from the very beginning because of their high salaries, low sponsorship revenues, and team owners without significant investment income.<sup>27</sup> Unlike the NBA, neither female professional basketball league had the benefit of a television contract.<sup>28</sup> Without regular television revenues, neither league was able to turn a profit.<sup>29</sup>

<sup>22</sup> See Smith, *supra* note 1.

<sup>23</sup> JAY J. COAKLEY, *SPORT IN SOCIETY* 264 (2007); GAIL BEDERMAN, *MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE U.S.* 121 (1995).

<sup>24</sup> See generally RICHARD E. LAPCHICK & KEVIN J. MATTHEWS, *RACIAL AND GENDER REPORT CARD* (2001); see also WNBA Home Page, <http://www.wnba.com> (last visited Jan. 15, 2008).

<sup>25</sup> See Donna Carter, *Women's Pro Basketball League Planned*, L.A. TIMES, Jan. 26, 1990, at C14. The WBL debuted on December 9, 1978, but disbanded in 1981, whereas the LPBA was launched in 1980 and failed within a few months. See Anna Maria Basquez, *Showtime for Shelley*, ROCKY MOUNTAIN NEWS (Denver, CO), July 16, 1996, at 3D.

<sup>26</sup> See Basquez, *supra* note 25, at 3D.

<sup>27</sup> See Carter, *supra* note 25, at C14. See also *Idea for NBA: Female League*, ORLANDO SENTINEL, Dec. 26, 1992, at B7.

<sup>28</sup> See Bill Jauss, *Geraty Digs Up Old Game - Women's League May Sprout Again*, CHI. TRIB., Jan. 17, 1992, at Sports 8.

<sup>29</sup> See *id.*

¶13 By 1981, both the LPBA and WBL had folded, leaving the United States without professional women's basketball.<sup>30</sup> In fact, women's basketball did not return to America for nine years. On March 15, 1990, the Women's Sports Association Professional Basketball League (WSAPBL) presented itself as the first of several small, regional women's basketball leagues to emerge in America.<sup>31</sup> The WSAPBL attempted to control expenses by limiting its host cities to the greater California area.<sup>32</sup> After some initial success, other regional women's leagues followed, such as the Women's World Basketball Association (WWBA) in the Midwest,<sup>33</sup> and the Liberty Basketball Association (LBA) on the East Coast.<sup>34</sup>

¶14 Like many small, startup, professional sports leagues, the new, regional women's leagues attempted to draw fan interest by tinkering with the game's traditional rules. For example, the LBA lowered the basket by one foot so women could more easily slam-dunk.<sup>35</sup> Despite such ingenuity, the LBA disbanded within one season due to a recession.<sup>36</sup> The other regional women's basketball leagues also ceased to exist soon thereafter.

#### B. From Zero Leagues to Two—the Emergence of the ABL and the WNBA

¶15 With the failure of regional, women's basketball leagues, sports entrepreneurs in the 1990s decided to re-launch a national women's professional basketball league. As early as the Summer Olympics in 1992, NBA Commissioner David Stern began to consider the possibility of the NBA funding a national, upstart women's basketball league.<sup>37</sup> Even before Stern could propose a business plan, however, California entrepreneur Steve Hams and eleven other investors announced the formation of their own women's basketball league: the American Basketball League (ABL).<sup>38</sup>

¶16 Initially an eight-team league, the ABL business plan included teams playing a forty-game season between the months of October and February, overlapping with the first half of the NBA season.<sup>39</sup> The original host cities included Atlanta, Columbus, Denver, Hartford/Springfield, Portland, Richmond, Seattle, and San Jose, where the

<sup>30</sup> See Carter, *supra* note 25, at 14.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See, e.g., John Bannon, *Pro's League for Women's Basketball Tries Again*, USA TODAY, July 2, 1991, at 2C.

<sup>34</sup> For a more detailed analysis of the LBA, see Jeff Williams, *New Women's Pro League*, NEWSDAY, Dec. 18, 1990, at 131; see also Ailene Voisin, *New LBA Hopes to Become NBA for Women*, ATLANTA J. & CONST., Jan. 20, 1991, at H3; Debbie Becker, *New League Hopes Big Things Come from Smaller Packaging*, USA TODAY, Feb. 18, 1991, at 5C. Initially, the LBA showed signs of success, drawing 10,753 fans to their inaugural game in Auburn Hills, MI. See *New League Streamlined for Success*, CHI. TRIB., Feb. 22, 1991, at Sports 4; see also *New Women's Pro Basketball League Rolling*, ST. LOUIS POST-DISPATCH, Feb. 24, 1991, at 9F.

<sup>35</sup> See Ailene Voisin, *Women's Pro League Plans Comeback*, ATLANTA J. & CONST., Apr. 2, 1993, at E13.

<sup>36</sup> See *id.*

<sup>37</sup> See David Aldridge, *NBA's Stern Defends Dream Team's Quarters*, WASH. POST, Aug. 5, 1992, at F8.

<sup>38</sup> See Earl Gustkey, *Women Have Two New Incentives this Season*, L.A. TIMES, Nov. 25, 1995, at C9; see also Dick Rockne, *Women's Pro Hoops in Seattle? Proposed League Would Feature Some Members of National Team*, SEATTLE TIMES, Nov. 29, 1995, at D2; Rob Oller, *Proposed League Still Trying to Take Flight*, COLUMBUS DISPATCH, Apr. 26, 1996, at 10D; *American Basketball League*, DAILY NEWS (New York, N.Y.), Oct. 6, 1996, at 1C.

<sup>39</sup> See *American Basketball League*, *supra* note 38; see also Dick Rockne, *Women's Pro League Takes Shot in Seattle*, SEATTLE TIMES, Feb. 21, 1996, at C1.

league headquarters was located.<sup>40</sup> According to this business plan, all ABL teams at least initially would be owned and operated by the ABL as a single entity, and the league would only draft players that had graduated from college.<sup>41</sup>

¶17 In November 1995, Hams announced that the ABL had signed nine of the eleven players on the women's United States Olympic team, each to two-year professional contracts with non-compete clauses—a move intended to fortify the league's position as the premier home of women's professional basketball.<sup>42</sup> According to Hams, the league planned to pay each of the U.S. Olympic team players \$125,000 a year, maintain a league average salary of \$70,000 a year, and institute a league minimum salary of \$40,000—all decisions intended to thwart the emergence of a competitor league.<sup>43</sup> Additionally, the ABL secured sponsorship agreements with four major companies: Reebok, First USA Bank, Lady Foot Locker, and basketball manufacturer Baden.<sup>44</sup>

¶18 Yet, despite Hams's best efforts to make the ABL the exclusive women's basketball league, on April 24, 1996—almost seven months before the first ABL game—the NBA announced that it, too, was launching a women's professional basketball league (the WNBA), which would begin play in the summer of 1997.<sup>45</sup>

¶19 Unlike the ABL, the WNBA planned to compete during a ten-week season in the summer, which did not overlap with the NBA season.<sup>46</sup> Also, the WNBA model enjoyed the immediate advantage of being backed by the NBA—a well-fortified American business with powerful management.<sup>47</sup> On June 28, 1996—a full year before the first WNBA season was to begin—the WNBA entered into a five-year prime-time television contract with the National Broadcasting Company (NBC).<sup>48</sup> In addition, before playing a single game, the WNBA entered into substantial television pacts with ESPN and the Lifetime Network.<sup>49</sup> Meanwhile, ABL television coverage was limited to just twelve Sunday night games on SportsChannel.<sup>50</sup>

¶20 The ABL was the first league to begin play, and the early results were positive. In one league-opening game, 5,513 fans witnessed the Colorado Xplosion defeat the Seattle Reign.<sup>51</sup> That same night, 8,767 fans packed the Hartford Civic Center to see the New

<sup>40</sup> See *Hartford/Springfield in Women's League*, HARTFORD COURANT, Feb. 21, 1996, at C2.

<sup>41</sup> See Joey Johnstone, *Playing for Pay*, TAMPA TRIB., Apr. 1, 1996, at Sports 6; Elizabeth Holland, *WNBA Triumphs in Round 3 Against ABL*, ST. LOUIS POST-DISPATCH, May 2, 1998, at Sports 23.

<sup>42</sup> See Gustkey, *supra* note 38. These players included: Jennifer Azzi, Katy Steding, Lisa Leslie, Sheryl Swoopes, Dawn Staley, Teresa Edwards, Ruthie Bolton, Nikki McCray and Carla McGhee. See Tom Flaherty, *Two Other Women's Leagues to Start this Year*, MILWAUKEE J. SENTINEL, May 2, 1996, at Sports 9C; see also Liz Robbins, *NBC to Televises the Women's NBA*, CLEVELAND PLAIN DEALER, June 28, 1996, at 2D.

<sup>43</sup> See Gustkey, *supra* note 38.

<sup>44</sup> See Celeste E. Whittaker, *American Basketball League Facing Uphill Battle*, ATLANTA J. & CONST., Oct. 16, 1996, at D3.

<sup>45</sup> See Earl Gustkey, *NBA to Direct a Women's League*, L.A. TIMES, Apr. 25, 1996, at C5.

<sup>46</sup> *Id.*; see also Flaherty, *supra* note 42.

<sup>47</sup> See generally Gustkey, *supra* note 45.

<sup>48</sup> See Robbins, *supra* note 42. The contract included a promise to broadcast the WNBA on Saturday afternoons. See Brian Landman, *One May Be Better than Two*, ST. PETERSBURG TIMES, July 9, 1996, at 1C.

<sup>49</sup> See Joanne Korth, *Basketball League Channels Energy into TV Deals*, ST. PETERSBURG TIMES, July 21, 1996, at 2C.

<sup>50</sup> See Tom Flaherty, *Basketball Spotlight Will Shine on the ABL*, MILWAUKEE J. SENTINEL, Oct. 15, 1996, at Sports 12.

<sup>51</sup> See Glenn Nelson, *Reign Stumbles in First ABL Step*, SEATTLE TIMES, Oct. 19, 1996, at B1.

England Blizzard defeat the Richmond Rage.<sup>52</sup> Throughout the inaugural season, one of the brightest ABL stars was Jackie Joyner-Kersey, the beloved American 1988 Olympic champion in the horizontal jump.<sup>53</sup> Even though 1996 Olympic basketball standouts Sheryl Swoopes and Rebecca Lobo ultimately rejected the ABL,<sup>54</sup> the ABL still hosted most of the 1996 women's basketball Olympians.<sup>55</sup> In the inaugural ABL championships, Valerie Still, a thirty-five-year-old who just four years earlier had been teaching high school, finished the game with 14 points and 13 rebounds to lead the Columbus Quest to a 77-64 victory over the Virginia Rage before a sellout crowd of 6,313.<sup>56</sup>

¶21 The WNBA meanwhile opened its inaugural season on June 21, 1997, with the fanfare of an NBA marketing blitz. The league placed teams in New York, Charlotte, Cleveland, Houston, Los Angeles, Phoenix, Sacramento, and Salt Lake City.<sup>57</sup> Former NBA Vice President Val Ackerman was promoted to the position of the league's first commissioner.<sup>58</sup> Nike, Coca-Cola, and American Express all signed on as premier league sponsors.<sup>59</sup> In the WNBA model, player salaries were kept below the average ABL salary rate, and the WNBA initially implemented a league-wide salary cap on all players' contracts at \$50,000.<sup>60</sup>

¶22 With heavy fanfare, 14,284 spectators turned out to the Los Angeles Forum to watch the first WNBA game between the Los Angeles Sparks and the New York Liberty.<sup>61</sup> The WNBA also enjoyed opening crowds of 11,455 in Cleveland and 8,915 in Salt Lake City.<sup>62</sup> By season's end, the wildly televised and marketed WNBA drastically exceeded all expectations in fan interest, attracting nearly 9,000 fans per game.<sup>63</sup> From the abyss emerged the Houston Comets's Cynthia Cooper as the league's top-performing player, averaging a league-best 22.2 points per game.<sup>64</sup> The Houston Comets won the league's first championship, 65-51 over the Liberty,<sup>65</sup> and at least in the beginning, it seemed that two professional basketball leagues could co-exist in America: the traditional ABL in the winter, and the hyped, dynamic WNBA in the summer.

<sup>52</sup> See *Blizzard Opens ABL with Win*, HOUS. CHRON., Oct. 19, 1996, at 15B.

<sup>53</sup> See Jere Longman, *Jumping to Hoops: Olympian Joyner-Kersey Dribbles Back to Sport of Her Youth for ABL*, DALLAS MORNING NEWS, Oct. 20, 1996, at 17B.

<sup>54</sup> Swoopes initially played for the ABL, but began playing for the WNBA in 1997. See William C. Rhoden, *Women's N.B.A. Takes First Big Step*, N.Y. TIMES, Oct. 24, 1996, at B20.

<sup>55</sup> See W.H. Stickney Jr., *Swoopes, Lobo Sign with WNBA*, HOUS. CHRON., Oct. 24, 1996, at 7B; see also Stephanie Storm, *Women's League Growing Fast*, ORLANDO SENTINEL, Dec. 15, 1996, at C12.

<sup>56</sup> See Kathy Orton, *Quest Is Over For Columbus*, WASH. POST, March 12, 1997, at C1.

<sup>57</sup> See Mark Asher, *WNBA Takes Its Leap Forward*, WASH. POST, Oct. 31, 1996, at C3.

<sup>58</sup> See *id.*

<sup>59</sup> See generally Valerie Lister, *On the Heels of ABL's First Season, Women's NBA Gets Ready to Roll*, USA TODAY, Mar. 13, 1997, at 15C; see also *Marketing v. Heart: WNBA, ABL in a Death Watch*, ORLANDO SENTINEL, Aug. 8, 1997, at C10.

<sup>60</sup> See Amy Shipley, *With Shrewd Planning, WNBA Ends First Season Leagues Ahead*, WASH. POST, Aug. 31, 1997, at A23.

<sup>61</sup> See Vic Ziegel, *WNBA States its Case with Well-Attended Debut*, ORLANDO SENTINEL, June 22, 1997, at C4.

<sup>62</sup> See *id.*

<sup>63</sup> See generally David Moore, *WNBA Establishes Itself as Fan Favorite in Rookie Season*, DALLAS MORNING NEWS, Aug. 4, 1997, at 12B.

<sup>64</sup> See W.H. Stickney Jr., *Cooper's Season One to Remember*, HOUS. CHRON., Aug. 16, 1997, at B8.

<sup>65</sup> See *id.*

*C. Survival of the Fittest: How the WNBA Garnered a Monopoly over American Women's Basketball*

¶23 The two-league women's basketball format in America, which appeared so promising in 1997, however, was not to be. The WNBA had no interest in cooperating with the ABL, and after a few years of fierce competition between the ABL and the WNBA, the deeper-pocketed WNBA emerged as the sole survivor.<sup>66</sup> The first sign of conflict between the ABL and the WNBA was in September 1997, when the ABL's Most Valuable Player, Nikki McCray, jumped ship to the WNBA.<sup>67</sup> Although McCray accepted a pay cut from \$150,000 in the ABL to \$50,000 in the WNBA (the league maximum), McCray felt that playing in the WNBA would be more profitable in the long run because of the WNBA's premier exposure.<sup>68</sup>

¶24 Without national broadcast television, the ABL tried to boost its presence by proposing various joint marketing initiatives with the WNBA, including a proposal for an inter-league, all-star game.<sup>69</sup> However, the WNBA rejected all ABL overtures, instead opting to compete directly against the ABL for the women's basketball market.<sup>70</sup> As a result, the ABL was placed in the undesirable position of needing to offer players significantly higher salaries to prevent them from defecting to their more prominent competitor.<sup>71</sup>

¶25 Even as the ABL attendance totals increased twenty percent in its second year and the league announced expansion plans into new cities such as Chicago,<sup>72</sup> the ABL was heading into a "no win" situation.<sup>73</sup> Spring 1998 was especially telling for the ABL, as seven of the eight collegiate All-American women's basketball players signed with the WNBA.<sup>74</sup> In an interview with the *San Francisco Examiner*, Gary Cavelli, CEO and co-founder of the ABL acknowledged, "I think we won Rounds 1 and 2, and they're winning the third round. We're definitely behind at this point."<sup>75</sup>

<sup>66</sup> See Terry Frei, *New Leagues Don't Follow ABL Lead*, DENVER POST, July 2, 2000, at C4.

<sup>67</sup> See Valerie Lister, *ABL Says No Bidding War Despite McCray's Jump*, USA TODAY, Sept. 17, 1997, at 10C.

<sup>68</sup> *Id.* (noting that McCray would earn additional income from a personal services contract).

<sup>69</sup> See Stephanie Storm, *Top Official Proposes ABL-WNBA All-Star Game*, ORLANDO SENTINEL, Jan. 18, 1998, at C10.

<sup>70</sup> See *ABL-WNBA All-Star Challenge Dunked*, SEATTLE TIMES, Feb. 3, 1998, at C2.

<sup>71</sup> See Jeff Z. Klein, *Foot Soldiers: The Launch of the WUSA Opens a New Front in Women's Pro Sports*, VILLAGE VOICE, Apr. 24, 2001, at 47 (stating that "the ABL collapsed, largely because of competition from the heavily promoted, heavily bankrolled WNBA"); see generally Amy Shipley & Karl Hente, *Women's Pro Hoops Leagues Battle for Position*, ST. LOUIS POST-DISPATCH, May 18, 1997, at 7F (discussing the competition between the ABL and WNBA for players).

<sup>72</sup> See generally Athelia Knight, *In Its Second Season, ABL Is Above Average: Interest in Sport Helps Attendance Increase in League*, WASH. POST, Jan. 2, 1998, at C7; see also Phil Rosenthal, *Can Jackson Be Sold on ABL vs. WNBA?*, CHI. SUN-TIMES, Apr. 8, 1998, at Sports 105; Earl Gustkey, *Women's Basketball: Rumors of Jordan Ownership Keeps the ABL Buzzing*, L.A. TIMES, June 30, 1998, at C8 (discussing a rumor that legendary NBA player Michael Jordan had considered buying a stake in the ABL's Chicago expansion team).

<sup>73</sup> See generally John Deshazier, *ABL Hasn't Scored Enough Points to Win Ratings Game*, TIMES-PICAYUNE (New Orleans, La.), Feb. 28, 1998, at D1.

<sup>74</sup> See Holland, *supra* note 41; *UConn's Sales to WNBA*, DAILY NEWS (New York, N.Y.), Apr. 29, 1998, at 71.

<sup>75</sup> Holland, *supra* note 41 (quoting Cavelli's interview with the *San Francisco Examiner*).

¶26 While WNBA attendance climbed above 10,000 fans-per-game in its second season and ownership moved toward expanding the league,<sup>76</sup> the ABL spent its 1998 summer dissolving its failed Long Beach, California franchise and trying to cope with superstar Dawn Staley's defection to the WNBA.<sup>77</sup> The ABL did catch one huge break in the 1998-99 season, as the NBA players went on strike for the first half of their season and national broadcast television temporarily picked up ABL games as replacement programming.<sup>78</sup> Nevertheless, once the NBA players returned to action, ABL broadcasts ceased, and on Tuesday, December 22, 1998, the ABL folded and filed for bankruptcy.<sup>79</sup>

*D. Transition Game: Changes in the WNBA Structure upon ABL Bankruptcy*

¶27 Once the WNBA became the only women's game in town, the league began to pursue an expansion strategy, but it was never able to significantly increase its fan base. After averaging an all-time high of 10,869 fans per game in the 1998 season, WNBA attendance began to decline steadily, falling below an average of 10,000 fans per game for the first time in 2000, and then falling below the 9,000 mark in 2003.<sup>80</sup> By 2006, WNBA average per-game attendance fell all the way to 7,490 fans per game.<sup>81</sup>

¶28 With WNBA attendance and revenues declining, players began to take steps to protect their interests in a declining pie. On November 6, 1998, shortly before the ABL filed for bankruptcy, the WNBA women's basketball players made the first step to change their labor relationship with the WNBA by forming the Women's National Basketball Players Association (WNBPA)—the first labor union ever comprised entirely of professional female athletes.<sup>82</sup> Shortly thereafter, on April 30, 1999, the WNBPA ratified its first league collective bargaining agreement (CBA) with the union.<sup>83</sup> According to the WNBPA website: "The inaugural CBA encompassed significant advances for WNBA players, and represents for all women, an important step toward pay equity and general equality."<sup>84</sup> The CBA established a near seventy-five percent minimum salary increase for WNBA rookies and a one hundred percent minimum salary increase for WNBA veterans beyond the minimums that the WNBA had previously unilaterally imposed.<sup>85</sup> The CBA also provided "year-round health coverage, a retirement plan, guaranteed contracts and a collective share of licensing income."<sup>86</sup> Yet, as compared to the status obtained in collective bargaining by men's professional sports

<sup>76</sup> See Darrell Williams, *WNBA Keeps Building on a Good Thing*, TIMES-PICAYUNE (New Orleans, La.), Aug. 2, 1998, at C2; see generally Tim Povtak, *Disney Makes it Official: Orlando Joins WNBA*, ORLANDO SENTINEL, Aug. 14, 1998, at C1.

<sup>77</sup> See Susan Slusser, *ABL Season to Start 2 Weeks Later*, S.F. CHRON., Sept. 3, 1998, at D7.

<sup>78</sup> See, e.g. Athelia Knight, *NBA's Loss Is Gain for ABL: Women's League Hits National TV*, WASH. POST, Nov. 26, 1998, at B14.

<sup>79</sup> See Melissa Isaacson, *Lights Go Out on the ABL: To No One's Surprise, Boys Club Wins Again*, CHI. TRIB., Dec. 23, 1998, at Sports 1.

<sup>80</sup> See Kim Callahan, *Season By Season WNBA Attendance 1 (2007)*, <http://womensbasketballonline.com/wnba/attendance/sbsatten.pdf> (last visited Jan. 12, 2008).

<sup>81</sup> *Id.*

<sup>82</sup> See WNBA Players Association, *About the WNBPA*, [http://www.wnbpa.com/about\\_wnbpa.php](http://www.wnbpa.com/about_wnbpa.php) (last visited Jan. 15, 2008).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *id.*

<sup>86</sup> *Id.*

unions, the WNBPA was relatively powerless. The WNBPA was unable to bargain as aggressively as most men's sports unions because the WNBA teams regularly threatened to either shut down the league or lock out the players if the WNBPA did not agree to certain terms proposed by the league.<sup>87</sup> With the maximum WNBA player salary at the time standing at just \$50,000, most WNBA players had not saved enough money to sustain a long lockout.<sup>88</sup>

¶29 The first CBA between the parties was ratified on April 30, 1999, and expired on September 15, 2002.<sup>89</sup> On April 25, 2003, the WNBA and WNBPA agreed to a second collective bargaining agreement. This version of the CBA remains in effect today.<sup>90</sup> According to the WNBPA, advancements in the second CBA include the creation of a free agency system for WNBA players and the return of player group licensing rights to WNBA players.<sup>91</sup> However, the pay for WNBA players, as well as the revenue generated by the WNBA, remained miniscule as compared to that of men's professional basketball players.

¶30 Then, in 2003, the WNBA decided to transform its business from a structure including central ownership in the league overall to a structure including independent team ownership as exists in the four premier men's leagues.<sup>92</sup> The impetus for this transition was an important decision handed down by the First Circuit Court of Appeals in *Fraser v. Major League Soccer*, which indicated that the centralized Major League Soccer structure—in many ways similar to the original structure of the WNBA—did not necessarily shield the league from antitrust liability.<sup>93</sup> As a result of the WNBA's structural change to an independent ownership model, WNBA teams began to independently manage their own operations and pursue their own players and sponsorship deals.<sup>94</sup> Nevertheless, this structural change did not affect the coordinated decision-making of the WNBA, which now occurred through the collective bargaining process.

<sup>87</sup> See, e.g. Bart Hubbuch, *WNBA Labor Deal, Draft Put on Hold*, DALLAS MORNING NEWS, Apr. 23, 1999, at 5B (stating that the WNBA postponed its 1999 draft indefinitely and threatened a lockout unless the players' union consented to the proposed collective bargaining agreement).

<sup>88</sup> This is in contrast to professional athletes in the four premier men's sports leagues that, based on their higher salaries, often have more personal reserves. Moreover, in the four premier men's sports leagues, the players' union often keeps a reserve fund to make payments to players in the event of a strike or lockout. For example, one of the reasons why the Major League Baseball Players Association was able to sustain such a long work stoppage in 1994 was because it had reserved \$200 million in funds to distribute to players in the event of a work stoppage. See, e.g., *Baseball's Last Gasp is Today*, PALM BEACH POST, Sept. 14, 1994, at Sports 1C (stating that the union planned to begin making payments to players from its \$200 million strike fund).

<sup>89</sup> See WNBA Players Association, *supra* note 82.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See Mel Greenberg, *New-Look WNBA to Open 7th Season: 2 Teams Fold, 3 See Change in Ownership*, CHI. TRIB., May 21, 2003, at Sports 9.

<sup>93</sup> See *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 58-61 (1st Cir. 2002); see also Marc Edelman, *Fan Ownership Can Give UFL a Leg Up on Building Brand Loyalty*, STREET & SMITH'S SPORTS BUS. J., Aug. 27-Sept. 7, 2007, at 28, 28 (stating "there are probably lingering perceptions of an antitrust advantage to having 50 percent common ownership amongst teams, even though the decision by the First Circuit Court of Appeals in the 2002 case *Fraser v. Major League Soccer* indicated that any such antitrust advantage is dubious."); Lacie L. Kaiser, *The Flight from Single-Entity Structured Sports Leagues*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 9-11 (2004).

<sup>94</sup> See generally Kaiser, *supra* note 93, at 11-13.

¶31 In recent years, many of the top women’s basketball players, unhappy with their salary prospects in the WNBA, have started spending their off-seasons playing overseas.<sup>95</sup> A number of American-born players have even indicated their desire to play exclusively overseas.<sup>96</sup> For example, Tina Thompson, a four-time WNBA champion with the Houston Comets, recently indicated she may forego the WNBA altogether because she believes she can triple her WNBA maximum salary by playing exclusively in Moscow, Russia.<sup>97</sup>

#### *E. The WNBA Education Policy*

¶32 From their incipient stages, both the WNBA and ABL enforced independent league regulations to prevent their teams from drafting players that still had NCAA college eligibility.<sup>98</sup> When the ABL ceased its operations in 1998, however, prospective women’s basketball players lost the leverage of having two separate leagues vying for player services.<sup>99</sup> Without two leagues, the only bargaining chip of a player that did not meet the age/education policy was a threat to play permanently overseas. For some players with young families well-settled in the United States, that was not a viable option.

¶33 Once the ABL ceased to exist and the WNBA players unionized, the WNBA took affirmative steps to protect its age/education policy from antitrust scrutiny by adding references to the league’s age/education policy into the CBA. As currently written, Article XIII, Section 1 of the CBA, which is entitled “Player Eligibility,” states the following:

[An American] player is eligible to be selected in the WNBA Draft [only] if she: (i) will be at least twenty-two (22) years old during the calendar year in which such Draft is held; (ii) has graduated from a four-year college or university, or is to graduate from such college or university, during the calendar year in which such Draft is held; or (iii) attended a four-year college or university, her original class in such college or university has already been graduated or is to graduate during the calendar year in which such Draft is held, and she either has no remaining intercollegiate eligibility or renounces her remaining intercollegiate

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<sup>95</sup> See Oscar Dixon, *More Players Profit from Testing Waters: Overseas Competition Gives League Reason for Concern*, USA TODAY, Aug. 21, 2007, at 10C.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> See Elizabette Holland, *Holdsclaw will Stay in College Basketball*, ST. LOUIS POST-DISPATCH, Mar. 30, 1998, at C6.

<sup>99</sup> The emergence of a rival professional sports league often impacts whether the dominant league attempts to maintain age/education policies. For example, the NFL reduced its age/education policy from four to three years after Hall of Fame running back Herschel Walker opted to sign with the New Jersey Generals team in the rival United States Football League after his sophomore year rather than wait the required third and fourth seasons before entering the NFL. See, e.g., PAUL WEILER & GARY ROBERTS, *SPORTS AND THE LAW* 201 (3d ed. 2004). Initially, the NFL selectively implemented its rule by granting a limited number of special exceptions to allow superstar collegiate players, including Barry Sanders, to enter the league early. See Charean Williams, *Got ‘Em – Longhorns Never Seem to Get Burnt by the NFL Draft*, FORT WORTH STAR-TELEGRAM, Apr. 18, 2005, at 1D. Then, in 1990, the NFL rewrote its longstanding eligibility rule to allow NFL entry to all players after their junior year of college or three years after high school. *Id.*

eligibility by written notice to the WNBA at least ten (10) days prior to such Draft.<sup>100</sup>

In essence, this age/education policy mandates that any American-born player wait until age twenty-two or complete four years of college before entering the WNBA.<sup>101</sup>

### III. LEGAL IMPLICATIONS OF THE WNBA AGE/EDUCATION POLICY

¶34 As of the date of publication, the WNBA age/education policy has not been challenged in court.<sup>102</sup> However, if challenged, a court might find the WNBA policy violates Section 1 of the Sherman Act as an illegal group boycott.

#### A. *Legal Standard for Reviewing Group Boycotts*

¶35 Section 1 of the Sherman Act states, in pertinent part, that “[e]very contract, combination . . . or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal.”<sup>103</sup> This section of the Sherman Act governs concerted refusals to deal (group boycotts).<sup>104</sup> Even though most concerted refusals to deal involve product boycotts, concerted refusals to deal also may concern boycotts in labor markets, such as the market for professional athletic services.<sup>105</sup>

¶36 The public policy rationale against group boycotts is well fortified by the Supreme Court of the United States.<sup>106</sup> In the 1914 case *Eastern State Retail Lumber Dealers’ Association v. United States*, the Supreme Court explained:

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a

<sup>100</sup> Women’s National Basketball Association Collective Bargaining Agreement, Art. XIII(1)(b), at 52, available at [http://www.wnbpa.com/downloads/WNBA\\_CBA.pdf](http://www.wnbpa.com/downloads/WNBA_CBA.pdf) (last visited Jan. 15, 2008) [hereinafter WNBA Collective Bargaining Agreement].

<sup>101</sup> See *id.*

<sup>102</sup> For a short period of time in 1998, it seemed that Tennessee University star Chamique Holdsclaw was going to challenge the rule; however, Holdsclaw decided to return to Tennessee for her senior season on her own accord. See Holland, *supra* note 98.

<sup>103</sup> 26 Stat. 209 (1890), codified as amended, 15 U.S.C. §§ 1-7 (2000). Enacted in 1890, during the rise of big business, the Sherman Act was intended to serve both political and economic purposes and to prevent any one business from becoming more powerful than the government. See Marc Edelman, *Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig’s Contraction Plan Was Never a Sure Deal*, 10 SPORTS L.J. 45, 56-57 (2003).

<sup>104</sup> See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 4.13, at 159-67 (3d ed. 1998).

<sup>105</sup> See Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 734 (2006); see also Edelman, *supra* note 103, at 57 (“[W]age fixing restraints are treated as price-fixing restraints cognizable under the Sherman Act, because wage restraints reallocate labor resources to other markets where employees are able to earn fair market value.”); Marc Edelman, *How to Curb Professional Sports’ Bargaining Power Vis-à-Vis the American City*, 2 VA. SPORTS & ENT. L. J. 280, 293 (“On the team level, professional sports seems to fall within section 1 of the [Sherman] Act, because teams compete against each other in the labor for free-agents.”).

<sup>106</sup> See SULLIVAN & HARRISON, *supra* note 104, at § 4.13; see generally *Klor’s Inc. v. Broadway Hale Stores*, 359 U.S. 207 (1959). In *Klor’s Inc. v. Broadway-Hale Stores Inc.*, the Supreme Court stated: “Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . .” *Id.* at 212.

conspiracy, and it may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.<sup>107</sup>

¶37 In other words, the danger caused by concerted conduct occurs where multiple companies act together in a manner that reduces consumers' freedom of choice.<sup>108</sup> This outcome is troubling because the consumer loses the opportunity to use purchasing power to indicate a preference for boycotted products, materials, or labor sources.<sup>109</sup>

### 1. Prima Facie Test for Review of Allegedly Anticompetitive Conduct

¶38 In assessing whether the allegedly anticompetitive conduct violates Section 1 of the Sherman Act, a court will begin with a prima facie review of the conduct by applying one of the Supreme Court's three sanctioned tests. On one end of the spectrum, if a defendant's business practices are so pernicious that they have no redeeming value, a court will apply the per se rule, which presumes there is a prima facie case of an antitrust violation without any further investigation of alleged justifications.<sup>110</sup> The per se rule is a bright line rule that facilitates legal certainty and promotes judicial economy.<sup>111</sup> The purpose of the per se rule is to avoid "subjective policy judgments" that most courts recognize "are more appropriate for legislative, rather than judicial, determination."<sup>112</sup>

¶39 On the other end of the spectrum, if the allegedly anticompetitive conduct seems to yield a more ambiguous effect, a court will apply Rule of Reason analysis, under which a court conducts a full economic investigation to determine whether the defendants' conduct is legal.<sup>113</sup> Applying the Rule of Reason, a court will determine whether a plaintiff can make a prima facie showing of a violation based on the presence of the following three factors: (1) market power, (2) anticompetitive effects that exceed any procompetitive justifications, and (3) harm.<sup>114</sup>

¶40 In between these two tests, if a court presumes the allegedly anticompetitive conduct is neither completely pernicious nor completely ambiguous, that court will apply a third type of test, called either the "quick look" or "truncated" Rule of Reason.<sup>115</sup>

<sup>107</sup> 234 U.S. 600, 614 (1914).

<sup>108</sup> See generally SULLIVAN & HARRISON, *supra* note 104, at 160-61; see also *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

<sup>109</sup> See generally SULLIVAN & HARRISON, *supra* note 104, at 164.

<sup>110</sup> See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); SULLIVAN & HARRISON, *supra* note 104, at 124-31; *McCann & Rosen*, *supra* note 105, at 735.

<sup>111</sup> SULLIVAN & HARRISON, *supra* note 104, at 126; Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH & LEE L. REV. 49, 57 (2007).

<sup>112</sup> *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1320 (D. Conn. 1977).

<sup>113</sup> See *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 689 (1978). Indeed, the very term "Rule of Reason" itself is somewhat of a misnomer because such analysis applies more of a standard-based approach than any hard rule. See *id.* at 688 (stating that "[c]ontrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."); see also Crane, *supra* note 111, at 57.

<sup>114</sup> See 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 49 (2007).

<sup>115</sup> *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763-64, 770 (1999).

Under that test, the court will consider economic effects based on only a “rudimentary understanding of economics.”<sup>116</sup>

¶41 According to legal scholars, antitrust law is in the midst of undergoing a “creeping transition,” as courts are moving away from applying the per se rule and toward applying either the quick-look test, or, even more frequently, the full Rule of Reason.<sup>117</sup> This shift has emerged as a result of a changing understanding of industrial economics, which has cast doubt on traditional notions about competitive effects.<sup>118</sup>

## 2. The Non-Statutory Labor Exemption

¶42 If the prima facie test produces the preliminary finding of an antitrust violation, a court next considers whether the antitrust defendants can rebut this finding based on one of antitrust law’s affirmative defenses/exemptions.<sup>119</sup> In the professional sports context, the most frequently applied defense is the non-statutory labor exemption, which shields from antitrust scrutiny any conduct that is reached through the collective bargaining process.<sup>120</sup> As a matter of public policy, the non-statutory labor exemption reflects the view that employees are better off negotiating together rather than individually, and therefore labor law (rather than antitrust law) should apply to situations where collective bargaining occurs.<sup>121</sup>

¶43 Although “[t]he interaction of the [antitrust laws] and federal labor legislation is an area of law marked more by controversy than by clarity,”<sup>122</sup> courts have inferred the scope of the non-statutory labor exemption “from federal labor statutes, which set forth a national labor policy of favoring free and private collective bargaining, which require good faith bargaining [with respect to mandatory terms and conditions of employment], and which delegate related rulemaking and interpretive authority to the National Labor Relations Board.”<sup>123</sup> In this vein, the non-statutory labor exemption exists not only to protect National Labor Relations Board (NLRB) authority but also “to allow meaningful collective bargaining to take place.”<sup>124</sup>

<sup>116</sup> *Id.*

<sup>117</sup> Crane, *supra* note 111, at 50; see also Marc Edelman, *Clarett’s Run to Court No Sure Score*, STREET & SMITH’S SPORTS BUS. J., Sept. 22-28, 2003, at 32, 32 (“since the middle 1980s, courts have moved away from per se rulings where concerted refusals to deal involve professional industries. Instead, modern courts prefer full-blown ‘rule of reason’ analysis.”).

<sup>118</sup> See Crane, *supra* note 111, at 51. In more recent years, this shift has expanded with the Supreme Court rarely intervening in antitrust cases, and a movement away from rules and toward standards carried out by the lower courts and antitrust enforcement agencies, which have followed an impulse to manage antitrust adjudication in a more multi-factor-dependent way. *Id.* at 56.

<sup>119</sup> See PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 106-22 (5th ed. 1997).

<sup>120</sup> McCann & Rosen, *supra* note 105, at 7.

<sup>121</sup> Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 196 (2004) (citing *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395 (1952)). The Supreme Court first applied the non-statutory labor exemption in the seminal case *United Mine Workers of America v. Pennington*, in which it stated: “in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws.” 381 U.S. 676, 710 (1965).

<sup>122</sup> *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959 (2d Cir. 1987).

<sup>123</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996).

<sup>124</sup> *Id.* at 237.

¶44 Nevertheless, given that the non-statutory labor exemption emerges from case law, there is a split among the circuits about how broadly the exemption applies. The Eighth Circuit in *Mackey v. National Football League* held that the non-statutory labor exemption applies only where an alleged restraint of trade: (1) involves mandatory subjects of bargaining, (2) primarily affects the parties involved, and (3) is reached through bona fide, arm's-length bargaining (the *Mackey Test*).<sup>125</sup> Meanwhile, the Second Circuit in *Clarett v. National Football League* held that the non-statutory labor exemption has a broader boundary, and it applies most broadly where the alleged antitrust injuries affect employees rather than competitors (the *Clarett Test*).<sup>126</sup> Because the *Clarett Test* is far broader than the *Mackey Test*, the WNBA age/education policy is more likely protected from antitrust scrutiny if the *Clarett Test* is applied.

### B. Early Challenges to Sports League Age/Education Policies

¶45 Each of the courts hearing the first three cases that challenged a sports league's age/education policy found the challenged policy to be illegal based on the per se rule and lack of applicable affirmative defenses/exceptions.<sup>127</sup> In the first of these challenges, *Denver Rockets v. All-Pro Management Inc.*,<sup>128</sup> the District Court for the Central District of California overturned an NBA rule that required all prospective men's basketball players to wait at least four years after completing their high-school education before applying for the league draft.<sup>129</sup> The NBA thereafter moved for a stay of this ruling, which was granted by the Ninth Circuit Court of Appeals,<sup>130</sup> but was then overturned by the Supreme Court.<sup>131</sup>

¶46 In *Denver Rockets*, then-nineteen-year-old basketball star Spencer Haywood, who was from an impoverished family, filed his antitrust suit against each of the teams in the NBA, alleging that the NBA age/education policy constituted an unreasonable restraint of trade.<sup>132</sup> Haywood alleged that he was entitled to a hardship exemption from the NBA policy because he was from a poor family and the NBA policy prevented him from earning a living by practicing his profession.<sup>133</sup>

<sup>125</sup> 543 F.2d 606, 614 (8th Cir. 1976).

<sup>126</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 131, 134 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

<sup>127</sup> See Edelman, *supra* note 117, at 32.

<sup>128</sup> 325 F. Supp. 1049 (C.D. Cal. 1971).

<sup>129</sup> *Id.* at 1051-57.

<sup>130</sup> *Denver Rockets v. All-Pro Mgmt., Inc.*, No. 71-1089, 1971 WL 3015, at \*1 (9th Cir. Feb. 16, 1971), *rev'd sub nom.* *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1206-07 (1971).

<sup>131</sup> *Id.*

<sup>132</sup> See *id.* One of the sections of NBA bylaws challenged under *Denver Rockets* specifically stated:

A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college.

*Denver Rockets*, 325 F. Supp. at 1059; see also McCann & Rosen, *supra* note 105, at 10.

<sup>133</sup> See *Denver Rockets*, 325 F. Supp. at 1061.

¶47 The District Court for the Central District of California agreed with Haywood, and granted him summary judgment.<sup>134</sup> In awarding Haywood his request for summary judgment, the court applied the per se rule, explaining that three different types of harms emerged from the NBA age/education restriction. The court stated:

The harm resulting from a “primary” boycott such as this is threefold. First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government.<sup>135</sup>

¶48 The court then denied each of the NBA’s three purported defenses: financial necessity, cost effectiveness, and desire to promote advanced education.<sup>136</sup> Although the court acknowledged that education policies are “commendable,” it nevertheless found that the goals of promoting education may not “override the objective of fostering economic competition which is embodied in the antitrust laws.”<sup>137</sup> In other words, antitrust law is not a forum for social policy.

¶49 Six years later in *Linseman v. World Hockey Association*,<sup>138</sup> the District Court for the District of Connecticut overturned another age/education policy, this time in hockey, finding the facts of that case “indistinguishable from the *Spencer Haywood* case.”<sup>139</sup> In *Linseman*, nineteen-year-old amateur Canadian hockey player Kenneth Linseman brought a preliminary injunction suit against the World Hockey Association (WHA), contending that the league’s prohibition against players under the age of twenty violated Section 1 of the Sherman Act.<sup>140</sup> Consistent with the court’s earlier decision in *Denver Rockets*, the *Linseman* court found that the WHA age/education policy amounted to a per se illegal refusal to deal,<sup>141</sup> and that there was not any valid purpose to the WHA rule.<sup>142</sup> The *Linseman* court also found that antitrust law did not allow for exceptions to the Sherman Act based on a sports league’s purported economic necessity.<sup>143</sup> The court noted: “Exclusion of traders from the market by means of combination or conspiracy is

<sup>134</sup> *Id.* at 1058-59.

<sup>135</sup> *Id.* at 1061. The court further added: “Of course, this is true only where the members of the combination possess market power in a degree approaching a shared monopoly. This is uncontested in the present case.” *Id.*

<sup>136</sup> *See id.* at 1066.

<sup>137</sup> *Id.*

<sup>138</sup> 439 F. Supp. 1315 (D.Conn. 1977).

<sup>139</sup> *Id.* at 1326.

<sup>140</sup> *Id.* at 1317.

<sup>141</sup> *Id.* at 1323, 1325-26.

<sup>142</sup> *Id.* at 1321-22.

<sup>143</sup> *Id.* at 1322. The WHA defendants in *Linseman* had alleged that maintaining the age requirement was an economic necessity because one of the reasons suggested for the age requirement was “that the Canadian junior hockey league, from which the WHA and National Hockey League draw much of their talent, would fail if the most talented teenagers were signed by professional teams.” *Id.* The WHA further contended that if “these Canadian junior teams failed to draw spectator support, the pool of talent relied upon by the professional leagues would dry up. The hockey leagues lack an organized farm system or an adequate number of college teams as a source from which to draw their players.” *Id.*

so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins."<sup>144</sup>

¶150 Then, for a third time, in *Boris v. United States Football League*, the District Court for the Central District of California struck down an age/education policy, this time involving professional football.<sup>145</sup> In *Boris*, plaintiff football player Robert Boris challenged an age/education policy of the United States Football League (USFL), which mandated that all prospective players exhaust their college eligibility before entering the draft.<sup>146</sup> Ultimately, the parties reached a settlement and dismissed the case with prejudice.<sup>147</sup> In the opinion approving the proposed terms of settlement, the court overturned the USFL age/education policy, which it found per se illegal.<sup>148</sup>

### C. Clarett v. National Football League

¶151 The most recent challenge to an age/education policy in professional sports, *Clarett v. National Football League*,<sup>149</sup> saw the Second Circuit Court of Appeals *uphold* an NFL age/education policy because that court found the NFL's age/education policy was protected from antitrust liability based on the non-statutory labor exemption.<sup>150</sup> In *Clarett*, the Second Circuit explained that subjecting the NFL's age/education policy to antitrust review "would subvert fundamental principles of our federal labor policy."<sup>151</sup> The court's decision was uniquely based on the Second Circuit's interpretation of the non-statutory labor exemption.<sup>152</sup> If that case had been brought in the Eighth Circuit (rather than the Second), a different outcome likely would have resulted.

¶152 The facts and case history in *Clarett* are distinctive. Maurice Clarett, who at the time was a twenty-year-old college sophomore at Ohio State University, challenged the NFL age/education policy that mandated that any prospective NFL player to wait at least three years upon graduating from high school before entering the NFL draft.<sup>153</sup> Clarett, who had been named the Big Ten Freshman of the Year and voted the best running back in college by *The Sporting News*, claimed that he was ready to play in the NFL after only two years of college, and that his exclusion amounted to a violation of antitrust laws.<sup>154</sup> After the NCAA suspended Clarett for several alleged rule infractions, Clarett decided to challenge the NFL's age/education policy in court.

¶153 Although Clarett argued that he had a legal right under federal antitrust law to enter the NFL draft, the NFL viewed its age/education policy differently, articulating three defenses: (1) that the age/education policy was immune from antitrust scrutiny based on the non-statutory labor exemption because the policy was the result of collective bargaining between the NFL and the players' union, (2) that Clarett had no standing

<sup>144</sup> *Id.* (quoting *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966)).

<sup>145</sup> 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,461 (C.D. Cal. Feb. 28, 1984).

<sup>146</sup> *Id.*

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

<sup>148</sup> *Id.*

<sup>149</sup> 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

<sup>150</sup> *Id.* at 125.

<sup>151</sup> *Id.* at 138 (internal citations and quotations omitted).

<sup>152</sup> See generally *id.* at 133-38 (rejecting the Eighth Circuit's widely followed *Mackey* Test and instead citing to other case law, exclusively from the Second Circuit).

<sup>153</sup> *Id.* at 125-26.

<sup>154</sup> *Clarett v. Nat'l Football League*, 306 F. Supp.2d 379, 382, 387-88 (S.D.N.Y. 2004).

under antitrust laws to bring his suit, and (3) that the NFL age/education policy was permissible under the Rule of Reason based on its purported procompetitive effects.<sup>155</sup>

¶154 At the district court level, Judge Shira Scheindlin issued a lengthy opinion in favor of Clarett, granting summary judgment and stating that the NFL age/education policy “must be sacked” because none of the NFL’s defenses “hold the line.”<sup>156</sup> The district court opinion analyzed the effects of the NFL age/education policy under the quick-look test and concluded that no further inquiry was needed because “Clarett has alleged the very type of injury . . . that the antitrust laws are designed to prevent,” in that Clarett was boycotted from the professional football market.<sup>157</sup> According to the district court, Clarett also had standing to sue the NFL because “his injury flow[ed] from a policy that excludes all players in his position from selling their services to the only viable buyer—the NFL,”<sup>158</sup> and the non-statutory labor exemption did not bar Clarett’s claim because the NFL met none of the three prongs of the *Mackey* Test—the NFL age/education policy was not a mandatory term or condition of bargaining, it did not primarily effect either the NFL teams or members of the NFLPA, and it was not reached between the NFL teams and the NFLPA through bona-fide arm’s length bargaining.<sup>159</sup>

¶155 The NFL appealed this judgment to the Second Circuit Court of Appeals, which reversed the district court, finding that the non-statutory labor exemption completely barred Clarett’s claim.<sup>160</sup> The Court of Appeals explained that it had “never regarded the Eighth Circuit’s test in *Mackey* as defining the applicable limits of the non-statutory labor exemption”<sup>161</sup> and that, according to Second Circuit case law, the non-statutory labor exemption applied as long as the alleged restraints involved a mandatory subject of bargaining and the exemption’s application would “ensure the successful operation of the collective bargaining process.”<sup>162</sup>

#### D. Applying the Law to the WNBA Age/Education Policy

¶156 Based on the aforementioned inconsistencies in the case law, it is impossible to predict with certainty whether a court would find the WNBA age/education policy to be illegal. However, applying certain assumptions about what case law a given court would consider, one can reach general conclusions about the court’s likely outcome. For example, if a court were to apply both the per se rule and the *Mackey* Test, that court

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

<sup>156</sup> *Id.* at 382.

<sup>157</sup> *Id.* In applying the quick-look test, the district court held: (1) the rule created obvious anticompetitive effects by prohibiting access to all players who failed to satisfy the rule; (2) the rule did not promote economic competition in the labor market; and (3) even if the NFL possessed legitimate procompetitive arguments, there existed less restrictive alternatives to the NFL age/education policy. *See id.* at 406-10.

<sup>158</sup> *Id.* at 382.

<sup>159</sup> *Id.*

<sup>160</sup> *Clarett v. Nat’l Football League*, 369 F.3d 124, 125 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

<sup>161</sup> *Id.* at 133.

<sup>162</sup> *Id.* at 143. The Second Circuit also reversed the district court on the issue of whether the age/education policy involved a mandatory term or condition of bargaining, finding that player eligibility policies are indeed mandatory subjects of bargaining for two reasons: (1) because these policies have a tangible effect on the wages of other players, and (2) because these policies represent a quite literal condition for initial employment. *Id.* at 139-40. On this issue, the Second Circuit’s reversal of the district court was not surprising, as the district court’s view was not aligned with previous case law, including the *Mackey* decision.

would probably find the WNBA age/education policy violates antitrust law. Meanwhile, if a court were to apply the Rule of Reason and the *Mackey* Test, the court would probably find that the age/education policy does not violate the antitrust laws. Finally, if a court were to apply the *Clarett* Test (irrespective of whether applied along with the per se rule or the Rule of Reason), the court would very probably not find an antitrust violation.

<u>Evaluating WNBA Age/Education Policy under Antitrust Law</u>			
<u>Prima Facie Test</u>	<u>Non-Statutory Labor Exemption Test</u>	<u>Is there an antitrust violation?</u>	<u>Explanation</u>
Per Se Test	<i>Mackey</i> Test (mandatory subject of bargaining, primarily affecting the parties involved, reached through bona fide, arm's-length bargaining)	Probably	The prima facie test is met; however, there is a chance that the WNBA could still avoid liability under the non-statutory labor exemption by showing that all three prongs of the <i>Mackey</i> Test are met.
Per Se Test	<i>Clarett</i> Test (mandatory subject of bargaining and the exemption's application would "ensure the successful operation of the collective bargaining process")	Very Probably Not	The prima facie test is met; however, there is a very likely chance that the WNBA could show that the non-statutory labor exemption applies given that the age/education policy is likely a mandatory term or condition of bargaining.
Rule of Reason	<i>Mackey</i> Test (mandatory subject of bargaining, primarily affecting the parties involved, reached through bona fide, arm's-length bargaining)	Probably Not	Under the Rule of Reason, the prima facie test is only met if the court limits the geographic market to the United States. If the prima facie test is met, the WNBA could still avoid liability under the non-statutory labor exemption if it can show that all three prongs of the <i>Mackey</i> Test are met.
Rule of Reason	<i>Clarett</i> Test (mandatory subject of bargaining and the exemption's application would "ensure the successful operation of the collective bargaining process")	Very Probably Not	Under the Rule of Reason, the prima facie test is only met if the court limits the geographic market to the United States. Even in that event, there is a very likely chance that the WNBA could show that the non-statutory labor exemption applies given that the age/education policy is likely a mandatory term or condition of bargaining.

### 1. Prima Facie Test

¶157 If a prospective WNBA player were to challenge the WNBA age/education policy as being a group boycott, the first issue for a court to determine is the proper standard of review.<sup>163</sup> If a court were to apply the per se rule—as courts did in *Denver Rockets*, *Linseman*, and *Boris*—the court would have no alternative but to find a prima facie violation because under the per se rule, group boycotts are held illegal “without regard to any claimed justification for the restraint.”<sup>164</sup> By contrast, if a court were to apply the Rule of Reason (either in full or quick-look), the court would only find an initial showing of an antitrust violation if the plaintiff were able to show each of the following: (1) market power, (2) a net anti-competitive effect, and (3) harm.

#### i) *Market Power*

¶158 Market power is defined as “the power to control prices or exclude competition.”<sup>165</sup> Courts generally determine the presence (or absence) of market power based on an economist’s testimony. If such testimony is not readily available, simple market share estimates serve as a reasonable alternative.<sup>166</sup>

¶159 When analyzing market share data, a court determines the scope of the relevant market based on both product and geographic considerations.<sup>167</sup> The relevant geographic market is defined as “the market in which the seller operates and to which the purchaser can turn for supplies.”<sup>168</sup> This is “the area to which players can turn, as a practical matter, for alternate opportunities for employment.”<sup>169</sup> This factor is important because if there is a limited opportunity for practical employment, a market restriction is more likely to be an antitrust violation.

¶160 In the context of an antitrust claim brought by a prospective WNBA player, the presence of market power depends upon how the court defines the geographic market. If a court were to define the geographic market as the United States—which is how most courts have defined the market in professional sports antitrust cases<sup>170</sup>—the court would find that WNBA teams maintain collective market power because there is no rival professional women’s basketball league in the United States. This means the WNBA would collectively have a one hundred percent market share.<sup>171</sup> If, however, a court were to define the geographic market as encompassing the entire world—as the First Circuit in

<sup>163</sup> See, e.g., *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 769 (1999); *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1320-23 (D. Conn. 1977).

<sup>164</sup> *Linseman*, 439 F.Supp. at 1320 (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1957)); see also *Crane*, *supra* note 111, at 49-56.

<sup>165</sup> See SULLIVAN & HARRISON, *supra* note 104, at 27 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92 (1956)).

<sup>166</sup> See *id.* at 28.

<sup>167</sup> See *id.* at 33 (citing *United States v. Grinnell Corp.*, 384 U.S. 563 (1966)).

<sup>168</sup> *Id.* (internal citations and quotations omitted).

<sup>169</sup> *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 63 (1st Cir. 2002) (internal citations and quotation marks omitted).

<sup>170</sup> See, e.g., *Mid-South Grizzlies v. Nat’l Football League*, 720 F.2d 772, 783 (3d Cir. 1983); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1296 n.3 (9th Cir. 1982).

<sup>171</sup> See Jayda Evans, *Turning Ten*, SEATTLE TIMES, May 18, 2006, at D1 (explaining that the WNBA is the only surviving women’s basketball league and that the thirteen previous attempts at women’s basketball in America each failed).

*Fraser v. Major League Soccer* recently defined the market for men’s soccer labor<sup>172</sup>—then the court would find the WNBA does not have market power, and the prospective WNBA player’s claim would fail under the Rule of Reason.

¶61 Empirical evidence seems to support finding a worldwide market for women’s basketball labor based on the recent trend of female basketball players leaving the WNBA in favor of European leagues.<sup>173</sup> As more American professional women’s basketball players move their careers overseas in pursuit of opportunities for higher pay, the argument that the WNBA competes against foreign leagues becomes continuously stronger.<sup>174</sup> A more thorough economic study of this point, however, would be needed if this case were eventually to go to trial, given the implicit burden of international relocation.

ii) *Net Anticompetitive Effects*

¶62 A net anticompetitive effect is one where the anticompetitive effects of the scrutinized conduct are greater than the procompetitive justifications for that conduct. The anticompetitive effects of the WNBA age/education policy are threefold: (1) boycotted WNBA players are harmed by their exclusion from the market, (2) competition in the overall WNBA labor market is harmed because certain teams cannot purchase boycotted players’ services, and (3) society overall is harmed because the individual WNBA clubs have monopolized an otherwise free market.<sup>175</sup>

¶63 In determining what qualifies as a procompetitive justification, courts regularly have held that such a justification must emerge from the same economic market as the alleged anticompetitive effects—meaning, in other words, that if the alleged anticompetitive effect of the WNBA age policy involves the entry labor market for women’s basketball players, courts will only consider offsetting economic benefits that also involve the entry labor market for women’s basketball players.<sup>176</sup> Applying this criterion, any impact of the WNBA age/education policy on in-game competition (such as by equalizing the talent level among teams) or any other basketball-related market is completely irrelevant.<sup>177</sup> Also, any social justification for an age/education policy is

<sup>172</sup> See *Fraser*, 284 F.3d at 59. The court stated:

Here, the jury said that neither the United States nor Division I delimited the relevant market—findings that imply that MLS faced significant competition for player services both from outside the United States and from non-Division I teams. That inference at a minimum creates uncertainty as to whether the jury could have found market power under section 1.

*Id.*

<sup>173</sup> See Dixon, *supra* note 95.

<sup>174</sup> *Id.*

<sup>175</sup> See *Denver Rockets v. All-Pro Management Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (as mentioned earlier, discussing these three anticompetitive effects in a similar case involving the group boycott by the NBA against men’s basketball player Spencer Haywood).

<sup>176</sup> See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978).

<sup>177</sup> The court in *Smith v. Pro Football, Inc.* addressed this very issue, rejecting the argument made by defendant NFL teams that on-the-field competition is relevant to antitrust scrutiny of the NFL draft. *Id.* at 1186. In doing so, the court stated:

The draft is allegedly “procompetitive” in its effect on the playing field; but the NFL teams are not economic competitors on the playing field, and the draft, while it may heighten athletic competition and thus improve the entertainment product offered to the public, does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at lower cost. Because the draft’s “anticompetitive” and “procompetitive” effects are

likewise irrelevant.<sup>178</sup> Consequently, it is extremely unlikely that any court would find the WNBA policy yields any substantial procompetitive justification that offsets the age/education policy's clear anticompetitive effects.

### iii) Harm

¶64 The final factor in Rule of Reason analysis requires the plaintiff to show that the alleged anticompetitive conduct caused harm. In the context of labor-market antitrust claims, courts have recognized that a showing of harm in the labor market is sufficient, which essentially conflates this factor with the showing of a net anticompetitive effect. Here, the excluded prospective WNBA players, as well as the potential consumers of WNBA basketball games are harmed by the group boycott.

## 2. Non-Statutory Labor Exemption

¶65 Presuming a prospective plaintiff is able to make a prima facie case of an antitrust violation against the WNBA (irrespective if whether based on the per se test, full Rule of Reason, or quick-look), a court next considers whether the antitrust claim is barred by the non-statutory labor exemption.

¶66 For a court to find that the non-statutory labor exemption applies, that court would have to find *either* (1) that the defendant is able to meet each of the three prongs of the *Mackey* Test (mandatory subject of bargaining, primarily affecting the parties involved, reached though bona fide, arm's-length bargaining) *or* (2) that the agreement involved a mandatory subject of bargaining and that subjecting the WNBA's age/education policy to antitrust rules would somehow subvert fundamental principles of federal labor policy ("the *Clarett* Test").<sup>179</sup> The determination of which test applies depends entirely upon where the prospective plaintiff brings suit. The Supreme Court has not indicated which of these two tests is more appropriate, and it has failed to grant certiorari on this issue.<sup>180</sup>

### i) *Is the WNBA Age/Education Policy a Mandatory Subject of Bargaining?*

¶67 The first prong of both the *Mackey* and *Clarett* Tests addresses whether the WNBA age/education policy is a mandatory subject of bargaining. There is little doubt that irrespective of what test a court applies, a prospective plaintiff would be able to show that the WNBA age/education policy is a mandatory subject of bargaining.<sup>181</sup> Applying the *Mackey* Test, the age/education policy is a mandatory subject of bargaining because the age/education policy has a direct affect on the wages of excluded prospective league

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not comparable, it is impossible to "net them out" in the usual rule-of-reason balancing. The draft's "anticompetitive evils," in other words, cannot be balanced against its "procompetitive virtues," and the draft be upheld if the latter outweigh the former. In strict economic terms, the draft's demonstrated procompetitive effects are nil.

*Id.*; see also *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,461 (C.D. Cal. Feb. 28, 1984) (rejecting "on-field competitive balance among USFL teams" as a defense).

<sup>178</sup> See *Smith*, 593 F.2d at 1186; see also *Boris*, 1984-1 Trade Cas. (CCH) at 68,461 (rejecting defendants' arguments in favor of the age/education policy based on physical and emotional maturity).

<sup>179</sup> *Clarett v. Nat'l Football League*, 369 F.3d 124, 138 (2d Cir. 2004), *cert. denied*, 544 U.S. 961 (2005).

<sup>180</sup> The Supreme Court declined the opportunity to review this issue when it denied *Clarett's* petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Clarett v. Nat'l Football League*, 544 U.S. 961 (2005).

<sup>181</sup> Although the district court in *Clarett* did not find that an age/education policy was a mandatory term or condition of employment, the district court was flatly reversed.

entrants, while, applying the *Clarett* Test, the age/education policy is a mandatory subject of bargaining both because the policy has a tangible affect on wages, and because it is a condition for initial employment.

ii) *Does the WNBA Age/Education Policy Primarily Affect the Parties Involved?*

¶168 The second prong of the *Mackey* Test addresses whether the age/education policy primarily affects the parties involved; it is unclear whether this policy also applies under the *Clarett* Test.

¶169 Applying the *Mackey* Test, it is more likely than not that a court would find that the WNBA age/education policy primarily affects the parties involved because both of the parties involved (the WNBA and the boycotted player) are within the scope of the collective bargaining process, even though a prospective WNBA entrant does not have a voice in her union representation.<sup>182</sup> As explained by the Second Circuit Court of Appeals in *Clarett* (although it is not exactly clear if that court is incorporating the second prong of *Mackey* into its own test), a prospective professional athlete that is excluded from a sports league based on an age/education policy 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.”<sup>183</sup> Nevertheless, the fact that a prospective league entrant is not yet a union member creates at least the possibility that a court might interpret this prong as unmet.

iii) *Is the WNBA Age/Education Policy Reached Through Bona Fide Arm’s-Length Bargaining?*

¶170 The final prong of the *Mackey* Test addresses whether the alleged agreement was reached through bona fide arm’s-length bargaining. Under this policy, it is equally likely as not that a court would find the WNBA age/education policy is a product of bona fide, arm’s-length bargaining.<sup>184</sup> Presuming the court applies the *Mackey* Test, the main argument in favor of finding that the age/education policy is a product of arm’s-length bargaining is that the policy appears directly in the league collective bargaining agreement, which was signed by both the WNBA teams and the WNBPA.<sup>185</sup> However, the main argument against such a finding is that the WNBA enforced its age/education policy prior to the start of its collective bargaining relationship with the WNBPA, and the WNBPA did not obtain anything of value in exchange for allowing the WNBA teams to retain that policy.<sup>186</sup> As stated in case law: “The union’s acceptance of the status quo [under the circumstances] cannot serve to immunize [a purported agreement between a league and a players’ union] from scrutiny of the Sherman Act.”<sup>187</sup> Indeed, under the third prong of the *Mackey* Test, a court may find the age/education policy is not immune

<sup>182</sup> See generally *Mackey v. National Football League*, 543 F.2d 606, 615-16 (8th Cir. 1976).

<sup>183</sup> *Clarett*, 369 F.3d at 141.

<sup>184</sup> See *Mackey*, 543 F.2d at 615-16.

<sup>185</sup> See WNBA Collective Bargaining Agreement, Art. XIII, *supra* note 100, at 52.

<sup>186</sup> See *Mackey*, 543 F.2d at 616 (explaining that based on the court’s independent review of the record, including the parties’ bargaining history, there was not substantial evidence to support a finding of bona fide, arm’s-length bargaining over the NFL’s Rozelle Rule preceding the execution of the 1968 and 1970 collective bargaining agreements, because the Rozelle Rule, which governs league free agency, “imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963.”).

<sup>187</sup> *Id.*

from antitrust scrutiny based on the following evidence: (1) the WNBA unilaterally enforced its age/education policy prior to the formation of a players' union; (2) the age/education policy was unaltered during any of the subsequent collective bargaining processes; (3) no evidence exists that the WNBPA received anything of value in exchange for consenting to the age/education policy; and (4) as compared with other professional sports bargaining relationships, female athletes have traditionally struggled with substantially lower bargaining power than males, as indicated by their substantially lower salaries and inferior conditions of employment.<sup>188</sup>

¶71 Analysis of whether the age/education policy was reached through bona fide, arm's-length bargaining is entirely irrelevant if the court applies the *Clarett* Test.

#### IV. ANALYZING THE SOCIAL IMPACT OF THE WNBA AGE/EDUCATION POLICY

¶72 Because antitrust law seeks to address economic issues and not social policy, even if the WNBA age/education policy were to withstand antitrust scrutiny, the policy still results in substantial social harm (and vice versa).

¶73 From an empirical perspective, research into the correlation between academic experience and life success has yielded mixed results about the value of an age/education policy in professional sports. A recent study performed by sports law professor Michael McCann indicates that when men's professional basketball players attend college for any length of time, these athletes become more (rather than less) likely to incur legal trouble later in life.<sup>189</sup> Meanwhile, a different study performed by Dr. Leo Lewis, a former professional football player and current associate athletic director at the University of Minnesota, indicates that more educated NFL football players are less likely to be involved in negative activities.<sup>190</sup> Recognizing that these research studies provide mixed reviews about the value of an age/education requirement, it becomes important to evaluate the WNBA age/education policy along an even broader range of criteria, which reveals additional benefits and additional harms.

##### A. *Social Benefits of the WNBA Age/Education Policy*

¶74 Antitrust issues aside, there are three social benefits to the WNBA age/education policy. First, the WNBA age/education policy has facilitated the perception of WNBA players as both scholars and athletes, and therefore also as role models.<sup>191</sup> Hence, their image is one of synergy between academics and athletics.<sup>192</sup> Indeed, one of the missions

<sup>188</sup> See *id.* at 615-16 (finding that there was no bona fide, arm's-length bargaining over the Rozelle Rule preceding the execution of the 1963 and 1970 collective bargaining agreements because (1) the rule imposed significant restrictions on players, (2) the rule remained unchanged in collective bargaining from the time it was unilaterally imposed by the league, and (3) the rule was not accepted by the players union as part of a quid pro quo).

<sup>189</sup> See Michael McCann, *NBA Players That Get In Trouble With the Law: Do Age and Education Level Matter?* SPORTS LAW BLOG, July 20, 2005, [http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with\\_20.html](http://sports-law.blogspot.com/2005/07/nba-players-that-get-in-trouble-with_20.html) (McCann performed his research by looking at arrest propensity among NBA players, controlling for age and level of education among arrested players).

<sup>190</sup> See Leo Lewis & Roger Harrold, 2003 Player Development Survey Report 45 (2004) (unpublished manuscript, on file with authors) (noting the positive effects of securing an education, such as gaining career mobility options).

<sup>191</sup> Earl Smith & Angela Hattery, *African American Community: The Dynamics of Race, Class, Gender, and Community*, in *DIVERSITY AND SOCIAL JUSTICE IN COLLEGE SPORTS: SPORT MANAGEMENT AND THE STUDENT ATHLETE* 390-91 (Dana D. Brooks & Ronald C. Althouse eds., 2007).

<sup>192</sup> Linda Sheryl Green & Tina Sloan-Green, *Beyond Tokenism to Empowerment: The Black Women in*

behind the WNBA is to encourage American girls to explore athletic opportunities.<sup>193</sup> However, another mission of society is to encourage girls to pursue educational opportunities, especially in light of the fact that education was for years denied to women.<sup>194</sup> By maintaining a graduation policy for WNBA players, “the league promotes a message that not only can females excel in athletics, but also that females can excel academically.”<sup>195</sup> Some professional women’s basketball players find this mission especially important.<sup>196</sup> For example, when University of Tennessee basketball superstar Chamique Holdsclaw decided she would not be the first to challenge the age/education policy in women’s basketball, she did so because she wanted to act in a manner that she believed showed leadership to young women.<sup>197</sup> In a March 1998 article published in the *St. Louis Post-Dispatch*, Holdsclaw was quoted as stating, “I really want to see these young women set goals. And I want one of those goals to be to get that degree.”<sup>198</sup> In an era where so many female celebrities receive media attention for misconduct, the current structure of the WNBA provides young women with more positive alternatives as role models.<sup>199</sup>

¶75

Second, the WNBA age/education policy helps to prepare its players for non-basketball careers upon personal retirement or league dissolution. Preparing for post-basketball careers is arguably more important for women’s basketball players than for those athletes in the men’s professional sports leagues because WNBA players earn substantially lower salaries than those playing in the four premier men’s leagues.<sup>200</sup> Although there is no actual barrier that prevents a prospective women’s basketball player from attending college either during or after her professional career, there is an argument that attending college later in life, when responsibilities are greater, would add constraints for these women not found in the traditional college experience.<sup>201</sup> Also, many women that plan to attend college later in life ultimately find it difficult or impossible to do so.<sup>202</sup>

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*Sport Foundation*, in DIVERSITY AND SOCIAL JUSTICE IN COLLEGE SPORTS: SPORT MANAGEMENT AND THE STUDENT-ATHLETE 314-27 (Dana D. Brooks & Ronald C. Althouse eds., 2007).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Harrison, *supra* note 10, at 12.

<sup>196</sup> See *Raising the Roof: Seven Athletes for the 21st Century* (ABC television broadcast Feb. 4, 2000) (on file with authors).

<sup>197</sup> See Holland, *supra* note 98.

<sup>198</sup> *Id.*

<sup>199</sup> For examples of recent media attention surrounding female celebrities in trouble with the law, including the drug use and drunk driving of young female celebrities Paris Hilton, Lindsay Lohan, Nicole Richie, and Britney Spears, see, e.g., Sean Smith, *Summer of Scandal!*, ENTERTAINMENT WEEKLY, Aug. 31, 2007, at 18; *At a Glance: Outcomes of Recent Celebrity DUI Cases*, CINCINNATI POST, Aug. 25, 2007, at 8B; *Are Media Icons the Wrong Role Models?*, BRAY PEOPLE (Ireland), Aug. 23, 2007, at General News Section. For a more promising article, indicating that not all girls want to emulate these negative role models, see, e.g., Rose Mary Reiz & Chad Swiatecki, *Bad Girls: Whatcha Gonna Do? Area Teens Say They Don’t Look Up to Starlets with Bad Reps*, FLINT J., Aug. 12, 2007, at G1.

<sup>200</sup> In 2006, the average WNBA salary was \$50,000 per year, with a rookie salary minimum of \$31,800 and star players earning about \$90,000. Melissa Isaacson, *Promotions in Motion: WNBA Athletes Do More than Play: They Also Sell the League*, CHI. TRIB., May 17, 2006, at Sports 8. By contrast, at the time of the *Clarett* lawsuit, the NFL rookie salary minimum was \$225,000 per year and the average NFL player earned \$1,258,800 per season. See *Clarett v. Nat’l Football League*, 306 F. Supp.2d 379, 383 (S.D.N.Y. 2004). Meanwhile, the NBA rookie minimum in 2006 was nearly \$400,000 per year and the league average was \$4,500,000. See Isaacson, *supra* note 200.

<sup>201</sup> See ALEXANDER ASTIN, WHAT MATTERS IN COLLEGE? 15-16 (1993).

<sup>202</sup> See generally CAROLINE SOTELLO VIERNES TURNER, FACULTY OF COLOR IN ACADEME, BITTERSWEET

Former Pennsylvania State University men's basketball coach Jerry Dunn therefore argues that the real problem with college athletes entering the professional ranks early is that these athletes are surrendering a one-time opportunity:

They're completely skipping a part of their lives they can never get back. All of a sudden you can't turn back, and the responsibilities become greater. They're skipping the basic foundation they need to take care of themselves and their families for the rest of their lives.<sup>203</sup>

¶76

A third advantage of the current WNBA age/education policy is simplicity. Although imperfect, age has been used throughout history as a reasonable proxy for maturity and ability, and maturity is often used as a proxy for emotional readiness to compete in professional sports.<sup>204</sup> Although age does not tell anything about a specific person, it indicates certain societal assumptions.<sup>205</sup> For example, one must be eighteen years old to vote.<sup>206</sup> This does not mean that a person younger than eighteen years old cannot be precocious enough to cast a meaningful ballot;<sup>207</sup> however, from a legal, practical, and ethical perspective, society cannot evaluate each potential voter individually, so society accepts age as a proxy.<sup>208</sup> Although sometimes it is frustrating to live in a world where decisions about people are made through generalizations about immutable characteristics such as age, if the WNBA were instead required to make a league-wide assessment about each potential league entrant on a case-by-case basis, doing so would lead to additional legal challenges about the merits of specific decisions.<sup>209</sup> As a result, a bright-line rule that a potential league entrant must have at least a minimum age or education level might be reasonable, assuming of course that maturity is an important characteristic for a female pro-basketball player to have.

#### *B. Social Harms from the WNBA Age/Education Policy*

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Despite the three purported advantages of the current policy, there are also social harms inherent in the requirement that prospective professional women's basketball players wait until reaching a certain age or education status before entering the league. First, the WNBA policy prevents adult women from making their own choices between college and professionalism. By limiting women basketball players' right to choose between education and career opportunities, these women's individual interests are subordinated to society's will. Moreover, because the WNBA has a monopoly over American women's professional basketball opportunities, by denying young women the opportunity to enter the WNBA draft, the WNBA denies them the opportunity to play professional basketball in any capacity in the United States, as there are no other professional women's leagues available to them.<sup>210</sup>

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SUCCESS (1999).

<sup>203</sup> See McCann, *supra* note 121, at 174.

<sup>204</sup> McCann & Rosen, *supra* note 105, at 750 (quoting Michael McCann).

<sup>205</sup> *Id.*

<sup>206</sup> U.S. CONST. amend. XXVI.

<sup>207</sup> McCann & Rosen, *supra* note 105, at 750-51 (quoting Michael McCann).

<sup>208</sup> *Id.* at 750.

<sup>209</sup> *Id.* at 750-51.

<sup>210</sup> See Evans, *supra* note 171.

¶78 Second, the WNBA policy inhibits young women from securing financial independence.<sup>211</sup> The WNBA minimum starting salary is \$32,400.<sup>212</sup> While \$32,400 in today's economy is not a huge amount of money, that income is sufficient to allow a young woman to independently support herself. By denying young, female basketball players the opportunity to pursue financial independence, these women remain monetarily tied to others, such as parents and, potentially, men.<sup>213</sup> Such an outcome is dangerous, especially in light of generations past, in which young women played a subservient role in society.<sup>214</sup> This outcome also defeats the argued purpose behind the age/education policy, which is to ensure players' independence and empowerment.

¶79 Third, the WNBA policy mandates that female basketball players develop their careers through the NCAA and higher education, an institution that profits from student-athletes' work-product.<sup>215</sup> An unavoidable consequence of the WNBA age/education policy is that many female basketball players, who otherwise would be eligible to earn a living playing professional basketball, are instead required to forego payment according to NCAA rules.<sup>216</sup> Even more troubling, women's basketball players are not permitted to enjoy the full college experience, as it is estimated that the average Division I varsity athlete spends at least forty hours per week practicing, lifting weights, attending team meetings, traveling and playing her sport.<sup>217</sup> With these policies in mind, although the NCAA claims to protect student-athletes from exploitation, many argue that the NCAA is really not helping the cause of young athletes.<sup>218</sup>

## V. CONCLUSION

¶80 There is a natural tension between the individual's right to earn wages as a professional athlete and the culture of athletes' socialization as student-athletes—a concept that boasts the highest ideals of intellectualism and athleticism in higher education, albeit at the “amateur” level. The WNBA presently has a policy that shapes the culture of their professional athletes as college graduates and mentors to youth that worship them. However, the question of whether this policy is legal, much less ethical, requires greater scrutiny.

¶81 From a legal perspective, determining whether the WNBA age/education policy is permissible boils down to a few simple questions about the applicable law. If a court were to apply the per se rule and the *Mackey* Test to the WNBA age/education policy, that court would probably find the age/education policy violates antitrust laws. However, if a court were to apply either the Rule of Reason or the *Clarett* Test, the WNBA age/education policy would more likely survive, especially if a court were to find that the market for women's basketball labor is global.

<sup>211</sup> Harrison, *supra* note 10, at 13.

<sup>212</sup> WNBA Collective Bargaining Agreement, Exhibit V, *supra* note 100, at 150 (2007 Rookie Salary Scale).

<sup>213</sup> Harrison, *supra* note 10, at 13.

<sup>214</sup> *See id.*

<sup>215</sup> *See* Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 MICH. J. L. REFORM 861, 871-77 (2002). At least one court has concluded that age/education policies principally serve as a response to demands made by NCAA athletic programs, rather than for any other bona fide reason. *See* Boris v. United States Football League, 1984-1 Trade Cas. (CCH) ¶ 66,012, at 68,462.

<sup>216</sup> *See* McCann & Rosen, *supra* note 105, at 748 (quoting Alan Milstein).

<sup>217</sup> McCann, *supra* note 121, at 174.

<sup>218</sup> *See* Edelman, *supra* note 215, at 872.

¶82 From an ethical perspective, while there are reasonable arguments on both sides, assessing the merits of the WNBA age/education policy requires answering the following two questions: (1) how does the WNBA age/education policy impact the cultural perception of academics and vocational mobility in a society that continues to value immediate versus delayed gratification; and (2) should societal goals, especially those that are not absolute, ever obligate an individual athlete to forego personal gratification based on the alleged positive externalities upon others? Once again, one could draw reasonable conclusions on either side of the issue, especially given the important role that Title IX and the collegiate athletic experience has played in fostering the emerging demand for women's professional sports.

¶83 Based upon the foregoing, it is clear that any analysis of the legal, ethical, and cultural issues involving the WNBA age/education policy must examine the positive, negative, and "gray area" outcomes of each suggested alternative. The challenge for our legal system then becomes how to continue to properly provide incentives for young female athletes to pursue advanced education without disturbing these athletes' personal autonomy and right to pursue independent financial interests.