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The NBA Gets a College Education: An Antitrust and the Labor Analysis of the NBA's Minimum Age Limit

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COMMENTS

THE NBA GETS A COLLEGE EDUCATION: AN ANTITRUST AND LABOR ANALYSIS OF THE NBA'S MINIMUM AGE LIMIT

"Would you deny someone like Tiger Woods, Alex Rodriguez or Venus and Serena Williams the chance to turn pro and earn a living before turning 20? No, because we live in America, and the right to do what you desire is one of the great gifts we have in this country. It's all about freedom, man!"[1]

- Dick Vitale

INTRODUCTION

In 1995, Kevin Garnett became the first basketball player drafted straight out of high school by a National Basketball Association (NBA) team in twenty years.[2] Professional scouts, coaches, and management considered Garnett a rare talent, possessing the physical maturity and skills necessary to begin playing professional basketball in the NBA immediately after graduating from high school.[3] Most American-born players are drafted only after playing in college, where they mature physically and mentally. Since 1995, however, the number of high school players drafted into the NBA has dramatically increased.[4] Some of those drafted, such as Garnett, excelled in the

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[1] Dick Vitale, *Don't Keep Best High Schoolers Out of NBA*, ESPN.COM, Apr. 26, 2005, http://espn.go.com/dickvitale/vcolumn050425_ageplan.html.

[2] Andy Katz, *CBA Discussions Coming Later This Summer*, ESPN.COM, June 24, 2004, http://sports.espn.go.com/nba/draft2004/news/story?id=1827134.

[3] Jack McCallum, *Hoop Dream; Kevin Garnett, A Sure-Shot Lottery Pick, Is Jumping From High School to the NBA*, SPORTS ILLUSTRATED, June 26, 1995, at 64.

[4] *See* Katz, *supra* note 2.

NBA, while others failed miserably and disappeared from the league.[5] To be eligible for the NBA draft during this period, an American player's high school class must have graduated; for foreign players, they must have turned eighteen prior to the draft. The NBA, however, made it clear in 2004 that it wanted to set a minimum age of twenty for draft eligibility.[6]

The NBA is a unionized league, with its players represented by the National Basketball Players Association (NBPA).[7] The NBA and NBPA negotiate terms of employment and memorialize those terms in a collective bargaining agreement (CBA); periodically, that CBA expires and is renegotiated. The NBA and NBPA negotiated a new CBA in 2005, with the NBA's proposed age limit being the most controversial and debated issue. The final agreement contained a new minimum age limit of nineteen, or one year removed from high school graduation.[8] This came on the heels of an antitrust suit against the National Football League (NFL) claiming the NFL's minimum age limit constituted a group boycott. In *Clarett v. National Football League*, the Second Circuit upheld the NFL's minimum age limit by granting the league antitrust immunity under the narrow nonstatutory labor exemption.[9] The NBA will similarly depend on the nonstatutory labor exemption if its minimum age limit faces an antitrust challenge.

This Comment looks at the historical relationship between antitrust law and the NBA and examines how the NBA's minimum age limit fares under antitrust scrutiny and the application of the nonstatutory labor exemption. Part I introduces the principles of antitrust law, the nonstatutory labor exemption, and the methods for analyzing antitrust claims and applying the nonstatutory labor exemption. Part II discusses some of the relevant antitrust claims filed against professional basketball leagues, providing an analogy for potential future claims

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[5] *See* Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 143-59 (2004) (providing an arguably generous classification of the success, or lack thereof, of players entering the NBA straight from high school); Michael Lee, *Pro Ball Calls, Not All Ready; Commissioner Tries To Slow High School Flow into NBA*, ATLANTA J.-CONST., June 20, 2004, at 1E (providing a brief comment on the success or failure of every high school player entering the league since 1995).

[6] Chad Ford, *Agents, Advisors Tell Teens To Declare*, ESPN.COM, Mar. 26, 2004, http://insider.espn.go.com/insider/story?id=1768727.

[7] *See* NBPA History, http://www.nbpa.com/history.php (last visited Jan. 21, 2006).

[8] The pertinent provision of the agreement states that a player shall be eligible for the entry draft when "[t]he player (A) is or will be at least 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player [...], at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school)." NBA-NBPA Collective Bargaining Agreement, art. X, § 1(b)(i) (2005).

[9] 369 F.3d 124 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1728 (2005).

against the NBA. Part III examines the recent district and appellate court decisions arising from Maurice Clarett's antitrust lawsuit against the NFL challenging the league's eligibility rule. Part IV explores the negotiations between the NBA and NBPA and analyzes the NBA's new minimum age limit under antitrust law and the nonstatutory labor exemption. This Comment concludes that the NBA's minimum age limit should be protected from an antitrust challenge by the nonstatutory labor exemption.

I. ANTITRUST AND THE NONSTATUTORY LABOR EXEMPTION

A. Antitrust and Professional Sports

Section 1 of the Sherman Act prohibits every contract, combination, or conspiracy in the restraint of trade or commerce among the states.[10] The Supreme Court noted that literal interpretation of the statute prohibits every restraint of trade, so the Court limited the Act's application to "unreasonable" restraints.[11] There are three analytical methods for determining the reasonableness of restraints: the rule of reason, per se illegal, and the "quick look."

1. The Rule of Reason

The rule of reason is the primary method of determining whether a restraint is reasonable. The rule of reason requires a court to find three factors for an antitrust violation: an actual agreement or conspiracy between competitors, the challenged restraint's adverse effect on or threat to competition in the relevant market, and that the anticompetitive effects of the restraint outweigh any pro-competitive justifications for the restraint.[12]

After a plaintiff proves the existence of an agreement, the second step requires a plaintiff to define the relevant market and show that the challenged action has an adverse effect on that market. The relevant market has two components: the product market and the geographic market. The product market is generally made up of products that are not only alike but reasonably interchangeable.[13] The product in professional sports leagues is the services of the players, who are the sellers, and those services are bought by the teams.[14] The geo-

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[10] 15 U.S.C. § 1 (2005).

[11] Standard Oil Co. v. United States, 221 U.S. 1, 86-92 (1911).

[12] Bd. of Trade v. United States, 246 U.S. 231, 239-41 (1918).

[13] United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 404 (1956).

[14] McCann, *supra* note 5, at 203 (citing E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 30 (1988)).

graphic market is the market in which a seller operates and a purchaser can look for the product.[15] A plaintiff alleging a group boycott, a typical claim arising from restraints in professional sports, must allege injury to the individual as well as to competition as a whole in the relevant market.[16] The plaintiff must also show that the defendant possesses "market power," that is, the "power to control prices or exclude competition."[17] The third step requires the court to balance the anticompetitive effects of the restraint with the pro-competitive justifications asserted by the defendant. Finally, if the court determines that the justifications outweigh the harmful effects, it must determine whether less restrictive means are available to accomplish the restraint's objective. If less restrictive means are available, the restraint may be found illegal.

2. Per Se Illegal

Some restraints, however, are deemed to have such predictable and pernicious anticompetitive effect that they are deemed per se violations of the Sherman Act.[18] The plaintiff must only show that a per se practice occurred and does not need to prove the unreasonableness of the restraint or define the relevant market and market power. Courts generally consider group boycotts or concerted refusals to deal to be per se violations, although the trend is shifting away from per se and towards rule of reason.[19]

There are some exceptions to practices that are normally considered per se violations. One pertinent exception arose from the Supreme Court's ruling in *NCAA v. Board of Regents* recognizing that some industries have unique characteristics requiring the use of trade restraints in order to maintain the industry's existence.[20] Within these industries, restraints that are normally per se illegal are analyzed using the rule of reason. The *NCAA* Court found that the NCAA (National Collegiate Athletic Association) is "an industry in which horizontal restraints on competition are essential if the product is to be

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[15] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961).

[16] Clarett v. NFL, 306 F. Supp. 2d 379, 405 (S.D.N.Y.), *rev'd*, 369 F.3d 124 (2d Cir. 2004).

[17] *Du Pont*, 351 U.S. at 391.

[18] N. Pacific v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."). Practices constituting per se violations include group boycotts, price fixing, market division, and tying arrangements. *Id.*

[19] *Id.*; Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) (stating that "[g]roup boycotts, or concerted refusals to deal . . . have long been held to be in the forbidden category").

[20] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

available at all."[21] The Court relied on one commentator's analysis of restraints on competition in sports leagues:

> [S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.[22]

Professional sports teams must mutually agree upon rules, thereby restraining the manner in which they compete.[23] Although these restraints may seem anticompetitive, the sports industry requires mutual agreements to preserve the integrity of the product and the restraints are viewed as pro-competitive because the preservation of the industry benefits consumers and athletes.[24]

3. "Quick Look" Analysis

The *NCAA* decision contributed to the emergence of an abbreviated or "quick look" analysis.[25] The quick look analysis is used when a restraint is not per se unlawful, but is sufficiently anticompetitive on its face that a full rule of reason analysis is not necessary. This allows a court to avoid the elaborate industry analysis required by the rule of reason.[26] The analysis presumes that the restraint is unreasonable. To rebut this presumption, a defendant must explain the reason for the restraint and illustrate that it is not anticompetitive. The burden then shifts to the plaintiff to show the anticompetitive effect. If that is demonstrated, the burden shifts back to the defendant to prove that there is an adequate pro-competitive justification for the restraint.[27] Courts are becoming more reluctant to consider group boycotts per se illegal, particularly in sports leagues, and are using the rule of reason or quick look analysis.[28] In the *Clarett* case, for example, Clarett and

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[21] *Id.* at 101.

[22] *Id.* (citing ROBERT H. BORK, THE ANTITRUST PARADOX 278 (1978)).

[23] *Id.*

[24] *Id.* at 102.

[25] *See* California Dental Ass'n v. FTC, 526 U.S. 756, 769-70 (1999) (noting that NCAA contributed to "what has come to be called abbreviated or 'quick-look' analysis").

[26] *Id.*

[27] *Id.* at 769-71.

[28] *See* Clarett v. NFL, 306 F. Supp. 2d 379, 405 (S.D.N.Y.), *rev'd*, 369 F.3d 124 (2d Cir. 2004) ("The Supreme Court has signaled its intent to move group boycotts off the short list of per se unreasonable conduct." (citing FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458-59 (1986); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 294 (1985); Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959))).

the NFL agreed that the rule of reason applied because the restraint arose in a sports league.[29]

B. The Nonstatutory Labor Exemption

Congress enacted labor statutes in an effort to prevent judicial use of antitrust law to resolve labor disputes.[30] Nonstatutory labor exemptions to antitrust law come from the Clayton Act, the Norris-LaGuardia Act, and the National Labor Relations Act.[31] The nonstatutory labor exemption grew out of the Supreme Court's interpretation of these statutes, which set forth a policy favoring free and private collective bargaining and requiring good faith bargaining over wages, hours, and conditions of employment with rulemaking and interpretive authority delegated to the National Labor Relations Board.[32] The exemption arose from interpretations "limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice."[33] The exemption "substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations" regarding the limits of industrial conflict.[34]

Labor law and collective bargaining would be ineffective if some restraints on competition were not shielded from antitrust law.[35] The nonstatutory labor exemption protects the national labor law scheme from being "virtually destroyed" by the routine imposition of antitrust penalties upon parties engaged in collective bargaining.[36] Labor law often welcomes anticompetitive agreements while antitrust law forbids them. As a result, the nonstatutory labor exemption insulates parties engaged in collective bargaining over wages, hours, and conditions of employment from judicial antitrust inquisitions. Allowing antitrust courts to intrude on the collective bargaining relationships "place[s] in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve."[37] The Eighth and Second Circuits differ on how to apply the nonstatutory labor exemp-

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[29] *Id.*

[30] Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996).

[31] Clayton Act, 15 U.S.C. §§ 12-37 (2005); Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (2005); National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69 (2005).

[32] *Brown*, 518 U.S. at 236-37.

[33] *Id.* (citing Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 709-10 (1965)).

[34] *Id.* at 237 (citing *Jewel Tea*, 381 U.S. at 709-10).

[35] *Id.* (finding that to "give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions").

[36] *Jewel Tea*, 381 U.S. at 711.

[37] *Brown*, 518 U.S. at 241.

tion, while the Supreme Court declined to adopt a specific test for its application.[38]

1. The Mackey *Test*

The Eighth Circuit formulated its test for the nonstatutory labor exemption in *Mackey v. National Football League*.[39] The plaintiff professional football players in *Mackey* claimed the NFL violated the Sherman Act by imposing the Rozelle Rule, which restricted the movement of players between teams. The players argued that the rule constituted an illegal combination and restraint of trade among teams by denying professional football players the right to freely contract for their services.[40] The district court agreed, finding that the nonstatutory labor exemption did not protect the NFL because the Rozelle Rule did not arise from collective bargaining.[41]

In affirming the district court's decision, the Eighth Circuit examined the relationship between labor and antitrust law, including the Supreme Court's decisions recognizing the nonstatutory labor exemption. From this, the court fashioned a three-pronged analysis for applying the exemption: First, the restraint must primarily affect only the parties to the collective bargaining relationship. Second, it must be a mandatory subject of collective bargaining. Third, it must arise out of bona fide arm's-length bargaining.[42]

The *Mackey* court found that although the Rozelle satisfied the first two prongs of the analysis, the exemption did not apply because the NFL did not show the rule to be a product of bona fide arm's length negotiating.[43] The court applied the rule of reason and found that the Rozelle Rule unreasonably restrained trade in violation of the Sherman Act.[44] The court rejected the NFL's pro-competitive justifications: competitive balance in the league, the investment made by NFL teams in scouting and drafting, the quality of play in the NFL, and the financial well-being of the NFL and its teams.[45] The Sixth and Ninth Circuits, along with the district court in *Clarett*, adopted the

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[38] *See Brown*, 518 U.S. 231; Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[39] 543 F.2d 606.

[40] *Id.* at 609.

[41] *Id.*

[42] *Id.* at 611-12, 614. (noting Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975); Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965)).

[43] *Id.* at 615-16.

[44] *Id.* at 622.

[45] *Id.* at 621.

Eighth Circuit's *Mackey* test, but it is not the only method for determining the application of the nonstatutory labor exemption.[46]

2. *The Second Circuit's Criteria for the Exemption*

The Second Circuit, disagreeing with the *Mackey* test, uses a different, less rigid analysis in applying the nonstatutory labor exemption. The Second Circuit's latest application of the nonstatutory labor exemption occurred in *Clarett v. National Football League.* In *Clarett*, the court explicitly rejected the *Mackey* test and declared that "the suggestion that the *Mackey* factors provide the proper guideposts . . . simply does not comport with the Supreme Court's most recent treatment of the nonstatutory labor exemption in *Brown v. Pro Football, Inc.*"[47]

The Second Circuit does not follow a defined test, but rather relies on balancing the conflicting policies embodied in labor and antitrust law, with labor law policies serving as the first point of reference.[48] In cases involving professional sports with collective bargaining, the court's threshold question is whether subjecting the issue to antitrust scrutiny would "subvert fundamental principles of our federal labor policy."[49] In practice, the Second Circuit applies the exemption when the restraint arises from a collective bargaining relationship, affects only the parties to that relationship, and is a mandatory subject of bargaining.[50]

3. *The Supreme Court's Application in* Brown v. Pro Football

The Supreme Court declined to adopt a specific test for applying the nonstatutory labor exemption when it considered the exemption's bearing on the NFL's collective bargaining relationship in *Brown v. Pro Football, Inc.*[51] The *Brown* Court stated that it did not interpret the exemption as broadly as the District of Columbia Court of Appeals, which "interpreted the labor laws as 'waiving anti-trust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a

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[46] Cont'l Maritime of S.F., Inc. v. Pac. Coast Metal Trades Dist. Council, Metal Trades Dept., AFL-CIO, 817 F.2d 1391 (9th Cir. 1987); McCourt v. Cal. Sports, Inc., 600 F.2d 1193 (6th Cir. 1979); Clarett v. NFL, 306 F. Supp. 2d 379, 405 (S.D.N.Y.), *rev'd*, 369 F.3d 124 (2d Cir. 2004).

[47] *Clarett*, 369 F.3d at 134.

[48] Local 210, Laborers' Int'l Union of N. Am. v. Labor Relations Div. Associated Gen. Contractors of Am., 844 F.2d 69, 79 (2d Cir. 1988).

[49] Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987); Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 527 (2d Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

[50] *Clarett*, 369 F.3d at 136-38.

[51] Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

labor market characterized by collective bargaining.'"[52] The Court recognized the importance of protecting the collective bargaining process from the inquiries of antitrust courts, as this is "the very result that the implicit nonstatutory labor exemption seeks to avoid."[53] The Court noted the tension between labor and antitrust law; while antitrust law prohibits almost all unreasonable restraints of trade, labor law "sometimes welcomes anticompetitive agreements conducive to industrial harmony."[54]

The *Brown* Court rejected the players' four proposals for limiting the exemption. The first proposal argued that the exemption should only apply to actual CBAs, but the Court stated that this did not reflect the rationale of the exemption. The second proposal argued that the exemption should terminate at the point of the impasse in negotiations or a reasonable time thereafter. The Court disagreed, finding that labor law permits employers to "engage in considerable joint behavior" after impasse, including lockouts, replacement hiring, negotiating separate agreements with the union, implementing the final offer, or maintaining the status quo.[55] The third proposal, also rejected by the Court, would exempt a "postimpasse agreement about bargaining 'tactics,' but not [a] postimpasse agreement about substantive 'terms.'"[56] The fourth proposal argued that professional sports are "special" in respect to labor law's antitrust exemption.[57] While acknowledging that professional sports depend on a degree of cooperation to survive, the Court found that to be an irrelevant distinction for fashioning a special labor law exemption from antitrust liability.[58]

The nonstatutory labor exemption covered the NFL's conduct in *Brown* because the conduct "took place during and immediately after a collective-bargaining negotiation," related to and grew out of "the lawful operation of the bargaining process," involved a subject "that the parties were required to negotiate collectively," and "concerned only parties to the collective-bargaining relationship."[59] The nonstatutory labor exemption does not protect all such agreements; rather, the Court stated that "an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would

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[52] *Id.* at 235 (citing Brown v. Pro Football, Inc., 50 F.3d 1041, 1056 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996)).

[53] *Id.* at 240-41.

[54] *Id.* at 241.

[55] *Id.* at 245.

[56] *Id.* at 247.

[57] *Id.* at 248.

[58] *Id.* at 248-49.

[59] *Id.* at 250.

not significantly interfere with that process."[60] The Court declined to decide where "to draw the line," acquiescing to Congress's intent to leave that decision to the National Labor Relations Board.[61] The *Brown* Court's decision not to adopt the *Mackey* test or to define the boundaries of the exemption casts doubt on whether the *Mackey* test is the appropriate means of determining the applicability of the non-statutory labor exemption.

II. ANTITRUST AND PROFESSIONAL BASKETBALL ASSOCIATIONS

"My position is to let in anybody who is good enough to play."[62]
- Spencer Haywood

A. Haywood and the NBA

The NBA is no stranger to players challenging its eligibility requirements under the Sherman Act. Spencer Haywood brought the first antitrust challenge to an NBA eligibility rule in 1971.[63] At the time, the NBA required that an amateur must be four years removed from high school prior to entering the league's draft.[64] The NBA instituted the bylaw as a self regulatory measure, not as part of a CBA with the NBPA.[65]

Haywood attempted to enter the NBA three years following his graduation from high school.[66] The NBA Commissioner rejected Haywood's contract, so Haywood filed a claim against the NBA seeking a preliminary injunction allowing him to enter the league. The claim asserted that the NBA eligibility bylaw constituted a group boycott by the NBA and its member teams in violation of section 1 of the Sherman Act.[67] The district court granted Haywood's motion, finding a "substantial probability" that the NBA eligibility bylaw constituted a group boycott, a per se violation of the Sherman Act.[68] The Ninth Circuit stayed the injunction, but Supreme Court Justice Doug-

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[60] *Id.*

[61] *Id.* (expressing its reluctance to set guidelines "without the detailed views of the [National Labor Relations] Board, to whose 'specialized judgment' Congress 'intended to leave' many of the 'inevitable questions concerning multiemployer bargaining bound to arise in the future'" (citing NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957))).

[62] Milan Simonich, *Young Pros Owe Spencer Haywood Large Vote of Thanks*, PITTSBURGH POST-GAZETTE, Nov. 28, 2003, at C-1.

[63] Denver Rockets v. All-Pro Mgmt, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

[64] *Id.* at 1060.

[65] *Id.* at 1059.

[66] *Id.* at 1052, 1054.

[67] *Id.* at 1054, 1057, 1059-60.

[68] *Id.* at 1056.

las reinstated it.[69] Justice Douglas distinguished professional basketball from professional baseball, as baseball enjoys greater exemption from antitrust law than other sports as a result of Supreme Court rulings and congressional protection.[70]

On remand, the district court determined that the NBA bylaws violated the Sherman Act.[71] The court found that the Act applied because the NBA engaged in interstate commerce and the agreement between teams constituted a sufficient contract and combination.[72] The court began by describing that the exception to per se group boycott analysis carved out by *Silver v. New York Stock Exchange*,[73] applied when: there is a legislative mandate for self-regulation within the industry; the collective action is intended to accomplish an end consistent with the policy justifying self-regulation, is reasonably related to that goal, and is no more restrictive than necessary; and the association provides procedural safeguards to assure that the restraint is not arbitrary and to furnish the basis for judicial review.[74] The *Denver Rockets* court found that the NBA eligibility bylaw failed the second and third prongs of *Silver*: the bylaw was overly broad in light of the proffered goals and there were no procedural safeguards enabling a player to petition the NBA.[75]

The court concluded by examining the justifications for the eligibility rule. The NBA contended that the purpose of the bylaws removed the restraints from normal antitrust coverage.[76] The NBA argued that the bylaw was "financially necessary to professional basketball as a business enterprise" and "necessary to guarantee that each prospective basketball player will be given the opportunity to complete four years of college prior to beginning his professional basketball career."[77] Haywood suggested that the rule enabled the NBA to use college to efficiently train young basketball players without having to pay the costs associated with creating its own minor league system.[78] According to the court, none of the NBA's justifica-

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[69] Haywood v. NBA, 401 U.S. 1204 (1971).

[70] *See* Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922) (holding that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws); Toolson v. N.Y. Yankees, 346 U.S. 356 (1953) (declining to overrule *Federal Baseball Club* absent congressional action).

[71] *Denver Rockets*, 325 F. Supp. at 1067.

[72] *Id.* at 1062.

[73] 373 U.S. 341 (1963).

[74] *Denver Rockets*, 325 F. Supp at 1064-65.

[75] *Id.* at 1066.

[76] *Id.*

[77] *Id.*

[78] *Id.*

tions provided a basis for antitrust exemption.[79] Following the ruling, the NBA created a hardship rule which allowed players demonstrating an economic hardship to circumvent the eligibility requirements and enter the league as early as their graduation from high school.

B. Wood, Williams, Caldwell, and the Nonstatutory Labor Exemption

1. Leon Wood and the NBA

Leon Wood filed suit against the NBA and its member teams in 1984 following the league's draft.[80] The league's CBA imposed a salary cap for teams, and the team that drafted Wood, the Philadelphia 76ers, did not have enough cap room to offer Wood a long-term contract at a salary comparable to other draft picks.[81] Wood sought a preliminary injunction restraining enforcement of the CBA so that he could negotiate with teams other than Philadelphia, which under the agreement controlled exclusive rights to sign Wood.[82] Wood argued that the salary cap and draft provisions were the product of an agreement among the NBA teams, as horizontal competitors, to eliminate competition for the services of college basketball players, constituting a per se violation of the Sherman Act.[83] The district court found that the challenged provisions of the CBA were shielded from antitrust liability by the nonstatutory labor exemption.[84] The court relied on the fact that the provisions affected "only the parties to the collective bargaining agreement—the NBA and the players—involve mandatory subjects of bargaining as defined by federal labor laws, and are the result of bona fide arm's-length negotiations."[85]

The Second Circuit affirmed the district court's application of the nonstatutory labor exemption. The court acknowledged that the challenged provisions would have been illegal had they been "agreed upon by the NBA teams in the absence of a collective bargaining relationship"; however, their embodiment within a CBA exempted them from antitrust scrutiny.[86] The court discussed the nature of professional sports as a business and professional sports teams as employers and the necessary arrangements specific to CBAs in sports and other industries:

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[79] *Id.*
[80] Wood v. NBA, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).
[81] *Wood*, 809 F.2d at 958.
[82] *Id.*
[83] *Wood*, 809 F.2d at 958.
[84] *Wood*, 602 F. Supp. at 528.
[85] *Id.*
[86] *Wood*, 809 F.2d at 959.

> The issues of free agency and entry draft are at the center of collective bargaining in much of the professional sports industry. It is to be expected that the parties will arrive at unique solutions to these problems in the different sports both because sports generally differ from the industrial model and because each sport has its own peculiar economic imperatives. The NBA/NBPA agreement is just such a unique bundle of compromises.[87]

The court also rejected Wood's claim that he fell outside of the bargaining unit as a potential employee, citing several cases determining that potential or prospective employees are included within the definition of employee in a bargaining relationship.[88] The court ruled in favor of the NBA "because no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy."[89]

2. *Charles Williams and the NBA*

In *NBA v. Williams*, the Second Circuit addressed the application of the nonstatutory labor exemption to the bargaining relationship between the NBA and NBPA once the CBA expired.[90] Charles Williams and a class of players asserted that by continuing its imposition of the salary cap, right of first refusal, and draft provisions of the CBA after its expiration, the NBA teams acted as a cartel and committed a per se violation of the Sherman Act.[91] The NBA countered that, in the absence of an agreement, it merely maintained the status quo and the nonstatutory labor exemption protected its policies.

The Second Circuit affirmed, finding that Congress never intended the antitrust laws to subvert multiemployer bargaining and that the Supreme Court upheld multiemployer bargaining "on the ground that Congress expressly considered its propriety and resolved that it

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[87] *Id.* at 961.

[88] *Id.* at 960 (citing Reliance Ins. Co. v. NLRB, 415 F.2d 1, 6 (8th Cir. 1969) (stating that job applicants are employees within the meaning of 29 U.S.C. § 152(3)); Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959) (finding that job applicants are employees); John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951) (finding that job applicants are employees); Houston Chapter, Associated Gen. Contractors of Am., Inc., 143 N.L.R.B. 409, 412, *enforced*, 349 F.2d 449 (5th Cir. 1965) ("'[E]mployment' connotes the initial act of employing as well as the consequent state of being employed."); *see also* McCann, *supra* note 5, at 197-98 (discussing how courts interpret "employee" to include potential employees in the bargaining unit and how collective bargaining is allowed to adversely affect the employment conditions of prospective employees).

[89] *Wood*, 809 F.2d at 959.

[90] NBA v. Williams, 45 F.3d 684 (2d Cir. 1995).

[91] *Id.* at 687.

should be allowed."[92] The court agreed with the Eight Circuit's holding that the nonstatutory labor exemption "precluded an antitrust challenge to various terms and conditions of employment implemented after impasse" in a collective bargaining session following expiration of a previous agreement.[93] In so agreeing, the court noted "that application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it."[94]

3. Joe Caldwell and the ABA

In 1995, the Second Circuit again relied on the nonstatutory labor exemption to bar antitrust claims against the American Basketball Association (ABA).[95] Joe Caldwell had a contract dispute with his team that ultimately led to his lawsuit against the league. Caldwell asserted that the ABA and its teams participated in a group boycott or a concerted refusal to deal.[96] In dismissing Caldwell's claim, the district court did not find a concerted refusal to deal, but made a finding of fact that Caldwell did not receive another offer from an ABA team because of his recent history of injuries and decline in ability.[97] The Second Circuit affirmed the district court's decision, stating that it would presume such conduct to be illegal absent the presence of a collective bargaining relationship, but that in this case, the claims were barred by the exemption.[98] According to the court, "Caldwell's antitrust claims would 'subvert fundamental principles of federal labor policy.'"[99] The court, therefore, applied the exemption and dismissed Caldwell's claims under the same reasoning it expressed in *Wood* and *Williams*.

III. MAURICE CLARETT AND THE NFL

The NFL recently successfully defended its eligibility rules in *Clarett v. NFL*.[100] The NFL rule effectively requires that a player seeking entry into the league be at least three years removed from the graduation of his high school class.[101] Clarett challenged the rule on

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[92] *Id.* at 691 (citing NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen Case), 353 U.S. 87, 95-96 (1957)).

[93] *Id.* at 692-93 (citing Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989)).

[94] *Id.* at 693.

[95] Caldwell v. Am. Basketball Ass'n, 825 F. Supp. 558 (S.D.N.Y. 1993), *aff'd*, 66 F.3d 523 (2d Cir. 1995).

[96] *Id.* at 564.

[97] *Id.* at 570.

[98] *Caldwell*, 66 F.3d at 527.

[99] *Id.* (quoting Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987)).

[100] Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004).

[101] Clarett v. NFL, 306 F. Supp. 2d 379 (S.D.N.Y.), *rev'd in part, vacated in part*, 369 F.3d

antitrust grounds. The district court concluded that the nonstatutory labor exemption did not shield the rule from antitrust laws and that the rule violated the Sherman Act.[102] The Second Circuit disagreed, applying the nonstatutory labor exemption.[103] These rulings represent the most recent and accurate analogies to a potential challenge to the NBA's age limit under antitrust and labor law.

A. The District Court Sacks the NFL's Eligibility Rule

Clarett sought entry into the NFL approximately two years following the graduation of his high school class.[104] Clarett wanted to enter the NFL after two seasons at Ohio State University. Clarett played his freshman year but sat out his sophomore year as a result of an NCAA and university imposed suspension. Because Clarett did not meet the NFL's eligibility requirements, he sued, claiming that that rule constituted a group boycott in violation of section 1 of the Sherman Act.[105]

The district court began by considering whether the nonstatutory labor exemption shielded the eligibility rule from antitrust law using the *Mackey* test.[106] The court first determined that the rule did not address a mandatory subject of collective bargaining, thus failing the second prong of the *Mackey* test.[107] The court stated that the rule did not mention wages, hours, or conditions of employment, and its effect made a class of potential players unemployable.[108] Because the rule related to the unemployable class of players and not those who were employed or eligible for employment, the court found that it did not concern wages, hours, and conditions of employment in the NFL.[109]

In the court's view, the rule also failed *Mackey's* first prong because it "*only* affects players, like Clarett, who are complete strangers to the bargaining relationship."[110] Although the nonstatutory labor exemption applies to potential employees, the court distinguished Clarett's situation because the rule excluded him from employment. The court stated that because "those who are categorically denied eligibility for employment, even temporarily, cannot be bound by the

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124 (2d Cir. 2004).

[102] *Id.* at 410.

[103] *Clarett*, 369 F.3d 124.

[104] *Clarett*, 306 F. Supp. 2d at 388 n.55.

[105] *Id.* at 390.

[106] *Id.* at 391.

[107] *Id.* at 393.

[108] *Id.*

[109] *Id.*

[110] *Id.* at 395.

terms of employment they cannot obtain," the exemption cannot apply to the NFL's eligibility rule.[111]

Finally, the court found that the NFL's eligibility rule also failed *Mackey's* third prong. The NFL's CBA did not contain the eligibility rule; it existed only in the NFL Bylaws.[112] Although the CBA referenced the NFL's Constitution and Bylaws, the court found that the NFL "failed to demonstrate that the Rule evolved from arm's-length negotiations" between the NFL and its players union.[113]

After concluding that the nonstatutory labor exemption did not apply, the court moved on to an antitrust analysis of the NFL's eligibility rule. Although Clarett alleged a group boycott, normally considered a per se violation, the court applied the rule of reason "because the challenged restraint arises in the context of a sports league."[114] Rather than use the traditional rule of reason, however, the court applied a "quick look" analysis because of the rule's obvious anticompetitive effects.[115] The court followed the Supreme Court's determination that a quick look "is appropriate where 'the great likelihood of anticompetitive effects can easily be ascertained,' and 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect.'"[116] The court found that Clarett established a prima facie antitrust violation because of the eligibility rule's "anticompetitive effect of excluding players" from the NFL.[117]

The NFL offered four pro-competitive justifications, none of which the court accepted as reasonable justifications under the antitrust laws. First, the NFL claimed that the rule protected less physically and psychologically mature athletes from heightened risks of injury.[118] Second, the NFL cited its goal of protecting the NFL's entertainment product from the adverse consequences of such injuries.[119] Third, the NFL wanted to protect its teams from the costs and liabilities associated with those injuries.[120] Finally, the NFL claimed that the rule protected adolescents from injury and self-abuse associated with the use of steroids by those who seek to prematurely de-

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[111] *Id.* at 396.
[112] *Id.* at 385.
[113] *Id.* at 396.
[114] *Id.* at 405.
[115] *Id.* at 408.
[116] *Id.* at 407-08 (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999)).
[117] *Id.* at 408.
[118] *Id.*
[119] *Id.*
[120] *Id.*

velop the strength and speed required to play in the NFL.[121] The court rejected all of these justifications as having "nothing to do with promoting competition."[122] Even if the NFL had presented a procompetitive justification, the court mentioned that there are less restrictive alternatives that satisfy the NFL's chief concern that younger players are not mentally or physically ready to play in the NFL.[123] Therefore, the NFL's eligibility rule constituted an unreasonable restraint of trade.

B. The Second Circuit Punts the District Court's Decision

The Second Circuit reversed, finding that the nonstatutory labor exemption applied and shielded the rule from antitrust scrutiny. The court stated that it "never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption."[124] The court instead relied on its decisions in *Caldwell*, *Williams*, and *Wood* to determine that the nonstatutory labor exemption applied to the NFL's eligibility rule.[125] The court also looked to the Supreme Court's decision in *Brown*, which relied on similar reasoning in applying the nonstatutory labor exemption.[126] The court regarded its own prior decisions as controlling authority because they "fully comport—in approach and result—with the Supreme Court's decision in *Brown*."[127]

The Second Circuit began with the threshold question it raised in *Wood*: "whether subjecting the NFL's eligibility rules to antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'"[128] The court answered that question affirmatively, applying the nonstatutory labor exemption for several reasons. First, the court examined the collective bargaining relationship between the NFL and its players union and noted, as it had in its previous cases, that the relationship altered the "governing legal regime" between the parties. Further, the terms and conditions of employment were committed to the bargaining table, with negotiation reserved to representatives of the league and its union.[129]

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[121] *Id.*
[122] *Id.*
[123] *Id.* at 410.
[124] Clarett v. NFL, 369 F.3d 124, 133 (2d Cir. 2004).
[125] *Id.* at 134-35.
[126] *Id.* at 135.
[127] *Id.* at 138.
[128] *Id.* (quoting Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987)).
[129] *Id.* at 137-39.

Second, the court found that the eligibility rules were a mandatory subject of collective bargaining. First, the eligibility rules represented a "literal condition for initial employment."[130] Second, the rules "have tangible effects on the wages and working conditions of current NFL players."[131] In determining this, the court analyzed the complex scheme of NFL salaries and how that scheme is based on the restraint for entering players and the expected longevity of NFL players.[132] As a result, the court looked at the eligibility rules in light of the other collectively bargained-for terms regarding wages and working conditions and concluded that elimination of the rules "might well alter certain assumptions underlying the collective bargaining agreement."[133] The court based this conclusion on the relationship between the eligibility rules and the rest of the bargaining agreement. Finally, the court noted that the eligibility rules afforded job security to veteran players, and that preservation of jobs is within union concern.[134]

The Second Circuit rejected Clarett's claim that the eligibility rules were impermissible bargaining subjects because they affected players outside of the union. The court compared Clarett's situation to "union demands for hiring hall arrangements that have long been recognized as mandatory subjects of bargaining."[135] In this sense, the NFL and its players union have the authority to determine the conditions under which prospective players, such as Clarett, will be considered for employment.[136]

Clarett argued that the rules were arbitrary and did not relate to his ability to play professional football. The court, however, found that Clarett's situation did not differ from a worker who lacks the basic requirements for employment.[137] The court further stated that the NFL and its union "can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever, so long as they do not violate federal [labor] laws."[138]

Clarett also argued that the NFL teams violated antitrust law by agreeing amongst themselves to impose the eligibility restrictions. In rejecting this argument, the court examined the relationship between the NFL and concluded that in the context of collective bargaining, labor law permits the NFL teams to act "as a multi-employer bargain-

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[130] *Id.* at 139.
[131] *Id.* at 140.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 140-41.
[136] *Id.* at 141.
[137] *Id.*
[138] *Id.*

ing unit in structuring the rules of play and setting the criteria for player employment."[139] In professional sports, this form of bargaining offers the advantage of allowing teams to agree with one another and then collectively bargain with the union over the rules and requirements of the association.[140] The Second Circuit concluded by noting that even though the eligibility rules were not expressed within the bargaining agreement, the agreement made clear reference to the rules and the union knew of their existence in the NFL's Constitution and Bylaws.[141] The rules were a mandatory bargaining subject and either the union or the NFL could have forced the other side to bargain if they desired a change.[142] Consequently, the court determined that the rules were part of the CBA and fell under the protection of the nonstatutory labor exemption.[143]

IV. THE NBA'S MINIMUM AGE LIMIT UNDER ANTIRUST LAW AND THE APPLICABILITY OF THE NONSTATUTORY LABOR EXEMPTION

"I would say [union director] Billy Hunter made a smart move if he did indeed raise it."[144]
- Spencer Haywood

Heading into the negotiations for the new CBA, NBA Commissioner David Stern advocated setting a minimum age limit of twenty-years-old for players wishing to enter the NBA draft.[145] Stern cited a desire to protect younger players, stating that "there are going to be more difficult times for kids as more and more come."[146] Meanwhile, the NBPA's executive director, Billy Hunter, emphatically proclaimed the union to be "adamantly against an age limit" and "holding the line" for recent high school graduates eager to enter the NBA draft.[147] Some within the union, however, supported an age limit, including vice president and NBA player Antonio Davis. Davis voiced his support for an age limit based on seeing "[players] needing maturity, [players] needing some years to learn professionalism."[148] Even Spencer Haywood, the man responsible for the successful challenge

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[139] *Id.*
[140] *Id.*
[141] *Id.* at 142.
[142] *Id.*
[143] *Id.*
[144] *Haywood: Age Limit 'Would Give Players Time To Mature,'* ESPN.COM, May 13, 2005, http://sports.espn.go.com/nba/news/story?id=2059767 [hereinafter *Haywood*].
[145] Katz, *supra* note 2; Lee, *supra* note 5.
[146] Lee, *supra* note 5.
[147] Katz, *supra* note 2.
[148] *Bulls Forward Davis Supports an Age Limit*, SEATTLE TIMES, Apr. 9, 2004, at D8.

against the NBA's eligibility requirements thirty years earlier, expressed his support for an increased age limit.[149]

During negotiations, Hunter asserted that he opposed the increased age limit, but also expressed his flexibility "on anything if it makes economic sense and improves the overall conditions for my constituents."[150] In the end, the new CBA contained an age limit of nineteen, or one year removed from high school graduation. This requirement was less than what Stern sought but more than what Hunter appeared willing to accept.[151] In addition to the age limit, the NBA and NBPA traded concessions relating to pensions and benefits, contract lengths, salary increases, revenue sharing, roster sizes, and harsher drug penalties.[152] The age limit, however, sparked the most discussion and is the only provision likely to face an antitrust challenge.[153]

A. Antitrust Liability

1. Rule of Reason, Per Se, or Quick Look?

While the *Denver Rockets* case provides some insight into a possible antitrust challenge to the NBA's minimum age limit, that decision occurred before the Supreme Court recognized that restraints in certain industries, such as sports leagues, should not be considered per se violations of the Sherman Act. Although group boycotts or concerted refusals to deal are normally per se violations, the NBA's age limit would likely be scrutinized under the rule of reason, in light of the *NCAA* decision. Like all sports leagues, the NBA requires cooperation between the competing teams composing the league in order to exist. The special characteristics of the NBA, as with the NCAA and other sports leagues, justify looking at otherwise per se violations under the rule of reason.[154]

The NBA would face the same difficulties encountered by the NFL at the district court level in *Clarett* if the minimum age limit underwent rule of reason scrutiny. The district court in *Clarett* used the quick look analysis because the anticompetitive effects of the

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[149] *Haywood*, *supra* note 144.

[150] *Hunter Still Philosophically Opposed to Raising NBA Age Limit*, ESPN.COM, May 12, 2005, http://sports.espn.go.com/espn/wire?section=nba&id=2059082.

[151] *NBA Reaches New Six-Year Labor Agreement with Higher Age Limit and Salary Cap*, ESPN.COM, June 22, 2005, http://sports.espn.go.com/espn/wire?section=nba&id=2092030.

[152] *Id.*

[153] Chad Ford, *Contract Length a Deal Breaker?*, ESPN.COM, May 20, 2005, http://insider.espn.go.com/nba/columns/story?columnist=ford_chad&id=2062067&num=0 ("If the league does institute such a rule, it likely will be challenged in court.").

[154] *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984); BORK, *supra* note 22, at 278.

NFL's eligibility rule were obvious (it excluded players from the league). The NBA minimum age limit has the same exclusionary effect and a court may similarly rely on the quick look analysis.

There is no dispute that the NBA teams worked together to bargain for and implement the minimum age limit. A plaintiff would also be able to prove that the NBA has market power in regard to services for basketball players within the United States. There are no other leagues in direct competition with the NBA, and even international leagues can be characterized as a different market because of the inferior quality of the athletes and the inherent lower salaries.[155] The outcome of a rule of reason or quick look analysis would rest on whether the NBA can provide pro-competitive justifications for the age limit that outweigh its anticompetitive effects.

2. Reasonableness of the Rule

The NFL's justifications for its eligibility rule in *Clarett* focused on protecting the league's product, preventing injuries to its players and the associated costs to the teams, and protecting adolescents who may turn to dangerous performance enhancing drugs to prematurely develop the strength and speed necessary for the league. The court rejected these reasons because they did not promote competition and there were less restrictive means available for protecting the health of young players.[156] Similarly, the *Denver Rockets* court discussed and rejected the NBA's justifications for its eligibility rules. The league stated that it needed the rule to function financially and that the rule gave each player the opportunity to attend four years of college.[157] Haywood argued that the rule gave the NBA an efficient and inexpensive minor league system in the form of college basketball.[158] The court rejected these arguments in terms of their justifying an exemption to antitrust scrutiny, but did not examine them as part of a rule of reason pro-/anti-competitive balancing test.

When discussing the current age limit, Commissioner Stern mentioned his desire to keep the general managers of NBA teams out of high school gymnasiums. Stern stated his concern for the youth who dream of being basketball players rather than doctors and focus their attention only on basketball, even though the likelihood of

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[155] *See* McCann, *supra* note 5, at 214-15 (discussing the difference in salaries between leagues and concluding "the NBA has a global monopoly on premier professional basketball").

[156] Clarett v. NFL, 306 F. Supp. 2d 379, 408-09 (S.D.N.Y.), *rev'd in part, vacated in part*, 369 F.3d 124 (2d Cir. 2004).

[157] Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1066 (D. Cal. 1971).

[158] *Id.*

actually making the NBA is extremely low.[159] As the *Clarett* court stated, concerns for the welfare of players and adolescents alone do not suffice as pro-competitive justifications.[160] To suffice, proffered justifications must show that, on balance, "the challenged restraint enhances competition."[161]

Without a pro-competitive justification, the NBA would not be able to show justifications for the age limit that outweigh its anti-competitive effects. The NBA may have a difficult time demonstrating any pro-competitive justifications based on protecting the financial stability and integrity of the league. The league experienced financial growth during the recent period in which an increased number of players entered the league straight out of high school.[162] The best evidence that a plaintiff may have in rebutting the NBA's justifications is the success and growth of the NBA during the past ten years, the period when the largest number of players have entered the league straight out of high school.

The success, both professionally and financially, of some of the current players in the NBA who came directly out of high school also weakens the NBA's justifications. Many of the justifications put forth by the NFL in *Clarett* are not applicable in the NBA, as the history of players coming directly out of high school does not indicate that they are more injury prone than older players. It is true, however, that few of the players who entered the NBA at eighteen were initially able to compete at the same level as other players. Most took several years to develop both mentally and physically, while others were unable to maintain employment within the league.[163] This may provide the NBA with a pro-competitive justification for the rule: as a result of NBA teams having limited roster space and financial flexibility, it may hurt competition to have teams use roster space on younger players who are currently unable to compete at the necessary level but whose teams are hoping will eventually develop into quality players. If a team lacks the talent to win games, it may not be able to attract fans or make money, resulting in that team's folding or relocating, which may harm competition in the league. This argument supports

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[159] Lee, *supra* note 5.

[160] *See Clarett*, 306 F. Supp. 2d at 408 ("While these may be reasonable *concerns*, none are reasonable *justifications* under the antitrust laws.").

[161] NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984).

[162] Ford, *supra* note 153 ("The NBA is in better financial shape than it was before the current 1999 CBA kicked in."); Sekou Smith, *Stern Expects NBA To Land in Europe; Commissioner Who Helped Revive Leagu's Fortunes Thinks Teams Overseas Are Next Step*, INDIANAPOLIS STAR, Mar. 25, 2004, at 5D.

[163] Mark Murphy, *Basketball; NBA Preview 2005–06; The Young and the Restless; High Schoolers Find the Going Tough at the NBA Level*, BOSTON HERALD, Nov. 2, 2005, at 80.

the rationale that the age limit maintains a level of competition within the league necessary for NBA teams to survive and thereby enhances or protects the NBA and its entertainment product.

Despite this possible pro-competitive justification, it is more likely that the NBA's minimum age limit would not survive antitrust scrutiny. Courts have rejected similar antitrust claims against professional sports organizations.[164] Given the recent success of players who would now be prohibited from playing, the league would have an even more difficult time proving that the age limit promotes competition. Fortunately for the NBA, the nonstatutory labor exemption prevents the intrusion of antitrust law into the collective bargaining relationship.

B. The Applicability of the Nonstatutory Labor Exemption

1. The Mackey *Test*

To qualify for the nonstatutory labor exemption under *Mackey*, the NBA's minimum age limit must meet three requirements. First, it must primarily affect only the parties to the collective bargaining relationship. Second, it must be a mandatory subject of collective bargaining. Finally, it must be a product of bona fide arm's-length bargaining. The NBA's minimum age limit satisfies all of these conditions.

a. Parties to the Collective Bargaining Relationship

The most contentious questions surrounding *Mackey's* application to the NBA's age limit are whether the requirement primarily affects parties to the agreement and whether it is a mandatory subject of bargaining. Potential NBA players are considered parties to the NBA and NBPA's bargaining relationship. Several courts have interpreted the term "employee" under the National Labor Relations Act to include potential employees or job applicants as members of the bargaining unit.[165] The Supreme Court stated that following the creation of a

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[164] *See Clarett*, 306 F. Supp. 2d at 408-09; Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049 (D. Cal. 1971).

[165] *See* Reliance Ins. Co. v. NLRB, 415 F.2d 1, 6 (8th Cir. 1969) (stating that job applicants are employees within the meaning of 29 U.S.C. § 152(3)); Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959) (finding that job applicants are employees); John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951) (finding that job applicants are employees); Houston Chapter, Associated Gen. Contractors of Am., Inc., 143 N.L.R.B. 409, 412, *enforced*, 349 F.2d 449 (5th Cir. 1965) ("'[E]mployment' connotes the initial act of employing as well as the consequent state of being employed."); *see also* McCann, *supra* note 5, at 197-98 (discussing how courts interpret "employee" to include potential employees in the bargaining

CBA, when a potential employee is hired, "the terms of the employment already have been traded out."[166] The "duty to bargain is a continuing one" and, as a result, "a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future."[167] Conversely, the *Clarett* district court stated that Clarett could not be considered part of the bargaining unit because the NFL's eligibility rule effectively excluded him from employment.[168] This contradicted the Second Circuit's judgment in *Wood* that the NBA's entry draft provision affected "only the parties to the CBA—the NBA and the players."[169] The *Clarett* district court, however, conceded that "[t]here is no dispute that collective bargaining agreements, and therefore the nonstatutory labor exemption, apply to both prospective and current employees."[170] The court also concluded that the NBPA and unions in general have an interest in preserving jobs for union members and "can seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders."[171] Consequently, the NBA and NBPA are authorized to negotiate the terms and conditions that will affect future players, players who are at the time of bargaining classified as potential employees. This authority extends to the requirements for employment and entry into the NBA. The effect of this duty and authority is that, contrary to the assessment of the *Clarett* district court, eligibility requirements primarily affect parties to the CBA.

b. Mandatory Subject of Collective Bargaining

The minimum age limit is a mandatory subject of collective bargaining because it pertains to the wages, hours, and other terms and conditions of employment in the NBA. The Supreme Court stated that mandatory subjects include "issues that settle an aspect of the relationship between the employer and employees" and that a matter is a mandatory subject depending on whether it vitally affects the "terms

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unit and how collective bargaining is allowed to adversely affect the employment conditions of prospective employees).

[166] J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944).

[167] NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 866 (5th Cir. 1966) ("To the extent that application forms, used in hiring new employees in the future, contain questions the answers to which affect conditions of employment, the union is entitled to bargain with respect thereto.").

[168] Clarett v. NFL, 306 F. Supp. 2d 379, 395 (S.D.N.Y.), *rev'd in part, vacated in part*, 369 F.3d 124 (2d Cir. 2004).

[169] Wood v. NBA, 602 F. Supp. 525, 528 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

[170] *Clarett*, 306 F. Supp. 2d at 395.

[171] *Clarett*, 369 F.3d at 139.

and conditions" of employment.[172] Courts have interpreted this to mean that a subject is mandatory if it affects wages, hours, and terms or conditions of employment.[173] As the *Mackey* court stated, "[w]hether an agreement concerns a mandatory subject depends not on its form but on its practical effect."[174] The NBA's age limit, like the eligibility rule in *Clarett*, represents "a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject."[175] As with the NFL and its players union, the NBA and the NBPA are responsible for setting the conditions under which a prospective player is considered for employment. This dictates that the age limit is a mandatory subject, because "[i]n accordance with the literal language of the Labor Act, the parties must bargain about the requirements or 'conditions' of initial employment."[176]

The age limit also affects the wages of players. Commentators have suggested that NBA players stand to lose money by coming into the league at an older age as a result of the structure of the league's contracts, rookie salary scale, and free agency system.[177] These commentators contend that no matter how long a player plays in the league, he will not have the same opportunity for "maximum contracts" by coming into the league a year later than previously possible.[178] Numerous aspects of the NBA's bargaining agreement, including contract lengths and annual salary increases, rookie wage scale, roster size, and salary caps may be directly affected by the age limit.[179] The minimum age limit is therefore a mandatory subject of bargaining.

c. Bona Fide Arm's-Length Bargaining

There should be little debating that the age limit arose from bona fide arm's-length bargaining. The statements made by both the NBPA

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[172] Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178-79 (1971).

[173] Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976); *Clarett*, 306 F. Supp. 2d at 395.

[174] *Mackey*, 543 F.2d at 615.

[175] *Clarett*, 369 F.3d at 139.

[176] *Id.* at 140 (citing R. GORMAN, LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 504 (1976)).

[177] *See* McCann, *supra* note 5, at 169-72 (illustrating how entering the league at different ages directly affects the earning capacity of NBA players); Katz, *supra* note 2 ("The consensus is that a player who comes into the league as a teenager has a chance to get two seven-year maximum contracts before he turns 36 when the cap starts to be affected. But a player who comes into the league in his 20s might only have one chance.").

[178] *See* McCann, *supra* note 5, at 169-72; Katz, *supra* note 2.

[179] *See Clarett* 369 F.3d at 140 (finding that NFL's eligibility rule affected wages because the complex scheme of salaries, the salary cap, free agency, and the rookie wage scale, among other things, were based on the presence of the age requirement).

director and NBA Commissioner indicate that the parties differed on the necessity of the age limit prior to and throughout the negotiations but eventually compromised. There is also evidence that the two sides engaged in the trading of concessions, and a case could likely be presented that the NBPA only agreed to the age limit after the NBA compromised on other contentious issues, thereby trading concessions quid pro quo.

2. The Second Circuit's Approach to the Age Limit

The NBA's age limit meets the Second Circuit's criteria for the nonstatutory labor exemption. It is more deserving of protection from antitrust scrutiny than the eligibility rule in *Clarett*. The court in *Wood*, *Caldwell*, and *Clarett* determined that rules similar to the NBA's minimum age limit are proper subjects of bargaining and therefore protected from antitrust liability.

Analysis of the NBA's minimum age limit mirrors that of the NBA's entry draft provision in *Wood* and the NFL's eligibility rule in *Clarett*. The conditions under which prospective players are considered for NBA employment are terms for the NBA and NBPA to determine. As with the eligibility provisions in *Wood* and *Clarett*, the NBA's age limit is a mandatory subject of bargaining as a "literal condition for initial employment."[180] The Second Circuit also determined that eligibility rules have tangible effects on the wages and working conditions of players in the league, including increasing job security for veteran players.[181] The NBA's rule, like its NFL counterpart, is central to the bargaining agreement and eliminating the rule may alter assumptions underlying the CBA and adversely affect its other terms and conditions.

The *Wood* and *Clarett* decisions discussed challenges to the procedures for entry into sports leagues. In both cases, the court adopted the position that the term "employee" under the National Labor Relations Act includes potential employees and job applicants.[182] The court also stated that unions can act to protect constituents and favor senior employees to the detriment of the less tenured and potential employees.[183] As a result, potential NBA players are considered parties to the bargaining relationship.

The NBA's age limit is included within the CBA and is the product of negotiations between the NBA and NBPA. This is in contrast to

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[180] *Clarett*, 369 F.3d at 139.
[181] *Id.* at 140.
[182] *Id.* at 140-41; Wood v. NBA, 809 F.2d 954, 960 (2d Cir. 1987).
[183] *Clarett*, 369 F.3d at 139.

the NFL's rule in *Clarett*, which met the criteria of being bargained for even though it existed only in the NFL Constitution and Bylaws. Public and private statements indicate that the NBA and NBPA negotiated the imposition of the age limit and the actual minimum age.[184]

The issue of entry into the NBA is at the center of collective bargaining. The agreement between the NBA and NBPA is a bundle of compromises geared to achieving solutions to problems and issues unique to the sports industry generally and the NBA specifically.[185] The minimum age limit is but one negotiated solution to one problem and allowing an antitrust court to strike that provision could unravel the entire agreement. The nonstatutory labor exemption applies because, in the words of the Second Circuit, subjecting the NBA's minimum age limit "to antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'"[186]

3. The Age Limit Examined Under Brown v. Pro Football

The NBA's minimum age limit qualifies for the nonstatutory labor exemption under the Supreme Court's reasoning in *Brown*. *Brown* stressed the importance of the collective bargaining relationship and protecting that relationship from judicial antitrust scrutiny. The creation of the NBA's minimum age limit paralleled the creation of the NFL's rule at issue in *Brown*. The age limit resulted from the collective bargaining negotiations between the NBA and the NBPA and is embodied in the CBA. The public statements made by representatives of the NBA and NBPA indicate that the two sides did not originally agree on the issue of an increased age limit and negotiated the issue at arm's length, perhaps even trading concessions quid pro quo.[187]

The *Brown* court mentioned that the exemption does not cover all joint imposition of terms by employers, as some may be so far removed from the collective bargaining relationship that antitrust intervention would not interfere with that relationship.[188] This, however, is not the case with the NBA's age limit. It arose from the negotiations between the NBA and NBPA relating to the current CBA. It is highly probable that many other elements of the bargaining agreement, such as the league's yearly salary increases, rookie wage scale, contract length, and salary cap, were based on the existence of the new age

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[184] *See supra* notes 157-53 and accompanying text.

[185] *See Wood*, 809 F.2d at 961 ("The NBA/NBPA agreement is just such a unique bundle of compromises.").

[186] *Clarett*, 369 F.3d at 138 (citing *Wood*, 809 F.2d at 959).

[187] *See supra* Part IV; *supra* notes 147-53 and accompanying text.

[188] Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996).

limit. The age limit is so closely tied to these other provisions that antitrust intervention would adversely affect the entire agreement.

While the Supreme Court in *Brown* declined to draw a line between what is and what is not covered by the nonstatutory labor exemption, it did mention aspects of the NFL's conduct that justified its application. The Court noted that the NFL's conduct occurred during and immediately following negotiations within a lawful bargaining process, concerned a proper subject for collective bargaining, and concerned only parties to the bargaining relationship.[189] As illustrated previously, all of these characteristics are also true of the NBA's minimum age limit. This supports the argument that the nonstatutory labor exemption applies to the NBA's bargaining relationship and the minimum age limit.

C. The Nonstatutory Labor Exemption Should Protect the NBA's Minimum Age Limit from Antitrust Scrutiny

In addition to the factual reasons set forth, there are legal and practical considerations supporting the application of the nonstatutory labor exemption to the NBA's minimum age limit. The purpose of the exemption is to allow for meaningful collective bargaining by shielding from antitrust scrutiny some restraints that arise from bargaining.[190] The NBA and NBPA cannot engage in successful future negotiations if they are concerned that potential restraints arising from those negotiations are subject to antitrust review. Submitting the NBA's minimum age limit to antitrust scrutiny would introduce instability and uncertainty to the NBA and NBPA's bargaining relationship and potentially unravel the NBA's entire CBA. Allowing a court to alter the minimum age limit, an important provision of the bargaining agreement, would undermine the agreement's other provisions that are based on that limit.[191]

To allow antitrust laws to intrude on the collective bargaining relationship between the NBA and NBPA would substitute the judgment of a court for that of the negotiating parties. Doing so would jeopardize the potentially beneficial labor-related effects that the relationship exists to achieve. The Supreme Court indicated its reluctance to do so without the detailed views of the National Labor Relations Board, noting Congressional intent to defer to the NLRB's "'specialized

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[189] *Id.*

[190] *Id.* at 237.

[191] *See Wood*, 809 F.2d at 961 (stating that "one cannot alter important provisions of a collective agreement without undermining other provisions").

judgment'" in such situations.[192] The NBA's minimum age limit is one aspect of the CBA between the NBA and NBPA. The agreement itself represents a bundle of compromises geared to achieving solutions to problems and issues that are unique to the sports industry generally and the NBA specifically.[193] Professional sports leagues require rules and restraints on competition in order to exist. The history of the NBA and other sports leagues illustrates the tenuous nature of the business, as teams often relocate because of the difficulties associated with generating the revenue stream necessary to support a team. Allowing a court to change the age of eligible players could affect the economic and financial models on which players' salaries, contracts, and other terms of employment are based. Because the provisions of the bargaining agreement are intended to promote competitive and economic balance within the league and to maintain the viability of the league and its teams, scrutinizing and nullifying fundamental provisions may harm competition within the league and the financial well-being of teams, players, and the NBA.

Many professions and occupations require that potential employees possess a certain educational level or skill set obtained through a training or certification program. These requirements may be industry imposed or statutory, such as age requirements for inherently dangerous industries. An amateur basketball player who does not meet the minimum age limit to enter the NBA draft is no different than a lawyer who has not been certified by the relevant bar association.[194] The NBA's age limit could, in effect, be viewed as requiring potential players to undergo a year of post-high school basketball training. It is feasible that a player could choose not to play organized basketball between high school graduation and becoming eligible for the draft; with the options available for a basketball player with legitimate NBA potential coming out of high school, however, sitting out of organized basketball is an unlikely scenario.[195] The track record of players entering the NBA directly from high school supports a requirement that players receive some additional training before entering the league. Most players in this category struggled to play at a competitive level

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[192] *Brown*, 518 U.S. at 250 (citing NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957)).

[193] *Wood*, 809 F.2d at 961.

[194] *See* Clarett v. NFL, 369 F.3d 124, 141 (2d Cir. 2004) ("Clarett is in this respect 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.").

[195] The most likely and prudent choice for a high school player pursuing an NBA dream is college basketball. There are also numerous leagues overseas and alternative professional basketball leagues in the United States, including the Continental Basketball Association and the American Basketball Association.

during their first two or three years in the league, with a few notable exceptions.[196] Even Kobe Bryant, currently among the best players in the NBA, failed to earn significant playing time until his third and fourth seasons.[197]

The issue of entry into the NBA is of tremendous importance and a vital aspect of collective bargaining. Eligibility rules are one method by which the NBA spreads talent among teams to maintain competitive balance within the league, thereby maintaining the viability of the league by enhancing competition among the teams and creating a product that attracts fans. The age limit allows teams to scout potential players at the college level, providing the opportunity to see players competing against a higher level of competition than in high schools. The NBA has limited space for players and the minimum age limit is one of the NBA's tools to ensure that the league gets the best players for the few available positions. The number of teams must be limited in order to ensure the success of the teams and league. The number of roster positions on a team is limited in order to control the costs associated with fielding a team and because the nature and rules of the game restrict the amount of playing time available during the season. Playing in the NBA is a privilege, not a right, and the players union is allowed "to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders."[198]

Finally, disputes arising out of collective bargaining are the domain of labor law, not antitrust law. Labor law provides remedies for those injured by collective bargaining, including claims of discriminatory or other illegal hiring practices. One objective of labor law is the removal "from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy."[199] The National Labor Relations Board is responsible for monitoring the bargaining process. Labor law "substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the . . . legal limits of" collective bargaining.[200] Allowing antitrust courts to determine what is acceptable bargaining is detrimental because prohibiting particular solutions designed for particular problems reduces the number and quality of compromises available to unions and employ-

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[196] Murphy, *supra* note 163 (citing Amare Stoudemire and LeBron James).

[197] *Id.* Another All-Star, Jermaine O'Neal, had a similar experience, as he did not get significant playing time until his fifth season after being traded by the team that drafted him. *Id.*

[198] *Clarett*, 369 F.3d at 139.

[199] Brown v. Pro Football, Inc., 518 U.S. 231, 242 (1996).

[200] *Id.* at 237.

ers for resolving their differences.[201] Labor law, not antitrust law, is the province for claims brought by potential employees dissatisfied with the requirements for employment established by an employer and union.[202] For example, claims arising from perceived unfair bargaining behavior must be pursued under an unfair labor practice claim, not the Sherman Act.[203] Likewise, the "proper action" for a claim that the age limit "might be illegal because of discrimination against new employees (players)" is under labor law.[204] Because labor law provides the protections and remedies for those injured by collective bargaining, the NBA's age limit should be shielded from antitrust scrutiny by the nonstatutory labor exemption.

CONCLUSION

The flood of players entering the NBA straight out of high school prompted the league to institute a new minimum age limit of nineteen. No matter whether the age limit is perceived as necessary or not, it is embodied within the CBA and arose out of the negotiations between the NBA and NBPA. An antitrust challenge to the NBA's minimum age limit would not be the first time the league faced such a challenge. Both the NBA and NFL have confronted similar challenges to eligibility provisions and triumphed as a result of the nonstatutory labor exemption.

The nonstatutory labor exemption provides protection to practices and policies arising from a bargaining relationship that may otherwise qualify as illegal restraints of trade in violation of antitrust laws. If subjected to antitrust scrutiny, a court is likely to invalidate the NBA's minimum age limit, because it does indeed restrain trade and lacks sufficient pro-competitive justifications. The age limit, however, should be protected from antitrust scrutiny by the nonstatutory labor exemption. It arose out of the bargaining relationship, applies primarily to parties to that relationship, is embodied in the bargaining agreement, is a mandatory subject of bargaining because it relates to wages and is a literal condition for employment, and is the product of negotiation and arm's-length bargaining between the NBA and NBPA. The nonstatutory labor exemption therefore applies no matter which method a court utilizes to determine the applicability of the exemption. Based on previous cases dealing with the nonstatutory labor exemption and professional sports leagues, the application of

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[201] *Clarett*, 369 F.3d at 143 (citing Wood v. NBA, 809 F.2d 954, 961 (2d Cir. 1987)).
[202] *Id.* at 143.
[203] *Wood*, 809 F.2d at 962 n.5.
[204] *Id.* at 962.

the exemption to the NBA's minimum age limit should face as little opposition as a free throw.

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