



Texas Entertainment and Sports Law Journal

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Entertainment & Sports Law Section

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The statements and opinions in the Texas Entertainment and Sports Law Journal are those of the editors and contributors and not necessarily those of the State Bar of Texas, or the Entertainment & Sports Law Section. This publication is intended to provide accurate and authoritative information with respect to the matters covered and is made available with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.

Join the Section

All members of the Entertainment & Sports Law Section are encouraged to make sure that their dues are paid. All dues payments are to be made directly to the Section's Treasurer. An application for joining the Section is provided in this publication.

Invitation to Publish

Anyone think they have the talent to write an article? This is your invitation to put that talent to use. The Entertainment and Sports Law Journal is soliciting articles to publish in upcoming issues. Article formats vary from long footnoted analyses to more informal discussions, and topics may span the spectrum of the sports and entertainment fields. Contact the editor and discuss the possibility of writing an article on a subject that interests you.

Articles may be submitted to:

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Chairman's Report

It is always appropriate to wait on writing this letter until after the Super Bowl is finished. After it's over, there is a certain lull in the air as we wait for baseball season to start. In the meantime, we keep an eye on the NHL and the NBA and look forward to March Madness. It is always easier to write such a column when we have more time and less mental clutter and are not glued to the big screen for scores and matchups.

But in the world of entertainment there always is something brewing. Probably the most attractive thing for our Section's entertainment members is the Entertainment Law Institute set for Austin, on March 19th and 20th. This is a two (2) day seminar which features some of the leading entertainment lawyers from around the country and includes some of our own members. If you want to receive some quality CLE and learn from the masters, this is the seminar for you. It also coincides with the South by Southwest Music Festival which will be going on all week. For more information on the seminar call the University of Texas School of Law/CLE Department at 512-475-6700.

The Section had a good year in 1998. With the assistance of the U.T. Law School/CLE folks we put on a quality Sports Law Seminar in October. We hope that this will become an annual event in co-sponsorship with the U.T. Law School. They were real easy to work with and are very professional in their planning. If anyone wants to get involved in being a member of the planning committee for next year's seminar please contact me at 214-871-6005 or e-mail: ckalis@aol.com. The strength of our Section has always been the unconditional support of its' members who volunteer to make our Section and the Texas State Bar one of the most exciting dynamic bar groups in the country.

Will have this Journal out and two (2) more just like it in 1999. Again, there is no State Bar organization in the country that I am aware of that has such a quality journal for sports and entertainment law. We should all extend our appreciation to the Editor, Sylvester Jaime, as well as all of the people who develop and write these articles. I look forward to meeting and talking to any readers who would like to become members or have a question while at the Entertainment Law Institute or at the State Bar Annual Meeting this summer in Fort Worth. We plan on having a bang up mini-CLE seminar like last year when Chip Babcock spoke about the Veggie-Libel case in which he defended Oprah Winfrey. His review of the defense's closing statement was enthralling.

As always, we look forward to your continued support for our Section and that of your friends and colleagues.

Christopher A. Kalis

10 ROUNDS with MIKE TYSON:

ROUND 1 ... Mike was released from Indiana prison after serving jail time for a 1991 rape conviction. Released after serving half of his sentence, Tyson was placed on probation and boxing's most promotable figure was back in the public eye and set on regaining the championship ...

ROUND 2 After several tune-up fights, Tyson gets a shot at the champion Evander Holyfield. Judge Mills Lane stops the highly-promoted championship fight when Tyson turns the match into a street fight and bites Holyfield's ear. Following the fight, the Nevada State Athletic Commission takes Tyson's boxing license and fined him \$3MM ...

ROUND 3 ... Adding to his legal troubles, a Las Vegas police officer claims Tyson struck him during the brawl in the ring which followed the Holyfield fight. In response to the officer's claim, Tyson's attorney stated that Tyson is often "a target of individuals filing frivolous lawsuits." ...

ROUND 4 ... After a one-year suspension stemming from the ear-biting incident, the Nevada State Athletic Commission reinstates Tyson's boxing license. The NSAC however issued a stern warning "this was Mike's last chance." The NSAC advised Tyson to continue psychotherapy and cautioned that failure to conduct "himself in accordance with NSAC rules would result in Tyson never fighting again in Nevada." ...

ROUND 5 ... Former co-manager John K. Horne names Tyson and Tyson's other manager, Shelly Finkel, as defendants in a lawsuit for interference with contractual relations and seeks to collect 10% of Tyson's next five fights; former Tyson trainer claims Tyson owes him \$5.1MM; and the IRS says Tyson owes \$14.3MM ...

ROUND 6 ... Mike Tyson is involved in a fender-bender. The two men in the other vehicle claim that Tyson got out of the car and then kicked and punched them. Tyson is charged with assault ...

ROUND 7 ... Following resolution of the civil claims arising from the fender-bender, the ex-champ pleads no contest to the assault charges ...

ROUND 8 ... Tyson returns to the ring and knocks out South African Francois Botha ...

ROUND 9 ... On the comeback trail to the championship and needing to pay the IRS, et al., Tyson is scheduled for another tune-up fight in Las Vegas in April, 1999 ...

ROUND 10 ... However, before Tyson fights again, Maryland District Court Judge Stephen Johnson throws a knockout punch after the no contest plea in the fender-bender case and now former heavyweight champion, Mike Tyson again sits in jail. Johnson sentenced Tyson to a year in jail for assault in the fender-bender case. Tyson's next fight will be with the Maryland appeals process, and the fight after that will be in Indiana with Marion County Superior Court Judge Patricia Gifford. Tyson faces revocation of his probation, set to expire in March 1999, in the 1991 case ...

Sylvester Jaime

FOR THE LEGAL RECORD

WHO SAYS CONTRACTS ARE GUARANTEED? National Basketball Association players knew it was a tough fight after arbitrator John Feerick ruled the salary provisions of player contracts were “not effective or operative during a lawful lockout”. NBA attorney Jeffrey Mishikin persuaded Feerick the NBA did not have to pay the 200 NBA players with guaranteed contracts during the lockout. With the \$800MM savings, league owners had ammunition to maintain the lockout. With sponsorship checks drying up for all but the biggest named players, the Players Association hastened to find a way to get paychecks to players. Feerick’s ruling, leveraged the league’s position and the NBPA had to accepted a modified salary cap and other concessions in the new collective bargaining agreement ...

You know the system works when:

A Cal State Bakersfield basketball recruit was acquitted of rape and sexual assault. After facing the charges and missing the 1998 season, the 6-6 point guard from New York will be eligible to play in September 1999 ...

Lawrence Taylor was still voted into the NFL Hall of Fame, despite drug and financial problems which called into question his off-field character ...

After former New York Jet Mark Gastineau surrendered to face criminal contempt charges for violating a court order to stay away from a woman who accused him of assault and not showing for a court date, lawyer Amelio Marion was able to strike a plea deal for Gastineau to plead guilty to a misdemeanor with an agreement for Gastineau to attend drug, alcohol and violence counseling ...

U. S. swimmers may yet get their Olympic gold medals. A German court established that the East German gold medal team had an unfair advantage because of drug use when they beat the second place American women’s team during the 1976 Olympic games in Montreal. Gold Medal recognition of the 4 American swimmers was being sought by U. S. Olympic Committee from the International Olympic Committee ...

You know the system is in trouble when:

The Texas University Interscholastic League voted to restore early season wins to Texas 5A defending champion Katy High School, despite the local district’s vote to have Katy forfeit the games for using a scholastically ineligible player. Following its good fortune, instead of implementing a method to assure no further violations, Katy’s undefeated on-the-field football team, turned themselves in for violating another UIL rule. A third team player was allowed to play during a playoff game with Katy safely ahead. Prior to the state championship game, Katy found that the player had forged the initials of a teacher on a progress report and thus he remained eligible for the team’s quest to repeat as state champions. The UIL forced Katy to forfeit its chance to play in the championship game. State Representative John Culberson has proposed legislation that would ensure that if another situation like

Katy’s arises, the individual player, not the entire team, will be penalized. Culberson wants to implement a system that ensures that the team is not disqualified because of a student’s conduct ...

The University of Washington apparently also did not have a system in place to avoid further violations. The football program had recently come off NCAA probation which had caused Don James to resign. The university reported that its representatives were in the homes of eight football recruits on the Sunday before the signing date of February 3, 1999. The recruits were immediately ruled ineligible to play for Washington because its representatives violated NCAA rules against off-campus recruiting during the mandatory “quite period” prior to signing day ...

Despite the support of Dallas Cowboys owner Jerry Jones and Tennessee Titans owner Bud Adams, the NFL refuses to vote Houston a franchise. The league wants a team in Los Angeles, with its movie stars and huge television audience, for its 32nd franchise. Leaving Houston’s effort in limbo until the spring meeting of the NFL owners ...

The World Boxing Council votes to recognize and “regulate women’s boxing”. Now women boxers will have equal access to the multiple divisional titles and promotional opportunities brought to men’s boxing by the WBC and other boxing ruling bodies ...

The Last Wills and Testaments of baseball Hall of Famers George Wright, Tommy McCarthy and Hugh Duffy were missing from a Boston courthouse vault. The wills were later found advertised for sale in a collector’s magazine ...

A California coach sells creatine to his high school players at a discount; a Florida football coach gives creatine to his 14 year-old son. Creatine, classified a “dietary supplement” and available without prescription, is used to energize muscles, enhancing quickness and power. Under 1994 law, creatine is not regulated nor subject to testing by the Food and Drug Administration. While most coaches advocate that athletes take nothing and use old-fashion weight lifting and eating to get bigger and stronger, creatine may be heading into the high school mainstream. The Nutrition Business Journal reports that creatine sales in the US were \$100MM in 1997 and may hit \$180MM in 1998. Is this the new drug issue in high school sports? ...

Waltrip High School basketball star Antonio Falu leads the team to the Texas Class 4A state title as a junior, and during his senior is found to have been a senior when he was a junior. A native of Puerto Rico, the player failed to disclose that he had attended prep schools in Florida and Virginia prior to enrolling in the Houston Independent School District high school, and the team was forced to forfeit the games the team won during his purported senior year

Remember the Journal can be accessed online at www.stcl.edu.
...

Sylvester R. Jaime

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law affiliated with Texas A&M University
Sports and Entertainment Law Society
Erik Karst, Student Casenote Editor

Termination of Race Track Employee

Subject to Payment of Unemployment Benefits

In *Retama Development Corp. v. Texas Workforce Commission*, 971 S.W.2d 136 (Tex. App.-Austin 1998), Retama Park Development Corporation (“Retama Park”) challenged the Texas Workers Commission’s (“TWC”) ruling that unemployment benefits awarded to an employee, Jimmy R. Brown, following his layoff were chargeable to its employer’s account. Retama Park argued that the termination of Mr. Brown’s employment was required by statute and relied upon by section 204.022(a)(2) of the Texas Unemployment Compensation Act, which provides that unemployment benefits may not be charged to the account of an employer if the employee’s last separation from employment was required by a state statute or municipal ordinance.

Retama Park operates as a licensed race track in Selma, Texas where it conducts live horse races. The Texas Racing Commission established live race dates for Retama Park for November and December of 1995. However, on November 21, Retama Park asked the Racing Commission to end its racing season two weeks early by canceling its six remaining live race dates. The Commission granted Retama Park’s request that same day. On November 22, Retama Park laid off its racing season security guard, Mr. Brown. Thereafter, the TWC granted Mr. Brown unemployment benefits and ruled that Retama Park’s employer account would be charged.

Retama Park asserted that its account should not be charged because Mr. Brown’s termination was “required by statute” when the Racing Commission ended its racing season. It argued that horse racing is such a highly regulated industry that every act is done pursuant to a statute, and therefore, acts done pursuant to a statutory authority are “required by statute.”

The appellate court rejected this assertion and held that, if the language of the statute is unambiguous, then the intention of the legislature as expressed in the plain meaning of the words used must be determined. Here, the TWC determined that an employee’s termination is “required by statute” when the layoff occurs pursuant to an agency’s statutorily mandated act, but not when the act or order is discretionary. Consistent with the TWC, the appellate court held that section 204.022(a)(2) of the Texas Unemployment Compensation Act unambiguously specifies that unless a state statute or municipal ordinance requires an employee’s termination, charge-back protection is unavailable to the employer. Because Mr. Brown’s discharge was not required by statute, the Act’s charge-back protection is not available to Retama Park and the district court correctly granted summary judgment in the TWC’s favor.

By William David McKinnie IV

Broadcast Concerning Dallas Cowboys Player Activities Not Defamatory

In *Young v. Griffin, LIN Television, Inc., and d/b/a KXAS Television*, 1998 WL 420317 (Tex. App.-Dallas 1998), the Dallas Court of Appeals upheld the trial court’s grant of summary judgment in favor of a reporter and television station in a defamation case brought by one of the subjects of an investigative report concerning the off-field conduct of some Dallas Cowboys players.

In May of 1996, KXAS Television broadcast a story by “Public Defender” Marty Griffin detailing the activities of Michael Irvin and other Dallas Cowboys players at the so-called “White House,” a suburban home that was allegedly used by certain players as a hedonistic retreat. The story described the “out of control” nature of the activities at the White House which included widespread cocaine use as well as entertaining prostitutes.

The report centered on Griffin’s interview with Dennis Pedini, an “associate” of Irvin’s. Pedini’s conversations with Irvin were recorded by a hidden camera and implied that Tillford Young, the plaintiff, had personal knowledge of the activities at the White House. The report identified Young as a “business associate and friend” of Irvin and detailed an alleged “arbitration agreement” providing that Young would receive \$10,000 from Irvin not to divulge Irvin’s drug involvement and supplier.

Young filed suit for defamation claiming that the news report implicated him as directly involved in the illegal and immoral activities that took place at the White House, thereby defaming him. In the alternative, Young argued that the report defamed him through innuendo by associating him with prostitution and drug use.

In reviewing the trial court’s grant of summary judgment for the defendants, the appellate court first analyzed Young’s contention that the broadcast directly defamed him. The court found that the broadcast did not directly defame Young because it simply suggested that he had knowledge of the drug use and prostitution at the White House rather than stating that he was himself involved on those activities.

As for Young’s claim of defamation by innuendo, the court noted that, although innuendo may be used to explain the effect and meaning of statements that do not directly defame, it cannot be used to extend the meaning of the statements in question. Alleged defamatory statements are to be construed by a court as a person of ordinary intelligence would perceive the interpretation. Here, the court found that a person of ordinary intelligence would not infer that Young had actually participated in the illegal and immoral activities at the White House after hearing the broadcast and held that the defendants were entitled to summary judgment as a matter of law.

By Taylor Campbell

Random Packaging of Sports Trading Cards Not RICO Violation

In *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602 (5th Cir. 1998), a group of individuals who had purchased Pinnacle sports trading cards brought a class action suit against the company alleging that its packaging practices violate the Racketeer Influenced and Corrupt Organizations Act (RICO). The Fifth Circuit affirmed the trial court's judgment that the plaintiffs did not have standing to bring a RICO action because they failed to plead a cognizable injury and refused their request for leave to amend their complaint.

Pinnacle manufactures football, baseball, hockey, and motor sports cards that are sold in packages of six to twenty cards. Rare and valuable collectible "chase" cards are randomly inserted in some of the packages. The odds of a package containing a chase card is printed on each package. The plaintiffs claimed that Pinnacle's marketing practice compromises all the elements of illegal gambling: (1) consideration (purchase price of cards), (2) for a chance (random inserting of cards), (3) to win a prize (the value of finding a "chase" card).

RICO provides a civil cause of action for treble damages for injuries as a result of (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. However, the trial court held that a plaintiff must first establish standing to sue by showing that it has suffered "injury to his property or business" and that the defendant's conduct "caused" the injury. The Fifth Circuit affirmed the trial court's dismissal of the plaintiff's action because it found that they had not sustained an "injury to their property or business."

Relying upon New York state law, which allows suits for the recovery of gambling losses, the plaintiffs argued that a court must examine whether state law has been violated to determine if a party has standing under RICO. The court rejected this argument because the existence of a possible cause of action for gambling expenditures under state law does not necessarily make the amount expended a "property loss" under RICO.

The court explained that injury to merely "intangible property interests" or "expectation interests" are not sufficient to confer standing under RICO. Here, the plaintiffs did not allege that they did not get exactly what they bargained for, namely, six to twenty baseball cards, one or more of which might be a chase card. Furthermore, even if some packages do not contain a chase card, the plaintiffs failed to allege that the value of the cards they received was less than the consideration paid.

The Fifth Circuit court also held that the trial court did not abuse its discretion in denying the plaintiffs' requested leave to amend their complaint. The court noted that plaintiffs were represented by able counsel and had been given three opportunities to articulate their damages. It concluded that allowing the plaintiffs to amend their complaint would impose unfair litigation expenses on Pinnacle. The court also pointed out that, with the exception of two cases, every other RICO lawsuit brought on these facts had been dismissed with prejudice.

Finally, the Fifth Circuit noted that the plaintiffs' failure to establish standing under RICO does not mean that they have no remedy for their alleged injuries. They may have a state law cause of action.

By Karlene Dunn

Texas Tech Football Player's Claim Moot After Eligibility Ends

In *Jones v. NCAA*, 1998 WL 51814 (Tex. App.-Amarillo 1998) the court dismissed a Texas Tech football player's claim that the National Collegiate Athletes Association ("NCAA") had improperly failed to waive its eligibility requirements.

In the fall of 1996, Joel Casey Jones, a player on the Texas Tech football team, was informed by the school that he was ineligible to play in the upcoming season because he had not passed the requisite number of course hours required by the NCAA. The school filed three waiver requests and a written appeal on his behalf with the NCAA but they were all denied. In response, Jones filed suit against Texas Tech and the NCAA. He sought injunctive relief allowing him to play football for Texas Tech and restraining the NCAA from penalizing Texas Tech if the school complied with the injunction.

The district court granted a temporary injunction preventing Texas Tech from enforcing NCAA rules precluding Jones from playing. The injunction also prevented the NCAA from punishing Texas Tech for complying with the injunction and from punishing Jones for exercising his rights under the injunction.

The NCAA appealed the validity of the temporary injunction to the Amarillo Court of Appeals. Without addressing the substantive merits of the appeal, the appellate court held that the injunction was no longer operative because after a temporary injunction becomes inoperative, its validity is moot. The court also denied the NCAA's request for a ruling on the validity of the injunction on the ground that it has no judicial authority to render an advisory opinion.

By J.R. Moore

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PRACTICING ENTERTAINMENT LAW IN TEXAS IN THE DIGITAL AGE

By Mike Tolleson

For those of us old enough to remember back to the early 80s, the entertainment business was a collection of clearly defined, quite mature and well established industries such as music, motion pictures, television, publishing, etc. The legal issues and deal structures were based on well established precedent and tradition. The bulk of the industry and, consequently, the money and the legal talent resided in New York, Nashville and Los Angeles.

The big news in the 70's had been the overhaul of the copyright law leading to the passage of the Copyright Act of 1976 which, (along with its various amendments), continues to serve as the guiding legal light today. Throughout the 70's and 80's the music industry grew fat on the excesses of rock'n roll and the musical appetites of the aging boomer population. In the early 80's the compact disc was introduced as the sound carrier of the future. The record industry prospered as it enjoyed a surge in revenue generated by the higher priced new format and the opportunity to convert its libraries of music to CDs for reissue to consumers whose old record players were becoming obsolete.

Meanwhile, the film industry discovered that its real profits were not at theater box offices but at video stores satisfying the home viewing audience. Just as the traditional entertainment industries of music, film and television began to reach maturity, along came yet another technological progression which is changing the legal landscape more dramatically than ever - the digitization of information.

Historically, entertainment law practice has involved working within the convergence of a number of areas of law, and its impact on a particular segment of the entertainment industry, whether it be music, film, television, publishing, art, computer games, etc. Typically, it involves applying principles of copyright, trademark, business organization, labor, tax, and contract law to a particular project. The practice requires a knowledge, not only of the law, but also familiarity of the customs, precedents, traditions, politics and economics of a particular industry either locally, regionally, nationally or internationally.

The arrival of digital technology and its application in the entertainment sector has given rise to new products, vocabulary, deal structures, legislation, economics, distribution systems, politics and practice areas. Terms

like "new media," "internet law," "computer law," "convergence," "electronic publishing," "electronic transactions" and "the year 2000 problem" now enter the conversation.

Issues related to financing, producing, distributing, and protecting entertainment products now extend to new mediums such as the internet, computers, DVD, and new products such as interactive multi-media CD-Roms, enhanced compact discs, and on-line play-for-pay Web sites. As Nicholas Negroponte has said in his book, "Being Digital," "we are making the transition from moving atoms to moving bits." As more entertainment product information finds its way into our homes via the transfer of bits through broadband fiberoptic conduits to our combination TV/computer receiver, the nature of the business is transforming in ways that create new and unresolved legal issues.

As a result, the base of knowledge required to be effective in the entertainment arena is expanding. The borderlines of the practice are fuzzier. The overlaps into traditional intellectual property areas and high technology issues are more frequent. Along with recording contracts, music publishing agreements, screenplay acquisition, and motion picture production deals, one can now include software copyright and license agreements, on-line licensing and consumer transactions, and protection of trademarks and domain names.

Rights acquisition issues have become more complicated. For example, in the old days if an artist wanted to record a song the record company requested a mechanical license from the copyright owner and paid a fee set by statute. Now consider the rights issues in the case of an enhanced audio CD (one containing interactive audio and visual information) which will be promoted (performed and manipulated) on the Internet at a particular Web site from which the consumer can purchase, listen, or download all or part of the album. The act of transmission, distribution, reproduction, or performance of any portion of the audio or video elements can each trigger the necessity for one or more licenses from the copyright owner and the negotiation of a fee. Consequently, the packaging of new media products has become more expensive and the prosecution of infringements and the enforcement of rights is becoming a problem of greater magnitude and expense.

Texas has long been a contributor to the national entertainment industry by virtue of the talented individuals, actors, musicians, writers, and artists who are born in Texas and then move to New York, Los Angeles, or Nashville to fully exploit their abilities. Beginning in the early 70's, Texas began finding its place in the national

Continued from page 6

spectrum as a geographic source of fully developed and produced entertainment products, in addition to being the birthplace for talented individuals.

The international distribution and success of television programs like "Dallas" did not hurt our popularity but rather increased the curiosity of those residing in foreign lands. By the late 70's, the television series, "Austin City Limits," was promoting Austin and Texas music in homes across America and beyond. The Texas Film Commission came to life in the early 70's under the guidance of its first director, Warren Skarren, who later achieved national recognition as a screen writer due to his work on Batman, Beetlejuice, Top Gun, Beverly Hills Cop, and more. By the late 80's, a Texas Music Office was created and since 1993 a Multimedia Industry Office has been established within the Governor's office. These three departments provide a wealth of information about the status and activities of their respective industries in Texas.

But when it comes to original records, television programs and motion pictures from Texas, the products are usually independent, low budget affairs that struggle to find financing and then distribution, marketing, and promotion outside the state. There are exceptions, and there have been successes which, of course, inspire others to keep trying. For every Willie Nelson, Lee Ann Rimes, ZZ Top, Richard Linklater, Robert Rodriguez, Mike Judge, Little Joe y La Familia, Stevie Ray Vaughan, or Richard Garriott, there are hundreds, if not thousands more, trying to get the funding and find the connections that will lead to their national discovery.

Consequently, the practice of entertainment law in Texas has been not so much about representing big name talent, major studios, and record companies or working on 40 million dollar motion pictures (although this can happen from time to time), but more about working with a wide variety of copyright and transaction issues facing relatively young, new and developing artists and startup companies formed to exploit their work. It's this fact which has resulted in many large law firms declining to pursue the practice area and why much of the interest is coming from relatively young lawyers in solo or small firm configurations. That, plus the time involved in getting over a steep learning curve and the shortage of good paying practice opportunities, leaves us with very few full time entertainment lawyers in the state and a large number of curious observers and part-time participants.

Although Texas based producers of music, television and motion pictures have historically struggled to attain national recognition, the arrival of digital has put us back on a level playing field with other entertainment industry

centers. Traditional Hollywood has had a difficult time making the digital transition in a significant way. They are still trying to recycle their old methods and product originally created for a linear medium. Successful "New Media" entertainment products geared to the computer based, game playing, Internet oriented crowd are not tied to the archaic business, political, financial and creative structures and methods of the old Hollywood system. They are emerging from high tech centers like Silicon Valley, San Francisco, Austin, Boston, and Seattle with new business models created by adopting bits and pieces from older industry. We are seeing features of film, music, or book publishing industry agreements merged in an effort to capture a business format reflective of the new commerce. Highly original and creative new entertainment properties are originating from Texas and finding their way to consumers internationally without the necessity of Los Angeles based distributors.

New technological developments are decentralizing the industry and are moving us toward a time when each individual will conceivably have his/her own web site, making each of us a creative content producer and distributor, and essentially a mini television station able to acquire and distribute copyrightable content directly to consumers worldwide. This is pretty exciting stuff for a guy that started life listening to Hank Williams on a windup Victrola record player.

With new technology leading the way, the entertainment business is rapidly changing and as usual the legal system is struggling to catch up. This should keep a few lawyers busy well into the next millennium. Meanwhile, look for my Web site coming soon to a computer near you. (www.miketolleson.com)

Previously published in the Texas Lawyer, September 7, 1998.

Mike Tolleson is the principal of Mike Tolleson & Associates, Austin. He was the first chairman of the Entertainment & Sports Law Section of the State Bar of Texas, a lifetime member of the Texas Music Association, and currently chairs the Planning Committee of the Annual Entertainment Law Institute.

(c) Mike Tolleson - 1998

Join the Section, Today!

Law v. National Collegiate Athletic Association: A Discussion of the Product, Athlete, and Coaches Market²

by Robert W. Mason¹

The National Collegiate Athletic Association (“NCAA”) is one of the biggest regulators of amateur college sports in the country.³ Among other roles, the NCAA controls standards of amateurism, adopts rules and regulations surrounding competitions, establishes academic standards for player athletic eligibility, and controls the size of coaching staffs and athletic teams.⁴ But such power in the hands of one governing body has made it a prime target for antitrust challenges.

The challenges, however, have been largely unsuccessful.⁵ The NCAA has identified two very different markets in its antitrust defenses: the “product” market; and the “athlete” market.⁶ Through differing restrictions, the NCAA has developed athletic competition into a viable product, thereby setting the foundation for uniform media contracts. Further, to remain a true amateur, the college athlete and institutions have to abide by many NCAA-promulgated regulations, including restrictions on compensation.

But what about the coaches? Salaries for many college coaches have skyrocketed in the last decade.⁷ Attempts to control the expanding salaries of the coaches led to the lawsuit in *Law v. National Collegiate Athletic Association*, a recent Tenth Circuit decision that discusses the coaches market and antitrust implications surrounding it.⁸

Part I of this paper provides an overview of antitrust law as it has been applied to amateur sports regulation, so that the reader will better understand the implications of *Law* on all three NCAA markets. Part I also introduces the NCAA’s three markets that courts have examined for antitrust violations. Part II provides the background of the *Law* decision at the district court level. Part III examines the *Law* decision of the Tenth Circuit and provides appropriate commentary. Part III also analyzes the potential effects of the *Law* decision on the athlete and product market of the NCAA, in addition to exploring aspects of the Tenth Circuit’s rationale in *Law*. Part IV examines the only subsequent antitrust case brought against the NCAA that mentions the *Law* decision: *Smith v. National Collegiate Athletic Association*.⁹

I. Antitrust Regulation of the NCAA

1. The Product Market

Most antitrust controversies involve the existence of some identifiable market.¹⁰ The NCAA has several potential markets. The most significant markets can be grouped into a product market, an athlete market, and a coaches market. The product market, as referenced throughout this paper, refers to the overall product that the NCAA provides to the consumers. The most observable part of this product to the paying consumer is, of course, televised athletic competitions.¹¹ Courts have explicitly found these competitions, such as NCAA football or basketball games, to constitute a product for purposes of antitrust analysis.¹²

For such an analysis, courts generally apply the Sherman Act. Section 1 of the Sherman Act prohibits “[e]very contract, combination, or conspiracy in restraint of trade or commerce among the several States.”¹³ To establish a claim under Section 1, the plaintiff must demonstrate: “(1) that there was a contract, combination, or

conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.”¹⁴

The first major case before the Supreme Court relating to Sherman Act violations and the NCAA was *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.¹⁵ In this case, the Supreme Court determined that the proper test for this type of Sherman Act grievance was the rule of reason.¹⁶ The Tenth Circuit amply summed up the role of the NCAA:

The NCAA determines playing rules, sets eligibility requirements, regulates recruiting, and establishes the requirements for and the number of scholarships that may be offered. It establishes when the seasons may start and must end, determines the number of games that may be played, and fixes the number of coaches a team may have.¹⁷

The television plan before the court consisted of limiting NCAA members from selling broadcast rights to their games in accordance with the plan only, and limiting the actual buyers to ABC, CBS and Turner.¹⁸ Surprisingly, the Tenth Circuit still found that the television arrangement before the court was “so fraught with anticompetitive potential that it appears to be one that would always or almost always tend to restrict competition.”¹⁹ Therefore, it affirmed the district court’s conclusion that the plan and contracts constituted per se illegal price fixing. Despite this finding, the court considered the television plan and the network contracts under the rule of reason because, “given the state of the record and the prospect of review by the Supreme Court, scrutinizing the plan and contracts under the rule of reason promotes litigation efficiency.”²⁰

The Supreme Court agreed with the Circuit court insofar as the application of the rule of reason approach.²¹ The Court stated that “what is critical in this case is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all. What the NCAA and its member institutions market in this case is competition itself.”²² The Court further stated “Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. [T]he essential inquiry remains the same—whether or not the challenged restraint enhances competition.”²³

After analyzing the arguments of the NCAA with respect to the televising of college football, in essence, the product market, the Court determined that “by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life.”²⁴ Thus the agreement constituted an unreasonable restraint of trade, thereby opening up the market for such now famous relationships as Notre Dame-NBC and others.²⁵

The rationale used by the Court for a rule of reason analysis has been the subject of much criticism and commentary.²⁶ The NCAA strictly clings to its stated goals of amateur-preservation and competition, in addition to the overall education of its athletes.²⁷ These purposes have been persuasive to courts in many different antitrust challenges.²⁸ But in reality, it would seem that, at least for the product market, the rule of reason is the correct standard to apply. Subsequent cases after *Board of Regents* have affirmed the rule of reason as the proper analysis in the product market, as well as in other markets.²⁹

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2. The Athlete Market

The athlete market refers to the NCAA's control of the individual collegiate athlete. The NCAA Manual and enforcement procedures closely regulate the dealings of the student-athlete. Such regulations require student-athletes to attend class, maintain a minimum grade point average, and enroll and complete a required number of courses to obtain a degree.³⁰ One of the more controversial rules prevents the student-athlete from hiring an agent or entering the NFL draft and, after failing to meet the professional standards, returning to play college football to improve his football skills in hopes of entering an upcoming draft. Student-athletes have unsuccessfully challenged this and other rules in the past.³¹

The athlete market is commingled with the product market, whereby the regulation of student-athletes helps the members make their respective team better. This in turn enhances the overall product competition, and bolsters its marketability. However, restricting the freedom of student-athletes has caused major problems for the NCAA as well as its member institutions. For example, many student-athlete scholarship recipients, having NCAA-mandated constraints on their employment, survive on a meager budget of \$35 per month—something almost akin to impoverishment.³² The schools provide room, board, and tuition, but even with these amenities students must fend for themselves with respect to other costs such as entertainment.³³ The commercialism of competition gives student-athletes public recognition.³⁴ This then drives student-athletes to forego degree-completion and enter professional sports as soon as it becomes lucrative. The end result is a student without a degree who has little or nothing to show for his years at the NCAA institution. These problems have been discussed in differing antitrust challenges to the NCAA's control of the athlete market.³⁵

As in the product market, courts that have analyzed antitrust challenges with respect to the athlete market have used the rule of reason.³⁶ As stated in *Banks*, “[w]e have held that if indicia of anticompetitive intent are lacking, the rule-of-reason analysis applies. The essential inquiry under the rule-of-reason analysis is whether the challenged restraint enhances competition.”³⁷ Thus, despite the differences between the athlete market and the product market, the product market's seemingly-dependent relationship to the athlete market pushes analysis of restrictions on the athlete market into the rule of reason analysis. Overall, though, athletes have failed to gain antitrust protection for themselves.³⁸

3. The Coaches Market

Salaries for college coaches in NCAA Division I sports such as basketball and football have risen dramatically in the last 20 years.³⁹ Concerns over out-of-control costs prompted the NCAA to take action to curtail expenditures.⁴⁰ At a special convention in August 1975, the NCAA adopted Bylaw 12-1 to limit the maximum number of assistant football and basketball coaches certain of the institutions could employ.⁴¹ Such restriction brought a challenge by coaches at the University of Alabama.⁴² The court reasoned that given the nature and purposes of the NCAA and its member institutions, the restriction was not unreasonable.⁴³ Despite the coaches' loss in their antitrust challenge to the Bylaw, the action highlighted the existence of the coaches market, a market consisting of all coaches in the NCAA, particularly those at Division I schools.

In this market, aside from limiting the maximum number of coaches on a staff, the NCAA has attempted to fix salaries and impose various other restrictions on the coaches. But the rule of reason analysis has been used under each challenge to the NCAA's actions.⁴⁴ In *Hennessey v. National Collegiate Athletic Association*, the court stated:

While this court has declined to grant the NCAA and its members a total exemption from the antitrust laws, it does believe that, given the nature and purposes of the NCAA and its member institutions, this particular restraint, limiting the number of assistant coaches who may be employed at one time by the institutions, is not a per se violation of the antitrust laws.⁴⁵

The coaches market, like the athlete market, is commingled with the product market. The restrictions on coaching staffs, salaries, and other such items affects the overall product of NCAA competition. Connecting the coaches market to the product market allows similar antitrust analysis by the courts. Limitations on coaches, whether through salary-caps or personnel, directly affects the overall product through increased or decreased costs, visibility, etc.

The coaches market was explicitly recognized in *Law*: “The market for coaching services is different from the market for intercollegiate sports. In the market for coaching services, coaches are the producers and schools are the consumers, whereas in the market for intercollegiate sports, the schools become the producers and the public the consumers.”⁴⁶ Thus, attempts to regulate this market must be examined for antitrust violations, just as the product market and athlete market are.

4. Antitrust Analysis Overview

The pre-analysis step antitrust challenges is that a court must determine the legality of the restraint in question.⁴⁷ The principal question of legality rests on whether the restraint in the market is such as merely regulates and thereby promotes competition, or whether it is such as may suppress or even destroy competition.⁴⁸ But because there is only one NCAA Division I, competition is arguably nonexistent.⁴⁹ For example, proponents of NCAA regulations limiting the number of coaches have argued that coaches may seek employment from other institutions.⁵⁰ But such institutions, if members of the NCAA, are subject to the same rules and regulations promulgated by that authority. The result is a restriction of competition.

Courts next consider the facts peculiar to the business to which the restraint is applied. Such facts include: the condition before and after the restraint is imposed; the nature of the restraint; the restraint's effect, actual or probable; the history of the restraint; the reason for adopting the particular remedy; and the purpose or end sought to be attained.⁵¹

Anticompetitive effects such as the one described above limiting the number of coaches in a sport are visible in other regulations the NCAA promulgates as well. Take the rule restricting the compensation that student-athletes can be given by their universities for athletic services.⁵² Such restriction constitutes an obvious price-fixing, which is in violation of Section 1 of the Sherman Act.

Also, the NCAA restricts the number and times teams may play each year.⁵³ This rule prevents universities from maximizing the output of the product—in this case sport games—and also restricts consumers

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from getting their maximum benefit for the sporting event. If more games were available, the price of games would reflect the demand for consumers to attend the games, thus the NCAA's rule prevents the sporting events from competing for the most consumers at the best available price.

To defeat or balance out the anticompetitive effects, the NCAA points to different benefits that its regulations promote. First, the NCAA often re-states its goal of preserving amateurism, and posits that such preservation often requires restrictions that would otherwise be deemed monopolistic.⁵⁴ Second, the NCAA points to its preservation of competition.⁵⁵ Rules necessary to preserve competition, such as limitations on the number and times of games, establish a uniform system so that all member school can easily move into and out of competition.

The overall result has been a rule of reason approach to NCAA rules and regulations challenged under the Sherman Act. The method courts use to reach this conclusion is derived from *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*⁵⁶ *Broadcast Music* states that the proper inquiry is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output?or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"⁵⁷ Per se application should occur only when the integration "render[s] markets more, rather than less competitive" and when the restraints are properly ancillary to the integration.⁵⁸ Even when agreeing that the challenged conduct is on its face illegal and therefore deserving of the per se analysis, courts have neglected to follow this approach, instead relying on the rule of reason analysis to promote such goals as judicial efficiency.⁵⁹

Another important statement in *Broadcast Music* was that anticompetitive restrictions were a necessary evil in order to market the overall product.⁶⁰ Under these unique circumstances, the court stated that the use of the per se rule would be inappropriate and, instead, determined that the agreement at issue in that case should be subjected to the more discriminating examination required under the rule of reason.⁶¹ The agreement on price was necessary to market the product at all.⁶² The NCAA has often pointed to the similarities of its marketing to that in *Broadcast Music*, and courts have been in agreement, applying the rule of reason to challenges brought under the antitrust laws to actions of the NCAA.⁶³

Finally, *Broadcast Music* represented the Supreme Court's adoption of a 'quick look' or truncated rule of reason analysis. This inquiry applies where per se condemnation of a practice is not appropriate, but where no elaborate industry analysis is necessary to reveal the anticompetitive character of an inherently suspected restraint.⁶⁴ This approach does not require proof of market power because adverse effects on competition are apparent.⁶⁵ Instead, the court directly analyzes the defendant's proffered competitive justifications for the restraint.⁶⁶

II. Law v. NCAA, The District Court Opinion

1. Background

In an attempt to reduce the costs in intercollegiate athletics without compromising student-athletes' access to higher education or disrupting the NCAA's competitive balance, the NCAA established a Cost Reduction Committee to examine potential methods of controlling overall costs.⁶⁷ In 1991, as a result of this Committee's

examination of various facts, the NCAA adopted Bylaw 11.02.3, which limited then number of coaches in all Division I sports and required institutions to designate one of their coaches in every sport other than football a restricted earnings coach(REC).⁶⁸

The limitations were designed to "establish a 'restricted earnings' category that will encourage development of new coaches while more effectively limiting compensation to such coaches."⁶⁹ The REC rule limited the compensation of the coach to \$12,000 during the academic year and \$4,000 during the summer months. Under this rule, RECs could receive additional compensation for performing duties for another department of the institution during either the summer or the academic year, provided that (1) such compensation is commensurate with that received by others performing the same or similar assignments, (2) the ratio of compensation received for coaching duties and any other duties is directly proportionate to the amount of time devoted to the two areas for assignment, and (3) the individual is qualified for and performing the duties outside the athletic department for which the individual is compensated.⁷⁰ Other athletic department employees' salaries or compensation was not limited. The Bylaw neither prevented member institutions from increasing expenditures on other aspects of their athletic programs as they implemented this Rule. This rule was approved by NCAA Division I institutions and became effective August 1, 1992.⁷¹

Several REC basketball coaches brought this action against the NCAA. Other suits had been filed challenging this rule as well.⁷² The matter came before the present court on Plaintiff's Motion for Summary Judgment on the issue of liability. The coaches in the two other lawsuits as well as the NCAA agreed to be bound by the District Court's ruling on the pending summary judgment motions with respect to the issue of liability.⁷³

2. District Court Opinion

In granting the summary judgment motion, the court utilized the rule of reason approach, relying on *Board of Regents*.⁷⁴ The court concluded that although the NCAA has a vital role in bringing amateur athletics to the public, the Supreme Court did not intend "to give the NCAA carte blanche in imposing restraints of trade on its member institutions or other parties because of its role in the marketplace."⁷⁵ Instead, the Court chose to seek justification for the challenged conduct under the rule of reason in order to allow the NCAA the opportunity to defend its conduct based on a standard of reasonableness. After an enlightening discussion of the rule of reason, the court followed the 'quick look' approach and moved directly to an analysis of the NCAA's proffered competitive justifications for the REC Rule.⁷⁶

The Court then examined the effects of the REC Rule to determine whether it was anticompetitive. The NCAA first argued that the Rule was not anticompetitive because RECs may obtain coaching positions with non-NCAA teams, such as high schools, Division II or III teams, overseas teams, or other non-coaching-related employment.⁷⁷ The Court found this argument to be without merit, because the absence of proof of market power does not foreclose a finding of anticompetitive behavior.⁷⁸ The bottom line was that this rule "specifically prohibits the free operation of a market responsive to demand and is thus inconsistent with the Sherman Act's mandates."⁷⁹

The NCAA next argued that the REC Rule may even be procompetitive because the rule will prevent the NCAA from going

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out of business due to increased costs, thus preserving the coaching positions for basketball coaches.⁸⁰ The court did not find any compelling evidence that the NCAA members are on the brink of financial disaster, or even that the effects of the REC Rule would save the institutions from collapse.⁸¹ In pointing out the differences between the coaching services market and the intercollegiate sports market, the court stated that “[p]rocompetitive justifications for price-fixing must apply to the same market in which the restraint is found, not to some other market.”⁸² Therefore the NCAA’s argument failed.

The court next looked to the NCAA’s justifications for the REC Rule. First, the court noted that the burden of establishing an affirmative defense which completely justifies the Sherman Act violation was on the NCAA.⁸³ As discussed *infra*, the NCAA attempted to emphasize its role in maintaining a level playing field in the sports arena, retaining and fostering the spirit of amateurism, and protecting its members from self-imposed potentially fatal cost increases.⁸⁴

After examining Board of Regents and Hennessey, the court concluded that despite the good intentions of the NCAA through its goals of the REC Rule to stabilize and depress the compensation of the RECs, alone, an otherwise objectionable regulation cannot be saved.⁸⁵ Comparing the present matter to Board of Regents and Hennessey, the court emphasized that restrictions on coach compensation is quite different from the regulations referred in the aforementioned cases because the coaches are earning their livelihood through service to the member institutions.⁸⁶

Finally, and most crucially, after recognizing that cost-cutting measures were needed, that amateurism and competitive equity should be maintained, and that retaining a coaching position for an entry-level coach benefits both the NCAA members and coaches, the court failed to find that the restraint furthered legitimate objectives.⁸⁷ The NCAA offered no evidence that the Rule furthers these objectives, so the court ended its inquiry at that point and found that the Rule was a restraint of trade as prohibited by the Sherman Act.⁸⁸ A permanent injunction against the NCAA was granted regarding application of the REC Rule.⁸⁹

III. Law v. NCAA, The Tenth Circuit Opinion and Commentary

1. Decision Overview

Because the matter reached the District Court on a summary judgment motion, the appeal was classified as interlocutory; however, jurisdiction was properly conferred because the NCAA sought review of the permanent injunction.⁹⁰ After reviewing the facts of the case, the Tenth Circuit determined that the proper standard of review is *de novo* because the summary judgment served as the basis for the injunction in this matter.⁹¹

The Tenth Circuit began with the determination of the proper analysis for the challenged rule. Pointing out that “[t]o prevail on a Section 1 claim under the Sherman Act, the coaches needed to prove that the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market,” the Tenth Circuit found that the NCAA did not dispute the agreement but that it did contest the district court’s finding that there was no genuine issue of material fact that the REC Rule is an unreasonable restraint of trade on the record before it.⁹²

The Tenth Circuit determined that the proper analysis was the rule of reason, despite finding that “the REC Rule constitutes the type of naked horizontal agreement among competitive purchasers

to fix prices found to be illegal *per se*.”⁹³ Relying on Broadcast Music, the Tenth Circuit emphasized that certain products require horizontal restraints, including horizontal price-fixing, in order to exist at all.⁹⁴ Indeed, the Tenth Circuit then examined Board of Regents to the extent that the Supreme Court refused to apply a *per se* rule and instead adopted a rule of reason approach in the televised college football market.⁹⁵

The adoption of the rule of reason approach did not go without argument. The coaches pointed to the Supreme Court’s refusal to create exceptions to the *per se* treatment of price-fixing schemes in other cases.⁹⁶ They also argued that Board of Regents is distinguishable because the agreement in that case went to marketing the product of college sports itself, and because it involved a joint selling agreement.⁹⁷

The Tenth Circuit countered that of the cases cited by the plaintiffs in which the Supreme Court has failed to create exceptions to the *per se* rule, none dealt with a product case that requires horizontal restraints to exist. Also, the Court stated that Board of Regents did not involve a joint selling arrangement because each school negotiated individually with television networks within the constraints of price agreements.⁹⁸ Likewise, it rejected the coaches’ argument that the coaches market was distinguishable from the product market; rather, it interpreted Board of Regents to more generally conclude that “all horizontal agreements among NCAA members, even those as egregious as price-fixing, should be subject to a rule of reason analysis.”⁹⁹

The Court then diagrammed the burden-shifting required under a rule of reason analysis: First, the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition; second, the defendant must come forward with evidence of the procompetitive virtues of the alleged wrongful conduct; and third, the plaintiff must show that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be reached in a substantially less restrictive manner.¹⁰⁰ Then, the court must weigh the harms and benefits against each other to determine the reasonableness of the challenged behavior.¹⁰¹

Thus, the Tenth Circuit next looked at the anticompetitive effect of the REC Rule. Such effect is shown indirectly by a plaintiff proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects.¹⁰² The court noted that when a practice such as price fixing has obvious non-competitive effects, a court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a truncated or ‘quick look’ rule of reason.¹⁰³

Here, the court found such an approach appropriate: “Because the REC Rule was successful in artificially lowering the price of coaching services, no further evidence or analysis is required to find market power to set prices.”¹⁰⁴ The court refused to consider other factual evidence because of the *prima facie* horizontal price restraint involved, which “are so obviously anticompetitive.”¹⁰⁵

The last argument by the NCAA involved Hennessey, a Fifth Circuit decision predating the Supreme Court’s opinion in Board of Regents. The Fifth Circuit upheld the NCAA’s rule limiting the number of assistant coaches a member institution could employ at any one time.¹⁰⁶ The Tenth Circuit found Hennessey non-controlling for several reasons.

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First, Hennessey addressed a restriction on the number of coaches as opposed to a price-fixing system which controls the maximum amount of money a coach may earn.¹⁰⁷ Second, Hennessey engaged in burden-shifting different from that emphasized in *Law*, making the plaintiff show the unreasonableness of the challenged conduct as opposed to merely showing the anticompetitive effect.¹⁰⁸ Third, the Hennessey opinion predated Board of Regents, and therefore may have differed if it had the benefit of the precedent. Lastly, the Tenth Circuit is not bound by Fifth Circuit precedent, so the Tenth Circuit does not have to consider the results of Hennessey.¹⁰⁹

The Court next moved onto the procompetitive rationales offered by the NCAA. The three rationales offered by the NCAA were: retention of entry-level coaching positions; reduction of costs; and maintenance of competitive equity.¹¹⁰ The Court recognized only the rationales in support of the REC Rule that were necessary to produce competitive intercollegiate sports.¹¹¹

The NCAA argued that the first justification, retention of entry-level positions, is procompetitive because it allows younger, less-experienced coaches to enter into Division I coaching positions.¹¹² However, the NCAA failed to show exactly how the salary limitations accomplish this goal. In fact, the REC Rule had no other restrictions to ensure that the positions would be filled with entry-level applicants. Finding no support for this argument, the Court moved next to the cost-reduction goal.¹¹³

Unfortunately for the NCAA, according to the Court, cost-cutting alone is not a valid procompetitive justification.¹¹⁴ “If it were, any group of competing buyers could agree on maximum prices.”¹¹⁵ The Sherman Act “precludes inquiry into the question whether competition is good or bad,” therefore negating the NCAA’s argument that without the REC Rule competition would lead to higher prices.¹¹⁶

Even if, as the NCAA argued, the cost reductions were necessary to save an inefficient or unsuccessful competitor from failure, the lack of evidence “that limits on RECs’ salaries would be successful in reducing deficits, let alone that such reductions were necessary to save college basketball” precluded the court from viably considering this argument.¹¹⁷

The goal of maintaining competitiveness was not persuasive to the Court either. The NCAA relied on Hennessey, but for the same reasons the Court rejected Hennessey as described *infra*, the Court found it unpersuasive in this context.¹¹⁸ In fact, the Court found that the REC Rule “is nothing more than a cost-cutting measure and shows that the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance.”¹¹⁹

Alternatively, the NCAA pushed for a ‘wait and see’ approach similar to the one adopted in Hennessey. However, the Tenth Circuit did not agree with the burden-shifting approach taken by the Fifth Circuit, more so in light of the Supreme Court’s decision in *Board of Regents*.¹²⁰ Therefore, the Court affirmed the District Court’s order granting a permanent injunction.¹²¹

2. Analysis of the Decision

The Tenth Circuit largely followed the rationale of the District Court in affirming the permanent injunction against the NCAA from reenacting compensation limits such as those contained in the REC Rule. Several elements of the Tenth Circuit’s opinion deserve some discussion. Among these are the effects this opinion has on the

product and athlete market, the decision to use the truncated rule of reason, the distinction between a price-restraint and other restraints the NCAA’s has imposed on member institutions, the preclusion of inquiry whether competition is good or bad, and the wave-off of the wait-and-see approach. I will discuss each of these in turn.

Law on the Product Market

One of the chief principles in *Law* is the representation that the REC Rule deals with the overall product of college sports. The product, which was described by Board of Regents, is competition itself.¹²² However, the plaintiffs in *Law*, in arguing for application of per se treatment of price-fixing schemes, point out that the “hiring of coaches involves the market for coaching services, an input, rather than college sports, the output.”¹²³

The Tenth Circuit stated that the overall product definition is insignificant; rather than attempting to engage in market discussions, the Court fell back on the overall agreement consisting of a horizontal agreement that is necessary for competition to exist altogether.¹²⁴ So which comes first, the chicken or the egg?

True, without coaches, the product of competition would be severely modified. However, the hiring and firing of coaches is not merely one factor in the underlying scheme of competition. Coaches are not subject to the same strict control as athletes. The people who are coaches must compete against other coaches for similar positions in the NCAA. Their relevant market is affected independently of the overall product. If a member institution decides to expand into a new arena (such as the University of Dallas’ recent addition of men’s baseball to its sports repertoire) then coaches within the market must compete for those openings due to the new demand. Similarly, if an NCAA member decides to scrap its program, then the supply of coaches increases, thus making the former coaches more willing to accept different offers than would normally be available.

The overall product of athletic competition among member institutions does not change. The free-market dictates what coaches are willing to accept and reject, and the overall result is that member institutions have a chance to get the best product (coach) for its dollar. Therefore, *Law*, if anything, hurts the coaches market in that the Tenth Circuit neglects to even analyze whether there is an independent market outright.

The student-athlete is improved by the establishment of an independent coaches market. Although the NCAA has often pointed to its preservation of amateurism and education through its stringent control of the athletes, the independent coaches market allows the student-athlete to have the best possible coach through the free-market system. Likewise, the university maximizes its investment in the student-athlete by obtaining the best coach for the student-athlete at the best possible price. The Tenth Circuit failed to appreciate its opportunity to discuss or at least enlighten the overall collegiate market by entertaining the idea of an independent coaches market, thus overall bringing down the ultimate product market.

Law on the Athlete Market

The effect of *Law* on the athlete market is more subtle. The athlete market, consisting of the supply of athletes versus the demand of the universities, is subject to the same rules of an open market. If a university has a need for a point guard, it must search the market for

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the best student-athlete qualified to fulfill its demand. Comparably, the student-athlete must enter into the supply pool with other point guards and select the best university from the available resources.

Perhaps Law's biggest effect on the athlete market is its strict adherence to Board of Regents' determination that the rule of reason is most appropriate in an industry in which horizontal restraints on competition are essential if the product is to be available at all.¹²⁵ Combined with Law's refusal to distinguish the overall product of collegiate competition from the markets of coaches, athletes, and overall product, the inference is that with respect to all challenges brought in the athlete market, the rule of reason applies. A challenge to the Supreme Court's rationale in the form of recognition of differing sub-markets inside the overall competition market would have greatly aided those pushing for increased student-athlete compensation.

Compensation of student-athletes has been a favorite subject of debate among amateur sports scholars.¹²⁶ Problems in this market have led to the dismissal of many coaches, the prevention of student-athletes individually from participating in university competitions, and the prevention of university teams, as a whole, from competing in seasonal and post-seasonal athletic play.¹²⁷ While the preservation of true amateurism has been a respectable goal in maintaining strict controls over student-athlete compensation, some critics have argued that it has gone too far. The topic of student-athlete compensation is beyond the scope of this paper.

However, the subject of judicial review for any such compensation proposal is not. The pros and cons of increased student-athlete compensation aside, a true, viable plan would have to pass rule of reason analysis as adhered to in Law. One thing Law does encourage is the possibility of an across-the-board stipend for student-athletes.¹²⁸ If Law had applied per se analysis to the REC Rule, then the corresponding inference would be that per se analysis should apply to other rules such as one governing student compensation.

Truncated Rule of Reason; Price v. Output Distinction

One of the more interesting features of the Law decision is the court's use of the truncated or 'quick-look' rule of reason analysis. According to the Court, the truncated approach is appropriate "when there is an agreement not to compete in terms of price or output[.]"¹²⁹ After adopting such an approach, the Court analyzes the procompetitive justifications for the restraint directly and weighs them against the anticompetitive effects.

Such an approach would seem appropriate in almost any market of the NCAA. However, it is interesting to note that when it comes to output-type limitations, courts have held the practice valid under the Sherman Act. However, limitations on prices have been held to be invalid.

For example, the NCAA's limitation of the number of coaches on a staff (arguably output versus the number of coaches available in the market as input), a practice that would require a truncated rule of reason approach, has been held valid under the Sherman Act.¹³⁰ Likewise, a restraint on the number of games a university may have (output), which also seems to require a truncated rule of reason analysis, has been held valid under the Sherman Act.¹³¹

But Law suggests that limitations on prices, a qualifier for truncated analysis, violate the Sherman Act as anticompetitive. This suggestion is especially visible in non-NCAA cases involving

horizontal restraints of trade.¹³² It follows that any NCAA-promulgated restraint that involves price control would fall under truncated rule of reason analysis and be in violation of the Sherman Act; whereas restraints that involve output restrictions would likely not violate the Sherman Act under truncated analysis.

Good v. Bad Competition: Keeping up with the Joneses

The NCAA argued that it could prevent the behavior of schools' attempting to 'keep up with the Joneses' by the REC Rule. The Tenth Circuit waved off this rationale, relying on National Society of Professional Engineers' logic that the Sherman Act does not decipher between good or bad competition. But what about when the restriction is in a market that is defined as competition itself?¹³³

Clearly, the distinguishing feature of the NCAA is the fact that its overall product is the competition of its member institutions and the underlying goals in support of the product. Because horizontal restraints are necessary for the product of competition to exist, then these restraints should be analyzed as to whether they save costs, create operating efficiencies, enhance competition, and widen consumer choice.¹³⁴

The underlying premise that seems to trouble courts with respect to the inquiry into the restraint is that there is no competition for the product; rather, competition is the product. With this rationale, examining the horizontal restraints in view of their effect on the product (competition) would seem a legitimate goal of judicial review.

If the restraint tends to hamper the product-or in other words equate to bad competition-then the restraint should be rejected. But if the restraint enhances the product by "increasing output, creating operating efficiencies, making a new product available [such as more or different competitions], enhancing product or service quality, and widening consumer choice" then the restraint should be weighed (if rule of reason analysis is appropriate) by the traditional balancing of procompetitive rationales versus anticompetitive effects.¹³⁵

Wait and See Approach

The NCAA's fall-back argument was for the Court to adopt the wait-and-see approach similar to the one adopted by the Fifth Circuit in *Hennessey*. Dismissing *Hennessey* as non-controlling with respect to its burden-shifting, the Tenth Circuit did not discuss this approach at all.¹³⁶ But this approach may have been the better approach to take in the long run, especially if the Court were to examine the good competition versus bad competition arguments as set forth above.

By refusing to put the burden of proving that the procompetitive benefits of the challenged restraint in that case outweighed its anticompetitive effects on the NCAA, the Fifth Circuit effectively adopted a wait and see approach.¹³⁷ This burden shifting would prevent the NCAA from developing experience on which the issue could eventually be adjudicated.¹³⁸ The Tenth Circuit disagreed to the extent that the burden should have been placed on the NCAA from the outset.

The pros of adopting this approach are that it allows the court more time to rule on a possible restraint of trade in violation of the Sherman Act.¹³⁹ The extra time would allow the NCAA to effectively administer the rule and adjust to its ramifications accordingly. Further, the time would prevent the courts from acting too quickly and blocking possible competition-enhancing laws, which the NCAA should be in

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a better position to decide on its own due to its experience in the product.¹⁴⁰ In *Law*, a wait and see approach would have allowed the NCAA to determine if, in fact, the Rule saved money for member institutions. This would have provided sufficient backing for the NCAA's claim. This is the exact support that was found lacking by the Tenth Circuit in the NCAA's justifications for the potential procompetitive effects of the Rule.

Conversely, the approach avoids controversial decisions and balks at an opportunity to nip a potential injustice in the bud. Halting a restraint at its outset and leaving the matter in the hands of judicial review may protect those parties directly effected by the restraint, without the uncertainty of a potential strike-down by the courts. Surely, both the NCAA and the coaches would rather know at the initiation of the REC Rule that the Rule was either in violation of the Sherman Act or not.

PART IV: *Smith v. NCAA*

1. Background

Smith involved a female athlete who participated in Division I NCAA competition for two years while simultaneously graduating college in two and one-half years. The NCAA denied *Smith* eligibility to compete based upon Bylaw 14.1.8.2 ("Postbaccalaureate Bylaw"), which provides that a student-athlete may not participate in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree. *Smith* challenged the Bylaw on the grounds that it is an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, in addition to other grounds that are beyond the scope of this paper.

The Third Circuit ultimately held the Postbaccalaureate Bylaw did not violate section 1 of the Sherman Act, principally because its determination that "the eligibility rules are not related to the NCAA's commercial or business activities."¹⁴¹ Therefore, because the Supreme Court recognized that the Sherman Act primarily was intended to prevent unreasonable restraints in "business and commercial transactions," it has only limited applicability to organizations which have principally noncommercial objectives.¹⁴²

2. Analysis

Smith distinguishes itself from *Law* because the bylaw in *Law* "concerned a restriction on the business activities of the institutions, whereas the Postbaccalaureate Bylaw does not. Because our analysis regarding the applicability of the Sherman Act focuses on the distinction between commercial and noncommercial activities, *Law* is inapposite."¹⁴³

Smith recognizes that the nature of the issue in *Law* is commercial. The Tenth Circuit in *Law*, however, fails to distinguish between the commercial nature of the REC Rule and other bylaws such as those pertaining to eligibility promulgated by the NCAA. Thus, the reader is left confused by the distinction created by the Third Circuit.

Further, *Smith* follows the trend that athlete-market challenges brought under the Sherman Act are governed by rule of reason. Even more so, *Smith* shows that limitations on student-athletic performance—the output as set forth above—will survive rule of reason analysis, confirming the propositions set forth in this paper. If *Smith* had somehow involved a price restraint, then likely the court would have found differently.

PART V: Conclusion

Law does little to illuminate the approach to antitrust scrutiny of NCAA rules. In fact, *Law* squandered an opportunity to identify a different independent market—the coaches market—and perhaps offer new insight into the proper analysis vehicle for NCAA antitrust challenges. What *Law* did do, though, is solidify existing thinking that the rule of reason is the proper tool for such challenges. Leave it to future courts to decide if, indeed, the NCAA is merely a conglomeration of smaller, commercial markets that should expect the same protection from monopolistic practices as other commercial ventures not hidden under the guise of amateurism and the NCAA.

¹The author is a Registered Patent Agent with the law firm of Vaden, Eickenroht & Thompson, LLP of Houston, Texas. The law firm specializes in intellectual property matters. The views in this commentary are the sole responsibility of the author, and do not necessarily reflect the views or opinions of members of Vaden, Eickenroht & Thompson, LLP or its clients.

²Since the completion of this commentary, on Monday, May 5, 1998, a federal jury levied the biggest financial penalty against the NCAA. A jury awarded restricted earnings coaches \$67 million for violating antitrust laws. The Dallas Morning News, Tuesday May 5, 1998, B1.

³The NCAA is a voluntary unincorporated association of approximately 1,100 educational institutions. The associations coordinates the intercollegiate athletic programs of its members.

⁴For a discussion of these rules and regulations, see Paul C. Weiler & Gary R. Roberts, *Sports and the Law* (1993).

⁵Weiler and Roberts deal with some of these cases in their book cited *infra*.

⁶See, for example, *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) for a discussion of the product market; *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) for a discussion of the athlete market.

⁷For a few examples of college coaches' salaries, see Weiler and Roberts, *Sports and the Law* (1993).

⁸*Law v. NCAA*, 902 F.Supp. 1394 (D.Kan. 1995).

⁹1998 WL 111526 (3rd Cir. 1998).

¹⁰The Ninth Circuit stated: "In antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the process of describing those groups of producers which, because of the similarity of their products, have the ability-actual or potential-to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market." *Los Angeles Memorial Coliseum Comm'n. v. NFL*, 726 F.2d 1381 (9th Cir. 1984).

¹¹For example, CBS signed a billion-dollar contract with the NCAA to televise the men's basketball tournament for seven years. Also, in 1991 Notre Dame and NBC entered into a five-year television contract for \$37.5 million dollars. See Weiler & Roberts, *Sports and the Law*.

¹²See *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

¹³15 U.S.C. § 1.

¹⁴*Bahn v. NME Hospitals, Inc.* 929 F.2d 1404 (9th Cir.), cert. denied, 502 U.S. 994, 112 S.Ct. 617, 116 L.Ed.2d 639 (1991).

¹⁵468 U.S. 85 (1984). This action was brought by members of the NCAA challenging control over the televising of college football games. The NCAA's television plan and network contracts prevented members from entering into their own agreements with other networks.

¹⁶468 U.S. at 113. The rule of reason test consists of the determination of whether the challenged competition is or is not unreasonably restrictive of competitive conditions.

¹⁷*Board of Regents of the University of Oklahoma v. NCAA*, 707 F.2d 1147 (Tenth Cir. 1983).

¹⁸*Id.* at 1157. This plan thus had only one vendor (NCAA) and therefore no price competition among the schools for the sale of broadcast rights.

¹⁹*Id.* at 1155.

²⁰*Id.* at 1157.

²¹*Board of Regents*, 468 U.S. 85 (1984).

²²*Id.* at 86.

²³*Id.* at 104.

²⁴*Id.* at 120.

²⁵See Footnote 10.

²⁶See Jay P. Yancey, *Is the Quick Look Too Quick?: Potential Problems With the Quick Look Analysis of Antitrust Litigation*, 44 U. Kan. L. Rev. 671 (1996); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 Tul.L.Rev. 2631 (1996); Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 Loy.L.A.L.Rev. 1213 (1993); Robert J. Kirby, *Antitrust Law—NCAA Thrown for a Loss by the Court's Traditional Antitrust Blitz*, 18 Creighton L.Rev. 917 (1984).

²⁷See *Board of Regents and Law*, 134 F.2d 1010.

²⁸See, e.g., *Justice v. NCAA*, 577 F.Supp. 356, 379 (D.Ariz.1983) (holding that NCAA sanctions such as rendering a college team ineligible for post-season play and for television appearances imposed for violations of rule against providing compensation to student-athletes did not violate antitrust law because sanctions were reasonably related to the NCAA's goals of preserving amateurism and promoting fair competition).

²⁹See *Smith v. NCAA*, 139 F.3d 180 (3rd Cir. 1998) for the athlete market application, and *Law* for the coaching market application.

³⁰*Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992).

³¹See *Banks* for an example of a student-athlete challenging the eligibility rule at Notre Dame.

³²Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. Tex.L.Rev. 59 (1995).

³³*Banks*, 977 F.2d 1081.

³⁴For example, the seven-year billion-dollar television deal between CBS and the NCAA mentioned in Footnote 10, *supra*.

- 35 See Smith, Justice, and Banks for examples of these challenges.
- 36 See Banks, 977 F.2d 1081 (7th Cir. 1992); and McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).
- 37 Banks at 1082.
- 38 E.g. Banks, Jones v. NCAA, 392 F.Supp. 295 (D. Mass. 1975), Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998).
- 39 C. Peter Goperlund III, Pay for Play for College Athletes: Now More Than Ever, 38 S.Tex.L.Rev. 1081, 1088 (1997).
- 40 Hennessey v. NCAA, 564 F.2d 1136 (5th Cir. 1977).
- 41 Id.
- 42 Id.
- 43 Id. at 1154.
- 44 See Hennessey and Law for examples.
- 45 Id. at 1152.
- 46 Law 902 F.Supp at 1406.
- 47 Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).
- 48 Id.
- 49 The author is aware of other collegiate competition organizations, such as the National Association of Intercollegiate Athletics, but the scope of this paper is limited to Division I programs.
- 50 Law, 902 F.Supp. at 1404.
- 51 Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918).
- 52 NCAA Const. and By-Laws Articles 15-16.
- 53 Id. Article 17.
- 54 Board of Regents, 468 U.S. at 102.
- 55 Id.
- 56 441 U.S. 1 (1979). In this case, a television network brought an antitrust suit against the licensing agencies for composers, writers and publishers and their members and affiliates, alleging that the system by which the agencies received fees for the issuance of blanket licenses to perform copyrighted musical compositions amounted to illegal price fixing. The Supreme Court held that the licensing arrangement was necessary if the market was even to exist at all.
- 57 Id. At 19-20.
- 58 Board of Regents at 1153.
- 59 Id. at 1157.
- 60 Broadcast Music at 23.
- 61 Id. at 24.
- 62 Id. at 23.
- 63 See the discussion in Board of Regents, 468 U.S. at 109.
- 64 Id. at 109.
- 65 Broadcast Music, 441 U.S. 1 (1979).
- 66 Law, 902 F.Supp. at 1405.
- 67 Id. at 1399.
- 68 See NCAA Bylaw 11.02.3, 11.3.4, and 11.7.4.
- 69 Id.
- 70 Id.
- 71 Id.
- 72 They asserted that the Division I members of the NCAA in violation of the Sherman Antitrust Act, 15 U.S.C. § 1, had conspired to limit the maximum compensation they will pay to one category of basketball coaches (The RECs).
- 73 Hall v. NCAA, Schriber v. NCAA.
- 74 Law, 902 F.Supp. 1403-1404.
- 75 Id. at 1405.
- 76 Id.
- 77 Id.
- 78 Id. (citing Board of Regents at 109).
- 79 Id. at 1405.
- 80 Id. at 1408. The NCAA's argument is that the cost spiral of personnel expenses under which the NCAA currently labors, if not curbed, will eventually and inevitably cause the complete demise of intercollegiate athletics.
- 81 At best, the rule would reduce the salaries of the lowest paid member of each school's coaching staff by a few thousand dollars. Although some RECs were paid from \$60,000-\$70,000, this was not the case in the majority of Division I schools.
- 82 Law at 1406 (citing United States v. Topco Assoc., Inc. 405 U.S. 596, 610 (1972)).
- 83 Id. at 1406.
- 84 Id.
- 85 Id. at 1407 (citing Chicago Board of Trade, 246 U.S. at 238 (1918)).
- 86 Id. at 1408.
- 87 Id. at 1410.
- 88 Id.
- 89 Id.
- 90 Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998), before three-judge panel.
- See Footnote 1.
- 91 Id.
- 92 Id. at 1012.
- 93 Id. at 1017.
- 94 Id. (citing Broadcast Music 441 U.S. 1 at 23 (1979)).
- 95 Id. (citing Board of Regents 468 U.S. at 99-103).
- 96 Id. at 1017-1018.
- 97 Id.
- 98 Id. at 1018.
- 99 Id.
- 100 Id. at 1019.
- 101 Id.
- 102 Id.
- 103 Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667, 675 (7th Cir. 1992).
- 104 Id.
- 105 Id. (citing Board of Regents at 109-110).
- 106 Hennessey at 1141-42.
- 107 Law 134 F.3d at 1020.
- 108 Id. at 1021.
- 109 Id.
- 110 Id. at 1021-1023.
- 111 Id. at 1021.
- 112 Id. at 1021-1022.
- 113 Id. at 1022.
- 114 Id.
- 115 Id.
- 116 Id. (citing National Society of Professional Engineers, 435 U.S. at 695).
- 117 Id. at 1023.
- 118 Id. at 1024.
- 119 Id.
- 120 Id.
- 121 Id.
- 122 Board of Regents at 86.
- 123 Law 134 F.3d at 1018.
- 124 Id. at 1017.
- 125 Board of Regents at 100-101 (quoting Broadcast Music at 19-20).
- 126 See Charlotte M. Rasche, Can Universities Afford To Pay For Play? A Look at Vicarious Liability Implications of Compensating Student Athletes, 16 Rev. Litig. 219 (1997); Eric J. Sobocinski, College Athletes: What is Fair Compensation?, 7 Marq. Sports L.J. (1996).
- 127 See NCAA v. Tarkanian, 488 U.S. 179 (1988) for an exposition in coaching problems. See Smith v. NCAA, 139 F.3d 180 (3rd Cir. 1998) for problems in the student-athlete arena. See Justice v. NCAA 577 F.Supp. 356 (D. Arizona 1983) for an example of a challenge to post-season competition restrictions.
- 128 This is true because the Tenth Circuit does not apply a per se approach to the REC rule, despite the fact that it agreed it was a horizontal restraint AND it involved price-fixing to a certain degree. It follows that compensation for the student-athlete at a similar level would undergo rule of reason analysis, thus preventing it from being found per se illegal under the Sherman Act. Gary R. Roberts presents arguments relative to this subject in The NCAA, Antitrust, and Consumer Welfare, 70 Tul. L. Rev. 2631 (1996).
- 129 Law 134 F.3d at 1024.
- 130 Hennessey, 564 F.2d 1136 (5th Cir. 1977).
- 131 This type of restraint has been held valid as well.
- 132 Not surprising, because these other cases almost always apply per se analysis to horizontal restraints of trade.
- 133 See Board of Regents for a discussion of this definition.
- 134 See Law 134 F.3d at 1022.
- 135 Id., brackets added by author for clarification. These goals have been accepted by courts as "justifications for otherwise anticompetitive agreements." Id. See also I ABA Section of Antitrust Law, at 66-67.
- 136 Law 134 F.3d at 1024.
- 137 Hennessey at 1153-54.
- 138 Id.
- 139 15 U.S.C. § 1.
- 140 The NCAA has been involved in competition—the product—since 1906, therefore giving it ample experience to make decisions with respect to its administration.
- 141 Smith at 185
- 142 Id. (citing Apex, 310 U.S. at 493).
- 143 Smith at 186, Footnote 4.

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The Entertainment & Sports Law Section of the State Bar of Texas was formed in 1989 and currently has over 500 members. The Section is directed at lawyers who devote a portion of their practice to entertainment and/or sports law and seeks to educate its members on recent developments in entertainment and sports law. Membership in the Section is also available to non-lawyers who have an interest in entertainment and sports law.

The "Entertainment & Sports Law Journal", published three times a year by the Section, contains articles and information of professional and academic interest relating to entertainment, sports, intellectual property, art and other related areas. The Section also conducts seminars of general interest to its members. Membership in the Section is from June 1 to May 31.

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The editors of the TEXAS ENTERTAINMENT AND SPORTS LAW JOURNAL ("Journal") are soliciting articles for our fourth annual writing contest for students currently enrolled in Texas law schools for the best article on a sports or entertainment law topic.

The winning student's article will be published in the Journal. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the Journal. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than June 15, 1999.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½ x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the Journal, please call Matthew J. Mitten, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-1845.



9th Annual Entertainment Law Institute March 19 & 20, 1999

The Four Seasons Hotel • 98 San Jacinto Boulevard • Austin, Texas

FRIDAY, MARCH 19, 1999

Presiding Officer: Mike Tolleson, Austin, Texas

8:00 a.m. LATE REGISTRATION

8:50 a.m. WELCOMING REMARKS

Ballroom Foyer, Four Seasons Hotel, Austin. Telephone: (512) 478-4500. Continental breakfast to be provided.

9:00 a.m. WRITING FOR FILM AND TV (PART I): ACQUISITION AND DEVELOPMENT OF LITERARY AND LIFE STORE RIGHTS (1.50 hours)

An exploration of legal and business issues in buying and selling concepts, life stories, books and other literary material for development as film or television projects. Issues addressed include: What is the role of the attorney? What are the basic copyright, privacy, defamation and other legal issues that typically need to be considered? What do submission agreements, option/purchase agreements and live story agreements look like? How are these agreements negotiated—what can relative newcomers expect? Who are typical buyers of different types of materials and stories and what are typical business and legal terms?

Moderator: R. Richard Pappas, Austin, Texas
F. Jay Dougherty, Los Angeles, California
Daniel M. Satorius, Minneapolis, Minnesota

10:30 a.m. BREAK

10:45 a.m. WRITING FOR FILM AND TV (PART II): SCREENPLAY AND TELEPLAY AGREEMENTS, DOCUMENTS, DEALS AND INDUSTRY CUSTOMS - (1.50 hours)

Once material has been optioned and goes into development for TV or film, new contracts for writing services must be negotiated, often with the writers who had nothing to do with the original concept or material. This session examines the role of agent and attorney in obtaining and negotiating writing agreements. Sample screenplay and teleplay agreements will be provided. The panel will discuss the terminology of these agreements, ("rewrite" vs. "revision") key business and legal terms; and the importance of the Writers Guild of America (WGA) and industry custom.

Moderator: R. Richard Pappas, Austin, Texas
F. Jay Dougherty, Los Angeles, California
Tom Hunter, Los Angeles, California

12:15 p.m. LUNCHEON PRESENTATION — (0.50 hours) — OPTIONAL

Tickets available in advance only for \$12.00 (box lunch)

Speaker: Evan M Fogelman
The Fogelman Literary Agency, Dallas, Texas
Topic: Hitting Pay Dirt in Publishing Deals—The View From Texas

1:45 p.m. SHOPPING RECORD DEALS: A&R APPROACH. ETHICS ISSUES — (0.75 hour ethics/PR credit)

A review of shopping agreements, compensation structures, and the appropriate approach to record labels, including a discussion of the role of lawyers in presenting creative material to A&R representatives and related ethics issues.

Kenneth Abdo, Minneapolis, Minnesota
Wallace Collins, New York, New York
A & R representatives, Los Angeles, & New York

2:30 p.m. LICENSING MUSIC FOR NEW MEDIA — (1.00 hours)

A review of the legal issues and practical policies in licensing music for new media. The speakers will cover licensing terms, pricing and strategies for computer games, CD-ROM's, DVD and Internet sites. The discussion will include a review of current practices, predictions of future trends and problems involving the legal and illegal distribution and sale of music via the Internet, and the effect of new distribution options on record companies distributors and retailers

Robert Koh, Palo Alto, California
Steven Winogradsky, North Hollywood, California

3:30 p.m. BREAK

3:45 p.m. INDEPENDENT FILM FINANCE — (1.50 hours)

An overview of film finance covering the five most common film finance/distribution scenarios, noting how independent filmmakers may relate to or participate in each. The presentation will also cover the more common method of financing for low budget independent film—investor financing, providing analysis of the three phases in the life of a film that may be financed in this manner, discussing the important distinction between active versus passive investor financing and then moving on to cover basic securities law considerations for passive investor offerings. Finally, the presentation will touch on the very contemporary aspects of raising financing for independent films on the Internet.

Speaker: John W. Cones, Los Angeles, California
Texas Commentators: Michael Norman Saleman, Austin, Texas
Rick Triplett, Austin, Texas

5:15 p.m. ADJOURN

SATURDAY MORNING, MARCH 20, 1999

Presiding Officer: Russell E. Rains, Austin, Texas

9:00 a.m. LEGAL ISSUES FACED BY EMERGING ARTISTS AND RECORDING/PUBLISHING COMPANIES (PART I) — (1.50 hours, including 0.25 hour ethics/PR credit from 10:00-10:15)

This session will focus on the selection of business structure and how this choice effects the music business directly—for example, copyright issues relating to partnership law and conflicts of interest in representing individual band members vs. the band. Trademark issues including ownership of the group name and trademark protection, and affiliation with performing rights societies, e.g., BMI, ASCAP, SESAC will also be covered.

Edward Z. Fair, Houston, Texas
Thomas J. McCaffrey, Houston, Texas
Steven Winogradsky, North Hollywood, California

10:30 a.m. BREAK

10:45 a.m. LEGAL ISSUES FACED BY EMERGING ARTISTS AND RECORD/PUBLISHING COMPANIES (PART II) — (1.50 hours)

Part two will address the next phase of legal issues faced by a developing artist or small record label/publishing company, including management agreements and talent agency agreements, shopping deals, small distribution/consignment deals, studio/producer spec deals, and investment agreements

Edward Z. Fair, Houston, Texas
Henry Root, Santa Monica, California
Mike Tolleson, Austin, Texas

12:15 p.m. LUNCHEON PRESENTATION — (0.50 hours) — OPTIONAL

Tickets available in advance only for \$24.00

Speaker: Evelyn Shriver & Susan Nadler, Assylum Record
Nashville, Tennessee
Topic: The Changing Nature of the Country Music Business

SATURDAY AFTERNOON, MARCH 20, 1999

Presiding Officer: David S. Sokolow, Austin, Texas

1:45 p.m. COPYRIGHT: WHAT HAS WASHINGTON WROUGHT, AND HOW WILL IT AFFECT THE MUSIC AND MOVIE BUSINESS? — (0.75 hour)

An update on Congressional and Supreme Court actions affecting copyright protection and duration, music performance licensing, importation of copyrighted goods, and infringement trial procedures.

Lionel Sobel, Santa Monica, California

2:30 p.m. LITIGATION—FOCUS ON REMEDIES: CASE LAW AND PRACTICAL LITIGATION STRATEGIES — (1.00 hour)

This session examines litigation options and relevant case law for typical disputes between artists and labels, including what sorts of behaviors or actions are sufficient to terminate contracts, strategies and approaches for terminating contracts when an artist wants out, management disputes, declaratory judgment as a remedy for perpetual contract renegotiation, practical impact of threats of audits, specific performance (from both the artist and the record company's perspective) and effects of bankruptcy on recording contracts.

Moderator: Cindi C. Lazzari, Austin, Texas
Cheryl L. Hodgson, Santa Monica California
Lawrence A. Waks, Austin, Texas

3:30 p.m. BREAK

3:45 p.m. RECORDING CONTRACTS—INDIES VS. MAJORS: DOING THE MATH — (1.50 hours)

Comparing and contrasting major and independent label deals with an emphasis on the financial impact of the artist

Moderator: Kenneth Abdo, Minneapolis, Minnesota
John Polk, Santa Monica, California
Daniel M. Satorius, Minneapolis Minnesota

5:15 p.m. ADJOURN TO RECEPTION FOR SPEAKERS AND REGISTRANTS

MCLE

An application for accreditation for this activity has been submitted to the MCLE Committee of the State Bar of Texas and is pending. It is expected that this program will be accredited by the State Bar of Texas for up to 13.50 hours of participatory continuing legal education credit (including the optional luncheons), of which 1.00 hour will apply to the legal ethics/professional responsibility requirement. Credit in other states also is available. CPAs may obtain 12.00 hours of CPE credit toward licensing with the Texas Board of Public Accountancy. Sponsor #250

CHAMPION ENTERPRISES

PRESENTS

“How to Become a Sports Agent”

Saturday, February 27, 1999

“Anatomy of a Recreational Injury Suit”

Saturday, March 06, 1999

&

Professor Walter Champion (e.g., author of Sports Law in a Nutshell and Fundamentals of Sports Law) and Champion Enterprises presents two conferences to be held at the University of Houston Hilton, 4800 Calhoun, Houston, Texas. Both conferences are accredited for six Texas Continuing Legal Education hours (including two hours of ethics for “How to Become a Sports Agent” and one hour of ethics for “Anatomy of a Recreational Injury Suit”).

SCHEDULE: How to Become a Sports Agent

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| 9:00 - 1:00 p.m. | Registration |
| 9:30 - 10:30 a.m. | “Agent Registration in Texas: Legal & Ethical Considerations,” (including 0.5 hrs. of ethics), Honorable Harold Dutton, State Representative & Attorney. |
| 10:30 - 11:30 a.m. | “Union Regulations for Agent Registration: Legal & Ethical Considerations,” (including 0.5 hrs. of ethics), Prof. Champion. |
| 11:30 - 11:40 a.m. | Break |
| 11:40 - 12:40 p.m. | “Getting & Keeping Your Athlete Clients: Avoiding Conflict of Interests,” (one hr. of ethics), Steve Herskowitz, Esq., Agent. |
| 12:40 - 1:40 p.m. | Break |
| 1:40 - 2:40 p.m. | “Understanding Players’ Contracts,” Frank Rynd, Counsel, Astros. |
| 2:40 - 3:40 p.m. | “Negotiating Players’ Contracts,” Randal Hendricks, Esq., Agent. |
| 3:40 - 3:50 p.m. | Break |
| 3:50 - 4:50 p.m. | “Understanding Collective Bargaining Agreements,” Steve Underwood, Counsel, Tenn. Oilers. |

SCHEDULE: Anatomy of a Recreational Injury Suit

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| 9:00 - 1:00 p.m. | Registration |
| 9:30 - 10:30 a.m. | “Participant vs. Participant,” Prof. Champion. |
| 10:30 - 11:30 a.m. | “Facility Liability,” Steve Patterson, Esq. |
| 11:30 - 11:40 a.m. | Break |
| 11:40 - 12:40 p.m. | “Health Club Waivers: Ethical & Legal Considerations,” (including 0.5 hrs of ethics), Bill Frizzell, Esq. |
| 12:40 - 1:40 p.m. | Break |
| 1:40 - 2:40 p.m. | “Chiropractic Evidence as a Way to Prove Recreational Injuries, Dr. Jana Landry, D.C. & J.D. (she will complete her J.D. in May and the Bar Exam in February; she is also a nationally ranked tri-athlete). |
| 2:40 - 3:40 p.m. | “The Near Monolith of Texas’ Sovereign Immunity as a Means of Thwarting School - Related Sports Injuries: Ethical & Legal Considerations,” (including 0.5 hrs of ethics), Pat Thornton, Esq. |
| 3:40 - 3:50 p.m. | Break |
| 3:50 - 4:50 p.m. | “Using Due Process as a Stratagem to Avoid the Slam Dunk of Sovereign Immunity for School - Related Sports Injuries,” Darah Sue Headley, Esq. |

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 Individual Lecturers Subject To Change.

Accommodations: University of Houston Hilton, 4800 Calhoun, Houston, Texas (713) 741.2447.

Special rates for participants.

I plan to attend Champion Sports Enterprises’ Conferences: “How to Become a Sports Agent” _____ (February 27th) and/or “Anatomy of a Recreational Injury Suit” _____ (March 06th). Both conferences to be held at University of Houston, Hilton.

Name: _____ Address: _____

Tele: _____ Att’y I. D. # & State (If applicable) _____

Signature: _____

*Enclosed is my check in the amount of (\$175.00 for one conference) (\$300.00 for both conferences) (\$60.00 for non-attorneys for one conference; \$100.00 for both conferences) payable to: CHAMPION SPORTS ENTERPRISES, ARENA TOWER I, 7322 SOUTHWEST FREEWAY, SUITE 900, HOUSTON, TEXAS 77074 (TEL: 713.621.5522; FAX: 713.995.1499)

STATE BAR OF TEXAS
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