

**Age Ain't Nothing But a Number: A Critique of Application of the
Non-statutory Labor Exemption in *Clarett***
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I. Introduction

The Sherman Antitrust Act was adopted in 1890 to protect the free market, preserve competition, and provide for equal opportunities and fairness in trade dealing. Specifically, Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several States.”¹

In analyzing Section 1, the Supreme Court has established a test to determine a violation of the Sherman Act based on whether “the challenged restraint merely acts to regulate and thereby promote competition or whether it restrains trade to the extent of suppressing and/or destroying competition.”² Encompassed in this analysis of restraints are illegal group boycotts to prohibit entry into the market by those who seek to compete.

Unlike antitrust laws, “labor law . . . encourages cooperation among competitors in employment.”³The Supreme Court has supported the idea of cooperation in the context of labor unions by immunizing certain bargaining between unions and employers from the reach of antitrust scrutiny. The Court has crafted two exceptions for collective bargaining, one based on the inherent exemption crafted in the Norris-LaGuardia Act, the so-called

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1. 15 U.S.C.A. § 1 (West 2013).
2. Ryan M. Rodenberg, *The NBA’s Latest Three Point Play: Age Eligibility Rules, Antitrust, and Labor Law*, 25-WTR Ent. & Sports Law. 14, 14 (2008).
3. Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales after Brady v. NFL and Anthony v. NBA*, 45 U.C. Davis L. Rev. 1221, 1227 (2012).

“statutory labor exemption;” and another, non-statutory labor exemption based on principles of mandatory bargaining subjects established by the National Labor Relations Board.⁴ The non-statutory labor exemption is particularly significant in the context of NBA and NFL player eligibility rules.

Originally, the National Basketball Association (NBA) required hopeful draftees to exhaust four years of collegiate eligibility in order to be eligible for the draft.⁵ The Supreme Court in *Haywood v. NBA*,⁶ held that the four-year rule violated Section 1, as an illegal group boycott of draftees from the professional sports market.⁷ Following that case, players were draft-eligible upon high school graduation.⁸ However, the NBA and its players’ association, the National Basketball Players Association (NBPA), agreed in 2005 to create a minimum age and eligibility rule for prospective rookies within the collective bargaining agreement.⁹ According to the rule, a prospective rookie must be at least 19-years old, *and* at least one year removed from his high school graduation in order to be eligible for the rookie draft.¹⁰ This rule has been dubbed the “one-and-done” rule.

The National Football League (NFL) has established a similar eligibility rule with the National Football League Players Association

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4. *Id.* at 1228.
5. Rodenberg, *supra* n. 1, at 15.
6. 401 U.S. 1204 (1971).
7. *Id.*
8. *Id.*
9. *Id.* at 14.
10. *Id.*

(NFLPA). In the 2011 collective bargaining agreement, the NFL and NFLPA adopted Article 6, Section 2(b) to govern college player eligibility.¹¹ The rule requires the prospective rookie to be three years removed from high school to be draft-eligible.¹² Essentially, football players must navigate three years of NCAA competition and injuries to reach the NFL draft.

Following a National Championship victory and Big Ten Freshman of the Year honors in 2003, the Ohio State University running back, Maurice Clarett was suspended and ruled ineligible to play.¹³ Rather than sit an entire year, Clarett sought to enter the NFL draft and filed a lawsuit that alleged the NFL player eligibility rule violated Sherman Act Section 1.¹⁴ In *Clarett v. National Football League*, the Second Circuit reversed a district court ruling that the NFL's rule constituted a violation of Section 1.¹⁵ In *Clarett*, current Supreme Court Justice Sotomayor concluded that the non-statutory labor exemption was applicable.¹⁶ As such, the Second Circuit incorrectly determined that player eligibility rules affect wages and working conditions, and failed to follow the appropriate precedent. It is imperative that athletes challenge *Clarett* and that courts return to the illegal group boycott analysis.

II. Incorrect Application of Exemption

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11. NFL/NFLPA Collective Bargaining Agreement, Article 6, Section 2(b) August 4, 2011, available at <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

12. *Id.*

13. *Clarett v. National Football League*, 369 F.3d 124, 125-26 (2d Cir. 2004).

14. *Id.* at 126.

15. *Id.* at 125.

16. *Id.*

The Supreme Court reviewed the application of Sherman Act Section 1 to professional sports in *Brown v. Pro Football, Inc.* In that case, the Supreme Court set forth the non-statutory labor exemption test as follows: 1. whether the restraint occurred during or immediately after a collective bargaining negotiation; 2. whether the restraint is a matter that must be negotiated collectively; and most importantly, 3. whether the restraint concerns “only the parties in the collective bargaining relationship.”¹⁷

In *Clarett*, however, the Second Circuit wrote that age restrictions are “a quite literal condition for initial employment and . . . *might* constitute a mandatory bargaining subject.”¹⁸ (emphasis added) This analysis is entirely inaccurate and wholly inappropriate. Case law has established that the only mandatory bargaining subjects concern wages, hours and working conditions.¹⁹ In the context of professional sports, “devices implanted to regulate free agency systems” have been considered mandatory bargaining subjects.²⁰ However, age restrictions and draft eligibility rules are not part of the free agent process, and as such, are not mandatory bargaining subjects within the scope of the non-statutory labor exemption.

Furthermore, the age restriction rules prevent a player from entering the professional sports market due to an arbitrary element, unsupported by any scientific, factual or actual correlation to an athlete/laborer’s ability to

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17. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).
18. *Clarett*, 369 F.3d at 139.
19. Harmon Gallant and Paul D. Staudohar, *Antitrust Law and Public Policy Alternatives for Professional Sports Leagues*, 2012 WL 4342431 (C.C.H.) (2003).
20. *Id.*#

enter into and successfully compete in the professional sports market. In the NBA, draftees are selected based on projections of future performance, rather than current talent and productivity levels, and scouts are largely capable of judging a player's potential by the time he turns 18.²¹ Those that are drafted younger also earn more money during their careers, play more minutes, and appear in more All-Star games than a player who is only *one year older* when he enters the NBA.²²

Additionally, the Second Circuit's application of the non-statutory labor exemption to player eligibility rules is that the court wholly overlooks the dispositive fact that the collective bargaining process excludes those athletes bound by the rules by stating that "NFLPA [is the] exclusive bargaining representative."²³ The Court's pronouncement in *Brown* explicitly requires that the collectively-bargained restraint to bind "*only th[ose]* parties" to the agreement.²⁴

Player eligibility rules of the NFL and NBA do more than bind the parties to the agreements - the rules bind each and every high school and collegiate football or basketball player. It is unlikely that the Supreme Court intended collective bargaining in professional sports and the general labor

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21. Ryan Rodenberg and Jun Woo Kim, *Testing the On-Court Efficacy of the NBA's Age Eligibility Rule*, *Journal of Quantitative Analysis in Sports*, Manuscript 1426 at 10 (2012).

22. *Id.* at 9.

23. *Clarett*, 369 F.3d at 138.

24. 518 U.S. at 250.

market to prohibit more than 85,000²⁵ would-be market competitors from entering the professional sports market when it announced *Brown*.

III. Illegal Group Boycott Rationale Revived

Courts must return to the illegal group boycott analysis when reviewing age restriction rules. The Supreme Court has authorized that test as the proper standard for these cases in *Haywood*. Illegal group boycotts are those “presumed to be unreasonable restraints of trade, simply by virtue of their obvious and necessary effect on competition. Once . . . such an arrangement has been established, no evidence of actual public injury is required, and no evidence of the reasonableness . . . will be considered.”²⁶ In *American Needle, Inc. v. NFL*, the Supreme Court explained that “members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.”²⁷ Therefore, players’ unions comprised of competitors are subject to Sherman Act liability when a union engages in concerted activity to restrain competition from the market.

Illegal group boycotts in professional sports, for even one year (like the NBA one-and-done rule), fall within the illegal group boycott sphere, as in *Blalock v. Ladies Professional Golf Association (LPGA)*. In *LPGA*, a court

25. NCAA Research, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2011/2011+probability+of+going+pro>.
26. *Blalock v. Ladies Professional Golf Association*, 359 F.Supp. 1260, 1264 (1973), citing, *E. A. McQuade Tours, Inc. v. Consolidated Air Tour*, 467 F.2d 178, 186 (5th Cir. 1972).
27. 130 S. Ct. 2201, 2209 (2010).#

determined that a one-year suspension of a golfer was an illegal group boycott and did not even consider the reasonableness of the suspension when the suspension was, (1) imposed without a hearing, (2) by other competitors who would experience financial gain as a result of the suspension, and (3) the suspended golfer was unable to earn prize money from playing in non-sanctioned events.²⁸

The age restriction rules serve the exact purpose that the court in *LPGA* determined to be *per se* illegal. The age restriction only serves to provide the veteran players of the league with a competitive and financial advantage. Those players who want to enter the NFL or NBA earlier than the rules permit cannot request a hearing with the leagues, players' unions, NCAA, or petition for an exemption/special exception.

Analogous to *LPGA*, age rules only serve the self-interest of veteran players, and prevent prospective draftees from earning a salary. While the Second Circuit approved the restrictions for that very reason, there is no pro-competitive purpose for the rules. Rookie players are subject to lower wages, and therefore produce a cheaper product than veteran players. Additionally, until a player is drafted into the NFL or NBA, he does not earn any money for playing his sport if he is an NCAA amateur athlete. Age restriction rules constitute conspiracies among veteran players' union members, and fall well within the reach of Section 1 of the Sherman Act as illegal group boycotts.

IV. Conclusion

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28. *Blalock*, 359 F.Supp. at 1265.

Contrary to *Clarett*, player eligibility rules are not within the purview of the non-statutory labor exemption. Rather, the proper analysis requires courts to apply an illegal group boycott analysis to the age restriction rules that have been imposed in both the NFL and NBA.