**ANTITRUST LAW** – SALARY CAP – AN ATHLETIC ASSOCIATION REGULATION THAT LIMITS THE SALARY OF COACHES IS AN UNREASONABLE RESTRAINT ON THE FREE MARKET AND CANNOT BE JUSTIFIED ON THE GROUNDS THAT IT PROMOTES COMPETITION – *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

## I. INTRODUCTION

Federal antitrust law, specifically the Sherman Act,[1] proscribes any contract or conspiracy that restrains trade. The original sentiment against such combinations was carried to the United States from the United Kingdom. Such fears of anticompetitive activities came, at least in part, from two sources. First, there was a feeling that the Crown would direct most opportunities to a select few businesses, thereby precluding the livelihood of others.[2] Second, was the common law development of freedom of contract; the philosophy that each business or person should have a fair chance to enter into activities with whom they wished for mutually agreed upon consideration.[3]

This second source conflicted with the very law it led to. That is, the ability to freely contract and to establish the price of goods or services may, with or without intent, restrain a third party's ability to enter the same market. Therefore, a business entity should have the right to do business with whom and to what extent it wishes but cannot preclude a third party from also freely contracting in that same industry. This tension set the early stages for challenges to the Sherman Act.[4] As a result, the judiciary was forced from the beginning of antitrust analysis to allow a flexible meaning to the Sherman Act because it can otherwise be read as a blanket

1. 15 U.S.C. §1 (West 1998). The relevant part of the statute states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." *Id.*

2. *See* Standard Oil Co. v. United States, 221 U.S. 1, 57 (1911).

3. *See id.* at 54-55.

4. *See id. See also* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1887); United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

prohibition of contracts.[5]

To complicate matters, associations whose primary purpose falls outside purely commercial ventures nevertheless enact agreements that have economic consequences that may be subject to antitrust challenges. Such organizations do not neatly fit the framework of antitrust analysis because without certain agreements that limit its members' abilities to contract, the organization could not exist at all. To eliminate the association would effectively eliminate the very product it creates. The National Collegiate Athletic Association, for example, is composed of member colleges and universities that approve rules to govern themselves as a whole in order to promote college athletics.[6] The NCAA established a rule that limited the compensation of a specific class of coaches to encourage less experienced applicants, reduce deficits of athletic departments, establish a level playing ground on which college teams could compete, and thereby promote college athletics in general.[7] The judiciary, however, found that such a rule eliminated the ability for college coaches to benefit from the free market system.[8] The coaches could no longer seek positions based on compensation and could not allow their skills to be paid at the going market rate. Unfortunately for the NCAA, the penalty for violating the Sherman Act appears financially devastating, with the association ordered to pay the plaintiffs $67 million.[9]

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5. *See, e.g.*, Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115 (1997). Davis touches on sports contracts as a whole, including those governing student athletes, and proposes that traditional contract law ideology can be used in governing contracts in the sports industry. *See id.*

6. *See* Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998), *cert. denied*, 1998 WL 334040 (U.S. Oct. 5, 1998).

7. *See id.*

8. *See id. See also* Rand E. Sacks, *The Restricted Earnings Coach Under Sherman Act Review*, 4 SPORTS LAW. J. 13 (1997). Sacks provides a useful and concise synopsis of recent antitrust suits defended by the NCAA. *See id.* In addition, Sacks describes in detail the process that led to the creation of the rule ultimately challenged in *Law*. *See id.*

9. *See* Glenn Wong, *Restricted Earnings Coaches Rule*, THE SPORTS LAWYER, Vol XVI, July/August 1998, p. 1, 12 ["Wong, *Restricted Earnings Coaches Rule*"]. This provides a helpful and quick synopsis of the NCAA bylaws that were challenged and the possible aftermath of the judgment. *See id.* The amount of the judgement has subsequently increased. *See* Doug Tucker, *NCAA Handed Another Legal Setback*, infra note 287 and supporting text.

## II. *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998)

### A. *Statement of Facts*

The National Collegiate Athletic Association ("NCAA") is an association made up of approximately 1100 universities and colleges.[10] The NCAA coordinates the intercollegiate athletic programs of its member institutions, including promulgating rules that govern participant eligibility, recruiting, and the size of athletic squads and coaching staffs.[11] In the late 1980s, the NCAA became concerned with the costs schools were incurring to develop and maintain competitive athletic programs.[12] The NCAA sought a mechanism to reduce the costs of running an athletic department while fostering competition among the member teams.[13] As a result, the Cost Reduction Committee was created in January 1989.[14] The committee found that member schools usually compete against each other to hire basketball coaches and determined the largest expense of an athletic budget was the money spent on salaries.[15] The committee proposed two bylaws.[16] The first reduced the Division I basketball coaching staff from three full-time and two part-time coaches, to three full-time and one restricted-earnings coach.[17] The second established the compensation of the restricted-earnings coaches at $12,000 per year, plus up to $4,000 each summer for work sponsored by the member institution, such as directing athletic

10. *See* Law, 134 F.3d at 1012. The NCAA is made up of Division I, II and III. *See* Wong, *supra* note 9, at 12. The division to which each member belongs depends on a number of factors including number of sports and scholarships available. *See id.*

11. *See Law*, 134 F.3d at 1012. Each school, however, is in charge of hiring its own coaching staff. *See id.*

12. *See id.*

13. *See id.* at 1012-13. The NCAA's Railborn Report found that 42% of Division I members were reporting deficits in their athletic programs averaging $824,000. *See id.* at 1012. Furthermore, 51% of the Division I schools were operating their basketball programs in a deficit. *See id.* at 1012-13. The average deficit of a Division I basketball program was $145,000. *See id.*

14. *See id.* at 1013. The NCAA determined that a uniform effort was required by its member institutions because individual college teams could not risk reducing costs by themselves because they risked being the only school to attempt such an effort and would, in all likelihood, sacrifice competitiveness as a result. *See id.* Therefore, the committee consisted of persons holding different positions within different member institutions. *See id.*

15. *See Law*, 134 F.3d at 1014.

16. *See id.*

17. *See id.* at 1013. Proposed bylaw 11.6.4 mandated the restricted-earnings coaching position in every sport except football. *See id.*

camps or clinics.[18] The NCAA adopted both proposals ("REC rule") in early 1991 and they went into effect in August 1992.[19] Binding all Division I member institutions that employ basketball coaches, the REC rule allowed restricted-earnings coaches to earn more than $16,000 per year if the compensation resulted from part-time work for the school.[20] This was permitted only if the coach was qualified for the employment, with the salary corresponding to salaries for equivalent positions, and the salary was not disproportionate to the time invested by the coach.[21] The NCAA, in adopting the position and corresponding salary structure, intended that the restricted earnings coaching position be filled by entry level coaches and hoped that schools would use the position to develop new coaches.[22] The NCAA was hopeful that this would level the playing field among the member institutions, allowing schools with smaller athletic budgets to compete along side wealthier schools for coaching talent while also reducing athletic department deficits and promoting competitiveness among intercollegiate basketball.[23] Several coaches who were Division I restricted-earnings coaches during the 1992-93 academic year brought a class action challenging the REC rule under the Sherman Antitrust Act,[24] claiming it was an "unlawful 'contract, combination . . . or conspiracy, in restraint of trade.'"[25]

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18. *See id.* at 1014. Proposed bylaw 11.02.3. The bylaw dictated the salary restriction to all Division I restricted-earnings coaches. *See id.* The $16,000 a year was deemed by the committee as equivalent to the approximate out-of-state tuition for graduate programs. *See id.*

19. *See Law,* 134 F.3d at 1015. At this time there were current salary restrictions on part-time Division I basketball coaches. *See id.* Compensation was limited to "full-grant in aid . . . based on the value of out-of-state graduate studies." *Id.* Despite this restriction, such coaches often earned more than $60,000 per year due to additional salaries for running summer camps sponsored by the institution or as a result of part-time positions at the school, usually in the physical education department. *See id.* at 1013.

20. *See id.* at 1014.

21. *See id.* at 1014-15. Specifically, NCAA Bylaw 11.02.3 provided that a restricted-earnings coach may be compensated for

> performing other duties for another department or office of the institution, provided: (1) The compensation . . . is commensurate with that received by others performing those same or similar assignments, (2) The ratio of compensation . . . for coaching . . . and any other duties is directly proportionate to the amount of time devoted. . . and (3) The [coach] is qualified for . . . the duties outside the athletic department. . .

*Id.* at 1014, note 4.

22. *See id.* at 1014.

23. *See Law,* 134 F.3d at 1012.

24. *See id.* at 1015 (citing 15 U.S.C. §1 (1998)). *See supra* note 1 and supporting text.

25. *See id.* at 1015 (quoting 15 U.S.C. §1 (1998)). *See supra* note 1 and supporting text.

*B. Procedural History*

In early 1995, plaintiffs Norman Law, Andrew Greer, Peter Hermann, Michael Jarvis, Jr. and Charles M. Reib, all restricted-earnings basketball coaches, sued the NCAA alleging violation of antitrust laws, specifically 15 U.S.C. §1 ("the Sherman Act").[26] The United States District Court for the District of Kansas exercised jurisdiction under 28 U.S.C §1337[27] and 15 U.S.C. §15.[28] Although plaintiffs sought a class certification of all Division I restricted earnings basketball coaches, both parties requested, and the district court agreed, to bifurcate the proceedings, addressing the issue of liability prior to class certification or damages.[29]

On May 24, 1995, the district court granted summary judgment in favor of the plaintiffs on the issue of liability and entered a permanent injunction against the NCAA,[30] barring the continued restriction of salaries against the named plaintiffs.[31] The district

26. *See* 15 U.S.C. §1 (1998). *See supra* note 1 and supporting text.

27. *See Law,* 134 F.3d at 1015. Title 28 U.S.C. §1337(a) states: "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of the Congress regulating commerce or protecting trade and commerce against restraints and monopolies..." 28 U.S.C. §1337(a) (West 1998).

28. *See Law,* 134 F.3d at 1015. Title 15 U.S.C. §15(a) states, in relevant part, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [sic] in any district court of the United States..." 15 U.S.C. §15(a) (West 1998).

29. *See Law,* 134 F.3d at 1015. Baseball coaches soon filed similar suits against the NCAA but agreed to be bound by the *Law* decision. *See* Wong, *supra* note 9, at 12. The plaintiffs in *Law* were certified as a class, Law v. NCAA, 167 F.R.D. 178 (D. Kan. 1996), as were the baseball coaches-plaintiffs, Schreiber v. NCAA, 167 F.R.D. 169 (D. Kan. 1996). *See* Wong, *supra* note 9, at 12. The classes totaled approximately 1900 coaches-plaintiffs. *See Supreme Court Denies NCAA,* ESPN.com, 1 (Oct. 6, 1998) (visited Oct. 8, 1998) <http://ESPN.sportsZone.com/gen/news/1998/981005/00872505.html>.

30. *See Law,* 134 F.3d at 1015. Jurisdiction was pursuant to 15 U.S.C. §26, which states in relevant part: "[a]ny person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened conduct that will cause loss or damage by a violation of the antitrust laws." 15 U.S.C. §26 (West 1998).

Plaintiffs are entitled to summary judgment when the trial court finds, on the basis of pleadings, depositions, interrogatories, admissions and affidavits, that there is "no genuine issue as to any material fact" so that the moving party is entitled to judgment as a matter of law. *Law,* 134 F.3d at 1016. An "issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant." *Id.* (quoting Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996)). The appellate court must first determine that, in the light most favorable to the petitioning party, no genuine issue of fact exists and, if it so finds, determine whether the "substantive law was correctly applied." *See id.* (citing Kaul, 83 F.3d at 1212).

31. *See* Law v. NCAA, 1996 WL 104328, *1 (D. Kan. Jan. 5, 1996). Only Herrman and Jarvis were entitled to an injunction, the district court held, because they were the only

court also enjoined the NCAA from "reenacting the compensation limitations embodied in the [REC rule]."[32] The court declared that the NCAA REC rule violated the Sherman Act.[33] The court found that the purpose of the NCAA rule in question was to cut costs.[34] As a result, the plaintiffs' services declined in value and their opportunities in the basketball coaching market were impaired.[35] The court held that the anticompetitive agreement caused antitrust injury to the plaintiffs because the REC rule amounted to an "unlawful 'contract, combination . . . or conspiracy, in restraint of trade'" which entitled the coaches to summary judgment.[36] According to reports, a jury later awarded the plaintiffs $22.3 million which was trebled under the Clayton Act[37] to total almost $67 million.[38] The NCAA filed an interlocutory appeal, challenging the portion of the injunction that declared the NCAA violated the antitrust laws.[39] The United States Circuit Court of Appeals for the Tenth Circuit granted the appeal pursuant to 28 U.S.C. §1292(a)(1).[40]

On appeal, the court quickly determined that the NCAA was entitled to restrain trade in order to further athletic competition.[41] This principle was established by the Supreme Court in *NCAA v. Board of Regents*.[42] However that restraint, the court made clear, must

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named plaintiffs still employed as Division I restricted-earnings basketball coaches at the time of the judgment. *See id.* at *3-4.

32. *See Law,* 134 F.3d at 1015 (quoting the unpublished district court order). Following the district court's finding the NCAA rescinded the compensation limits, but this action was never appropriately ratified. *See id.*

33. *See Law,* 1996 WL 104328 at 2.

34. *See id.*

35. *See id.*

36. *See Law,* 134 F.3d at 1015 (quoting the unpublished district court order and 15 U.S.C. §1) (*See supra* note 1 and supporting text).

37. 15 U.S.C. §15(a) (West 1998). *See infra* note 286 and supporting text.

38. *See* Wong, *supra* note 9, at 12. Treble damages are pursuant to 15 U.S.C. §15. *See infra* note 286 and supporting text. Basketball coaches were awarded $11.2 million, $1.6 million was awarded to baseball coaches and coaches of other sports received $9.5 million. *See* Wong, *supra* note 9, at 12. Including attorneys fees, the NCAA obligation was close to $80 million but has since increased. *See* Doug Tucker, *NCAA Loses Appeal in Coaches' Case,* (Associated Press Wire Report, Slug: Court-NCAA-Coaches, Oct. 6, 1998), *see also* Doug Tucker, *NCAA Handed Another Legal Setback,* infra note 287 and supporting text.

39. *See Law,* 134 F.3d at 1016.

40. *See id.* at 1015. Title 28 U.S.C. §1292(a) states, in relevant part, "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . granting . . . injunctions." 28 U.S.C. §1292(a) (West 1998).

41. *See Law,* 134 F.3d at 1018.

42. *See* 468 U.S. 68 (1984).

have a procompetitive justification.[43] In this case, the NCAA was unable to justify its limit on coaches' salaries because it was not connected with balancing the equities between college basketball teams.[44] For that reason, the challenged rule unreasonably restrained the college basketball coaching market and violated antitrust law.[45]

### C. *Prior Law*

In *Law*, the restraint challenged was the salary of a specific category of college basketball coaches.[46] The coaches alleged that they could not bid out their services based on their qualifications, and further alleged that this restrained trade and commerce.[47] These allegations brought into play horizontal price fixing and the two basic analyses of antitrust law: the Rule of Reason[48] and the per se rule.[49] Since the passage of the Sherman Act, both of these analyses have developed and their application to a horizontal price agreement, an agreement between competitors on the price of their goods or services, has evolved.[50] To more easily understand the legal principals applied in *Law*, a basic comprehension of this development will prove useful.

#### 1. The Rule of Reason

Section 1 of the Sherman Act,[51] was once interpreted to bar all contracts that restrained trade or commerce.[52] However, in *Standard Oil Co. v. United States*,[53] the Supreme Court held that §1 more properly asked a court to determine whether the agreement in question unreasonably restrained trade.[54] In a case handed down more then 20 years after the passage of the Sherman Act, the

43. *See Law*, 134 F.3d at 1021.
44. *See id.* at 1024.
45. *See id.*
46. *See Law*, 134 F.3d at 1014.
47. *See id.*
48. *See id.* at 1016.
49. *See id.*
50. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); NCAA v. Board of Regents, 468 U.S. 85 (1984).
51. 15 U.S.C. §1. *See supra* note 1 and accompanying text.
52. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).
53. 221 U.S. 1 (1911).
54. *See id.* at 59-60.

Standard Oil Company of New Jersey ("Standard Oil") was accused, under §1 of the Sherman Act,[55] of restraining trade in the oil industry.[56] It was alleged that through a network of subsidiaries, rebates to other companies and vast amounts of capital, Standard Oil effectively controlled the transportation and distribution of crude oil.[57]

Chief Justice White, writing for the majority, first examined the common law roots of antitrust law.[58] The *Standard Oil* Court concluded that the primary interest protected by antitrust law was the individual freedom of contract.[59] Therefore, agreements that inhibited one's ability to freely negotiate within a trade or business were limited.[60] This necessarily meant that a balance had to be struck between freedom of contract and contracts that went so far as to limit another's ability to enter into agreements.[61] The view quickly developed, according to the Court, that contracts that intended to "do wrong" to the market or public by restraining commerce violated public policy.[62]

Based on this analysis, Justice White suggested that §1 of the

55. *See id.* at 31. Standard Oil was also charged with violating §2 of the Sherman Act. *See id.* Section 2 of the Sherman Act reads in pertinent part: "Every person who shall monopolize, or attempt . . . or conspire with any other person or persons . . . to monopolize any . . . trade or commerce among the several States, or with foreign nations, shall be deemed guilty. . ." 15 U.S.C §2 (West 1998).

56. *Standard Oil Co.*, 221 U.S. at 31. The suit was a result of 40 years of activity during which at least 34 companies and numerous individuals, including John D. and William Rockefeller, were suspected of violating antitrust laws. *See id.* at 30. During this time period, the group of companies acquired the stock of various independent firms and corporations operating in the petroleum business and held the stock in trust. *See id.* at 34. The trust was declared illegal by the Supreme Court of Ohio, State *ex rel* Attorney General v. Standard Oil Co., 30 N.E. 279 (Ohio 1892), because it restrained trade and monopolized commerce. *See Standard Oil Co.*, 221 U.S. at 39-40. As a result of the trust's disbanding, $97,250,000 was transferred to the Standard Oil Company of New Jersey. *See id.* at 42.

57. *See id.* at 36-39. Specifically, Standard Oil was alleged to control the railroad and pipeline transportation of oil, as well as to have entered into trade restraining contracts with competitors and forced price cutting in the retail markets. *See id.* at 42-43.

58. *See id.* at 49-50.

59. *See id.* at 54-55.

60. *See Standard Oil Co.*, 221 U.S. at 54-55.

61. *See id.* The Court also found that an individual's right to agree to restrain his own trade was limited. *See id.* According to the Court, the view that restraints on commerce were evil, developed out of a common sense notion that freedom of contract could not go too far. *See id.* This belief was fueled in England, in part, due to the fear that the crown might favor particular individuals or enterprises to the extent of creating a monopoly, thereby limiting other's livelihood. *See id.* at 57.

62. *See id.* at 58.

Sherman Act could not be interpreted literally.[63] For "any restraint on trade" could be applied to any agreement entered into by companies or individuals.[64] The development of antitrust law that led to the enactment of the statute, the Court declared, necessitated the view that §1 cannot govern those agreements not implicated at common law: agreements that incidentally restrained commerce but otherwise involved legitimate trade issues.[65] Instead, the judicial standard developed at common law should be used to interpret §1: contracts that intended to restrain trade or commerce or those that unduly or unreasonably restrained the free market were not permitted under the Sherman Act.[66] From the Court's analysis and interpretation of the Sherman Act was born the "Rule of Reason" that has remained the usual way in which challenged restraints are analyzed for antitrust implications.[67]

Applying this standard to the facts as found by the trial court, Justice White concluded without hesitation that petitioners had violated antitrust laws.[68] The evidence was clear, the Court explained, that Standard Oil amassed capital and took actions with the clear purpose of restraining trade and dominating the oil industry.[69] Standard Oil intended to and was successful in centralizing the control of petroleum in the United States.[70]

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63. *See id.* at 59-60 (citing 15 U.S.C. §1, *see supra* note 1 and accompanying text).

64. *See Standard Oil Co.*, 221 U.S. at 63.

65. *See id.* at 59-60. The government argued that the Court should not look beyond the face of the statute; every contract that restrained trade, unreasonable or not, was a violation. *See id.* at 63. The Court responded, however, that without its import of common law interpretation, the statue might fall to a vagueness challenge. *See id.* The petitioners, on the other hand, challenged the statute on constitutional grounds alleging that on its face, it made illegal freedom of contract and association. *See id.* at 69. The Court quickly dismissed this challenge in light of its statutory interpretation. *See id.*

66. *See id.* at 60. Justice White went on to find that §2 of the Sherman Act was a backstop to §1. *See id.* According to the Court, corporations and individuals taking the two sections together, could not reasonably question the meaning of the statute. *See id.* Together, the sections clearly allowed for freedom of contract while prohibiting improper restraints on trade. *See id.* at 62.

67. *See id.* at 62. Justice Harlan concurred in the result, however disagreed with the Rule of Reason. *See id.* at 83-94 (Harlan, J., concurring and dissenting). In short, the Justice believed that reading such words as "undue" or "unreasonable" into the plain language of the statute amounted to judicial legislating. *See id.* at 83-94 (Harlan, J., concurring and dissenting). The face of the statute made illegal all restraints on trade. *See id.* at 85-94 (Harlan, J., concurring and dissenting) (citing United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) and United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898)).

68. *See Standard Oil Co.*, 221 U.S. at 74.

69. *See id.* at 75.

70. *See id.* The injunction imposed by the trial court preventing Standard Oil from

2. The Per Se Rule

The reasonableness standard adopted by the Court in *Standard Oil* was at issue 30 years later in *United States v. Socony-Vacuum Oil Co.*[71] Another antitrust suit brought by the United States government against oil companies, the precise issue before the Court was whether the trial court had erred by instructing the jury that a contract or conspiracy to fix price levels within an industry was illegal per se under §1 of the Sherman Act.[72] The respondents, consisting principally of large oil companies, were alleged to have fixed prices of gasoline in both the wholesale and retail markets.[73] It was alleged that they established and participated in buying programs in which they purchased and stored gasoline from independent refineries and set the market price for retail gas sales.[74] The respondents produced and refined crude oil, owned oil pipe lines, marketed gasoline both retail and wholesale, and owned retail gasoline stations.[75] They were accused of forming a committee in which they selected the companies that would purchase gasoline from independent refineries and set the price to be paid for products.[76] The evidence

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voting its stock or exerting control over its thirty-seven subsidiaries was kept in tact. *See id.* The Court modified the trial court remedy in so far as allowing the subsidiaries of Standard Oil to continue interstate commerce in the petroleum industry. *See id.* at 81.

71. 310 U.S. 150 (1940).

72. *See id.* at 210-12.

73. *See id.* at 169. The alleged violations stemmed from a long and intricate background. *See id.* The alleged area of activity was in the Midwest and Texas. *See id.* at 178, 185. The oil and gas market was in a devastating position at the time. *See id.* at 170. Crude oil and gasoline markets were unstable due to overproduction. *See id.* (footnotes omitted). Oil prices in the market fell below the cost of production. *See id.* at 170. At one point, for instance, oil sold in some parts of the country for ten to fifteen cents a barrel and retail gasoline for two and one-eighth cents per gallon. *See id.* at 171. At the same time, it was not possible to temporarily shut down oil wells because subsurface changes made it impossible to open them back up again. *See id.* In response to the overproduction, states attempted to limit the amount each well could produce but such laws proved problematic to enforce. *See id.* Oil was unlawfully produced and gas illegally manufactured and refiners ended up selling the products for any price they could get. *See id.* at 171.

74. *See id.* at 178-85 (footnotes omitted). The indictment charged twenty-seven corporations and fifty-six individuals. *See id.* at 166, n.1. Twenty-six corporations and forty-six individuals were brought to trial. *See id.* The jury returned guilty verdicts for sixteen corporations and thirty individuals. *See id.* New trials were granted for three corporations and fifteen individuals, and judgment *non obstante veredicto* was entered for one corporation and ten individuals. *See id.* at 166, note 1.

75. *See Socony-Vacuum Oil Co.*, 310 U.S. at 191-92.

76. *See id.* at 178-85 (footnotes omitted). In 1933, partially in response to the unstable oil and gas market, Congress passed the National Industrial Recovery Act, 48 Stat. 195 (1933). *See Socony-Vacuum Oil Co.*, 310 U.S. at 171. Pursuant to the Act, a committee was

demonstrated that the refineries had no choice but to sell at the established prices.[77] Following a three-and-half month trial, the jury returned a guilty verdict, finding that respondents intended and succeeded in increasing the prices in the oil and gas market in 1935 and 1936 and had therefore illegally restrained trade.[78]

Before the U. S. Supreme Court, the respondents did not deny setting the prices, but rather argued that because the prices reflected fair market value, the price fixing was not an unreasonable restraint on trade.[79] Furthermore, they maintained that during the time in question, the market was unstable and their efforts helped stabilize the economy and kept many independent refiners in business.[80] Justice Douglas, writing for the majority, disagreed and held such a price fixing scheme illegal per se.[81] The Court explained that a plan to fix prices was in itself unreasonable, regardless of the price set or the justifications offered.[82] The Court determined this was the appropriate rule because any plan that fixed prices among competitors had the natural effect of curtailing competition and establishing arbitrary prices.[83] The Justice proffered that such a scheme allowed for what may amount to a reasonable price one day likely turning into an unreasonable one the next day.[84] The Court asserted that the potential power that accompanies such an agreement cannot require the in-depth analysis of the government because it would require the Justice Department to ascertain "from day to day whether [the price] has become unreasonable" in concluding whether the Sherman Act had been violated.[85] This was

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established with the goal of stabilizing the industry. *See id.* at 172. Most major companies in the oil industry were represented on the committee and it was alleged that the conspiracy was developed as a result of the their meeting on a continual basis. *See id.* at 172. Portions of the Act were soon held to be unconstitutional, (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and the remainder of the Act expired in June 1935. *See id.* at 174, 185, and 227.

77. *See id.* at 185.

78. *See id.* at 195-96, 199, 230.

79. *See Socony-Vacuum Oil Co.*, 310 U.S. at 212. The Seventh Circuit Court of Appeals agreed in as much as the respondents were entitled to a jury charge that allowed the restraints to be weighed for unreasonableness and the charge that price fixing was illegal per se was therefore reversible error. *See id.* at 211.

80. *See id.* at 190.

81. *See id.* at 212.

82. *See id.* (citing United States v. Trenton Potteries, 273 U.S. 392 (1927)).

83. *See Socony-Vacuum Oil Co.*, 310 U.S. at 212-13 (citing Trenton Potteries, 273 U.S. at 398).

84. *See Socony-Vacuum Oil Co.*, 310 U.S. at 212-13.

85. *Id.* at 213.

clearly too burdensome, the Court found, particularly due to ever changing economic conditions.[86] If price fixing was required to be investigated, then the Sherman Act would be "emasculated . . . its philosophy would be supplanted by one which is wholly alien to a system of free competition."[87] Instead of a particular type of injury, the Sherman Act is concerned with limiting rights that may be pushed to "evil consequences."[88] For this reason, a price fixing plan such as the one in question was not subject to the Rule of Reason but was illegal per se, therefore the jury charge was correct.[89] The Court distinguished *Standard Oil* on the basis that it was not a case that dealt with price fixing or price structures.[90]

Although the Court used a per se analysis instead of the Rule of Reason, the road the Court took in finding the antitrust liability was similar to that taken in *Standard Oil*.[91] Following their lengthy analysis of the Sherman Act, the Court swiftly concluded that the challenged agreement was an illegal restraint on trade and commerce.[92] The program in question, the Court explained, was designed and had the effect of raising and maintaining the price of gasoline.[93] The Sherman Act criminalizes such combinations.[94] Therefore, such defenses as assisting an unstable market, the existence of competition during the period in question, or that the fixed prices fluctuated, had no impact on determining whether antitrust laws had been violated.[95] What was fatal to the plan, the Court countered, was

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86. *See id.*

87. *Id.* at 221.

88. *Socony-Vacuum Oil Co.*, 310 U.S. at 214 (citing Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 49 (1912)).

89. *See Socony-Vacuum Oil Co.*, 310 U.S. at 214.

90. *See id.* at 214.

91. *See id.* at 219-20.

92. *See id.*

93. *See Socony-Vacuum Oil Co.*, 310 U.S. at 216.

94. *See id.* at 219-20.

95. *See id.* at 218-22 (footnotes omitted). The respondents also argued that the government, by establishing and overseeing the Planning Committee, either knew or should have known about the buying scheme and allowed it to continue. *See id.* at 207-08. This argument was rejected for several reasons. *See id.* at 226-28. First, one of the individual respondents, Charles E. Arnott, vice president of Socony-Vacuum, and a member of the planning committee explained to the Petroleum Administrative Board, the body overseeing the committee, that the programs he was helping to initiate did not violate antitrust laws. *See id.* at 202. Second, although the committee had instructions to stabilize the oil industry, the Petroleum Board sent the committee a letter stating that it had no authority to set up a buying program. *See id.* at 205-06. Finally, the Court explained that it would make no difference whether the government knew of the program or not, because there cannot be

simply an agreement to fix prices.[96] The Court declared that to any extent a combination effected prices, there would be interference with the open market.[97] In the Court's opinion, the evidence pointed to an obvious strategic and well orchestrated plan that severely impacted competition.[98] Because all that was required to be shown was a conspiracy to fix prices, there was ample evidence, in the Court's opinion, that the Sherman Act had been violated.[99]

3. Horizontal Price Fixing

Following *Socony-Vacuum* there were clearly two types of analyses that may be applied when an agreement was challenged under §1 of the Sherman Act, the per se analysis and the Rule of Reason developed in *Standard Oil*.[100] The Court made evident in *Mandeville Island Farms, Inc. v. American Crystal Sugar, Co.*,[101] that a horizontal price fixing agreement was the type of pricing plan that was typically ripe for application of the per se analysis.[102] Only eight years after *Socony-Vacuum*, the Court was considering the actions of three beet refiners in northern California.[103] The plaintiffs-petitioners were sugar beet farmers in California.[104] Their only markets were three refiners in the same area who bought the beets and turned them into sugar.[105] The refiners were also the only suppliers of sugar beet

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any such thing as "volunteers" to the United States government who are charged with setting national policy. *See id.* at 227.

96. *See id.* at 222.

97. *See Socony-Vacuum Oil Co.*, 310 U.S. at 221. Justice White went on to explain that the philosophy of the Sherman Act goes deeper than targeting an organized monopoly. *See id.* Any combination, the Justice offered, that "tamper[ed] with price structures [was] engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market. . ." *Id.* at 221.

98. *See id.* at 220.

99. *See id.* at 219-20. The dissent was authored by Justice Roberts and joined by Justice McReynolds. *See id.* at 254 (Roberts, J., dissenting). The Court of Appeals was correct, Justice Roberts opined, in finding the jury instructions to amount to reversible error. *See id.* at 260 (Roberts, J., dissenting). The reasonableness of the agreement between the respondents should have been measured, according to the Justice. *See id.* at 261 (Roberts, J., dissenting). The dissent also took issue with trial venue, the granting of new trials to several defendants and the closing argument by the government at the conclusion of the trial. *See id.* at 255-59, 263-67 (footnotes omitted).

100. 221 U.S. 1 (1911).

101. 334 U.S. 219 (1948).

102. *See id.*

103. *See id.* at 222.

104. *See id.*

105. *See Mandeville Island Farms, Inc.*, 334 U.S. at 222 (footnotes omitted).

seeds and, by standard contract with each farmer, "supervised the planting, cultivation, irrigation and harvesting of the beets."[106] The three refiners entered into an agreement prior to the 1939 beet season to pay the same prices for beets bought from the local beet farmers.[107] Because the refiners already controlled almost all aspects of the beet farming business, the petitioners considered the only bargaining power they had was with respect to the selling price of the beets.[108] Once in place, the petitioners alleged, the price agreement between the beet refiners created a uniform price and thereby violated §1 of the Sherman Act by inhibiting the free flow of commerce.[109]

After disposing with the reasons for petitioner's complaint being dismissed below, the Court concluded without debate that the alleged price fixing scheme stated a cause of action.[110] Taken as true, the refiner's plan amounted to a horizontal price fixing scheme, that is, an agreement between competitors governing the competition between them.[111] Justice Rutledge, writing for the majority, stated unequivocally that such agreements were exactly the type precluded by the Sherman Act.[112] Therefore, no balancing or market analysis would be necessary because such price fixing was illegal per se.[113] The Court took the time to explain that it would make no difference that those injured by the price fixing were sellers, customers or

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106. *Id.* at 222-23.

107. *See id.* at 223-24. The price was based on the average net returns of each of the refiners. *See id.* at 223. The plan ended following the 1941 beet season. *See id.* at 223-24.

108. *See id.* at 223.

109. *See Mandeville Island Farms, Inc.*, 334 U.S. at 223, 226.

110. *See id.* at 229-35 (footnotes omitted). Both the trial court and the court of appeals took the opinion that the alleged restraint did not implicate commerce "among the several states" as required by §1 of the Sherman Act. *See id.* at 221 (citing Mandeville Island Farms, Inc. v. American Crystal Sugar Corp., 64 F. Supp. 265 (1946); Mandeville Island Farms, Inc. v. American Crystal Sugar Corp., 159 F.2d 71 (9th Cir. 1947)). The lower courts reasoned that the commerce was purely in-state because the beets were grown in California by the plaintiffs and refined into sugar by defendants prior to being sold to markets outside California. *See Mandeville Island Farms*, 334 U.S. at 224-29 (footnotes omitted). Therefore, the beets in question never left the state. *See id.* Because the refiners sold the sugar in an open market with competitive bidding, the Sherman Act was not implicated. *See id.* Citing the *Shreveport Rate Cases*, the Court concluded that such a mechanical separation of commerce could not be entertained. *See id.* at 229 (citing Houston, East & West Texas Railway Co. v. United States, 234 U.S 342 (1914)) (footnotes omitted). The Court thought it obvious that control over input price, the beets, necessarily had an impact on the output price, that of the sugar. *See id.* Therefore, the competitive nature of the sale of sugar was affected. *See id.*

111. *See id.* at 235-36.

112. *See id.* at 235-36 (footnotes omitted).

113. *See Mandeville Island Farms, Inc.*, 334 U.S. at 236.

consumers.[114] The proximity of the injury was also of no consequence, the Court proclaimed, as long as the market in northern California, the only one available to petitioners, was impacted.[115] What was important, according to the Court, was the suspect agreement's effect on commerce.[116] As alleged in the complaint, the facts illustrated that there was no other market available to the petitioners; they faced paying the uniform price or not selling the beets at all.[117] This was a clear case, Justice Rutledge concluded, for the application of a per se analysis.[118]

4. Refining the Rule of Reason and the Per Se Rule

The situation was less clear in *National Society of Professional Engineers v. United States*[119] than it had been in *Mandeville Island,* however the court ultimately concluded that the per se rule was appropriate.[120] At issue was the code of ethics adopted by the International Society of Engineers that disallowed its consultant-members from negotiating or discussing the subject of fees with a customer until after the customer had chosen to hire the engineer.[121] The society did not dispute that the code restrained price competition, but presented the affirmative defense that it was reasonable because competition between member engineers would adversely affect the quality of projects.[122] This, in turn, would

114. *See id.* at 235.

115. *See id.* at 236.

116. *See id.* at 238.

117. *See Mandeville Island Farms, Inc.*, 334 U.S. at 240.

118. *See id.* at 235-36. Justices Jackson and Frankfurter dissented because they were of the opinion that petitioners amended their complaint at trial in such a way as to not challenge the respondents' plan regarding the effect it had on interstate commerce. *See id.* at 246-49 (Jackson, J., dissenting) (footnotes omitted). Therefore, the dissebt believed the majority drew impermissible assumptions from the record. *See id.*

119. 435 U.S. 679 (1978).

120. *See id.* at 696.

121. *See id.* at 682-83. The National Society of Professional Engineers Code of Ethics Section 11(c) stated "[the engineer] will not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding . . . is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars." *Id.* at 685, note 7. The society had 62,000 members, 12,000 of whom were consulting engineers. *See id.* at 682. Consultants perform fee related services to "study, design, and construct all types of improvements to real property." *Id.* at 682. The society was formed in 1935 to promote "the social, economic and professional interests of its members." *Id.* at 682.

122. *See id.* at 684-85 (footnote omitted). The society also sought to promote the traditional method of hiring engineers, basing a decision on an engineer's reputation and background, not price. *See id.* at 685 (footnote omitted).

endanger the "public health, safety and welfare."[123] Therefore, the society argued, the policy on fees was not an unreasonable restraint of trade under the Rule of Reason.[124]

The petitioner's argument called for Justice Stevens to explain and clarify the two ways the judiciary may examine an agreement under the Sherman Act.[125] Sounding similar to Chief Justice White in *Standard Oil*, Justice Stevens first explained that the Sherman Act cannot be literally interpreted lest virtually all contracts involving trade would be subject to liability.[126] Therefore, the judiciary must determine which agreements violate antitrust laws.[127] The Rule of Reason accomplishes this goal.[128] However, the Justice cautioned, the Rule of Reason does not necessarily mean what its name might suggest – it does not open every antitrust inquiry to arguments regarding the reasonableness of the challenged restraint.[129] For instance, it does not permit inquiring into the unreasonableness of price fixing.[130] Also not permitted under the Rule is the argument that special characteristics of an industry demand trade restraints, instead of competition, because they enhance commerce.[131] This action shall be left to Congress.[132] Instead, the Rule of Reason attempts to measure the challenged restraint's effect on

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123. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 684-85 (footnote omitted).

124. *See id.* at 685-87. The trial court found that the code effectively prevented engineers from both soliciting and submitting fee information to prospective clients. *See id.* at 684 (citing United States v. National Soc'y of Prof'l Engineers, 389 F. Supp. 1193, 1206 (1974)). However, the court did not make findings as to the society's contention that the code was necessary for the public good. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 686. The D.C. Court of Appeals modified (striking down a portion of the remedy) but affirmed the trial court. *See id.* at 686 (citing United States v. National Soc'y of Prof'l Engineers, 55 F.2d 978 (1977)) (footnote omitted).

125. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 687.

126. *See id.* at 687-88 (citing Board of Trade of City of Chicago v. United States, 246 U.S. 231 (1918)). Justice Stevens explained that the legislative history requires courts to "give shape" to the broad language of the Act. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 688, n.11 (citing 21 CONG. REC. 2456 (1890) (comments of Sen. Sherman)).

127. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 688.

128. *See id.* The Court explained that the origins of the rule are in common law. *See id.*

129. *See id.*

130. *See id.* at 689 (footnote omitted).

131. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 689.

132. *See id.* Congress has exempted certain industries from antitrust law. *See id.* The Court cited as examples the agricultural cooperatives, the Capper Volstead Act ,7 U.S.C. §§291-2 (1922); insurance, the McCarran Ferguson Act, 15 U.S.C. §§1011-1013 (West 1945); and newspaper joint operating combinations, 15 U.S.C. §1801 (West 1970). *See id.* at 690, n.14.

competition.[133] A court must determine whether the restraints of trade are ancillary to transactions that are otherwise legitimate.[134]

In order to do this, the Court turned to *Standard Oil* and from it formulated a two part test used when applying the Rule of Reason: a restraint's effects may be unreasonable "based either (1) on the nature or the character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices."[135] Either one of these prongs can evidence an unreasonable restraint on trade and for both, the inquiry is confined to determine the impact on competition.[136] A court's goal was to test whether the challenged plan either promoted or suppressed the free exchange of commerce.[137] The inquiry, therefore, was a fact-finding one.[138]

The Court then took the time to compare the two analyses of antitrust law, describing them as "complimentary," with the purpose of each the same: to reach an opinion concerning the effect the challenged restraint had on competition.[139] What is the difference between the two? The per se analysis applied to agreements that were anticompetitive on their face, no study of the industry was required and the restraints were therefore illegal per se.[140] The Rule of Reason, on the other hand, required a judicial inquiry into the particular business or industry, a market analysis, if you will, that explored the reasons for the restraint's existence.[141] However, neither analysis allowed a court to determine whether competition was in the best interest of the public or industry in question.[142] This amounted to an assertion that "competition itself is unreasonable."[143] In applying these principles, therefore, a court must first facially assess the challenged restraint to determine which analysis should be applied.[144]

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133. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 690.

134. *See id.* at 689. Justice Stevens offered an employment contract or the sale of a business as examples. *See id.*

135. *Id.* at 690 (citing *Standard Oil*, 221 U.S. at 58) (footnote omitted).

136. *See id.* at 690.

137. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 691 (citing *Chicago Board of Trade*, 246 U.S. at 238).

138. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 691, note 17.

139. *See id.* at 691-92.

140. *See id.* at 692.

141. *See id.*

142. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 692.

143. *Id.* at 696.

144. *See id.* at 692.

In taking this step, Justice Stevens found the code of ethics in question not a price-fixing scheme but the equivalent of such: it disallowed the discussion of price between the engineer and the customer.[145] Therefore, customers were deprived of the benefit of competitive bidding and the code had the same effect as a price-fixing scheme.[146] The Court ultimately disagreed with petitioners and found the code facially invalid and illegal per se.[147] Justice Stevens recognized that narrowly tailored agreements promulgated by associations such as the petitioner which would typically be illegal per se may be entitled to the Rule of Reason.[148] This was so because such an association's goals were not centered around economic concerns.[149] In this case, however, the code in question did not qualify because it was an overbroad attack on the free market.[150]

One year later, the Court faced a situation involving an agreement that on its face appeared to be illegal per se but which was organized by an association whose first priority was not economy based.[151] In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[152] the respondents challenged an alleged horizontal pricing scheme, shown in *Mandeville Island Farms* to be clearly inapposite to

145. *See id.* at 692.

146. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 692.

147. *See id.* at 693. The Court went on to explain that, while a legitimate concern, quality to customers was a concern of the society's specifically, not a concern of the Sherman Act. *See id.* at 694. The public policy defense raised by the petitioners involved a claim that competition was negative and created a "frontal assault" on the Sherman Act, therefore making it impermissible. *See id.* at 695.

148. *See id.* at 686.

149. *See id.* at 686 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89, note 17 (1975)). The Justice proffered that, in order to exist at all, some associations may have to reach agreements that affect competition. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 686.

150. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 696. Justice Blackmun, concurring in the result and joined by Justice Rehnquist, believed more "elbow room" should have been left in the Rule of Reason. *See id.* at 701 (Blackmun, J., concurring). According to Justice Blackmun, professional organizations may require a flexible application of the Rule because their goals are not often purely based on economics. *See id.* at 699 (Blackmun, J., concurring). The Justice proffered that there may be a situation where more than a small adverse effect is placed on competition, yet is still justified under the Rule. *See id.* at 700 (Blackmun, J., concurring). Chief Justice Burger also concurred in the judgment, but disagreed with the remedy. *See id.* at 701 (Burger, C.J., concurring in part and dissenting in part). The Chief Justice concluded that the remedy prohibiting the society from "adopting any official policy statement, or guideline stating or implying that competitive bidding is unethical," was a violation of Free Speech. *Id.*

151. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

152. *See id.*

the philosophy behind the Sherman Act.[153] Similar to *National Society of Professional Engineers* where the Court analyzed the Rule of Reason before applying the per se analysis, in *Broadcast Music, Inc.* the Court clarified the per se rule before remanding the action for application of the Rule of Reason.[154]

The Columbia Broadcasting System ("CBS") challenged the manner in which copyrighted musical performances[155] were sold by the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI").[156] The plan in question was known as a "blanket license."[157] The blanket license entitled CBS to perform, as often as desired, any and all of the musical compositions owned by the members of the ASCAP and BMI for a specified amount of time.[158] Fees charged for the license were not based on the type or frequency of the music performed or the timing of its use.[159] Instead, prices depended on the yearly revenue of a licensee or on a flat dollar amount.[160] Although ASCAP and BMI sold blanket licenses almost exclusively, their right to sell the material was a nonexclusive one.[161] Individual artists and "consumers" of the copyrighted material were free to negotiate.[162] The

153. *See id.* at 6.

154. *See id.* at 24.

155. *See Broadcast Music, Inc.*, 441 U.S. at 4. Copyright laws allow the owner of the copyrighted material to hold an exclusive right to "perform the work for profit." *Id.* (citing Act of Jan 6, 1897, 29 Stat. 481).

156. *See Broadcast Music, Inc.*, 441 U.S. at 2, 4. CBS is a national television network, comprised at the time of roughly 200 affiliate stations. *See id.* at 4. ASCAP consisted at the time of approximately 22,000 individual artists who were copyright owners. *See id.* at 5. The members granted ASCAP the nonexclusive right to "license nondramatic performances" of their artistic creations. *See id.* at 2. BMI, essentially equivalent to ASCAP, had approximately 30,000 members at the time. *See id.* (footnotes omitted). The two organizations licensed those wishing to use the copyrighted material and distributed the royalties to their members. *See id.*

157. *See id.* at 5. ASCAP and BMI were formed, in part, because individual artists found it too difficult to license and monitor the use of each copyrighted composition. *See id.* at 4-5.

158. *See id.* The evidence suggested that television stations were among the largest users of copyrighted music and often held blanket licenses. *See id.* at 5.

159. *See id.*

160. *See Broadcast Music, Inc.*, 441 U.S. at 5.

161. *See id.* at 6.

162. *See id.* In fact, this was why the trial court dismissed the defendant-class action after an eight-week trial. *See id.* at 4, 6. The appellate court disagreed, however, holding the blanket license illegal per se because it amounted to a price fixing scheme. *See id.* at 6 (footnotes omitted).

The nonexclusive licenses held by the organizations were the result of a long history of antitrust investigations and suits. *See id.* at 10-11. At the time, both BMI and ASCAP operated under the constraints of consent decrees. *See id.* at 11-12 (citing United States v.

respondents argued that the blanket license amounted to horizontal price fixing and was illegal per se under §1 of the Sherman Act.[163]

Citing *National Society of Professional Engineers*, Justice White summarized the anticompetitiveness to which the per se rule is applied and described such agreements as having no redeeming qualities, therefore requiring no further analysis.[164] However, just because something fixed a price does not render the agreement illegal per se.[165] The Justice cautioned a court from labeling behavior as price fixing and applying the per se analysis based on this description.[166] Taking such action to its natural conclusion may lead to condemning contracts that do not fall under the purview of the Sherman Act.[167] Regardless of the label applied to an agreement, a court must still analyze the agreement to the point of determining which analysis is required.[168] If the agreement or industry is unfamiliar to the court, it should not hastily apply the per se analysis.[169] That was the case, the Court explained, with the agreement challenged by CBS.[170]

The commerce, in question here, was prescribed by federal law.[171] While the copyright laws did not allow for antitrust violations, those reasonably attempting to exercise their rights should not be held to have violated federal antitrust laws per se.[172] It may be impossible, for instance, for each member of ASCAP to negotiate individually for each use of a musical composition.[173] In this fashion, it may be argued that the particular market demands a blanket license.[174] This system may be found to be less expensive and more efficient than individual contracts and essentially create a separate product

ASCAP, 1940–1943 Trade Cases Paragraph 56,104 (S.D.N.Y. 1941); United States v. BMI, 1966 Trade Cases paragraph 71,941 (S.D.N.Y. 1966)) (footnotes omitted).

163. *See Broadcast Music, Inc.*, 441 U.S. at 6.

164. *See id.* at 8 (footnotes omitted).

165. *See id.* at 9.

166. *See id.*

167. *See Broadcast Music, Inc.*, 441 U.S. at 9. Justice White offered as examples a simple partnership agreement or joint venture. *See id.*

168. *See id.*

169. *See id.* at 10.

170. *See id.*

171. *See Broadcast Music, Inc.*, 441 U.S. at 18.

172. *See id.* at 18-19. In addition, Justice White offered that the blanket license was not a simple horizontal price fixing scheme because the price was different for each license. *See id.* at 23.

173. *See id.* at 14.

174. *See id.* at 20

altogether.[175] The point, however, was that an analysis of the market was required before implicating the Sherman Act.[176] There was no other way to determine whether the agreement in question had a positive or negative effect on commerce.[177] The Rule of Reason allowed for such investigation and measuring of unreasonableness and was therefore more appropriate than a per se analysis.[178]

5. Antitrust Law and the NCAA

The NCAA is an organization much like those under scrutiny in *National Society of Professional Engineers* and *Broadcast Music*. It was for that reason the Court, in *NCAA v. the Board of Regents*,[179] opined that the more appropriate analysis was the Rule of Reason.[180] In doing so, the Court built upon the Rule of Reason analysis offered in *National Society of Professional Engineers* and its predecessors by detailing two steps that a court must go through when performing the Rule of Reason; first, a market analysis and second, a consideration of any justifications offered for the challenged restraint.[181] Of course, in the end, the objective remained the same as any antitrust analysis: determine the effect on competition.[182]

Since 1951, the NCAA had governed the television broadcasting of its members' football games with the intention of fostering game attendance.[183] The NCAA's specific goal was to prevent football fans from watching games on television instead of attending games that were not on television.[184] The plan at issue involved separate

175. *See Broadcast Music, Inc.*, 441 U.S. at 20-22 (footnote omitted).

176. *See id.* at 24.

177. *See id.* at 19-20. For instance, the trial court found there were thousands of artists, millions of musical compositions and thousands who use them. *See id.* at 20. The court found that CBS would "require between 4000 and 8000 individual license" agreements per year to replicate a blanket license agreement. *See id.* at 21, note 35.

178. *See id.* Justice Stevens concurred in the holding that the blanket licenses were not illegal per se. *See id.* at 25 (Stevens, J., concurring in part and dissenting in part). The Justice, however, would have applied the Rule of Reason analysis instead of remanding the responsibility. *See id.* at 25-26 (Stevens, J., concurring in part and dissenting in part). Upon doing so, Justice Stevens concluded that the license could not withstand the Rule of Reason analysis and violated §1 of the Sherman Act. *See id.* at 25 (Stevens, J., concurring in part and dissenting in part).

179. 468 U.S. 68 (1984).

180. *See id.* at 103.

181. *See id.* at 109, 113.

182. *See id.* at 103.

183. *See Board of Regents*, 468 U.S. 85, 89 (1984).

184. *See id.* The NCAA did not maintain that their goal was to preserve attendance at

contracts with CBS and the American Broadcasting Company ("ABC").[185] The plan was challenged under §1 of the Sherman Act by two NCAA-member universities[186] who were also members of the College Football Association ("CFA").[187] The CFA was successful in negotiating its own television contract with National Broadcasting Company ("NBC"), but never consummated the contract due to threats of sanctions by the NCAA.[188] The university-respondents alleged that the NCAA television contract restrained trade by limiting the number of times any school could appear on television, the total number of games allowed to be shown, and established artificial fees for the games.[189]

Justice Stevens quickly concluded the television plan restrained trade because members were not free to enter into their own broadcasting contracts and, additionally, because the plan set prices artificially high.[190] The Court also found the plan to amount to a horizontal price fixing scheme that was typically illegal per se due to such a strong anticompetitive impact.[191] However, the NCAA argued,

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games that were shown on television. *See id.* at 115.

185. *See id.* at 92. The Turner Broadcast System had cable rights. *See id.* at 93, note 9. Originally the television contracts were renewed every year. *See id.* at 90-91 (footnotes omitted). At one time, the negotiations were based on member surveys but later were pursuant to "principles of negotiation." *Id.* at 91. Studies were conducted yearly by the National Opinion Research Center that showed television had an adverse effect on attendance at untelevised games. *See id.* at 90. The current plan was a four year contract that ran through the 1985 football season. *See id.* at 91.

186. *See id.* at 89. The Universities of Oklahoma and Georgia brought the suit. *See id.*

187. *See Board of Regents*, 468 U.S. at 89. The CFA was formed by member-universities of the NCAA with the intent of promoting football within the general framework of the NCAA. *See id.*

188. *See id.* at 94-95.

189. *See id.* at 92-94 (footnotes omitted). Specifically, the networks were permitted to have 14 live "exposures." *See id.* at 92. Any game could not appear on more than one station. *See id.* at 93. The networks were mandated to show 82 different NCAA members in a two year span, while no member could appear more then four times to a national audience and six times total. *See id.* at 94. Although each network negotiated with members individually, the price was suggested by the NCAA based on whether the game was telecast nationally or regionally, national being more valuable. *See id.* at 93. No member was permitted to sell broadcast rights to its football games outside the NCAA agreement. *See id.* at 94.

190. *See id.* at 98. This conclusion was based on the trial court finding that because the contract price was not "influenced by the size of the viewing area audience, the number of [broadcasting] markets or particular characteristics of the game or the participating teams," CBS and ABC paid a different price than they would have had the price been determined on the open market. *Id.* at 93 (footnote omitted).

191. *See Board of Regents*, 468 U.S. at 99-100. Contributing to this view was the cap that the contract placed on the number of broadcasts in which any one member could appear and the fact that the agreement prevented institutions from competing against one another for

and the Court agreed, that the per se rule was inappropriate because of the particular nature of the NCAA and the product it offered, college football.[192] The Court explained that the NCAA marketed competition itself and but-for the use of horizontal restraints, the product itself would be unable to exist.[193] The size of the football field, the number of players and the rules governing eligibility of players and coaches were several examples of restraints that allowed the NCAA to effectively market its product.[194] In addition, college football was a unique product with academic and institutional traditions that the NCAA was allowed to promote.[195] Such promotion could not be facilitated absent agreements among members intended to increase competition and efficiency.[196] Therefore, although the challenged rule involved horizontal price fixing, the appropriate antitrust analysis was the Rule of Reason.[197]

Justice Stevens reminded the Court that the goal of measuring the restraint's impact on competition remained the same, and for that reason the evidence that the plan was a horizontal price scheme placed a heavy burden on the NCAA to justify its television plan.[198] In order to reach this goal, the Court must first analyze the market which was the subject of the inquiry and next weigh the justifications offered by the NCAA.[199] The Court held that as a matter of law, the NCAA's dominance in the relevant market was immaterial, thereby making the market analysis a moot point.[200] This was because the "absence of market power does not justify a marked restriction on price or output."[201]

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television time. *See id.*

192. *See id.* at 101.

193. *See id.*

194. *See id.*

195. *See Board of Regents*, 468 U.S. at 102.

196. *See id.* at 102-03 (citing *Broadcast Music, Inc.*, 441 U.S. at 18-23). The Court opined that the NCAA's role in fostering college athletics defined the market and probably increased the choices available to athletic fans and athletes alike. *See id.* at 102 (citing Justice v. NCAA, 577 F. Supp. 356, 379-83 (Ariz. 1983)) (string cite omitted).

197. *See id.* at 103.

198. *See id.* at 113.

199. *See Board of Regents*, 468 U.S. at 104 (footnotes omitted).

200. *See id.* at 109.

201. *Id.* (footnote omitted) (citing *National Soc'y of Prof'l Engineers*, 435 U.S. at 692). The court also dismissed the NCAA's contention that it did not dominate the market for factual reasons. *See Board of Regents*, 468 U.S. at 111-12. The relevant market in the case was college football(not television programs as a whole), a unique product and almost completely controlled by the NCAA,. *See id.* at 112.

Without the market analysis, the Court moved quickly through the NCAA's justifications, finding them without merit.[202] The Court concluded that the goal of live game attendance could not be explained by the television plan.[203] Games were televised at all times during the day and not necessarily at the same time as live untelevised games.[204] The Court determined that the NCAA's argument was premised on the assumption that untelevised games could not compete with games being broadcast in a free market.[205] However, the Court found that one cannot attempt to shield a product just because it is not as attractive as another.[206] The Sherman Act could not support a justification that competition itself was unreasonable.[207]

### D. *The Opinion of the Law Court*

The court in *Law v. National College Athletic Association*[208] determined that a limit on coaches' salaries that was otherwise unconnected with balancing the equities between college basketball teams unreasonably restrained the college basketball coaching market and violated antitrust law.[209] Therefore, although the NCAA may be entitled to restrain trade in order to further athletic competition, the cap on coaches' earnings violated antitrust law.[210]

The process the court went through in finding the NCAA liable

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202. *See id.* at 113-20 (footnotes omitted). The NCAA offered numerous reasons for the television contract including it being a joint venture to market the games (rejected because the institutions themselves sold their games); that it helped reduce price (rejected by the district court findings); that it maintained balanced athletic competition (rejected because the way in which a school spends its money was not controlled); that it was justified by the unique role the NCAA plays in college athletics (already considered when choosing between the per se analysis and the Rule of Reason). *See id.*

203. *See Board of Regents*, 468 U.S. at 13-20.

204. *See id.* at 116 (footnote omitted).

205. *See id.* at 116-17.

206. *See id.* at 117.

207. *See Board of Regents*, 468 U.S. at 117 (citing *National Soc'y of Prof'l Engineers*, 435 U.S. at 696). The dissent was authored by Justice White (and joined by Justice Rehnquist). *See Board of Regents*, 468 U.S. at 120 (White, J., dissenting). The dissent viewed the NCAA as an entity outside the realm of the Sherman Act because it is a self-regulating noneconomic entity whose goal is to keep college athletics from being "professionalised." *See id.* at 133-34 (White, J., dissenting). In the Justice's view the television plan was not unreasonable in light of these goals and was similar to the other rules, such as player eligibility, that fostered the market that is college athletics. *See id.* at 122-24, 128.

208. Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

209. *See id.* at 1024.

210. *See id.* at 1017, 1024.

for violating §1 of the Sherman Antitrust Act in many ways mirrored the development of antitrust principles. Judge Ebel, writing for a unanimous court, began with a brief description of the Rule of Reason and the per se analysis.[211] Horizontal price fixing was then the focus, followed by an application of the Rule of Reason.[212] The court then addressed the market analysis and devoted considerable effort in responding to the NCAA's justifications.[213] Ultimately, the court concluded that principles of antitrust law had been violated, and therefore affirmed the district court's grant of summary judgmentin favor of the plaintiffs.[214]

After addressing the threshold questions of jurisdiction and standard of review,[215] the court stated that only unreasonable restraints of commerce were barred by the Sherman Act.[216] The court proceeded to briefly outline the per se rule and the Rule of Reason and what each means to the judicial process.[217] According to Judge Ebel, if the per se analysis was applied, the court would not have to stop to measure the impact of the challenged conduct.[218] In contrast, the Rule of Reason did require such an investigation.[219] Although both search to find the impact the challenged conduct had on competition, the Rule of Reason required the court to measure the "procompetitive virtues" of the challenged plan to see if it allowed its otherwise "anticompetitive impacts."[220]

Initially, the court warned that agreements such as the one in question were usually deemed illegal per se.[221] The court asserted

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211. *See id.* at 1012.

212. *See Law,* 134 F.3d at 1017, 1019.

213. *See id.* at 1019.

214. *See id.* at 1021.

215. *See id.* at 1015-16. Jurisdiction was pursuant to 28 U.S.C. §1292(a)(1), *see supra* note 40 and accompanying text. *See id.* The court explained that injunctions are usually reviewed to ascertain whether the district court abused its discretion. *See id.* at 1016 (citing United States v. Jenks, 22 F.3d 1513, 1519 (10th Cir. 1994)). However, a summary judgment that serves as the basis for an injunction is reviewed de novo, according to the court. *See Law,* 134 F.3d at 1016 (citing *Jenks,* 22 F.3d at 1517). De novo review means the appellate court is not required to give deference to the findings of fact or conclusions of law determined by the court below; it is a new look at the record. *See, e.g.,* Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985).

216. *See Law,* 134 F.3d at 1016 (citing *Board of Regents,* 468 U.S. at 98 and *Standard Oil Co.,* 221 U.S. at 52-60).

217. *See Law,* 134 F.3d at 1016.

218. *See id.*

219. *See id.* at 1017 (citing *National Soc'y of Prof'l Engineers,* 435 U.S. 679 (1978)).

220. *See id.* at 1017 (citing United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993)).

221. *See Law,* 134 F.3d at 1017 (citing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S.

that because the REC rule limited the price that NCAA colleges and universities paid to a restricted-earnings basketball coach, it was a naked price restraint on its face.[222] In other words, in examining the REC rule on its face, it created such a high probability of anticompetitive effects, the court offered, that such agreements were often condemned as illegal per se.[223] However, the court admitted there was an exception to this analysis because some products required horizontal restraints in order to exist at all.[224]

The court recognized this exception in the Supreme Court's decisions in *Broadcast Music, Inc.* and *Board of Regents*.[225] The court concluded that college basketball was a product that fits this exception.[226] Judge Ebel illustrated the point by describing rules that prohibit payments to athletes and require them to attend class.[227] In the court's opinion, such rules, although horizontal restraints, actually promoted competitiveness.[228] The court reminded the parties that they could not lose sight of the product market—college basketball—and risk damaging it in some way by failing to take into account the possible justifications that may exist.[229] Therefore, the court reasoned that to reach its objective of assessing the REC rule's impact on competition, the Rule of Reason must be applied.[230]

The first part of the court's analysis briefly examined the burden

411, 436 n.19 (1990); *Socony-Vacuum Oil Co.*, 310 U.S. at 223).

222. *See Law*, 134 F.3d at 1017 (citing *Mandeville Island Farms*, 334 U.S. at 235). Horizontal price fixing is a naked price restraint on its face if the contract is an agreement among competitors to fix the price of a product. *See id.*

223. *See id.* (citing *Board of Regents*, 468 U.S. at 100-01).

224. *See id.* (citing *Board of Regents*, 468 U.S. at 101-02).

225. *See id.* (citing *Broadcast Music, Inc.*, 441 U.S. at 23 and *Board of Regents*, 468 U.S. at 99-103).

226. *See Law*, 134 F.3d at 1018 (citing *Board of Regents*, 468 U.S. at 101-02).

227. *See id.*

228. *See id.* (citing *Board of Regents*, 468 U.S. at 103).

229. *See id.* at 1017.

230. *See Law*, 134 F.3d at 1019. The plaintiff-coaches attempted to distinguish *Board of Regents* on several grounds. *See id.* at 1018. However, the court opined it was of no moment that the subject in *Board of Regents* was output (television to customers) as opposed to input (coaching services), because *Board of Regents* determined in general that horizontal price restraints were necessary for college sports. *See id.* at 1018-19 (citing *Board of Regents*, 468 U.S. at 101-03). In addition, the court added, the plaintiffs could not argue that this case was different because it did not involve "joint buying" because neither did *Board of Regents*. *See id.* at 1019 (citing *Board of Regents*, 468 U.S. at 113). The court explained that the Supreme Court rejected the NCAA's description of their television plan as a joint venture in *Board of Regents*, finding television sales went directly to the institutions. *See id.* at 1019. (citing *Board of Regents*, 468 U.S. at 113).

of proof.[231] The court explained that the coaches bear the initial burden of evidencing an adverse effect on competition.[232] According to the court, once demonstrated, the NCAA must advance procompetitive aspects of the challenged agreement.[233]

The court offered that coaches had two ways of showing the REC rule's anticompetitive effects: (1) by demonstrating that the NCAA had enough market power within a defined market, or (2) by evidencing the actual effects against competition, such as control over price.[234] The court explained that although both allow for the NCAA to offer justifications, only the first requires a market analysis.[235] Over the disagreement of the NCAA, the court maintained that the REC rule fit into the second category and therefore it could skip analyzing the relevant market.[236] Again describing the REC rule as a naked restraint on price, the court determined that a market analysis was not required.[237] The reason being, the court explained, was because the Supreme Court declared that, as a matter of law, no in-depth investigation to identify and analyze the industry was necessary when the challenged plan restricted price on its face.[238] The court referred to this as the "quick look" Rule of Reason.[239] The court additionally explained that anticompetitive effect was found despite not investigating the relevant industry, when the plaintiff demonstrates a horizontal price plan, that the plan was effective, and that the defendant was better served by the price than it would have been had market forces

231. *See Law*, 134 F.3d at 1019.

232. *See id.* (citing Clorox v. Sterling Winthrop, 117 F.3d 50, 56 (2d Cir. 1997)) (string cite omitted).

233. *See id.* (citing *Clorox*, 117 F.3d at 56) (string cite omitted). If the defendant meets this burden, then the burden shifts back to the plaintiff to prove that the conduct in question is not a "reasonably necessary" means to a legitimate end, or that that end can be reached in a much less restrictive manner. *See id.* at 1019 (citing *Clorox*, 117 F.3d at 56) (string cite omitted). If this burden is met, the court must weigh the benefits against the harms. *See id.* at 1019. These last two shifts are not relevant to this case.

234. *See id.* at 1019 (citing *Brown Univ.*, 5 F.3d at 668-69) (string cite omitted).

235. *See Law*, 134 F.3d at 1019-20.

236. *See id.* The NCAA argued, in part, that the relevant market was basketball coaches and the REC rule only effected eight percent of that market. *See id.* at 119-20. Therefore, a genuine issue of material fact was presented "about whether [the NCAA] possess market power." *Id.* at 1020.

237. *See id.*

238. *See id.* at 1020 (citing *Board of Regents*, 468 U.S. at 109).

239. *See Law*, 134 F.3d at 1020 (citing Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n., 961 F.2d 667, 674 (7th Cir. 1992)).

determined the price.[240]

Applying these principles to the evidence, the court had little trouble determining that the REC rule had an anticompetitive effect.[241] The undisputed evidence demonstrated that the NCAA limited entry level part-time coaches' salaries to $16,000 per year.[242] Before the REC rule, the free market brought as much as $60,000 per year for a basketball coach holding the same position.[243] In addition, the court cited the NCAA's admission that the REC rule successfully reduced coaches salaries and because it proved successful, no further analysis was required.[244]

Before turning to the NCAA's justifications, the court addressed in some detail[245] the NCAA's reliance on *Hennessey v. NCAA*.[246] In *Hennessey*, the Fifth Circuit upheld an NCAA bylaw that limited the number of assistant basketball coaches an institution could have on staff at one time.[247] After weighing the benefits and detractors to competition, the rule was declared not to be an unreasonable restraint on trade and therefore not to be a violation of the Sherman Act.[248] The court in *Law*, however, declared that the *Hennessey* decision did not assist the NCAA for four reasons.[249]

First, the court clarified the issue in *Hennessey* as the number of coaches, not a salary restriction, and was therefore not a horizontal price scheme.[250] Second, the court explained that the plaintiffs in *Hennessey* had the burden of showing the unreasonableness of the restraint and they failed to meet it, probably in part because the restraint was so new.[251] With this allocation of burden, the court simply disagreed.[252] Better judgment prevailed in the present case, the court contended, where the plaintiffs only bore the burden of evidencing the "naked character" of the REC rule.[253] Third, the

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240. *See Law*, 134 F.3d at 1020.
241. *See id.*
242. *See id.*
243. *See id.*
244. *See Law*, 134 F.3d at 1020.
245. *See id.* at 1021.
246. 564 F.2d 1136 (5th Cir. 1977).
247. *See Law*, 134 F.3d at 1021 (citing *Hennessey*, 564 F.2d at 1141-42).
248. *See id.* (citing *Hennessey*, 564 F.2d at 1153-54).
249. *See id.*
250. *See Law*, 134 F.3d at 1021.
251. *See id.*
252. *See id.*
253. *See id.* The burden then shifted to the NCAA to justify the agreement, Justice Ebel added. *See id.*

court reminded the defendants that *Hennessey* preceded *Board of Regents*, which suggested a less deferential analysis to the NCAA than taken by the Fifth Circuit in *Hennessey*.[254] Lastly, the court declared that *Hennessey* was not controlling on their decision because it was not Tenth Circuit precedent.[255]

With *Hennessey* dismissed, the court expressed that the NCAA now had an opportunity to show that the REC rule was justified because its procompetitive attributes justified its restraint on commerce.[256] The court reminded the NCAA that its justifications had to show that "on balance, 'the challenged restraint enhances competition.'"[257] The court determined the REC rule had a better chance of survival if the NCAA could show the rule was of great necessity to the preservation and promotion of the college basketball game.[258] With that, the NCAA set forth three justifications.[259]

First, the NCAA asserted that the REC rule created a position that promoted competition because it allowed younger, less experienced coaches to be hired.[260] This in turn, prevented teams from hiring more experienced coaches in that position, promoting balanced competition among the teams.[261] The court responded that the REC rule specified nothing about the experience of the coach but was simply a salary cap.[262] In addition, the court pointed out that the REC rule allowed coaches to be paid more than $16,000 per year if also employed as a qualified teaching or faculty member.[263] The court made clear that this was not evidence to support the NCAA's contention.[264] Moreover, the social value of the Rule was of no moment, because it still had to have a procompetitive impact.[265]

As its second justification, the NCAA explained that the REC rule

254. *See Law*, 134 F.3d at 1021.
255. *See id.* The Federal Court of Appeals is separated into 13 circuits. While decisions of each circuit are persuasive on the others, each circuit is only bound by its own opinions and those of the Supreme Court. *See, e.g.*, Raynor v. Merrell Pharmaceuticals, Inc., 104 F.3d 1371 (D.C. Cir. 1997).
256. *See Law*, 134 F.3d at 1021 (citing *Clorox*, 117 F.3d at 56) (string cite omitted).
257. *See id.* (quoting *Board of Regents*, 468 U.S. at 104).
258. *See id.* (citing *Board of Regents*, 468 U.S. at 117).
259. *See id.* at 1021-24
260. *See Law*, 134 F.3d at 1021-24.
261. *See id.* at 1022.
262. *See id.*
263. *See id.*
264. *See Law*, 134 F.3d at 1022.
265. *See id.* at 1021-22.

successfully lowered college basketball budgets.[266] However, the court found that cost cutting alone could not save the REC rule, particularly when as a result of the REC rule, the coaches had no market incentive to improve.[267] The Sherman Act was not only aimed at lower prices, the court stressed, but also focused on the quality that is inherent from competition.[268] The NCAA may have wanted universities to hire the same caliber coaches in the disputed position, but could not claim as its reason that price competition for the coaches' services was "an evil because the Sherman Act preclude[d] inquiry into the question of whether competition [was] good or bad."[269]

Third, the NCAA posited that the REC rule assisted in maintaining competitiveness.[270] This was a justification that bore some weight because the court maintained that it understood that the NCAA must be permitted to preserve competitiveness among member colleges in order to have a marketable product.[271] The NCAA explained that the REC rule prevented wealthier schools from hiring the most experienced coaches, thereby creating an imbalance among schools.[272] While the REC rule did limit salary, the court dismissed the justification because the NCAA failed to prove that it had the desired effect of enhancing competition or preventing coaching inequities.[273] Because the REC rule spoke only to salary, the court concluded that it did not limit the experience a coach could have, only the amount of money he could earn.[274]

As a last chance for reprieve, the NCAA took a page from the

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266. *See id.* at 1022.

267. *See id.*

268. *See Law*, 134 F.3d at 1022.

269. *Id.* at 1022-23 (quoting *National Soc'y of Prof'l Engineers*, 435 U.S. at 695). The court went on to dismiss several of the NCAA factual contentions related to cost cutting. *See Law*, 134 F.3d at 1023. It could not be said, the court opined, that the aim of the REC rule was college deficits, because no such evidence was presented. *See id.* More importantly to the court, the REC rule did not limit the total amount of money that member schools were allowed to spend on their basketball programs. *See id.*

270. *See id.* at 1023-24.

271. *See id.*

272. *See Law*, 134 F.3d at 1023-24.

273. *See id.* at 1024. The court made its point with an illustration. *See id.* at 1024, n.15. With the REC rule, a more experienced coach may take a restricted-earnings position at a basketball powerhouse, such as North Carolina. *See id.* Without the rule, however, a developing program might be able to lure such coaches away with more money. *See id.*

274. *See Law*, 134 F.3d at 1024. The court proffered that the cost reduction was planned in such a way as not to disturb the current competitive balance. *See id.*

*Hennessey* decision and asked the court to adopt a wait and see approach.[275] The court quickly rejected this argument, reiterating their belief that the *Hennessey* court erred as a matter of law when it shifted the burden of showing the procompetitive effect of the challenged agreement away from the NCAA.[276] The court maintained that *Board of Regents* made clear that the NCAA must bear this burden.[277]

The court concluded after examining the REC rule on its face and distilling the NCAA's justifications, that it was not aimed at achieving a competitive balance and there was not enough evidence of a relationship between the challenged plan and a procompetitive effort to maintain competitiveness or lower costs.[278] Because there was no such evidence, the court declared that there existed no triable issue of fact, and the NCAA could not withstand a summary judgment motion.[279]

## III. CONCLUSION

It seems relatively clear that the principles of antitrust law relied upon in the *Law* decision are well founded and applied accurately. The *Law* court set forth in deliberate fashion each facet of its analysis. Through its examination of the per se rule and the Rule of Reason, the court made clear how each analysis applied and why it chose to analyze the REC rule under the latter.[280] The court also described with clarity why the REC rule was a horizontal price scheme and explained how precedent had treated such schemes.[281] The Supreme Court has left little doubt that price fixing is in direct conflict with §1 of the Sherman Act.[282] Neither a basketball coach

275. *See id.* at 1024 (citing *Hennessey*, 564 F.2d at 1153-54). The NCAA offered that even if the evidence was insufficient to demonstrate the REC rule's procompetitive effect, the court should wait to see if the rule would succeed. *See Law*, 134 F.3d at 1024. In rejecting this argument, the court listed several justifications that have allowed otherwise anticompetitive agreements to withstand antitrust challenges. *See id.* at 1023. They included increasing availability of a product, making available a new product, increasing customer choice and increasing the quality of a product or service. *See id.*

276. *See id.* at 1024.

277. *See id.* (citing *Board of Regents*, 468 U.S. at 104).

278. *See Law*, 134 F.3d at 1024.

279. *See id.*

280. *See id.* at 1016-20.

281. *See id.* at 1017-19.

282. *See, e.g.*, Continental T.V. v. G.T.E., 433 U.S. 36, 50 (1977), in addition to the cases

nor any other person should be prevented from making the best living he can based on the talent he possesses. The REC rule clearly set forth such a restriction. At the most basic level, coaches could no longer market their services to the highest bidder but instead looked out to a market where all potential employers offered the same compensation.

The *Law* opinion seems to clarify the position of the NCAA in relation to antitrust law. Clearly, it is recognized as a unique organization that markets a unique product: competition itself. It was for this reason that the price fixing, usually an operation condemned per se, was afforded the Rule of Reason analysis that allowed the NCAA to offer procompetitive justifications.[283] However, the *Law* opinion, taken in conjunction with *Board of Regents*,[284] evidences the willingness of the judiciary to view college athletics as a business, complete with economic considerations such as salaries. Consequently, the NCAA may be likely to scrutinize proposed rules in the future for their economic impact and potential for antitrust liability. Of course, it remains to be seen if other NCAA rules will be subject to antitrust challenges, such as a limit to the size of coaching staffs and student-athlete qualifications.

However legally sound the judgment might be, the resulting injunction that extinguished the REC rule is likely to be easier to swallow than the $67 million judgment that accompanied it.[285] Because the NCAA is an association, the judgment will necessarily be paid by its member-institutions: colleges and universities. It will have to be determined which members bear the heaviest burden. Such a large payment is likely to impact each school's athletic budget which may in turn have a ripple effect on each college and university as a whole. Ironically the monetary judgment may negatively impact the number of jobs and the amount of salaries within a schools' athletic department. The dollar amount of the judgment is the result of the Clayton Act,[286] which trebles damages that result from violations of

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cited in this analysis, *see supra* notes 71, 101.

283. *See Law*, 134 F.3d at 1017-19.

284. *See Board of Regents*, 468 U.S. 68.

285. See Law v. NCAA, 1996 WL 104328 (D. Kan. Jan 5, 1996). The damages award was a separate unpublished district court opinion. *See* Wong, *supra* note 9, at 12.

286. 15 U.S.C. §15(a) (West 1998). The statute reads in relevant part "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . ." *Id.* The Clayton Act has been broadly construed to allow private parties to effectively enforce antitrust laws as well as deter violations from occurring. *See, e.g.*, Brunswick Corp., v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477,

the Sherman Act.

The NCAA may have no choice but to pay the $67 million judgment unless it can reach a settlement with the plaintiff-class.[287] In the future, however, it may want to argue that although its practices fall under the Sherman Act, it should not be subject to such high monetary judgments if it violates them; pushing instead to be liable only for the actual harm it causes.

To accomplish such a task, the NCAA would have to convince Congress that due to its uniqueness, that is, an association with the goal of facilitating and promoting student athletics (i.e. competition itself), it deserves a statutory exception to the treble damages provision. While the legislative history behind the antitrust laws is beyond the scope of this note, it is conceivable that such an organization was not on the mind of legislators drafting such laws at the turn of the century.[288] In contrast, while the point is certainly debatable, the NCAA may contend that its overall purpose is not commercial in nature. Therefore, the NCAA may argue that while particular rules that govern its membership may be economical in nature, their primary goal is to further amateur competitiveness. Indeed, this argument has had limited persuasiveness in the judiciary, permitting NCAA rules that might otherwise be per se invalid to be considered in light of their procompetitive effect. Members of Congress may be similarly persuaded. Such a statutory exemption would not allow the NCAA to violate antitrust laws or even keep them from paying damages. However, Congress might consider exempting them from the treble damages portion of the remedy usually available. Instead, leaving in tact the possibility of injunctive relief and compensatory damages.

If the exemption applied to this case, the award to the plaintiffs would still total more than $22 million. In fact, facing the large judgment in conjunction with the speculation of how it is going to

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486 n.10 (1977); Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982); J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 561 (1981).

287. *See* Doug Tucker, *NCAA Loses Appeal in Coaches' Case* (Associated Press Wire Report, Oct. 6, 1998), *see supra* note 38 and accompanying text. As this note was going to publication, the NCAA had recently lost its motion for a new trial regarding the damages awarded by a jury in May 1998. *See* Doug Tucker, *NCAA Handed Another Legal Setback*, (Associated Press Wire Report, Slug: NCAA-Restricted-Earnings, Jan. 15, 1999). In addition, District Court Judge Kathryn Vratil adjusted the $67 million award for inflation, causing it to climb to more than $74 million. *See id.* When interest and legal fees are included, the NCAA is currently facing an estimated $90 million judgment. *See id.*

288. *See Brunswick Corp.*, 429 U.S. at 486, n.10.

be paid and the accompanying publicity may be creating the opportune time to appeal to Congress. The NCAA may argue that such an exemption, while still allowing retribution for antitrust violations, would allow the organization to preserve its goals of fostering student-athletics. Of course the strong counter argument remains that without the threat of treble damages, the NCAA may run freely in experimenting with rules that may violate antitrust laws without worrying about the ramifications. Congress will also be concerned with pressure for similar exemptions from numerous groups that also consider their product a unique one.

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