SPORTS AND THE RULE OF REASON

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I. – Introduction

Litigation involving sports has no ordinary solution. It is widely known that one can easily envision a great philosophical discussion as to whether there should be any special legal treatment to sports-related claims. And antitrust violations in the sports contexts are no different; they have frequently troubled the courts with puzzling questions yet to be finally decided.

Accordingly, a great number of litigants have often voiced their arguments in court contending softer application of antitrust laws for sports matters. Even immunities from antitrust laws have been repeatedly insinuated[1].

No issue, however, has drawn more the attention of the courts than the application of the rule of reason to horizontal restraints devised in sports contexts. By acknowledging that at least some degree of cooperation is necessary to make the whole activity work, courts have been frequently applying the rule of reason in sports cases brought under Section 1 of the Sherman Act.

In a very brief summary, the peculiarities of the sports industry itself make necessary, under the rule of reason, to set out, *inter alia*, a balance of the pro-competitive aspects of a certain conduct and its likely harmful effects, if any, to justify a finding for an antitrust violation, or not.

Even though courts have settled to apply the rule of reason, the controversies arising from sports contexts are far from finishing. One of the several inquiries not quite clearly settled by case law relates to whether there is, or should be, any difference between professional and amateur sports for purposes of application of antitrust laws, and ultimately the rule of reason.

NCAA v. The Board of Regents of Oklahoma University[2] faced such a question. But a non unanimous Supreme Court avoided rendering a straightforward decision on the issue. Thus, to analyze such a distinction it will be necessary to discuss the meaning of the rule of reason in the sports scenario.

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[1] Overall, Courts have been reluctant to find sports businesses exempt from antitrust laws. There are, however, few, albeit relevant, exceptions. Although subject to intense criticism, and even some legislative change, the baseball antitrust exemption still stands. See, e.g., Steven A. Fehr, *The Curt Flood Act and Its Effect on the Future of the Baseball Antitrust Exemption*, 14, no. 2, Antitrust and the Business of Sports, 21-24 (2000).

[2] *468 U.S. 85, 104 S. Ct. 2948 (1984).*

And before that, briefly explain the context in which the rule of reason was created by courts.

After the historical analysis of the case law formulating the rule of reason analysis, and thereafter decisions specifically on the sports context, several questions will be posed. What are the arguments, if any, to justify a distinction between amateur and professional sports? What will be the ultimate result of such a distinction? Would this distinction be relevant for antitrust purposes? These and some other questions are discussed herein.

II. – Development of the Rule of Reason Analysis

In the late 1800s, the industrial revolution led the United States to significant social changes, and ultimately to a new market and business structure. Recognizing the inherent risks of individual proprietorships and simple partnerships, investors decided to switch to corporations. After a brief experiment with pools, which did not turn out to be viable because of extensive cheating, business entrepreneurs turned to trusts; the most reliable device towards economic concentration[3].

The use of trusts flourished in the post industrial revolution years, specially in oil, steel, electric power, and other public utility industries. Nonetheless, trusts were regarded by the public as intolerable hazards. Peer pressure against the merger activity which derived from trusts eventually led to the enactment of the first antitrust statute in the United States, the Sherman Act[4]. The Sherman Act declared illegal, *inter alia*, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."

The Supreme Court, however, later recognized that Congress could not have meant "every" contract. Lest there be no hardship to common business arrangements, in *Standard Oil Co. of New Jersey v. United States*[5], the

[3] See, e.g., Eleanor M. Fox & Lawrence A. Sullivan, Cases and Materials on Antitrust, (1989); Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust: An Integrated Handbook, (2000); and Paula A. Forgioni, Os Fundamentos do Antitruste, (1998).

[4]The Sherman Act, however, was initially used to challenge cartels, rather than trusts. See, e.g., United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); and United States v. Addyston Pipe & Steel Co, 85 F. 271 (6th Cir. 1989).

[5] *221 U.S. 1 (1911)*. With respect to the Standard Oil case, see Willian Howard Taft, Anti-Trust Act and the Supreme Court, 81-86 (1984), ("the Standard Oil Trust was probably one of the chief reasons for passing the statute in 1890. The record in the case covered 12,000 printed pages. It took 184 printed pages just to tell the summary

Supreme Court announced the application of the rule of reason to antitrust cases, under which a contract was to be considered illegal only if any undue restraint to competition could result therefrom[6].

The rule of reason approach required that several aspects be taken into account in order to assess the unlawfulness of an agreement under the Sherman Act, such as "the history behind and reasons for the agreement, its purpose, its scope and duration, and its likely competitive effects[7]." Therefore, courts must look "beyond just structural conditions and consider also behavior and intent, as well as the efficiencies of size (economies of scale and scope)[8]."

Standard Oil set forth the rule of reason as a standard for assessing violations of the Sherman Act. Accordingly, courts would only be allowed to prohibit and punish contracts which unreasonably restrain trade.

Over time, however, courts repeatedly found that certain kinds of agreements violated Section 1 of the Sherman Act, and therefore decided to deem them as per se unlawful, without assessing the elements necessary under the rule of reason. Accordingly, several arguments were presented by the courts to justify the use of a per se approach, rather than the rule of reason.

The chief argument in this regard relates to the fact that per se analysis basically brings greater simplicity and certainty to antitrust cases,

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story of the birth and growth of the monopoly. It had resulted in nine different Standard Oil companies and sixty-two other corporations and partnerships operating oil wells, refineries, pipe-line and tank-line companies. The ruling body was the Standard Oil Company of New Jersey, that held stock in the other companies and did eighty-five per cent of all the business of the United States selling refined oils and other products of petroleum.")

[6] Id. ("In view of the many forms of contracts and combinations in which were being evolved form existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this review evidenced the intend not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which could constitute an interference that is an undue restraint.")

[7] Michael J. Cozzillio & Mark S. Levinstein, Sports Law Cases and Materials, 260 (1997)

[8] John E. Kwoka Jr & Lawrence J. White, The Antitrust Revolution – Economics, Competition, and Policy (3rd Edition 1999).

leading to quicker and less costly litigation[9]. To further this purpose, adverse effects on competition were presumed, and no defenses to per se violations were to be admitted. Several Supreme Court decisions followed deeming per se unlawful agreements such as price fixing, horizontal market division, group boycotts, and tying arrangements[10].

In the meantime, the Supreme Court, in *National Society of Professional Engineers v. United States*[11], rejected the view that courts would be allowed to gauge any social betterments when applying the rule of reason. This decision effectively limited the scope of the judicial inquiry solely to the evaluation of the impacts of a certain practice on competition. Further, it developed the proposition that "the rule of reason does not support a defense based on the assumption that competition itself in unreasonable[12]."

As antitrust cases were filed, new and complex factual situations were constantly brought before courts. And consequently, new propositions arose as to the applicability of the rule of reason even when the agreement *sub-judice* would typically fall within the per se category defined by the courts.

Per se rules are by definition inflexible and strict, and sometimes were indiscriminately applied to outlaw business agreements not only unlikely to produce anti-competitive effects, but also ultimately efficient to the parties. Therefore, it was just a matter of time until the courts actually began to gauge

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[9] *Northern Pacific Ry. V. United States 356 U.S. 1, 5, 78 S.Ct. 514, 2 (1958)* ("There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in a n effort to determine at large whether a particular restraint has been unreasonable – an inquiry so often wholly fruitless when undertaken.")

[10] See, e.g., *Arizona v. Maricopa Cty. Medical Socý, 457 U.S. 332 (1982)* (price fixing); *United States v. Topco Associates, Inc., 405 U.S. 596 (1972)* (horizontal market division); *Northwest Wholesale Stationers v. Pacific Stationery Printing Co. 472 U.S. 85 (1985)* (group boycotts); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)* (tying arrangements).

[11] *435 U.S. 679 (1978)*

[12] Id.

its application in peculiar circumstances, such as the one found in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc (CBS)*[13].

Broadcast Music, Inc. v. CBS involved an arrangement under which thousands of artists and other performance rights owners licensed their performance rights through blanket licenses issued by Broadcast Music ("BMI"). The blanket license device basically permitted the licensee to perform anything in BMI's repertoire, whereas BMI monitored the performances and paid owners for use.

While the practice could account for illegal price fixing, the Supreme Court declined to deem the arrangement facially unlawful, because of its obvious transactional efficiencies. The integration of the copyright owners effectively created a new product, namely, the blanket license, which triggered an extended rule of reason analysis.

Ultimately, in *Broadcast Music, Inc. v. CBS* the Supreme Court introduced the concept of the quick look analysis for antitrust cases. Under this brand new concept, courts would have to quickly look at context and likely effects of the agreement *sub-judice*, before deciding to apply either the per se rule or the rule of reason.

All in all, courts have been sharply disagreeing about the application of per se and rule of reason over the past decades[14]. There is no well defined solution for this conflict, and certainly courts will keep on struggling on this very same issue. Doctrinal discussions even raised the possibility that the per se and rule of reason analysis might establish evidentiary presumptions, rather than two separate categories of substantive rules[15].

However, as with the new product seen in *Broadcast Music, Inc. v. CBS*, other particular situations are known to trigger the rule of reason analysis as well. Courts have already identified a few scenarios in which a per se approach would be inappropriate, such as lack of judicial experience with the industry or with the restraint under discussion[16], restraints imposed by professions[17], and unique characteristics of the business[18].

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[13] *441 U.S. , 99 S.Ct. 1551 (1979)*

[14] For an extensive description of the evolution of the per se and rule reason discussion, see, e.g., Thomas A. Piraino Jr., Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act, 47 Vand. L.Rev. 1753 (1994).

[15] See, e.g., Louis B. Schwartz et al., Antitrust – Free Enterprise and Economic Organization, 423-425 (6th edition 1982)

[16] United States v. Topco Associates, Inc.

[17] Louis B. Schawrtz et al., supra, at 424 ("National Society of Professional Engineers. Although the Court rejected the proffered justification for banning competitive bidding, it did not reject the possibility that some restraints imposed by a profession

After this brief explanation of the judicial conflict concerning the rule of reason, it is now time to go beyond and further evaluate how the sports business fits into it. While the characteristics of the sports business are unique enough to move away from a per se approach, it is clear that the rule of reason offers no easy solution for sports-related antitrust cases, as will be seen further on herein.

III. – The Rule of Reason and the World of Professional Sports

Before analyzing the application of the rule of reason itself, it is important to point out that antitrust defendants in sports-related claims usually tend to sustain a single entity argument against alleged violations of Section 1 of the Sherman Act. Such a defense stands for the contention that professional sports leagues, such as the NFL or the NBA, act as a single entity, therefore being legally unable to engage in coordinate efforts so as to be held liable for a violation of Section 1 of the Sherman Act.

While extensively contended, the single entity defense has achieved little success. Courts have repeatedly rejected the single entity defense in professional sports league cases[19]. In *Los Angeles Memorial Colliseum Commission v. NFL*[20], the Ninth Circuit affirmed the District Court's opinion, discarding the contention that the NFL would be a single entity for antitrust purposes. Both courts basically agreed on the fact that NFL teams are separate business entities whose products have an independent value.

But for the few contexts in which a single entity defense would have a chance to be successful, no other legal argument, in principle, prevents the

may be justified. Presumably the nature of the activities carried on by a profession, i.e., practicing law or medicine, may justify joint action administering entry examinations to insure the necessary moral or intellectual qualities.")

[18] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.

[19] The single entity defense, however, has been accepted for some professional leagues. See, e.g., Fraser v. Major League Soccer, 97 F. Supp.2d 130 (D.Mass. 2000). The context under which a single entity argument could be successful usually concerns weaker leagues where the teams are not fully independently managed, and where player acquisition costs, salaries, and benefits are centralized in the league itself. See, e.g., Women's National Basketball Association, and Major Indoor Lacrosse League.

[20] *726 F.2d 1381 (1984)*

courts from fully analyzing sports-related antitrust claims[21]. As already mentioned, however, the sports business is an industry where antitrust laws are not easily applied. Some degree of coordination is required in order for the product to be available at all[22]; a context which otherwise would fit into the per se category.

Therefore, the classic rule of reason inquiry formulated by Justice Brandeis in *Chicago Board of Trade v. United States*[23] applies to professional sports-related cases, and has in fact been often quoted in antitrust cases involving that industry[24]. In very general terms, "reasonability is based on the purpose of the restraint, the causal connection between the restraint and this purpose, and the severity of the restraint relative to the ends served[25]."

Although the concerted action has to some extent been considered lawful due to the particularities of the industry, standards of reasonableness for sports-related antitrust claims are yet to be created. Some concepts have already been presented in court in order to ease the rule of reason analysis, but none has been fully approved thus far.

In light of this unpleasant impasse, some attempts to connect the reasonableness analysis to the ancillary restraint doctrine have been made. Such doctrine foresees that agreements which restrain competition may be deemed valid if they are subordinate to another legitimate transaction and necessary to make that transaction effective. But these attempts have been rejected by the Ninth Circuit, which considered the ancillary restraint doctrine applied to sports cases too "inventive[26]".

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[21] Exception is made to the nonstatutory labor exemption. See, in this regard, the leading Supreme Court opinion handed down in *Brown v. Pro Football, Inc., 116 S.Ct. 2116.*

[22] *NCAA v. Board of Regents of the University of Oklahoma.* Antitrust cases involving professional sports also rely on the concept established by the NCAA case to move away the per se approach. See, e.g., *Sullivan v. NFL, 34 F.ed 1091 (1st Cir. 1994)*

[23] *246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918)* ("the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.")

[24] See, e.g., *Los Angeles Memorial Colliseum Commission v. NFL*

[25] Jonathan E. Seib, Recent Development, Antitrust and Nonmarket Goods: The Supreme Court Fumbles Again, 60 Wash. L. Rev. 721. (1984)

[26] *Los Angeles Memorial Colliseum Commission v. NFL, 726 F. 2d at 1395.*

Even if the ancillary restraint theory were to be accepted as a pattern for professional sports rules, those rules would not be per se lawful. Ancillary professional league rules would still be subject to the rule of reason analysis[27]. *Los Angeles Memorial Colliseum Commission v. NFL* expressly required the assessment of less restrictive means for the analysis of the franchise relocation rule under dispute. And further held that the rule restricting team movement was in fact unreasonable, for there were possible less restrictive means to achieve the end purported by the NFL.

Moreover, the application of the rule of reason in professional sports cases, albeit complex, still follows the patterns established by *National Society of Professional Engineers v. United States*. Ultimately professional sports entrepreneurs aim to gain profits, and therefore engage to some extent in activities similar to other businesses. Thus, courts are limited to look only at the balance of the competition effects of a particular professional league restraint, and therefore are not able to consider other factors which would offset hazards to competition.

Under the rule of reason approach, the question, therefore, is whether a particular restraint devised by a professional sports league is reasonably purported to promote and produce the sports product itself, and whether the benefits of such a restraint are not outweighed by its harms to competition. Also, the analysis of the probability of less restrictive means for achieving the same purpose purported by a particular restraint should be evaluated under the rule of reason.

But before analyzing the benefits and hazards of a particular restraint under the rule of reason defined in *National Society of Professional Engineers v. United States*, courts have first to define the relevant product market involved in the dispute, making use of the following tests: (i) reasonable interchangeability; and (ii) cross elasticity of demand, as per the rule set forth in *Los Angeles Memorial Colliseum Commission v. NFL*.

The definition of the relevant market plays a very important role in the rule of reason analysis. It is widely known that antitrust laws are primarily concerned with the promotion of interbrand competition[28]. Therefore, the rule of reason analysis in the sports context must evaluate whether professional sports leagues compete with other forms of entertainment and, if so, whether a particular restraint sufficiently promote interbrand competition to justify the negative impact on intrabrand competition.

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[27] M. Randall Oppenheimer, Selected General Observations on Antitrust Law and Entertainment/Sports Practice, C425 ALI-ABA 199 (1989)

[28] Continental T.V. Inc v. GTE Sylvania Inc., 433 U.S. 3 (1977)

The First Circuit in *Sullivan v. National Football League* expressly manifested concern in defining the proper scope of the rule of reason analysis. The First Circuit was troubled with the Supreme Court's decision in *NCAA v. Board of Regents of Oklahoma University,* because the Court considered certain procompetitive effects that existed outside of the relevant market in which the restraint operated.

Probably the court in *Sullivan v. National Football League* anticipated a problem not fully appreciated by the Supreme Court. The majority's opinion in *NCAA v. Board of Regents of Oklahoma University* did not expressly recognize a difference between professional and amateur sports for antitrust purposes. And, nonetheless, the majority applied a different rule of reason analysis. Therefore, the question must be posed: Should there be a different rule of reason standard for amateur sports?

IV. – Rule of Reason and Amateur Sports

It is impossible to refer to antitrust cases in the amateur sports context without speaking of the Supreme Court's decision in *NCAA v. Board of Regents of Oklahoma University*. This decision is the leading antitrust case in the amateur context[29]. Basically it involved the analysis of a plan devised by the NCAA which limited the total amount of televised games, and the number of games that colleges may televise.

The NCAA devised the plan with the specific purposes of reducing the adverse effects of television in the live attendance of college football games, and of maintaining competition balance among the amateur football teams. No college was permitted to negotiate any sale of its television rights except in accordance with the express terms of the NCAA television plan.

Colleges producing games with mass appeal brought suit because the NCAA plan prevented them from either gaining a share in the television agreement according to their popularity, or leaving the association in order to independently negotiate the contracts. For the NCAA announced that it would take disciplinary actions against any colleges or universities which individually negotiated their games.

[29] At least to what refers to college sports; no Olympic issues have been addressed in this paper. See, e.g., Joseph P. Bauer, Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace, 60 Tenn. L. Rev. 263, 288 (1993) ("The majority of antitrust disputes are the result of adherence to NCAA rules, which may impact adversely on competition. The most significant antitrust challenges to collegiate sports activities have arisen in two broad arenas: off –the-field activities, particularly involving broadcasting rights; and game-related rule making.")

A non unanimous Supreme Court decision in *NCAA v. Board of Regents of Oklahoma University* defined the relevant market as "live college football telecast". The Court found that the NCAA plan reduced the total number of games televised and fixed the prices paid for games, ultimately increasing the prices for the telecasts.

According to substantial body of case law, those practices usually accord for per se violations of Section 1 of the Sherman Act, because the probabilities of their pernicious and anticompetitive effects are more than high. However, the Court recognized the existence of particularities in the sports industry, and used the quick look analysis created in *Broadcast Music, Inc. v. CBS*, declining to rule the practices *sub-judice* per se unlawful, rather applying the rule of reason.

It is important to note at this point that the Supreme Court's decision to apply the rule of reason was not based either on the lack of judicial experience with this kind of arrangement or even with the industry, or on the fact that the NCAA is a non-profit organization. Actually, the Supreme Court decided not to apply a per se rule because the sports business is an industry in which horizontal restraints on competition are essential to make the product available at all.

The majority's opinion ultimately found the NCAA plan to violate Section 1 of the Sherman Act. The plan was held by the Court to be unreasonable because it created prices higher and output lower than they would otherwise be. Such structure would be unresponsive to consumer choice, and therefore unlawful. Further, the majority approved the District Court's findings that the plan was devised in a way inconsistent with its original purposes of protecting gate attendance and maintaining competition balance among amateur athlete football teams.

While acknowledging benefits outside the relevant market defined for the case, the majority followed the rule of reason standard set forth by *National Society of Professional Engineers v. United States*, thus assessing only the balance between the benefits and hazards to competition deriving from the NCAA plan. In order to reach the conclusion that the plan was unreasonable, the majority's opinion applied a standard of reasonableness related to consumer choice, and also a very restrict market definition[30].

The concerns of the First Circuit in *Sullivan v. National Football League* with respect to a proper definition of a standard rule of reason were

[30] The definition of the market was a key issue in *NCAA v. Board of Regents of Oklahoma University*. The majority's opinion did not consider that college football would be able to compete with other forms of entertainment, and therefore did not properly evaluate possible interbrand benefits deriving from the NCAA plan.

not unfounded. The Supreme Court's opinion in *NCAA v. Board of Regents of Oklahoma University* creates an awkward rule of reason analysis, which leaves lawyers and courts lost in assessing the lawfulness of horizontal restraints in sports-related cases.

It is beyond doubt that amateur sports represent a huge and profitable business in the United States, generating large revenues. In several aspects, therefore, college games are akin to professional sports leagues. Their stadiums are covered with advertising, and their coaches sometimes earn millionaire salaries or hold contracts with sponsors involving large monetary sums. Also, universities make substantial profits from other sources of endorsement[31].

But it is clear that the NCAA purposes differ from the ones pursued by professional leagues. One can easily envision a consumer who wants to purchase non professional athletic activities. The academic status of the sports games is tantamount for these consumers, and actually constitutes part of the product sold[32]. Thus, NCAA sells amateurism, and this entails consequences in the antitrust analysis.

The amateurism and education goals furthered by the NCAA have prompted the courts to frequently hold that "the rules governing intercollegiate athletics are not subject to strict antitrust analysis[33]", even though non-profits entities, such as the NCAA, have already been deemed to be within the reach of the antitrust laws, as per the rule set forth in *NCAA v. Board of Regents of Oklahoma University.*

Actually*, Hennessey v. NCAA*[34] and *Justice v. NCAA*[35] effectively drew a distinction between the NCAA rules that are intended to promote amateurism, and those that have an obvious and discernable economic purpose. The former would be exempted from antitrust liability, whereas the latter would be subject to antitrust scrutiny, according to the rules set forth by those cases, which preceded *NCAA v. Board of Regents of Oklahoma University* .

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[31] See, e.g., Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, 14, no. 2, Antitrust and the Business of Sports, 46-50 (2000).

[32] Although fans may prefer academic sports because of school rivalries. See, e.g., Daniel A. Rasher & Andrew D. Schwarz, *"Amateurism" in Big-Time College Sports*, 14, no. 2, Antitrust and the Business of Sports, 51-56 (2000).

[33] See Stephanie M. Greene, Regulating the NCAA: Making the Calls Under the Sherman Antitrust Act and Title IX, 52 Me. L. Rev. 81, 83 (2000).

[34] *564 F2d 1136, 1149 (5th Cir. 1977)*

[35] *577 F.Supp. 356, 382-3 (D. Ariz. 1983)*

Both *Hennessey v. NCAA* and *Justice v. NCAA* have already provided inspiration for some decisions. For instance, *Law v. NCAA*[36] involved a rule promulgated by the NCAA restricting salaries of Division 1 basketball coaches. Because this rule allegedly had identifiable commercial interests, the Tenth Circuit subjected it to antitrust scrutiny under the rule of reason.

Conversely, in *Smith v. NCAA*[37], the rule of reason analysis was purely irrelevant, since the objectives of the rule under dispute were not commercial in nature. The rule in *Smith v. NCAA*, namely, the Post baccalaureate rule, prohibited students from taking part in athletics while enrolled in a graduate program outside their undergraduate institution. Such a rule, therefore, would either be exempt from antitrust scrutiny, or would easily pass the rule of reason analysis.

The NCAA is a non-profit and educational association. Its objectives do not correspond with the ones mainly pursued by the professional leagues. Therefore, there is an obvious need for establishing a rule of reason standard which respects the NCAA purposes. The best approach perhaps is the one suggested by the dissenting opinion rendered by Justice Stevens in *NCAA v. Board of Regents of Oklahoma University*.

In Justice Steven's view, the noneconomic nature of NCAA demanded a different treatment, and therefore should not be ignored in the antitrust analysis of horizontal restraints. Justice Stevens concluded that the NCAA plan appeared to be reasonable, because it spurs the goal of amateurism, reducing the financial incentives towards professionalism.

Such a conclusion conflicts with the basic rule of reason inquiry formulated in *National Society of Professional Engineers v. United States*, which was used by the majority's opinion. *National Society of Professional Engineers v. United States* implies that noneconomic values, such as the promotion of amateurism and fundamental educational objectives, could not be taken into account in the assessment of the lawfulness of a horizontal restraint in the amateur sports context. How should this conflict be settled by the courts?

V. – Conclusion

In *Los Angeles Memorial Colliseum Commission v. NFL*, the Ninth Circuit recognized that the sports industry does not readily fit into the antitrust context, and therefore that it would be difficult to gauge the positive and

[36] *134 F.3d 1010 (10th Cir. 1998)*

[37] *266 F.3d 152 (3rd Cir. 2001)*

negative effects in order to proceed with the rule of reason analysis. The restraint then at issue involved franchise relocation, and was devised by the NFL; a professional sports league.

In the amateur context, however, the situation becomes even worse, since relevant goals other than profit are sought. In the condition of an amateur entity, the NCAA pursues public policy interests, which must be enforced by the courts. The majority's opinion in *NCAA v. Board of Regents of Oklahoma University* stuck to the principles set forth in *National Society of Professional Engineers v. United State*, thus completely disregarding the need to further those public policy principles.

Perhaps consumer choice should not be a factor leading to a finding of unreasonableness of a particular restraint when balanced against the goal of amateurism. And perhaps the distinctions made by the courts in *Hennessey v. NCAA* and *Justice v. NCAA*, dividing the legal treatment dispended to the NCAA between commercial (subject to antitrust scrutiny) and noncommercial (exempt from antitrust liability) interests, do not make much of a sense. For *NCAA v. Board of Regents of Oklahoma University* evidently demonstrates that those interests might be so intertwined as to make impossible a clear distinction.

The best solution, therefore, would entail a revision, and maybe the overruling, of *National Society of Professional Engineers v. United States*, at least to what refers to the amateur sports industry. When analyzing the validity of agreements restraining competition in the collegiate scenario, courts should be able to fully appreciate whether a particular restraint imposed by the NCAA has the *possibility* of promoting and preserving amateurism and integration of athletics and education. Those goals should not be ignored.