

BUNIVERSITY OF MIAMI BUSINESS LAW REVIEW W

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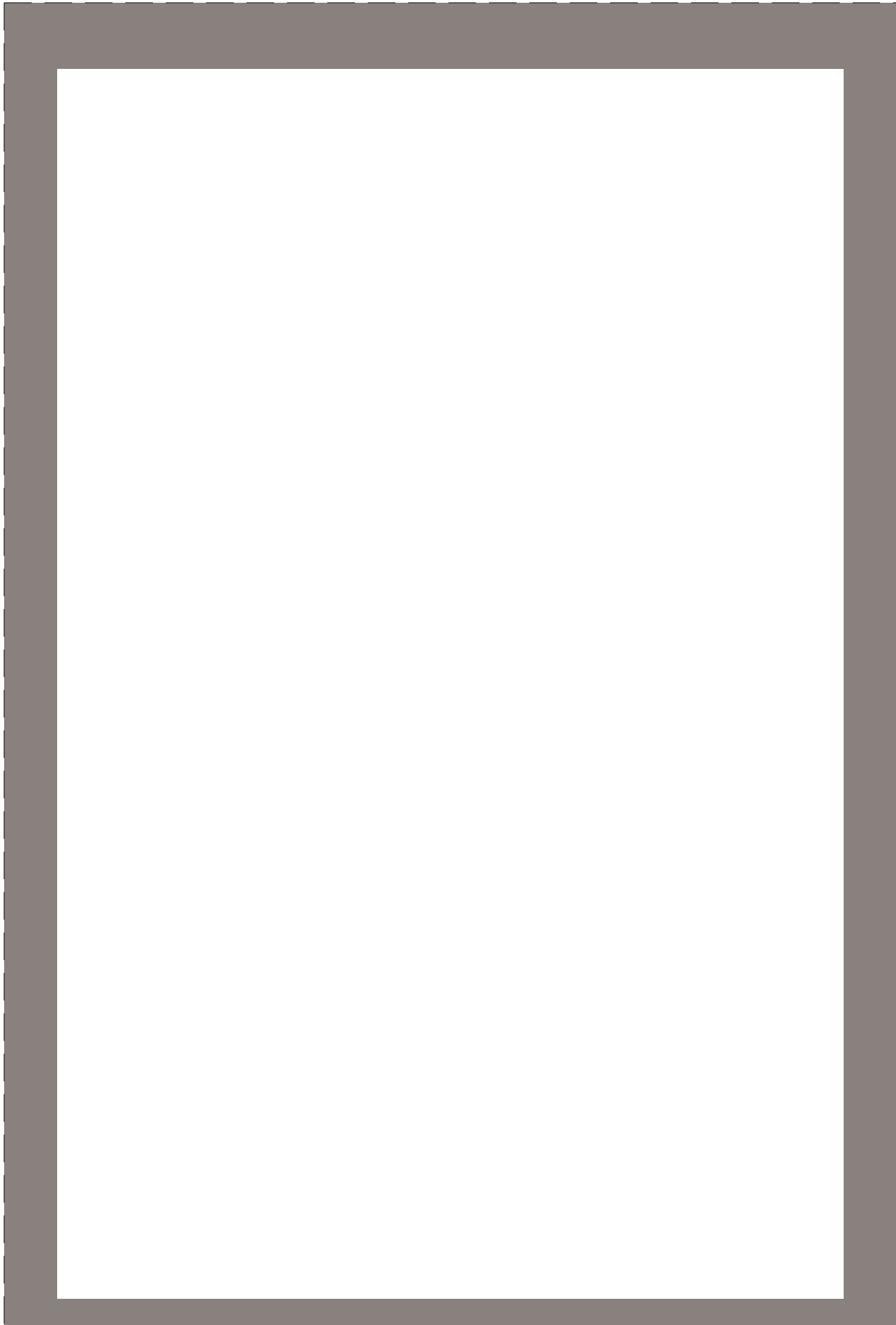
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BREAKING BAD: AN EXAMINATION OF THE NCAA'S INVESTIGATION PRACTICES OVER THE LAST FORTY YEARS

RYAN APPEL

In response to the increasing number of infractions cases that have surfaced over the past several years¹ and heightened scrutiny from the general public and media², the National Collegiate Athletic Association (“NCAA”) proposed changes to its enforcement model, which were developed in a working group led by the President of Oregon State University, Ed Ray. The proposed revisions addressed various aspects of the enforcement model, including, but not limited to, the current violation structure, the committee on infractions, and accountability standards for coaches and university officials.³ According to NCAA President Mark Emmert and chairman of the NCAA Board of Directors Gary Brown, the revisions were made to “restore public trust in college sports and the NCAA.”⁴ On October 30, 2012, the Division Board I Board of Directors approved of the revisions⁵ and the changes became effective in August of 2013.⁶

Unfortunately, these changes do not address one of the NCAA enforcement model’s most glaring issues: investigation procedures. This note will analyze corrupt investigation practices that the NCAA has exhibited in the past and propose a solution to restore the integrity of college athletics. Section II will describe the history of the NCAA and provide a description of the NCAA’s enforcement procedures. Section III of this article will explore previous NCAA investigations, some of which ultimately led to lawsuits filed against the NCAA. Section IV will discuss both state and federal governments’ attempts to regulate the NCAA

¹ See, NAT’L COLLEGIATE ATHLETIC ASS’N, FINAL REPORT: NCAA WORKING GROUP ON COLLEGIATE MODEL – ENFORCEMENT 1-2 (2012), available at http://www.ncaa.org/sites/default/files/Report_Final_101112.pdf [hereinafter *New NCAA Model*].

² See, Eric Prisbell, *NCAA Board Endorses Major Changes in Rules Enforcement*, USA TODAY (Aug. 2, 2012, 7:36 PM), <http://usatoday30.usatoday.com/sports/college/story/2012-08-02/ncaa-board-endorses-changes-in-rules-enforcement-penalties/56714992/1>.

³ *New NCAA Model*, *supra* note 1, at 3-4.

⁴ *Id.* at 2.

⁵ Gary Brown, *DI Board of Directors Approves Overhauled Enforcement Structure*, NCAA (Oct. 30, 2012, 4:41 PM), <http://www.ncaa.com/news/ncaa/article/2012-10-30/di-board-directors-approves-overhauled-enforcement-structure>.

⁶ Jodi Balsam, *New NCAA Enforcement Structure Effective August 1, 2013*, OFFICIAL REV. (Aug. 9, 2013), <http://www.theofficialreview.com/new-ncaa-enforcement-structure-effective-august-1-2013/>.



through legislation, such as the newly proposed NCAA Accountability Act. Section V will propose new, transparent enforcement guidelines for the NCAA that integrate legal concepts and practices. Section VI will conclude this note.

II. BACKGROUND

a. History of the NCAA

The NCAA is a voluntary, unincorporated athletic association of higher education institutions that possesses the authority to create and promulgate regulations that govern its respective members.⁷ Currently, the NCAA has more than twelve hundred member institutions⁸ and oversees over four hundred thousand student athletes.⁹ Each member school ratifies and agrees to be bound by NCAA rules and regulations and to administer their athletic programs in accordance with such rules and regulations.¹⁰ The NCAA oversees almost all areas of college athletics, including but not limited to, amateurism and recruiting of student athletes.¹¹

The NCAA originated in 1905 and stemmed from Theodore Roosevelt's concern about safety in college athletics.¹² Essentially, President Roosevelt wanted to implement a rule-making body to prevent "commercialism, excessive physical injury to student athletes, and cheating by some participating schools."¹³ The NCAA first addressed amateurism and eligibility issues in the 1920's with the development of the Amateur Committee.¹⁴ Many of the cases that the Amateur Committee addressed centered on recruitment issues and subsidization of athletes.¹⁵ However, the NCAA did not develop a standard code of conduct for college athletes and university athletic programs until 1946.¹⁶

⁷ WALTER T. CHAMPION, JR., *SPORTS LAW IN A NUTSHELL* 276 (4th ed. 2009).

⁸ *Membership*, NCAA (last visited Apr. 10, 2014), <http://www.ncaa.org/about/who-we-are/membership>.

⁹ *Who We Are*, NCAA (last visited Apr. 10, 2014), <http://www.ncaa.org/about/who-we-are>.

¹⁰ GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 157 (3d ed. 2002).

¹¹ GLENN M. WONG, *ESSENTIALS OF AMATEUR SPORTS LAW* 5 (2d ed. 1994).

¹² Alain Lapter, Article, *Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform*, 12 *SPORTS LAW J.* 255, 264 (2005).

¹³ *Id.* (footnote omitted).

¹⁴ Glenn Wong et al., *The NCAA's Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 VA. *SPORTS & ENT. L.J.* 47, 49 (2009) [hereinafter Wong, *IAC History*].

¹⁵ *Id.*

¹⁶ *Id.*

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It was then that the NCAA promulgated “Principles for the Conduct of Intercollegiate College Athletics.”¹⁷ The principles encompassed “old amateur ethos” connected to “financial aid, recruitment, academic standards for athletes, institutional control and the principle of amateurism itself.”¹⁸ They were adopted at the NCAA’s 42nd Convention in 1948 and would soon thereafter be referred to as the “Sanity Code.”¹⁹

To complement the newly established Code, the Executive Committee of the NCAA created the Constitutional Compliance Committee (“CCC”) to interpret the Sanity Code and to determine whether certain practices violated or adhered to the code.²⁰ At that time, there was only one penalty for violations: expulsion from NCAA through the vote of its members at an annual NCAA convention.²¹ This remedy proved to be ineffective.²² In 1950, seven universities were caught violating the Sanity Code.²³ During the 1950 NCAA Convention, none of those seven universities were expelled.²⁴ Because of the concern about the severity of the expulsion, the Sanity Code was repealed the following year.²⁵ In addition, the CCC was also replaced by the Committee on Infractions (“COI”).²⁶ In 1973, the NCAA member universities voted to create new entity to alleviate the workload and reduce responsibilities of the COI: the Enforcement Staff.²⁷

b. The Enforcement Staff and the Committee on Infractions

The Enforcement Staff is a group of full-time NCAA employees.²⁸ It is responsible for investigating a member institution’s “failure to comply with NCAA legislation or to meet the conditions and obligations of membership.”²⁹ The Enforcement Staff gathers information about

¹⁷ JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY* 69 (2006).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Wong, *IAC History*, *supra* note 14, at 49.

²² *See, id.*

²³ *Id.* at 49-50.

²⁴ *Id.*

²⁵ *See, Crowley, supra* note 17, at 69.

²⁶ *See, GLENN M. WONG, ESSENTIALS OF SPORTS LAW* 185 (4th ed. 2010).

²⁷ *See, id.*

²⁸ Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 755 (2007); *see also* NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA BY-LAWS 311-27 (2013-2014 ed.) [hereinafter *NCAA Bylaws*].

²⁹ *See, WONG, supra* note 26, at 185.

potential violations independently from the COI and presents information that it collected to the COI at a formal hearing.³⁰

The COI, on the other hand, presides over infraction hearings, issues penalties against institutions or individuals that violate NCAA bylaws, and supervises the enforcement program and procedures.³¹ The NCAA recently increased the size of the COI from ten to twenty-four members in response to the increasing number of infractions cases that have surfaced over the past several years.³² In contrast to the Enforcement Staff, none of the twenty-four committee members are full-time NCAA employees.³³ In order to ensure that the COI is diverse, members of the COI are categorized into seven different representative groups: (1) current or former university presidents, (2) current or former university athletic directors, (3) former NCAA coaches, (4) representatives from conference offices, (5) university staff or faculty, (6) athletic administrators with compliance experience, and (7) members of the general public with formal legal training who are not associated with a collegiate institution, conference, or professional sports organization and who do not represent coaches and athletes.³⁴

c. The Enforcement Process

The Enforcement Staff triggers the NCAA enforcement process with an investigation.³⁵ It typically receives information about possible violations from multiple types of sources such as member institutions, media reports, and anonymous sources.³⁶ However, it may only initiate investigations “when it has reasonable cause to believe that the institution may have violated NCAA rules.”³⁷ Factors that the Enforcement Staff considers in making its reasonable cause determination include the source’s reliability and credibility.³⁸ The Staff then makes a preliminary

³⁰ See, *id.* at 185; *NCAA Bylaws*, *supra* note 28, at 317-18.

³¹ See, WONG, *supra* note 26, at 185.

³² *New NCAA Model*, *supra* note 1, at 10.

³³ *Id.*; see also Rogers & Ryan, *supra* note 28, at 755.

³⁴ *New NCAA Model*, *supra* note 1, at 10.

³⁵ Katherine Elizabeth Maskevich, Comment, *Getting Due Process into the Game: A Look at the NCAA's Failure to Provide Member Institutions with Due Process and the Effect on Student-Athletes*, 15 SETON HALL J. SPORTS & ENT. L. 299, 308 (2005).

³⁶ *Enforcement Process: Investigations*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/enforcement/enforcement-process-investigations> (last visited Apr. 6, 2014).

³⁷ Maskevich, *supra* note 35, at 308.

³⁸ *Id.*

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inquiry and determines whether the allegation is substantial.³⁹ If it is determined that the allegation is substantial, the Enforcement Staff will send a letter to the president of the university in question (“Official Inquiry”), which notifies the institution that an investigation has commenced.⁴⁰

After the university in question has received an Official Inquiry, the Enforcement Staff may initiate its investigation on the member institution’s campus or outside of the campus.⁴¹ These investigations usually include interviews of individuals that may be involved with or have knowledge of a potential violation.⁴² Any individual that is interviewed is permitted to have a lawyer present and must be informed that the purpose of the interview is to determine whether the interviewed individual has knowledge of or involvement with the potential NCAA violations.⁴³ Because the NCAA lacks subpoena power, the NCAA often experiences difficulty in obtaining interviews with individuals that do not fall under the NCAA’s jurisdiction, such as agents, former student athletes, and former university employees. To corroborate the interviews, Enforcement Staff members collect supporting documentation, including, but not limited to, compliance files, phone records, and e-mails, from sources such as member institutions and interviewees.⁴⁴

If the Enforcement Staff believes that it has discovered enough evidence of a violation, a notice of allegation (“Notice of Allegation”) is sent to the member institution. The Notice of Allegation includes the alleged violations; the details of the allegations; the possible level of each violation; the available hearing procedures and opportunity to answer the allegations; and factual information that the Enforcement Staff relied on in making its determination.⁴⁵

After a member institution responds to the Notice of Allegation, the case is sent to the COI. The COI will only hear and review cases that involve Level I or Level II violations.⁴⁶ A Level I violation is the most severe of the NCAA four violation categories and applies to severe

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Enforcement Process: Investigations*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/enforcement/enforcement-process-investigations> (last visited Apr. 6, 2014).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *NCAA Bylaws*, supra note 28, at 318.

⁴⁶ *Id.* at 311.

breaches of conduct.⁴⁷ The new model defines severe breaches of conduct as behavior that “seriously undermines or threatens the integrity of any NCAA Collegiate Model. . .including any violation that provides or is intended to provide a substantial or extensive recruiting, competitive, or other advantage, or a substantial or extensive impermissible benefit.”⁴⁸ Severe breaches of conduct include the following: lack of institutional control, academic fraud, and failure to cooperate with an NCAA investigation.⁴⁹ If an infraction falls under Level I, the violating member institution may suffer daunting consequences such as post-season bans, scholarship restrictions, and financial penalties.⁵⁰

Level II violations apply to “significant” breaches of conduct.⁵¹ This type of breach includes behavior involving “more than a minimal but less than a substantial or extensive impermissible benefit” and “more than a minimal but less than substantial or extensive” recruiting or competitive advantage.⁵² In addition, conduct that may compromise any NCAA enduring value may also constitute a Level II violation.⁵³ More simply put, Level II violations are milder forms of Level I violations, or the result of repeated Level III violations.⁵⁴ Moreover, if a university is guilty of committing multiple Level II violations, the Level II violations may be grouped together and elevated to a Level I violation.⁵⁵

After the COI is notified of a potential Level I or Level II violation, it assigns the case to a hearing panel of five or seven COI members.⁵⁶ The hearing panel then conducts a hearing to determine whether violations of the NCAA regulations occurred and to determine appropriate penalties if necessary. At the hearing, parties or their respective legal counsel must present “material, relevant information necessary for the hearing panel to reach an informed decision, including information that corroborates or refutes an allegation.”⁵⁷ Upon the conclusion of a hearing, the hearing panel prepares a final written infractions decision on behalf of the COI

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 312.

⁵⁰ *Id.* at 322.

⁵¹ *Id.* at 312.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 313.

⁵⁷ *Id.* at 319.

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and sends the decision to the president of the institution involved.⁵⁸

After the COI issues an infraction report, the institution then has the option to appeal the hearing panel's findings within fifteen days of the release of the hearing panel's decision.⁵⁹ The appeal is heard by the Infractions Appeals Committee ("IAC")⁶⁰, which is appointed by the NCAA board of directors.⁶¹ The IAC is comprised of five COI members, one of which must be a member of the general public that does not have a connection to a collegiate institution, conference, professional or similar sports organization, or represent coaches or athletes in any capacity.⁶²

Individuals and institutions accused of Level I and Level II violations may also elect, in conjunction with the Enforcement Staff, to summary disposition procedures as a way to settle a matter and propose penalties.⁶³ During the summary disposition process, the accused institution, individuals, and Enforcement Staff jointly submit a written report to the chairman of the COI that includes proposed findings and proposed penalties of fact.⁶⁴ The report must also describe a summary of information that the findings were based on, identify the violation of NCAA bylaws that took place, indicate that all parties agreed on the overall level of the case, and list any agreed-upon aggravating and mitigating factors.⁶⁵ In addition, the report must include the Enforcement Staff's stipulation that the investigation, if conducted by the institution, was complete and a stipulation that the proposed findings are substantially correct and complete. Once it has received the written report, the COI will determine whether the findings and proposed penalties are adequate.⁶⁶ If the COI determines that that the findings and proposed penalties are inadequate, then the case will be subject to the hearing procedures enumerated above.⁶⁷

⁵⁸ *Id.* at 320.

⁵⁹ *Id.* at 325.

⁶⁰ *Id.* at 325.

⁶¹ *Id.* at 315.

⁶² *Id.*

⁶³ *Id.* at 317.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 317-18.



II. PERSONAL FOULS: AN EXAMINATION OF THE ENFORCEMENT STAFF'S PAST MISCONDUCT

This section explores the unethical conduct exhibited by the Enforcement Staff from 1976 to the present day and lawsuits that stemmed from such conduct. These lawsuits were filed by former college coaches whose careers were hindered as a result of the unprincipled investigation practices. The causes of action for said cases include, but are not limited to, violation of due process rights, defamation, negligence, and tortious interference with contractual relations.

a. University of Nevada, Las Vegas

Jerry Tarkanian was a prominent basketball coach that battled with the NCAA for decades. He began his Division I college coaching career at California State University, Long Beach ("Long Beach State") in 1968.⁶⁸ In 1973, after building Long Beach State into a basketball powerhouse, he left to become the head basketball coach at University of Nevada, Las Vegas ("UNLV").⁶⁹ After his departure, the NCAA submitted an Official Inquiry to Long Beach State.⁷⁰ The Enforcement Staff then commenced an investigation and presented its findings to the COI at a hearing that was held without an opportunity for Tarkanian or UNLV to cross-examine the NCAA's witnesses.⁷¹ The COI found that Long Beach State was guilty of twenty-three NCAA infractions. Subsequently, Long Beach State was placed on three years of probation and was banned from the 1974 NCAA basketball tournament.⁷²

⁶⁸ A.D. Hopkins, *Jerry Tarkanian*, LAS VEGAS REV.-J. (Sept. 12, 1999, 2:00 AM), <http://www.reviewjournal.com/news/jerry-tarkanian>.

⁶⁹ *Id.*

⁷⁰ Univ. of Nev. v. Tarkanian, 594 P.2d 1159, 1160 (1979). Long Beach State was founded in 1949, making it nineteen years old when Tarkanian arrived on campus. *Our History*, CAL. STATE UNIV. LONG BEACH, <http://www.csulb.edu/about/history/> (last visited Apr. 6, 2014). One of Tarkanian's former players, Ed Ratliff, believes that the NCAA assumed that Tarkanian was cheating because of his immediate success at a young institution like Long Beach State. Sam Gardner, *Hall of Famer Has a Nice Ring to Tark's Former Players*, FOX SPORTS (Dec. 17, 2013, 12:30 PM), <http://msn.foxsports.com/college-basketball/story/hall-of-famer-has-nice-ring-to-tark-s-former-players-121713>.

⁷¹ Univ. of Nev., 594 P.2d at 1161.

⁷² *Id.*; see also Rick Telander, *The Shark Gets a Ruling with Bite*, SPORTS ILLUSTRATED, Oct. 10, 1977, at 26, available at <http://si.com/vault/article/magazine/MAG1135754/index.htm>; Chris Dufresne, *These Forty Niners Still Looking to Strike Gold*, L.A. TIMES (Mar. 8, 2012), <http://articles.latimes.com/2012/mar/08/sports/la-sp-0309-long-beach-basketball-20120309/2>.

Tarkanian’s family believes that the NCAA followed him to UNLV.⁷³ During Tarkanian’s first season at UNLV, the Enforcement Staff launched an investigation of the UNLV men’s basketball program for a number of violations.⁷⁴ One of the charges involved academic fraud. The NCAA alleged that Jerry Tarkanian told a professor to give one of his players, David Vaughn, a “B” in the professor’s class.⁷⁵ According to the NCAA investigator, the professor informed the investigator that Vaughn rarely attended the class and that he was afraid of losing his job if he did not give Vaughn a “B.”⁷⁶ The professor denied making such a statement to the investigator.⁷⁷ In fact, he attempted to contact the COI to dispute the statement, but they refused to listen to him.⁷⁸ The professor then hired an attorney and gave a sworn affidavit, which stated that he did not make the alleged statement and that Vaughn earned his “B.”⁷⁹ In addition, the professor’s attorney interviewed several students, all of whom claimed that Vaughn regularly attended the class.⁸⁰

Another questionable tactic employed during the UNLV investigation involved the NCAA’s interrogation of Rodney Parker, a New York playground coach that paired high school players with college basketball programs.⁸¹ The NCAA asserted that Tarkanian and his staff had “done something with Rodney” to land recruit Rudy Jackson, who ultimately decided to enroll at Wichita State.⁸² Therefore, David Berst, an NCAA investigator, interviewed Parker and did not take notes or record the interview.⁸³ After the interview, Berst claimed that UNLV paid for Parker to attend the Dapper Dan Roundball Classic (“Roundball”) in Pittsburgh, Pennsylvania. Unbeknownst to Berst, Parker secretly tape recorded the entire interview. The tape revealed that Parker paid his own way to Roundball every year. Tarkanian and his attorney flew to the NCAA headquarters in Kansas City to play Parker’s tape recording and disprove

⁷³ Sam Borden, *A Rebel’s Methods Go Mainstream*, N.Y. TIMES (Jan. 3, 2013), http://www.nytimes.com/2013/01/04/sports/ncaabasketball/college-basketball-catches-up-to-jerry-tarkanians-rebel-ways.html?page-wanted=all&_r=0.

⁷⁴ JERRY TARKANIAN WITH DAN WETZEL, RUNNIN’ REBEL: SHARK TALES OF “EXTRA BENEFITS,” FRANK SINATRA, AND WINNING IT ALL 202 (2012).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 203.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*



Berst's accusation.⁸⁴ Upon their arrival, the NCAA informed Tarkanian and his attorney that "You can't play the tape because David Berst is not on trial, UNLV is."⁸⁵

Three years after the launch of the investigation, the COI submitted an Official Inquiry to the president of UNLV.⁸⁶ The Official Inquiry asserted Tarkanian violated NCAA legislation.⁸⁷ After the hearing, the COI determined that UNLV and its players committed thirty-eight violations.⁸⁸ It also concluded that "Tarkanian had either contacted or arranged for others to contact principals involved in the infractions investigation in an effort to discourage them from reporting violations to the NCAA or to cause them to give untruthful information to the university's investigators."⁸⁹

UNLV appealed twenty-seven of COI's findings and argued that the evidence that UNLV produced during their own investigation proved that no violations occurred.⁹⁰ The university also attacked the investigation procedures and the integrity of the two individuals who conducted the investigation.⁹¹ However, UNLV lost its appeal.⁹²

To reprimand UNLV for the violations, the NCAA imposed sanctions, including probation.⁹³ In addition to imposing sanctions, the COI requested that UNLV "show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him from the athletic program during its probation period."⁹⁴ In other words, the NCAA threatened to impose more sanctions on UNLV if the university did not remove Tarkanian as its men's basketball coach. In response, the president of UNLV relieved Tarkanian of his duties.⁹⁵

In 1977, Tarkanian filed suit in Nevada state court against UNLV, its president, and its regents.⁹⁶ Because UNLV was a public university,

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Univ. of Nevada, 95 Nev. at 391.

⁸⁷ *Id.*

⁸⁸ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 185 (1988).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 186 (1988).

⁹⁵ *Id.* at 187.

⁹⁶ Univ. of Nevada v. Tarkanian, 95 Nev. 389, 394 (1979).

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Tarkanian sought a declaration that he had been denied procedural and substantive due process of law.⁹⁷ Ultimately, the Supreme Court of Nevada held that NCAA was a necessary party and should be joined to the lawsuit.⁹⁸ In July of 1979, Tarkanian amended his complaint to include the NCAA as a defendant.⁹⁹

One of the primary issues in the case was whether the NCAA acted under the color of state law.¹⁰⁰ The Supreme Court of Nevada held that the NCAA was a state actor in this case. The Supreme Court of the United States, however, granted certiorari and determined that the NCAA was not a state actor and therefore Tarkanian was not denied his due process rights.¹⁰¹ Because the Supreme Court was only asked to address the state-actor question, the Court did not determine whether Tarkanian's NCAA hearings were constitutionally inadequate.¹⁰²

Tarkanian's fight against the NCAA did not end with the Supreme Court's decision. In 1992, Tarkanian and his wife filed another complaint in Nevada state court against the NCAA, claiming that the NCAA wrongfully attempted to force Tarkanian out of college basketball.¹⁰³ More specifically, he claimed the organization manufactured evidence against his basketball programs.¹⁰⁴ In 1998, the NCAA paid Tarkanian \$2.5 million dollars to settle his lawsuit.¹⁰⁵ Although the NCAA did not admit guilt, NCAA President Cedric Dempsey admitted that the case against Tarkanian produced changes in the NCAA investigation procedures,¹⁰⁶ and he issued a statement apologizing to Tarkanian:

The NCAA regrets the 26-year ongoing dispute with Jerry Tarkanian and looks forward to putting this matter to rest. Obviously, Jerry Tarkanian has proven himself to be an excellent college basketball coach, and we wish him and his family continued success for the remainder of his career. We know that

⁹⁷ *Id.* at 394.

⁹⁸ *Id.* at 399.

⁹⁹ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 188 (1988).

¹⁰⁰ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 113 Nev. 610, 611 (1997).

¹⁰¹ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 201(1988).

¹⁰² *Id.*

¹⁰³ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 113 Nev. 610, 611 (1997).

¹⁰⁴ *Tarkanian wins \$2.5 million settlement from NCAA*, CNN/SPORTS ILLUSTRATED (Apr. 2, 1998), http://sportsillustrated.cnn.com/basketball/college/news/1998/04/02/tarkanian_ncaa/.

¹⁰⁵ *Id.*

¹⁰⁶ Richard Sandomir, *Maverick Coach Wins Battle and Collects from N.C.A.A.*, N.Y. TIMES, Apr. 3, 1998, at A1

this dispute has caused distress for all concerned. We sincerely hope that by resolving this conflict, wounds can begin to heal.¹⁰⁷

While satisfied with his monetary award, Tarkanian expressed that the NCAA “can never, ever, make up for all the pain and agony they caused [him].”¹⁰⁸ The NCAA investigated Tarkanian for seven years and failed to prove a single major violation.¹⁰⁹

b. University at Buffalo, State University New York

University at Buffalo, State University of New York (“SUNY Buffalo”) hired Timothy Cohane as the head coach of its men’s basketball program in 1993.¹¹⁰ When Cohane first began his tenure at SUNY-Buffalo, the men’s basketball program was not a member of a league; however, after a few years, the men’s basketball team joined the Mid-Atlantic Conference (“MAC”).¹¹¹ On August 3, 1999, a MAC employee informed the NCAA about an alleged infraction involving the SUNY-Buffalo men’s basketball team.¹¹² In 1999, *before* the NCAA launched an investigation, the NCAA told SUNY-Buffalo that Cohane committed a major NCAA infraction and should be forced to resign.¹¹³ On that same day, Cohane was forced to resign.¹¹⁴

The next year, the NCAA commenced its investigation into Cohane’s men’s basketball team led by Tom Hosty and Stephanie Hanna, two Enforcement Staff members.¹¹⁵ Several members of the basketball team, some of whom exhausted their eligibility to play at the collegiate level, refused to cooperate with the Enforcement Staff; in response, SUNY-Buffalo threatened to withhold players’ degrees if they did not cooperate

¹⁰⁷ JERRY TARKANIAN WITH DAN WETZEL, *RUNNIN’ REBEL: SHARK TALES OF “EXTRA BENEFITS,”* FRANK SINATRA, AND WINNING IT ALL xvi (2005).

¹⁰⁸ *Tarkanian wins \$2.5 million*

¹⁰⁹ James Potter, *The NCAA As State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269, 1304 (2007).

¹¹⁰ Complaint at 2, *Cohane v. Nat’l Collegiate Athletic Ass’n.*, WL 2373474 (W.D.N.Y. Sept. 27, 2005) (No. 04-CV-0181S).

¹¹¹ *Cohane v. Nat’l Collegiate Athletic Ass’n.*, 2005 WL 2373474 at *1 (W.D.N.Y. Sept. 27, 2005) *aff’d in part, rev’d in part sub nom.*

¹¹² Complaint at 6, *Cohane v. Nat’l Collegiate Athletic Ass’n.*, WL 2373474 (W.D.N.Y. Sept. 27, 2005) (No. 04-CV-0181S).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

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with the NCAA.¹¹⁶

The Enforcement Staff presented its case to the COI in 2001.¹¹⁷ In developing its case, it primarily relied upon affidavits provided by SUNY officials.¹¹⁸ After conducting its hearing, the COI found that Cohane held impermissible basketball tryouts, that the SUNY-Buffalo exceeded coaching staff limitations, that SUNY-Buffalo players received impermissible benefits, and that minor secondary violations were committed.¹¹⁹ It also found that Cohane committed an ethical conduct violation during his interview with the COI because he was “evasive, deceptive and not credible” and “contrary to the principles of ethical conduct.”¹²⁰

One of the punishments issued by the COI was a show-cause penalty against Cohane.¹²¹ In short, if Cohane sought employment in an athletic capacity at a NCAA member institution between March 21, 2001 and December 2, 2002, he and his prospective employer would be required to appear before the COI and the COI would determine whether the member institution should be subject to the NCAA’s show-cause procedures.

Cohane immediately appealed the COI’s decision.¹²² The IAC was troubled by the Enforcement Staff’s behavior in conducting its investigation.¹²³ In its report that was issued eight months after the COI’s report, the IAC found that the Enforcement Staff “investigators did not interview all persons who, the Infractions Appeals Committee believe[d], had relevant information” to the investigation.¹²⁴ Such individuals included three of the four players accused of participating in impermissible tryouts, the SUNY-Buffalo athletic director, and the SUNY-Buffalo compliance officer.¹²⁵

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Cohane 2005 WL 2373474 at *1.

¹¹⁹ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *University at Buffalo, State University of New York*, 1 (Mar. 21, 2001) [hereinafter *SUNY Infractions Report*].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *Former Head Men’s Basketball Coach University at Buffalo, State University of New York Public Infractions Committee Appeal Report*, 1 (October 21, 2001) [hereinafter *SUNY Appeals Report*].

¹²⁴ *Id.*

¹²⁵ *Id.*

The IAC also took issue with the COI's conduct as well.¹²⁶ The IAC found that the former head coach's conduct during the hearing was not an ethical conduct violation:

We believe that it is important to state clearly that a person's assertion of innocence, however vigorous, against charges of violations should not ordinarily be the subject of an unethical conduct finding. In this case, the Infractions Appeals Committee does not believe the former head coach's conduct in presenting his defense should in any way give rise to an ethical conduct violation.¹²⁷

While the IAC affirmed the COI's violations, it terminated Cohane's show-cause penalty on the date that it issued its report.¹²⁸

In 2004, Cohane filed a complaint in federal court against several individuals and entities, including but not limited to the NCAA, SUNY-Buffalo, Tom Hosty, and Stephanie Hanna.¹²⁹ Cohane asserted that his due process rights were violated by Hosty, Hanna, and the NCAA, all of whom were state actors because they acted in concert with State officials employed at SUNY-Buffalo during the investigation.¹³⁰ While the United States District Court found that the NCAA and its employees did not act under the color of state law,¹³¹ the Second Circuit of the United States Court of Appeals found that the NCAA and its employees were state actors.¹³² The Second Circuit distinguished Cohane's case. The court found that while in *Tarkanian* the "NCAA enjoyed no governmental powers to facilitate its investigation," including the power to subpoena witnesses,¹³³ in Cohane's case, SUNY Buffalo used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena.¹³⁴

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Complaint at 6, *Cohane v. Nat'l Collegiate Athletic Ass'n.*, WL 2373474 (W.D.N.Y. Sept. 27, 2005) (No. 04-CV-0181S).

¹³⁰ *Cohane* 2005 WL 2373474 at *8.

¹³¹ *Cohane v. Nat'l Collegiate Athletic Ass'n ex rel. Brand*, 215 F. App'x 13,14 (2d Cir. 2007).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

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c. Mississippi State University

In 2002, the Enforcement Staff commenced an investigation involving Mississippi State University (“Mississippi State”) head football Jackie Sherrill and some of Sherrill’s assistant coaches.¹³⁵ The following year, Mississippi received a Notice of Allegations from the NCAA, which alleged that Mississippi committed a number of NCAA rule violations.¹³⁶ Sherrill was named in two of the allegations set forth by the NCAA.¹³⁷ One allegation asserted that Sherrill offered a car to recruit Joseph Scott.¹³⁸ The second allegation asserted that Sherrill made impermissible offers to recruit Chris Spencer.¹³⁹ More specifically, the NCAA alleged that Sherrill told Spencer’s father, Ben Wallace, that “he would make sure that Spencer and his family were taken care of, and that if Wallace was in need of employment or anything, to call Sherrill.”¹⁴⁰

In October 2004, the COI ruled that the Mississippi State football program committed several NCAA violations, including impermissible recruiting contact, inducements, and unethical conduct.¹⁴¹ While some of the football program’s assistants were found guilty, Sherrill was not.¹⁴²

Despite his exoneration, Sherrill filed a lawsuit against (i) the NCAA; (ii) Mark P. Jones, who was an NCAA Director during the Mississippi State investigation; (iii) Richard Johanningmeier, who was an NCAA investigator involved with the Mississippi State investigation, and (iv) Julie Gilbert, a booster for University of Mississippi (“Ole Miss”), one of Mississippi State’s rivals in college football.¹⁴³ The complaint, which has been amended twice since being filed in 2004, propounds eighteen counts of wrongdoing¹⁴⁴ and asserts that, in concert, the defendants:

¹³⁵ The NCAA first learned of possible violations and alerted Mississippi State of investigation. Wong, *IAC History*, *supra* note 14, at 122.

¹³⁶ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *Jackie Sherrill Notice of Allegations*, 1 (_____) [hereinafter *Sherrill NOA*].

¹³⁷ *Id.* at 5.

¹³⁸ *Id.* at 9.

¹³⁹ *Id.*

¹⁴⁰ Wong, *IAC History*, *supra* note 14 at 123.

Id. at 124.

¹⁴¹ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *Mississippi State University Committee on Infractions Reports*, 1 (TBD).

¹⁴² *Former Mississippi State coach, who filed suit in 2004, says organization defamed him*, THE CLARION LEDGER, (Apr. 11, 2009), <http://www.clarionledger.com/article/20090412/SPORTS030102/904120347/>.

¹⁴³ Complaint at 1, *Sherill v. Nat’l Collegiate Athletic Ass’n.* (NO. 2007-0161-C).

¹⁴⁴ *Id.* at 34.

- (a) Contacted and hired private investigators to illegally, willfully, maliciously, and repeatedly follow, harass, and stalk Plaintiff; Plaintiff's players; Plaintiff's Staff and Coaches; Plaintiff's potential recruits; and Mississippi State Alumni and Boosters with the intent to interfere with Jackie W. Sherrill's right to earn a living, his contract of employment with Mississippi State University, his right to coach football, and his right to serve as an NCAA football coach.
- (b) Unreasonably and persistently hounded and unreasonably invaded the privacy of the Plaintiff.
- (c) Committed such malicious acts as soliciting information from unreliable sources; threatening and intimidating witnesses; falsely reporting information known by them to be false; twisting testimony of witnesses; destroying or causing the spoliation of documents, audio tapes and evidence and/or carelessly and recklessly failing to preserve evidence; and conveying false information to others about the Plaintiff's and Plaintiff's associates.
- (d) Willfully giving publicity to private facts and thereby invading the privacy of Plaintiff on the reasonable expectation that the information be kept confidential. Information has been made public and is highly offensive and objectionable to any reasonably person since the information made public pertaining to Jackie W. Sherill was false, inaccurate, and incomplete.
- (e) Intentionally gave publicity to private acts which invaded the Plaintiff's reasonable expectation of privacy and is contrary to applicable provisions of the NCAA Rules and Regulations and of State Law.¹⁴⁵

The case is currently pending in the Madison County Circuit Court in Mississippi. While the allegations in the complaint have not yet proven to be true in the court, they are very consistent with a pattern of behavior that NCAA Enforcement Staff members have demonstrated in prior investigations.

d. University of Southern California

In 2006, the Pacific 10 Conference ("Pac-10"), which is now the

¹⁴⁵ *Id.* at 27-28.

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Pacific 12 conference, launched an investigation of the University of Southern California (“USC”) regarding improper benefits that were allegedly distributed to USC running back Reggie Bush, his mother, and his stepfather.¹⁴⁶ Soon thereafter, the NCAA Enforcement Staff, in conjunction with the Pac-10, investigated the allegations.¹⁴⁷ The investigation lasted almost four years before the COI conducted its hearing.¹⁴⁸ In 2010, the COI issued its report, which found that from October 2004 until November 2005, Bush and his family agreed to form a sports agency partnership with two individuals: Lloyd Lake, a convicted criminal, and Michael Michaels.¹⁴⁹ During this time period, Lake and Michaels purportedly gave Bush and his family impermissible benefits, including “several thousand dollars, an automobile, housing, a washer and dryer, air travel, hotel lodging, and transportation, among others.”¹⁵⁰ Because Bush allegedly received these benefits, the COI deemed that he was ineligible from October 2004 to November 2005 and imposed harsh sanctions on USC, including a two-year bowl ban and significant scholarship reductions.¹⁵¹

In the USC investigation report, the NCAA alleged that USC running backs coach Todd McNair was aware of and acquiesced to the improper benefits that were received by Reggie Bush.¹⁵² As a result, McNair lost his job.¹⁵³ In response, McNair filed a lawsuit in the Los Angeles Superior Court against the NCAA, claiming that the NCAA’s investigation was one-sided and that the NCAA’s ruling will negatively impact his future earnings.¹⁵⁴ The several causes of action enumerated in the complaint include but are not limited to, libel, slander, tortious interference with prospective economic advantage, tortious interference

¹⁴⁶ *Timeline of investigation at the University of Southern California*, USA TODAY (June 25, 10), http://usatoday30.usatoday.com/sports/college/2010-06-10-usc-timeline-bush-mayo-violations_N.htm.

¹⁴⁷ *Bowl ban among penalties for Southern California*, NCAA.COM, <http://www.ncaa.org/wps/wcm/myconnect/public/ncaa/resources/latest+news/2010+news+stories/june+news+stories/bowl+ban+among+penalties+for+southern+california>.

¹⁴⁸ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *University of Southern California Infractions Report*, 1 (2012) [hereinafter *USC Report*].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *USC parts ways with running backs coach Todd McNair*, L.A. TIMES (July 1, 2010), <http://articles.latimes.com/2010/jul/01/sports/la-sp-0702-usc-todd-mcnair-20100702>.

¹⁵⁴ Rich Hammond, *Judge: NCAA ‘malicious’ in investigation of McNair*, THE OC REGISTER, <http://www.ocregister.com/2012/11/21/judge-ncaa-malicious-in-investigation-of-mcnair/112730/#more-112730>.

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with contractual relations, and negligence.¹⁵⁵

In his complaint, McNair asserted that the Enforcement Staff provided suggestive questions to witnesses, including Lloyd Lake, at interviews, which McNair was not present at, in order to wrongfully implicate McNair.¹⁵⁶ During these interviews, none of the witnesses, including Reggie Bush, ever indicated that McNair had knowledge of the benefits received by the Bush family.¹⁵⁷ However, in finding that McNair violated NCAA rules, the NCAA *solely* relied on Lloyd Lake's responses and mischaracterized these responses.¹⁵⁸ McNair was not permitted to be present during Lake's interrogation and he was not permitted question or cross-examine Lake.¹⁵⁹

In August of 2012, in a Los Angeles Superior Court opinion, the judge labeled the NCAA investigation as "malicious" and claimed that some of the NCAA's behavior illustrated "ill-will" or "hatred" towards McNair.¹⁶⁰ One Enforcement Staff members even labeled McNair as a "lying morally bankrupt criminal, in [his] view, and a hypocrite of the highest order."¹⁶¹ The judge noted that at least three people may have improperly contacted the NCAA infractions committee regarding McNair's complicity in the investigation.¹⁶² In addition, the NCAA showed "reckless disregard for the truth" and some of the witnesses secretly exchanged emails with the COI.¹⁶³ The opinion also states that a COI member admitted that an interview with McNair was "botched."¹⁶⁴

The NCAA filed a motion to seal the documents in McNair case and the court granted the motion;¹⁶⁵ however, non-parties have attempted to intervene and unseal the documents in order to expose the NCAA's

¹⁵⁵ Complaint at 1, McNair v. National Collegiate Athletic Ass'n (No. BC462891) [hereinafter *McNair Complaint*].

¹⁵⁶ McNair Complaint *supra* note ____ at 3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Dennis Dodd, *Documents appear to show improper NCAA involvement in USC case*, CBSSPORTS.COM (November 27, 2012), <http://www.cbssports.com/collegefootball/blog/dennis-dodd/21162720/documents-appear-to-show-improper-ncaa-involvement-in-usc-case>.

¹⁶¹ *Id.*

¹⁶² Dennis Dodd, *NCAA pushing back on unsealing of documents in McNair/USC case*, CBSSPORTS.COM (Jun. 24, 2013), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/22514205/ncaa-pushing-back-on-unsealing-of-documents-in-mcnairusc-case>.

¹⁶³ The Sports Xchange, *Three violated NCAA ethics code in USC appeal*, YAHOO! SPORTS, November 28, 2012 <http://sports.yahoo.com/news/report-three-violated-ncaa-ethics-051013372—ncaaf.html>.

¹⁶⁴ Dodd, *supra* note ____.

¹⁶⁵ *Id.*

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investigation practices.¹⁶⁶ In June 2013, the New York Times and the Los Angeles Times filed an opposition to the NCAA's motion to seal the documents.¹⁶⁷ One of the arguments put forward by the non-parties is that the public has great interest in accessing court records that show that the NCAA published statements with both common law and constitutional malice.¹⁶⁸ The motion specifically notes that the public interest is magnified given the NCAA's "perceived excesses" in its USC investigation.¹⁶⁹

e. University of Miami

In 2005, Nevin Shapiro, a University of Miami booster, formed Capitol Investments USA, Inc. ("Capitol Investments"), a corporation that falsely portrayed itself as wholesale grocery distribution business.¹⁷⁰ From 2005 to 2009, Capitol Investments sold securities to investors, who were under the assumption that their investments funded a legitimate grocery business, and promised the investors returns between ten and twenty-six percent.¹⁷¹ In actuality, Capitol Investments was conducting ponzi scheme, which illegally funded the lavish lifestyle of Shapiro.¹⁷² The ponzi scheme caused over sixty investors to lose \$820,000,000 in investments.¹⁷³ In 2009, a group of Capitol's investors filed involuntary bankruptcy proceedings against Capitol Investments and Nevin Shapiro.¹⁷⁴ One year later, Shapiro was indicted on "two counts of money laundering, two counts of wire fraud, one count of securities fraud and one count of conspiracy to commit securities and wire fraud."¹⁷⁵ Ultimately, Shapiro pled guilty to two counts and was sentenced to twenty years in prison.¹⁷⁶

Shapiro's unscrupulous behavior during the past decade was not limited to the financial crimes that he committed. In August 2011, the

¹⁶⁶ Non-Party's Press Representatives Application to Intervene, *McNair v. National Collegiate Athletic Ass'n* (No. BC462891).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Securities Exch. Comm'n, *SEC Charges Prominent Miami Beach Businessman in \$900 Million Ponzi Scheme*, <http://www.sec.gov/news/press/2010/2010-63.htm>.

¹⁷¹ *Id.*

¹⁷² *United States v. Shapiro*, 505 F. App'x 131 (3d Cir. 2012)

¹⁷³ *Id.*

¹⁷⁴ *In re Capitol Investments, Inc.*, 473 B.R. 838, 840 (Bankr. S.D. Fla. 2012)

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

National Collegiate Athletic Association (“NCAA”) announced the investigation of Shapiro’s inappropriate interactions with the University of Miami (“UM”) football and basketball programs.¹⁷⁷ Reportedly, Shapiro distributed improper benefits to UM football and basketball players from 2002 to 2011, violating NCAA regulations.¹⁷⁸ Such benefits allegedly included money, cars, yacht trips, jewelry, and televisions.¹⁷⁹

Ironically, the NCAA exhibited unethical practices in carrying out the UM investigation, particularly in securing interviews with key witnesses. Under NCAA by-law 19.2.3, all representatives of member institutions “have an affirmative obligation to cooperate fully with and assist the NCAA enforcement staff, the Committee on Infractions and the Infractions Appeals Committee to further the objectives of the Association and its enforcement program.”¹⁸⁰ However, the NCAA is limited in conducting its investigation because it does not have subpoena power;¹⁸¹ therefore, it cannot require those outside of its jurisdiction, like parents of student-athletes or prospects or agents, to cooperate in its investigations.¹⁸² However, the NCAA found a way to circumvent this limitation in the UM investigation. In December of 2012, the NCAA announced that some of its staff members improperly obtained information about Nevin Shapiro and his involvement with the UM football program from Shapiro’s attorney, Maria Elena Perez, a University of Miami School of Law alumna.¹⁸³ Ameen Najjar, an NCAA Enforcement Staff member during the investigation, entered an agreement with Perez to elicit information utilizing Perez’s subpoena power during Shapiro’s bankruptcy proceedings.¹⁸⁴ More specifically, NCAA Perez agreed to Enforcement Staff members sat in on question

¹⁷⁷ Steve Gorten, *Miami issues statement about Nevin Shapiro*, SUN-SENTINEL (Aug. 16, 2011), http://articles.sun-sentinel.com/2011-08-16/sports/fl-ncaa-visit-miami-hurricanes-0815-20110814_1_coach-al-golden-ncaa-probe-ncaa-enforcement-officials.

¹⁷⁸ Charles Robinson, *Renegade Miami football booster spells out illicit benefits to players*, YAHOO! SPORTS, (Aug. 16, 2011), http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611.

¹⁷⁹ *Players got gifts from ex-Miami booster*, ESPN.COM, (Aug. 17, 2011), http://espn.go.com/college-football/story/_/id/6866006/ponzi-schemer-nevin-shapiro-says-provided-benefits-miami-athletes%27%20rel=%27nofollow.

¹⁸⁰ *NCAA Bylaws*, supra note ___, at 312.

¹⁸¹ Nat’l Collegiate Athletic Ass’n, Membership, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/process/investigations>.

¹⁸² *Id.*

¹⁸³ Tim Reynolds, *NCAA Announces Problems With Miami Investigation*, ASSOCIATED PRESS (Jan. 23, 2013), <http://bigstory.ap.org/article/ncaa-announces-problems-miami-investigation>.

¹⁸⁴ *Id.*

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individuals regarding the UM investigation under the guise of “Rule 2004” examinations, which are bankruptcy depositions to obtain information.¹⁸⁵ During these depositions, the staff members provided Perez with questions to ask witnesses while they were under oath.¹⁸⁶

Sean Allen, a former UM football equipment manager and former associate of Nevin Shapiro, was victimized by the NCAA’s arrangement with Perez. In August 2011, the NCAA conducted an interrogation of Allen, which was independent of Shapiro’s bankruptcy proceedings.¹⁸⁷ The NCAA felt that Allen was not being forthcoming and truthful during the interview; they were correct.¹⁸⁸ In fact, in an interview with CBS Sports, Allen admitted ““I denied. I denied. I denied. I lied about EVERY-THING.”¹⁸⁹

In December 2011, Allen was deposed subpoenaed in connection with Shapiro’s bankruptcy proceedings.¹⁹⁰ Prior to his “Rule 2004” examination, Perez assured Allen’s counsel, Devang Desai, that Allen’s deposition would focus on his employment with Capitol Investments.¹⁹¹ When Allen arrived at the deposition, he was surprised to see Najjaran NCAA investigator and During his deposition, DesaiAllen asked the NCAA investigator to leave.¹⁹² While Najjar was not present during the deposition, his presence was felt. ; however, despite these wishes, the investigator stayed. Shapiro’s attorneyPerez asked thirty-four questions provided by the NCAA investigator Najjar that were about the UM scandal and unrelated to the bankruptcy proceedings.¹⁹³ In fact, some of the questions had been drafted by Nevin Shapiro while he was in

¹⁸⁵ Complaint at 6, Rob Dauster, *Investigator questions Mark Emmert, NCAA’s look into enforcement*, NBC SPORTS COLLEGE BASKETBALL TALK (Jan. 1, 2013), <http://collegebasketballtalk.nbcsports.com/2013/01/31/investigator-questions-mark-emmert-ncaas-look-into-enforcement/>. Florida Bar v. Perez, No. SC14-733 (Fla. filed Apr. 14, 2014)[hereinafter *Perez Complaint*]. Rule 2004 examination is a deposition which may only relate to “the acts, conduct, or property or to the liabilities and financial condition of the debtor or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge.” Fed. R. Bankr. P. 2004.

¹⁸⁶ *Id.*

¹⁸⁷ Bruce Feldman, *Exclusive: Ex-employee details how Hurricanes program unraveled in scandal*, CBSSPORTS.COM, (Sep. 21 2012), <http://www.cbssports.com/collegefootball/story/20301408/exclusive-exemployee-details-how-hurricanes-program-unraveled-in-scandal>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Perez Complaint *supra* note ___ at 12.

¹⁹¹ *Id.* Reynolds, *supra* note ___.

¹⁹² Feldman, *supra* note ___; *see also*

¹⁹³ *Id.*; *see also* Perez Complaint *supra* note ___ at 14.

prison.¹⁹⁴ Because he was under oath, Allen had no choice but to tell the truth and expose the lies that he conveyed during his NCAA interview.

Sean Allen was not the only person deceived by these purported “Rule 2004” examinations. Perez also deposed Michael Huyghue, a former business associate of Shapiro’s, in Orlando, Florida.¹⁹⁵ According to Huyghue’s attorney, the deposition did not relate to bankruptcy and Perez primarily asked Huyghue to identify photographs of UM athletes with Shapiro.¹⁹⁶

In response to reports that surfaced regarding the Enforcement Staff’s mismanagement of the UM investigation, the NCAA engaged law firm Cadwalader, Wickersham & Taft LLP (“Cadwalader”), a national law firm, to launch an independent external investigation of the Enforcement Staff’s procedures and conduct.¹⁹⁷ The report was issued in February of 2013 and found that the NCAA committed several acts of misconduct.¹⁹⁸ Cadawalader found that the NCAA violated its own internal practice when the Enforcement Staff, rather than the NCAA’s in-house counsel, engaged Ms. Perez.¹⁹⁹ It also revealed that the NCAA’s legal department advised Najjar not to execute the arrangement with Perez because the legal department believed that the arrangement with Perez was “an effort to circumvent the limits on the NCAA’s authority to compel cooperation from third parties.”²⁰⁰ Najjar disregarded this advice.²⁰¹ In addition, the report noted that the Vice President of Enforcement Julie Roe Lach and Managing Director of Enforcement Tom Hosty, who was also a named defendant in *Cohane*, exercised insufficient oversight of Najjar and “failed to detect and rectify the problems with the Perez proposal for almost a full year.”²⁰² Moreover, it found that:

Mr. Najjar adopted and Ms. Lach and Mr. Hosty went along with the Perez proposal without sufficiently considering whether it was

¹⁹⁴ See, CADWALADER, WICKERSHAM & TAFT LLP, *Report on the NCAA’s Engagement of a Source’s Counsel and Use of the Bankruptcy Process in its University of Miami Investigation* (2012) [hereinafter *NCAA External Report*].

¹⁹⁵ Perez Complaint *supra* note ____ at 15.

¹⁹⁶ *Id.*

¹⁹⁷ NCAA launches external review of enforcement program, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/NCAA+launches+external+review+of+enforcement+program>.

¹⁹⁸ *NCAA External Report supra* note ____ at ii.

¹⁹⁹ *Id.* at 31.

²⁰⁰ *Id.* at 30.

²⁰¹ *Id.*

²⁰² *Id.* at 51.

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consistent with the NCAA's membership's understanding about the limits of the Enforcement Staff's investigative powers. There are a number of techniques that, though impermissible in the law enforcement context, were considered over the line for NCAA investigations. Mr. Najjar and his supervisors never considered whether the Perez proposal fell within that category.²⁰³

The report also mentions that Richard Johanningmeier, who initially oversaw the UM investigation and is named a defendant in Jackie Sherrill's pending case in Mississippi, was aware of the arrangement with Perez and "seemed to believe that the proposal entailed nothing more than paying for the transcripts produced in the deposition, which he did not see as a departure from past practice."²⁰⁴

Abusing an attorney's subpoena power was just one type of tactic that the NCAA has used in in the Miami investigation; coercion was another. Former UM football player Dyron Dye was also interviewed twice by the NCAA in 2011.²⁰⁵ During his second interview, Dyron Dye made statements that implicated UM. In 2013, Dye filed an affidavit on behalf of former UM coach Aubrey Hill, which contained information that conflicted with statements provided by Dye in his second NCAA interview.²⁰⁶ In the affidavit, Dye stated that, during his second interview, Johanningmeier:

continually threatened me if I did [not] comply with him. I felt intimidated by Mr. Johanningmeier and I was also concerned regarding the possibility of losing my scholarship and athletic eligibility. . . . I felt compelled to testify in a manner that would be consistent with the manner in which Mr. Johanningmeier was directing me in order to keep my eligibility. . . . I feel it is unfair the NCAA has twisted my testimony to use it negatively against coach Hill.²⁰⁷

Dye also filed a police report, asserting that former NCAA investigator Richard Johanningmeier coerced him into providing answers that would

²⁰³ *Id.* at 5.

²⁰⁴ *Id.* at 45.

²⁰⁵ Zac Ellis, *Report: Miami player says NCAA tried to coerce him into implicating school*, SPORTS ILLUSTRATED, (Jun. 3, 2013) <http://college-football.si.com/2013/06/03/report-miami-player-says-ncaa-tried-to-coerce-him-into-implicating-school/>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

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incriminate the UM football team.²⁰⁸ In August 2013, despite the fact that the NCAA had not issued its findings, UM released Dye from the football team because his involvement in the NCAA's investigation was a "distraction."²⁰⁹

On October 23, 2013, almost two and a half years after the commencement of the investigation, the COI released the UM infractions report.²¹⁰ The sanctions imposed upon UM include, but are not limited to, the loss of nine football scholarships and the loss of three basketball scholarships.²¹¹ Show-cause penalties were also issued against two football assistant coaches and one assistant basketball coach.²¹²

Former UM basketball coach Frank Haith, who is currently the head coach at the University of Missouri, was also found guilty and suspended for five games during the 2013-2014 college basketball season.²¹³ According to the report, Shapiro entertained the UM basketball coaches at a strip club and gave the basketball coaches ten thousand dollars to secure a commitment from a high school prospect.²¹⁴ While incarcerated, Shapiro threatened to tell the NCAA about the strip club outing and the issuance of ten thousand dollars if Haith and his staff did not return the money.²¹⁵ In response, Haith, according to the report, advanced multiple payments to his assistant coaches so that they could repay Shapiro.²¹⁶

None of the three sanctioned coaches have filed a law suit against the NCAA; however, it would not be surprising if some of these coaches followed the footsteps of Jerry Tarkanian, Tom Cohane, Jackie Sherrill, and Todd McNair. Of the four sanctioned coaches, Haith may have the most intriguing case against the NCAA. On May 6, 2013, Haith filed a petition to perpetuate testimony of Bank of America employees in the United States District Court Southern District of Florida under Federal

²⁰⁸ *Id.*

²⁰⁹ Michael Casagrande, Dyron Dye booted from Miami football team, *SUN SENTINEL*, (Aug. 19, 2013), <http://www.sun-sentinel.com/sports/um-hurricanes/sfl-dyron-dye-booted-from-miami-football-team-20130819,0,2016040.story>.

²¹⁰ See, NAT'L COLLEGIATE ATHLETIC ASS'N, *University of Miami Infractions Report*, 1 (Oct. 22, 2013) [hereinafter *Miami Report Report*].

²¹¹ *Id.* at 63, 67.

²¹² *Id. Id.* at 65-66, 68.

²¹³ *Id.* at 67.

²¹⁴ *Id.* at 20-21.

²¹⁵ *Id.* at 21.

²¹⁶ *Id.*

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Rule of Civil Procedure 27.²¹⁷ In anticipation of litigation, Haith filed this petition to determine whether Bank of America allowed an unknown person to access private microfiche copies of three checks that were requested by the NCAA during the UM investigation.²¹⁸

According to an affidavit of Pamela Haith, she and Frank became “suspicious of the information that the enforcement staff possessed concerning three checks (Checks Nos. 2092, 2095, and 2096)” after Frank’s second interview with the NCAA.²¹⁹ She further asserted that the she and Frank could not locate this information that the NCAA had from the bank statements and check images.²²⁰ On October 22, 2012, the NCAA Enforcement Staff told the Haiths that a “‘source’ informed the staff that a microfiche copy of the checks was available.”²²¹ With this information, Ms. Haith contacted Bank of America on that same day to inquire, for the first time, about the three checks that were requested by the NCAA.²²² A customer service representative informed Ms. Haith that those copies had been “previously viewed or ordered.”²²³ Ms. Haith then informed Bank of America’s fraud department that an unauthorized individual may have gained access to the three checks.²²⁴ Bank of America agreed to investigate the matter.²²⁵ Ms. Haith communicated with Bank of America on multiple occasions after her initial phone call to determine the status of Bank of America’s investigation.²²⁶ In November of 2012, Bank of America informed Ms. Haith that the case was closed without any explanation.²²⁷

The petition asserts that Bank of America’s unwillingness to share information is an “attempt to conceal an illicit act.”²²⁸ If the petition is granted, Haith’s counsel will subpoena Bank of America employees²²⁹ and

²¹⁷ Verified Petition to Perpetuate Testimony and Incorporated Memorandum of Law at 1, Haith v. Bank of America, (S.D. Fla. 2013) (No. 1:13-mc-21611).

²¹⁸ *Id.* at 3.

²¹⁹ Affidavit of Pamela R. Haith at 2, Haith v. Bank of America (S.D. Fla. 2013) (No. 1:13-mc-21611).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 2-3.

²²⁴ *Id.* at 3-4.

²²⁵ *Id.* at 4.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *See, id.*; *see also*, Dennis Dodd, *Haith petition looking at how bank records were obtained*, CBSSports.com (May 6, 2013), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/22206546/haith-petition-looking-at-how-bank-records-were-obtained>.

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may ultimately file a civil action against Bank of America under the Gramm-Leach-Bliley Act, which requires financial institutions to protect information that they collect from consumers.²³⁰ If Haith's counsel is able to determine that the "unknown person" is an NCAA employee or agent, Haith may have grounds to file a lawsuit against the NCAA.

IV. FALLING SHORT OF THE GOAL LINE: GOVERNMENT INTERVENTION

a. State Government

After *Tarkanian*, the Florida, Illinois, Nebraska, and Nevada state governments passed statutes that required the NCAA to incorporate due process into their enforcement procedures.²³¹ Some of these statutes specifically address investigation deficiencies, particular those found in the interrogation process.²³² For example, the Nevada statute mandated that oral statements be transcribed at the request of any party.²³³ In addition, the statutes addressed the lack of rules governing the use of evidence. The Illinois statute even mandated that Illinois rules of evidence apply at enforcement hearings.²³⁴ The Nevada statute required that "all written statements introduced as evidence at a proceeding must be notarized and signed under oath by the person making the statement."²³⁵ Further, the statute gave accused individuals the right to "confront and respond to all witnesses and evidence related to the allegations against the party and may call witnesses on his or her own behalf."²³⁶

In response, the NCAA challenged the constitutionality of these laws in federal court. In 1992, the NCAA filed a suit against the State of Nevada, the first state that passed this type of law, asserting that the due process laws violated both the Commerce Clause and the Contract Clause.²³⁷ The NCAA sought to enjoin application of the Nevada

²³⁰ *Id.*; see also, Bureau of Consumer Prot. Bus. Ctr., *Gramm-Leach Bliley Act*, <http://www.business.ftc.gov/privacy-and-security/gramm-leach-bliley-act>.

²³¹ Robin J. Green, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 144 (1992).

²³² *Id.*

²³³ Nev. Rev. Stat. Ann. § 398.175.

²³⁴ 110 ILCS 25/4

²³⁵ Nev. Rev. Stat. Ann. § 398.155(4).

²³⁶ Nev. Rev. Stat. Ann. § 398.155(2).

²³⁷ Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 635 (9th Cir. 1993). The Commerce Clause of the United States Constitution gives Congress the power to "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Contract Clause of the

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statutes and a declaration that statutes were void.²³⁸ The United States Court of Appeals of the Ninth Circuit found that the NCAA engages in interstate commerce and held that the statute violated the Commerce Clause of the United States Constitution because the practical effect of the regulation would “control conduct beyond the boundaries of the State.”²³⁹ In other words, if the NCAA wanted to enforce uniform procedures, it would have to apply the Nevada statute in every state.²⁴⁰ The court also struck down the Nevada statute because it would conflict with the other due process statutes passed by other states.²⁴¹ While the *Miller* decision only applies to the Nevada statute, the reasoning enumerated in the opinion casted “serious doubt on the ability of the states to force the NCAA to adhere to more rigorous due process principles.”²⁴²

b. Federal Government

The United States House of Representatives has also attempted to intervene in both professional and collegiate athletics on numerous occasions in the past and has failed on each of those occasions. In 2000, Congress attempted to address the incorporation of due process into NCAA procedures.²⁴³ Representative Meeks of New York introduced a bill which would have required NCAA member institutions to retain legal counsel for any of their student athletes that were accused of violating the NCAA rules and to provide “notice and opportunity to be heard before an arbitrator, neutral party, or tribunal not associated with the National Collegiate Athletic Association or a member institution shall be afforded before any enforcement actions are administered by the institution.”²⁴⁴ Under the bill, accused students shall have “the opportunity to be heard by testimony or otherwise” and the right to controvert “every material

United States Constitution holds that “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.” U.S. Const. art. I, § 10, cl. 1.

²³⁸ Nat'l Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476 (D. Nev. 1992) aff'd, 10 F.3d 633 (9th Cir. 1993)

²³⁹ Miller at 639.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² CRS Report for Congress, *The NCAA and Due Process: Legal Issues*, <http://congressionalresearch.com/RL32529/document.php?study=The+NCAA+and+Due+Process+Legal+Issues>.

²⁴³ H.R. 4117, 106th Cong. § 2 (2000).

²⁴⁴ *Id.*



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fact which bears on the question of the [accused student] or private rights involved” at all hearings.²⁴⁵ The bill, unfortunately, was not enacted.²⁴⁶

In August 2013, two members of Congress attempted to intervene in the enforcement procedures again through the proposal of the National Collegiate Athletics Accountability Act (“NCAA Act”).²⁴⁷ The purpose of the bill is twofold: to improve health and education of student-athletes and to require more transparency from the NCAA.²⁴⁸ The NCAA Act requires that the NCAA provide institutions and student athletes with due process procedures such as “the opportunity for a formal administrative hearing,” “not less than one appeal,” and “any other due process procedure that Secretary determines by regulation to be necessary.”²⁴⁹ In addition, the NCAA must “hold in abeyance any such remedy until all appeals have been exhausted or until the deadline to appeals has been passed.”²⁵⁰

While the purpose of the NCAA Act is admirable, it inadequately addresses the NCAA’s lack of transparency. The bill only addresses the hearing and appeals components of an NCAA investigation process and does not address the investigation practices. Even if the proponents of the bill were to amend the bill to address the investigative procedures of the NCAA, history is a strong indication that the bill would likely not pass because Congress has exhibited a reluctance to intervene in college athletics. However, at minimum, the NCAA act may exert additional pressure on the NCAA to make drastic changes to its enforcement procedures.

c. Subpoena Power

Among others, Urban Meyer, the head football coach at the Ohio State University, believes that a grant of subpoena power will help resolve issues that plague NCAA investigation process.²⁵¹ Because of its lack of

²⁴⁵ *Id.*

²⁴⁶ GovTrack, *H.R. 4117 (106th): Collegiate Athletics Due Process Act of 2000*, <https://www.govtrack.us/congress/bills/106/hr4117>.

²⁴⁷ *House bill would reform NCAA*, ESPN.COM (Aug. 1, 2013), http://espn.go.com/college-sports/story/_/id/9530187/legislation-introduced-house-reform-ncaa.

²⁴⁸ *Id.*

²⁴⁹ The NCAA Accountability Act, H.R. 2903, 113th Cong. § 2 (2013).

²⁵⁰ *Id.*

²⁵¹ *See*, Graham Watson, *Urban Meyer thinks the NCAA should have subpoena power. Can that really work?*, CBSSPORTS.COM, http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/Urban-Meyer-thinks-the-NCAA-should-have-subpoena?urn=ncaaf-wp3915.

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subpoena power, the NCAA Enforcement Staff has resorted to indecorous tactics, such as using an attorney's subpoena power, to gain truthful testimony from the individuals that it interviews. The NCAA's interview of Sean Allen in the UM case is a prime illustration of the sincerity concerns that surround NCAA interviews. During Allen's interview with the NCAA, he lied. During his deposition, he was truthful and provided a testimony that contradicted his interview with the NCAA.

While this solution would minimize unethical Enforcement Staff practices, it is unrealistic. First, because the NCAA is a private association, it is unlikely that Congress will grant it subpoena power. Congress has never granted subpoena power to a governing body in professional or amateur athletics and, as discussed in Section IV, has demonstrated a reluctance to intervene with NCAA enforcement procedures. The NCAA could also ask state legislatures for subpoena power; however, that process would be time consuming and, to be effective, would require all fifty states to pass legislation that would grant the NCAA this power. Second, if the NCAA was granted subpoena power, it would likely be limited. Josephine R. Potuto, a Professor at the University of Nebraska School of Law who served three terms as the COI chair, has noted that if NCAA subpoena power legislation is passed, it "will require that issuance of a subpoena be based on a quantum of credible information that the individual has relevant information."²⁵² The problem with this credible information requirement is that the NCAA sometimes has a need "to obtain information where the requisite factual basis underlying the suspicion cannot be shown."²⁵³ Therefore, it is unlikely that a grant of subpoena power would truly enhance the NCAA's investigative practices. Finally, it is improbable that the member institutions, which vote on all NCAA rules and regulations, would approve of a congressional grant that would increase the NCAA's enforcement staff's powers and lead to a more strict enforcement model.

V. A NEW GAMEPLAN: INTERNAL SOLUTIONS TO NCAA INVESTIGATION DEFICIENCIES

In September 2013, NCAA President Mark Emmert admitted that "the only thing everybody agrees on with Division I governance is that it

²⁵² Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 294 (2010).

²⁵³ *Id.*

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doesn't work."²⁵⁴ He expressed that he "expects a lot of change" to the Division I governance and that the NCAA Board of Directors will convene over the next six to eight months to discuss changes.²⁵⁵ The five investigations described in Section III of this note illustrate aspects of the enforcement investigations that the Board of Directors (the "Board") must address. The Board can do so through the implementation of ethical standards, investigation regulations, and independent committee that oversees the Enforcement Staff.

A. Independent Oversight of the Enforcement Staff

Coaches oversee players. Athletic directors oversee coaches. University presidents oversee athletic directors. The NCAA oversees its member institutions; however, there is no oversight of the NCAA. NCAA investigator Rich Johanningmeier was named in three of the investigation cases discussed in the Section III: Mississippi State, University of Southern California, and the University of Miami. His continued unethical investigation practices demonstrate that the NCAA's leadership does very little to restrain or control its Enforcement Staff members. This type of perpetual behavior calls for independent oversight of the Enforcement Staff. If the NCAA seeks to maintain its integrity as a governing body, it is necessary to appoint independent, disinterested officers, who are not employed by the NCAA, that specifically monitor Enforcement Staff investigations. The employment of oversight officers is crucial to hold Enforcement Staff members accountable for their actions. Such officers could be administrators or faculty of member institutions and would be independent of the COI.

B. Code of Conduct

Lawyers are governed by model rules of professional conduct that have been adopted by forty-nine states.²⁵⁶ Violations of such conduct result in license suspension, disbarment, or judicial sanctions. As of the date of this note, a code of conduct does not exist for Enforcement Staff members. In order to establish an effective oversight system of the enforcement staff, it will be imperative to establish standards that the Enforcement Staff must abide by and be held accountable to.

²⁵⁴ *Id.*

²⁵⁵ *NCAA President says change coming*, ESPN.COM (Sept. 23, 2013), http://espn.go.com/college-sports/story/_/id/9713684/ncaa-president-mark-emmert-says-lot-change-coming-ncaa.

²⁵⁶ See, National (ABA) Standards of Conduct, <http://libguides.law.ucla.edu/nationalethics>.

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An effective code of conduct should include rules that deter the questionable practices that the NCAA has exhibited in past investigations. For example, the Enforcement Staff pressured interviewees to provide incriminating responses during the Buffalo State and UM investigations. Therefore, this code should forbid the Enforcement Staff from coercing witnesses during their interviews. In the UNLV case, the Enforcement Staff member David Berst lied about the responses that Rodney Parker provided during Parker's interview. Thus, a code of conduct should also disallow the falsification of evidence. This code should also prohibit the Enforcement Staff from bringing meritless allegations before the COI; bar the Enforcement Staff from obstructing an accused's access to material with evidentiary value; and require the Enforcement Staff to disclose all information to the accused individuals, accused institutions, and COI that may negate or mitigate purported offenses.

This list of rules is far from exhaustive; however, it provides a basic framework that the NCAA can expand on. To ensure that the Enforcement Staff adheres to a code of conduct, the NCAA should enumerate consequences for violating the code, such as loss of employment or suspension.

C. Procedural Regulations

While the some Enforcement Staff members have displayed unethical behavior, these members have not violated any rules or procedures. Therefore, it is equally important that the NCAA establishes investigations regulations for Enforcement Staff to follow in addition to a code of conduct. Currently, the only rules in place that that govern investigative procedures are the NCAA bylaws, which set wide parameters for the NCAA staff to operate under. These rules should aim to ensure that enforcement procedures are conducted fairly and with the sole purpose of revealing the truth.²⁵⁷

In the Buffalo State case, NCAA investigators elected not to interview individuals that would have helped supported Tom Cohane's defense. To ensure that accused individuals and institutions receive fair hearings, a rule should be implemented that requires the NCAA to interview all individuals that have knowledge that may mitigate the allegations brought against the accused.

The NCAA could also implement rules that resemble the NCAA due process laws that were passed by Florida, Illinois, Nebraska, and Nevada.

²⁵⁷ Fed. R. Evid. 102.



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In the USC case, Todd McNair was not allowed to confront Lloyd Lake. To avoid this unfairness, the NCAA should allow all accused individuals and institutions to confront all witnesses that testified against them. Moreover, to ensure that testimonies are not mischaracterized and are reported accurately, the NCAA should install a rule that *requires* all interviews to be transcribed by a court reporter to ensure and a rule which requires that all written statements by witnesses to be notarized.

In addition, the NCAA could also model some of its investigation regulations after the Federal Rules of Evidence. A common practice that was illustrated in the UM and USC investigations was the use of leading questions, which are questions that suggests the answer to the person being interrogated.²⁵⁸ To prevent suggestive questions during interviews, the NCAA should consider implementing a rule modeled after Federal Rule of Evidence 611(c), which states “leading questions should not be used on direct examination except as necessary to develop the witness’s testimony.”²⁵⁹ The NCAA could develop a tailored definition of “hearsay”²⁶⁰ and forbid any statements that constitute its definition of “hearsay” from being used at COI hearings.

VI. CONCLUSION

The Enforcement Staff’s corrupt practices have far reaching, trickling effects. To date, former USC coach Todd McNair has been unable to secure employment at an NCAA member institution. Tim Cohane, who is currently an associate head coach at a Division III school, never returned to the Division I ranks.²⁶¹ The accused individuals are not the only ones who suffer from improper behavior, but it is also the students who suffer from resulting sanctions and penalties imposed on their respective institutions. Because Government intervention and oversight is not a viable option, internal reform is imperative. The member institutions must ratify rules that inject boundaries and structure into

²⁵⁸ LEADING QUESTION, Black’s Law Dictionary (9th ed. 2009), leading question.

²⁵⁹ Fed. R. Evid. 611 .

²⁶⁰ The Federal Rules of Evidence as defines hearsay a “statement that he declarant does not make while testifying at the current trial or hearing” and “a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 803(a).

²⁶¹ Timothy Cohane is also an adjunct faculty member at the Roger Williams University School of Law. According to his university biography, he enrolled in law school to o be able to represent student-athletes and coaches against the National Collegiate Athletic Association. Roger Williams University School of Law, *Tim Cohane*, <http://law.rwu.edu/tim-cohane>.

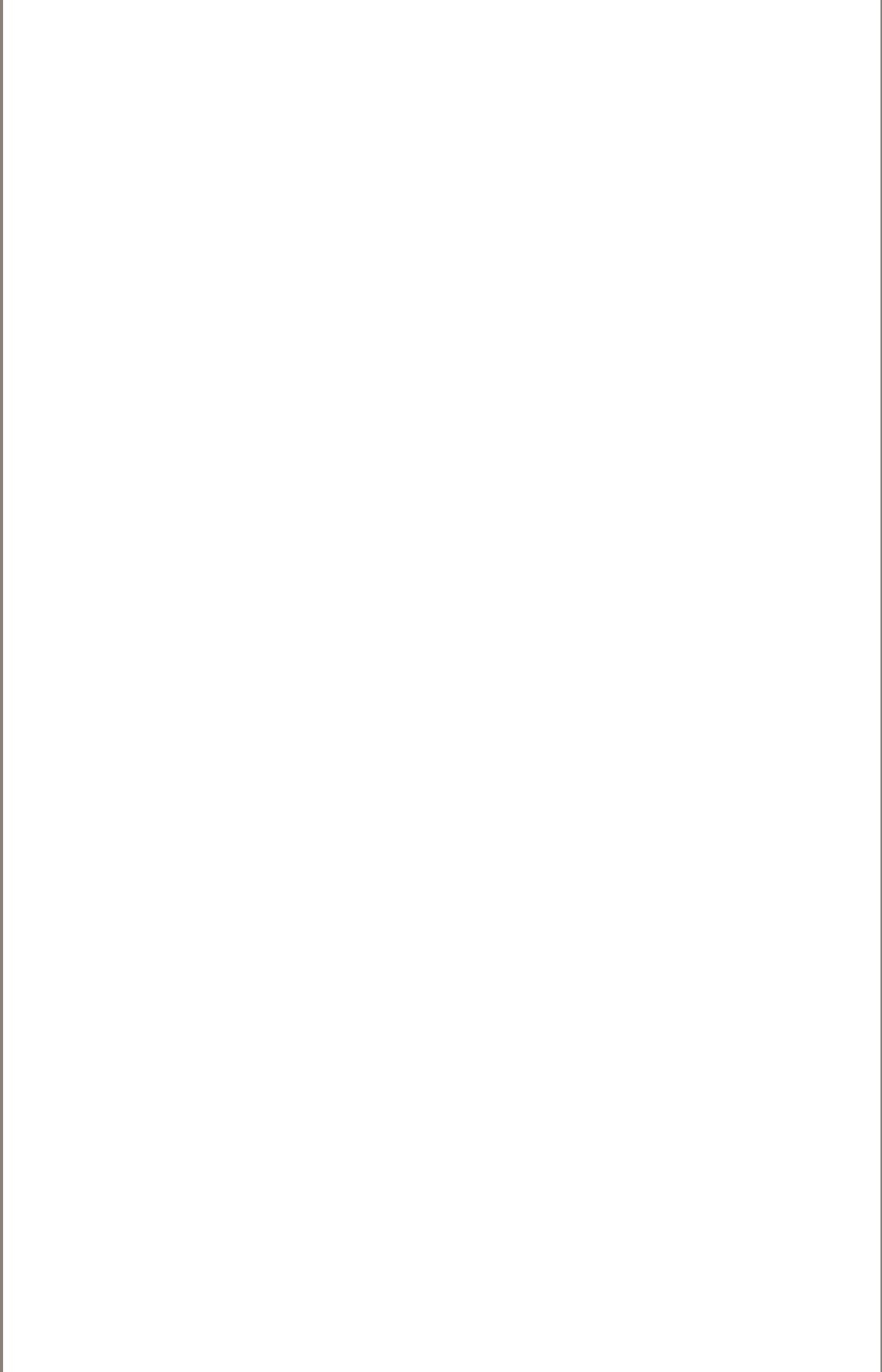
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NCAA investigations; this is the only way that the Enforcement Staff will be stopped from breaking bad.





**THROWING THE RED FLAG: WHY THE NFL SHOULD
CHALLENGE THE RULING ON THE FIELD THAT
PLAYER DECERTIFICATION LOWERS THE
ANTITRUST SHIELD**

ALEXANDRA HAYES

I. INTRODUCTION

At 11:59pm on March 11, 2011, the collective bargaining agreement between the NFL and the NFLPA expired, signaling the end of one of the most peaceful labor periods in recent professional sport history.¹ Hours earlier, the players voted to decertify their union and filed an antitrust lawsuit against the owners, alleging that various practices violated Section 1 of the Sherman Act.² The *Brady* lawsuit raised various issues that remained, for the most part, unresolved after the last round of litigation between the players and owners in the late 1980s and early 1990s.³ By decertifying their union, the players hoped to prove to the court that they no longer remained in a collective bargaining relationship with the owners, a move that the Supreme Court hinted at in *Brown v. Pro Football, Inc.*⁴ as a means of lowering the labor exemption shield from antitrust scrutiny.⁵ Initially, it seemed like the players made a smart move when Judge Susan Nelson granted the players' request for a preliminary injunction against the lockout.⁶ This success was short-lived as the owners immediately appealed the decision to the Eighth Circuit, which reversed the district court opinion and reinstated the lockout.⁷ Although refusing to squarely address the merits of the players' antitrust claims, the Eighth Circuit strongly hinted that it would side with the owners and uphold the nonstatutory labor exemption because the players had not sufficiently demonstrated that they no longer remained in a collective bargaining relationship with the owners, despite decertifying the union.⁸

This note addresses the extreme difficulty the courts have had in

¹ Associated Press, *NFL Labor History Since 1968*, (Mar. 3, 2011, 5:05 PM), http://sports.espn.go.com/nfl/news/story?page=nfl_labor_history.

² See, *infra* Part V.

³ See, *infra*, Part IV..

⁴ 518 U.S. 231 (1996).

⁵ See, *Brown* discussion *infra*, Part IV.E.

⁶ See, *infra* Part V.A.

⁷ See, *infra* Part V.B.

⁸ Erick V. Posser, *Brady v. NFL: How the Eighth Circuit "Saved" the 2011 NFL Season by Supporting Negotiation, Not Litigation*, 19 VILL. SPORTS & ENT. L.J. 603, 644-45 (2012).

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resolving antitrust disputes regarding player restraints in professional sports and explains why the players' lawsuit was ultimately doomed for failure had the parties not settled before the Eighth Circuit reached a determination on the merits. Part II of this article briefly outlines the natural conflict between the goals of federal antitrust and labor laws and Congress's attempts to protect union activity through the enactment of the Clayton Act, Norris-LaGuardia Act, Labor Management Relations Act, and the National Labor Relations Act. Part III discusses the inherent difficulty in applying these Acts and the judicially created nonstatutory labor exemption to the unique circumstances of professional sports leagues. Part IV describes the many attempts by the courts to create an adequate test to determine when exactly the nonstatutory labor exemption no longer shields player restraints from antitrust scrutiny. Part V compares the district court and Eighth Circuit opinions regarding the players' request for a preliminary injunction in the *Brady v. NFL* litigation. Finally Part VI discusses why the players should not be given the additional bargaining weapon of antitrust litigation and why they failed to establish a breakdown of the collective bargaining relationship.

II. HISTORICAL CONFLICT BETWEEN ANTITRUST AND LABOR LAW

The opposing goals of antitrust laws and labor laws have led to inherent conflict in their enforcement.⁹ Antitrust laws seek to promote free market competition by banning agreement and cooperation between competitors that unreasonably restrain trade.¹⁰ These agreements are analyzed as either *per se* violations of the Sherman Act or under the Rule of Reason analysis.¹¹ Antitrust issues arising in the sports industry are

⁹ Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1223 (2012); Michael H. LeRoy, *The Narcotic Effect of Antitrust Law in Professional Sports: How the Sherman Act Subverts Collective Bargaining*, 86 TUL. L. REV. 859, 870-71 (2012).

¹⁰ Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1047 (1994); Feldman, *supra* note 9, at 1223.

¹¹ Corcoran, *supra* note 10, at 1047 (The *per se* rule "categorically invalidates those arrangements that are in their nature. . . adverse to competition and. . . subject to a conclusive presumption of invalidity." The rule of reason seeks "to determine whether the restraint is justified by legitimate business purposes" by balancing "its precompetitive and anticompetitive effects."); *see, e.g.*, *United States v. Topco Associations, Inc.*, 405 U.S. 596 (1972) (holding territorial licenses of a private label grocery cooperation *per se* illegal under Section 1 of the Sherman Act); *see, NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984) (holding the NCAA's television rights illegal under the Rule of Reason analysis because the anticompetitive effects of the contract outweighed any precompetitive justifications).

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traditionally analyzed under the Rule of Reason because “horizontal restraints on competition are essential if the product is to be available at all.”¹² This analysis requires the courts to determine whether the questioned restraint is justified by legitimate business purposes and is no more restrictive than necessary.¹³

Labor law, on the other hand, seeks to promote cooperation between employees as a group and between employees and their employers through the collective bargaining process.¹⁴ Furthermore, lawful labor practices such as strikes, boycotts, and lockouts would be illegal under antitrust scrutiny.¹⁵

To balance this conflict, Congress first created what is known as the statutory labor exemption from antitrust laws to protect and maintain labor relations.¹⁶ The Clayton and Norris-LaGuardia Acts protect labor unions from antitrust scrutiny, decreeing that unions are not “combinations or conspiracies” in restraint of trade.¹⁷ These acts also serve to protect legitimate labor activities such as picketing and strikes that would otherwise be subject to antitrust scrutiny as well.¹⁸ Specifically, Section 6 of the Clayton Act declares that human labor is not a commodity or article of commerce subject to antitrust scrutiny.¹⁹ Section 20 of the Clayton Act and the Norris-LaGuardia Act limit the ability of the federal courts to enjoin certain labor activities, such as pickets and boycotts, and declares that it is federal policy to favoring the collective bargaining relationship.²⁰

However, these Acts did not protect agreements between unions and

¹² See, Nat'l Collegiate Athletic Ass'n, 468 U.S. 85 at 101.

¹³ See, Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (see discussion *infra*, Part V.A.).

¹⁴ See, 15 U.S.C. § 17 (2012); Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2012); National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012); Labor Management Relations Act 29 U.S.C. §§ 185-188; see also, Feldman, *supra* note 9, at 1223.

¹⁵ See, Corcoran, *supra* note 10, at 1048; LeRoy, *supra* note 9, at 871.

¹⁶ 15 U.S.C. § 17 (2012); Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2012); see, Stefan SZYMANSKI, PLAYBOOKS AND CHECKBOOKS: AN INTRODUCTION TO THE ECONOMICS OF MODERN SPORTS 83 (Princeton University Press 2006); Corcoran, *supra* note 10, at 1046.

¹⁷ 15 U.S.C. § 17 (2012); Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2012); see, Christopher Smith, *A Necessary Game Changer: Resolving the Legal Quagmire Surrounding Expiration of the Nonstatutory Labor Exemption in Sports*, 14 U. PA. J. BUS. L. 1191, 1195 (2012).

¹⁸ Corcoran, *supra* note 10, at 1048; Smith, *supra* note 17, at 1195; see, Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (discussed *infra*, Part V.A.).

¹⁹ See, 15 U.S.C. § 17 (2012); Feldman, *supra* note 9, at 1228.

²⁰ 29 U.S.C. § 52; Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2012); see, Corcoran, *supra* note 10, at 1049; Feldman, *supra* note 9, at 1228.

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non-labor groups, such as employers, leading to the creation of the nonstatutory labor exemption.²¹

The National Labor Relations Act and the Labor Management Relations Act established collective bargaining as the appropriate process to govern relationships between employers and unions, requiring good-faith negotiations with respect to wages, hours, and other terms and conditions of employment.²² In other words, Congress wanted to encourage employers and unions to reach voluntary agreements regarding the economic terms of employment however, these acts did not include a statutory exemption to antitrust scrutiny as the Clayton and Norris-LaGuardia Acts did.²³

The Supreme Court therefore held that, looking to the Clayton and Norris-LaGuardia Acts and the national policy favoring collective bargaining relationship in the National Labor Relations Act and Labor Management Relations Act, certain union-employer agreements must be protected from antitrust scrutiny.²⁴ Because the collective bargaining process necessarily involves certain rules and conditions that would normally be considered anti-competitive, the Court created a judicial exemption to antitrust scrutiny to promote the collective bargaining process and the resulting agreements.²⁵ The nonstatutory labor exemption created a limited repeal of antitrust laws to allow the statutorily authorized bargaining process to work and promote the preference for resolving labor disputes through voluntary agreements and labor remedies, rather than judicial intervention.²⁶ Without this exemption, it would be impossible to require groups of employers and employees to require groups of employers and employees to bargain but at the same time forbid them to make agreements among themselves that are necessary to make the process work.²⁷

This tension was most evident in the early 1900s as federal courts continually found ways to issue injunctions against union employees' activities, subverting congressional intent.²⁸ Although Section 6 of the

²¹ Smith *supra* note 17, at 1195; *see*, Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (discussed *infra*, Part V.A.).

²² Feldman, *supra* note 9, at 1229.

²³ *Id.* at 1229.

²⁴ Smith, *supra* note 17, at 1195.

²⁵ Feldman, *supra* note 9, at 1223-24; Posser, *supra* note 8, at 612.

²⁶ Feldman, *supra* note 9, at 1230.

²⁷ LeRoy, *supra* note 9, at 871; *see*, Brown v. Pro Football, Inc., 518 U.S. 231 (1996) (discussed *infra*, Part IV.E).

²⁸ LeRoy, *supra* note 9, at 871.

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Clayton Act was designed to bring lawful union practices outside the enforcement of antitrust law, courts continued to grant injunctions against them.²⁹ Congress responded by stripping federal courts of their jurisdiction to hear labor disputes under the Norris-LaGuardia Act.³⁰ Section 113 of the Norris-LaGuardia Act defines a labor dispute as “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.”³¹ The National Labor Relations Act further imposes a mutual obligation on the employer and the union to bargain in good faith in order to reach an agreement regarding wages, hours, and other terms and conditions of employment.³² To facilitate good faith bargaining and agreement on these issues, the National Labor Relations Act confers upon both sides certain economic weapons, such as lockouts for the owners and strikes for the employees.³³ The labor laws also confer primary jurisdiction upon the National Labor Relations Board to police disputes arising out of collective bargaining relationships.³⁴

III. APPLYING THE NONSTATUTORY LABOR EXEMPTION IN PROFESSIONAL SPORTS

Although the nonstatutory labor exemption and the jurisdictional prohibition on injunctions did much to quiet the tension between

²⁹ *Id.*; see, e.g., *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 205 (1921).

³⁰ “No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.” 29 U.S.C. § 101; see, *LeRoy*, *supra* note 9, at 871.

³¹ 29 U.S.C. § 113(c) (2006). This definition is reaffirmed in Section 2(9) of the National Labor Relations Act. 29 U.S.C. § 152(9) (2006). The purpose of the Norris-LaGuardia Act is to “take the federal courts out of the labor injunction business.” See, *Brady v. National Football League*, 640 F.3d 785, 789-790 (8th Cir. 2011) (quoting *Jacksonville Bulk Terminals, Inc. v. Int’l Longshoremen’s Ass’n*, 457 U.S. 702, 712 (1982) (internal quotations omitted).

³² 29 U.S.C. § 158(d); see *infra*, Part V.

³³ *LeRoy*, *supra* note 9, at 875-76.

³⁴ “The Acts also established the National Labor Relations Board (NLRB) to make rules and regulations regarding collective bargaining, to guard against unfair labor practices, and to act as an enforcement and investigatory body.” *Corcoran*, *supra* note 10, at 1050; see, *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (discussed *infra*, Part IV.E).



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antitrust and labor law that existed in the early 1900s, it brought about unique complications in the professional sports context.³⁵ The unique nature of professional sports requires agreement and cooperation between the individual teams because of the need for effective competition and relative equality between the teams to maintain fan interest.³⁶ Unlike other cartel arrangements, professional sports management meets frequently and openly to discuss plans and impose rules, activity that would surely violate Section 1 of the Sherman Act in other circumstances.³⁷ Not only do professional sports leagues require cooperation between the individual teams, the leagues as a whole are textbook examples of monopoly cartels because there is no significant competition that can pose a real threat to justify lowering prices to maintain a competitive market.³⁸

These actions have been defended under the “competitive balance” justification and essentially legitimized by Congress in 1951.³⁹ For example, the NFL attempted to justify its reserve clause as a means for weaker teams to retain their best players to become stronger competitors within the league.⁴⁰ The means employed by the NFL to restraint team and player activity are frequently cited as compelling evidence of the need for the competitive balance defense due to its resounding popularity and financial success.⁴¹ The result is that the nonstatutory labor exemption protects restraints, such as salary caps and free agency, contained in collective bargaining agreements are protected from antitrust scrutiny.⁴² Although these restraints negatively affect players, the owners also made concessions for player protection, such as increased insurance contributions and minimum salary levels for lesser players, as consideration.⁴³ The courts have thus insulated sports leagues from

³⁵ In the typical challenge to the nonstatutory labor exemption, the employer challenges a restraint included in a collective bargaining agreement at the insistence of the union. In the sports context, it is the players attempting to challenge the validity of the exemption shielding owner-imposed restraints. Corcoran, *supra* note 10, at 1056; *see also*, LeRoy, *supra* note 9, at 872.

³⁶ *See*, Corcoran, *supra* note 10, at 1053; Feldman, *supra* note 9, at 1232; LeRoy, *supra* note 9, at 872.

³⁷ SZYMANSKI, *supra* note 16, at 72-73; *see also*, Feldman, *supra* note 9, at 1233 (explaining that sports teams are nontraditional multiemployer bargaining units due to interdependence required for the league as a whole to function effectively).

³⁸ SZYMANSKI, *supra* note 16, at 70-72 (explaining that the XFL, minor league baseball, etc. are not sufficient alternative markets to create competition to the major sports leagues).

³⁹ SZYMANSKI, *supra* note 16, at 74-76; Corcoran, *supra* note 10, at 1054.

⁴⁰ SZYMANSKI, *supra* note 16, at 74; Corcoran, *supra* note 10, at 1054.

⁴¹ SZYMANSKI, *supra* note 16, at 85.

⁴² *Id.* at 83-84.

⁴³ *Id.* at 84.

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antitrust scrutiny so long as the restraint is a part of a valid collective bargaining agreement, giving prominence to labor law.⁴⁴

The real problem arises when the courts are faced with the question of whether or not to continue applying the nonstatutory labor exemption when a current collective bargaining agreement expires before a new agreement is reached.⁴⁵ This problem was first addressed in *Bridgeman v. NBA*.⁴⁶ When the current collective bargaining agreement expired, the players declared that they no longer consented to the restraints of the agreement and filed an antitrust suit.⁴⁷ The owners, on the other hand, continued to operate under the terms of the expired agreement.⁴⁸ In court, the players proposed two different tests to determine the extent of the nonstatutory labor exemption: that the exemption to dissipate the moment the collective bargaining agreement expired or, in the alternative, that the exemption should dissipate when the parties reached an impasse, a temporary deadlock in negotiations.⁴⁹ The owners proposed a perpetual test that would keep the exemption in place as long as the parties continued to operate under the terms of the old agreement.⁵⁰ The immediate and perpetual standards proposed by each side had their obvious problems but the impasse test required some consideration.⁵¹ The court rejected all three tests and held that a restraint could continue to operate under the nonstatutory labor exemption if it remains unchanged from the prior agreement and the owners have a “reasonable belief” that the restraint will be incorporated into the next agreement.⁵² The problem with this test is that it does not encourage good faith negotiation but instead, strategic behaviors by both sides to mask their true intentions.⁵³

⁴⁴ Smith, *supra* note 17, at 1196.

⁴⁵ *Id.* at 1198.

⁴⁶ See, *Bridgeman v. Nat'l Basketball Ass'n*, 675 F. Supp. 960, 963 (D.N.J. 1987); see also, Smith, *supra* note 17, at 1199.

⁴⁷ *Bridgeman*, 675 F. Supp. 960 at 963.

⁴⁸ *Id.* at 963.

⁴⁹ *Id.* at 964-966.

⁵⁰ *Id.* at 964-966.

⁵¹ An impasse is a significant point in negotiation because once an impasse is reached, the parties are no longer obligated to continue bargaining and the owners may unilaterally impose restraints contemplated in the negotiations. However, an impasse usually is not the end of negotiation, but rather a temporary deadlock that can be broken by application of economic force, such as a lockout. *Id.* at 966; see also, Corcoran, *supra* note 10, at 1061-62.

⁵² *Bridgeman*, 675 F. Supp. . at 965-967.

⁵³ Corcoran, *supra* note 10, at 1064.

IV. EARLY LABOR STRIFE IN THE NFL

There is a long history of tension between antitrust and labor law in disputes between the NFL and its players.⁵⁴ Some of these disputes were settled in favor of the players⁵⁵ and some were settled in favor of the owners⁵⁶. Regardless of which side won each battle one thing was clear; the courts have been unable to determine exactly where the nonstatutory labor exemption should end.⁵⁷ Instead, the courts have applied the facts of each case to determine whether or not the exemption should apply.

A. *Mackey v. National Football League*

In one of the first antitrust challenges, the players brought suit against the NFL owners challenging the “Rozelle Rule” under Section 1 of the Sherman Act.⁵⁸ The district court found the “Rozelle Rule” to be a per se violation of the Sherman Act and also a violation under the Rule of Reason.⁵⁹ The owners challenged whether the nonstatutory labor exemption immunized the “Rozelle Rule” from antitrust litigation and, if the exemption did not apply, whether the Rule was enforced in a manner that did not violate antitrust laws.⁶⁰

Beginning in 1968, the NFLPA was recognized as a labor organization and the owners and NFLPA had engaged in collective bargaining over terms of employment.⁶¹ These negotiations resulted in two collective bargaining agreements, both of which expired in 1974.⁶² The owners and NFLPA were unable to reach an agreement on a new agreement.⁶³ One major contention in the negotiations was the reserve system that later evolved into the “Rozelle Rule.”⁶⁴ The reserve system severely limited

⁵⁴ See, e.g., *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989); *McNeil v. National Football League*, 1992 WL 315292 (D. Minn. 1992); *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993); *White v. National Football League*, 836 F. Supp. 1458 (D. Minn. 1993); *White v. National Football League*, 41 F. 3d 402 (8th Cir. 1994); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

⁵⁵ See, *Mackey*, 543 F.2d 606 (8th Cir. 1976); *McNeil*, 1992 WL 315292; *White*, 836 F. Supp. 1458.

⁵⁶ See, *Brown*, 518 U.S. 231; *Powell*, 930 F.2d 1293; *White*, 41 F. 3d 402; *White*, 822 F. Supp. 1389.

⁵⁷ See, *Brown*, 518 U.S. 231; *Mackey*, 543 F.2d 606.

⁵⁸ *Mackey*, 543 F.2d at 609.

⁵⁹ *Id.*

⁶⁰ *Id.* at 609-10.

⁶¹ *Id.* at 610.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

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player mobility, requiring players to remain with their team for the entire duration of the contract plus one year if the team chose to exercise the option to retain the player.⁶⁵ If the player did not sign a new contract during that option year, the player would become a free agent and if a new team signed that player at the end of the option year, that team was not required to pay compensation to the former team.⁶⁶ Starting in 1963, the owners unilaterally adopted the “Rozelle Rule.”⁶⁷ This rule allowed the league commissioner to compensate the former team of a free agent with one or more players from the new team if the teams could not reach a satisfactory agreement.⁶⁸

The court rejected the player’s argument that the nonstatutory labor exemption could only apply to employee groups based on the national policy favoring collective bargaining agreement, requiring a logical extension to employer groups as well in appropriate circumstances.⁶⁹ The players did not challenge the rule outright in negotiating either collective bargaining agreement and it was incorporated by reference into the first agreement as a part of the NFL Constitution and Bylaws.⁷⁰ Therefore, to determine whether the nonstatutory labor exemption applied to the “Rozelle Rule” the court applied a three-part inquiry that has become known as the “Mackey Test”: (1) whether the restraint primarily affected only the parties to the collective bargaining relationship, (2) whether the agreement sought to be exempted concerns a mandatory subject of collective bargaining, and (3) whether the agreement is the product of bona-fide arm’s length bargaining.⁷¹ It was clear to the court that the “Rozelle Rule” only affected the parties to the collective bargaining relationship.⁷² It also involved a mandatory bargaining subject⁷³ because the “Rule” operated to restrict player movement and depress salaries.⁷⁴ Finally, the court determined that the “Rozelle Rule” was not a product of bona-fide arm’s length bargaining because it was unilaterally implemented by the owners and the provisions of the collective bargaining

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 610-11.

⁶⁹ *Id.* at 612.

⁷⁰ *Id.* at 612-13.

⁷¹ *Id.* at 614.

⁷² *Id.* at 615.

⁷³ *See*, 29 U.S.C. § 158(d) (there is an obligation to bargain collectively with respect to “wages, hours, and other terms and conditions of employment”).

⁷⁴ Mackey, 543 F.2d at 615.



agreements did not provide a benefit to the players or the union.⁷⁵ This holding opened the Rule to attack under Section 1 of the Sherman Act.⁷⁶

The team owners defended their unilateral adoption of the “Rozelle Rule” under Section 6 of the Clayton Act, which states that human labor is not a commodity or article of commerce subject to the Sherman Act.⁷⁷ However, the court held, in conjunction with other professional sports disputes, that exemption from antitrust scrutiny under Section 6 of the Clayton Act only applies to self-imposed restrictions of employee unions, not restrictions imposed by the employers.⁷⁸ Due to the unique circumstances of professional sports leagues, and the fact that the district court already inquired into the effects and justifications of the “Rozelle Rule,” the court of appeals refused to hold that the Rule was a per se violation of the Sherman Act.⁷⁹ Turning to the Rule of Reason analysis⁸⁰, the court of appeals affirmed the district court’s ruling that the “Rozelle Rule” violates the Sherman Act because it was significantly more restrictive than necessary to serve any legitimate purpose it might have.⁸¹ It significantly reduced player bargaining power in negotiating contracts and deterred teams from pursuing free agents in such a way that could not be justified by the owners’ interest in maintaining a competitive league.⁸²

The court limited its decision to the facts of the case and noted that such a rule may be immune from antitrust scrutiny if it was the result of bona-fide arm’s length bargaining.⁸³ It also noted that some more reasonable restraints on player movement might pass antitrust scrutiny as reasonably necessary to maintain a competitive league.⁸⁴

B. *Powell v. National Football League*

Powell v. National Football League once again dealt with antitrust challenges to player mobility in free agency.⁸⁵ The collective bargaining

⁷⁵ *Id.* at 616.

⁷⁶ *Id.*

⁷⁷ 15 U.S.C. § 17; *Mackey*, 543 F.2d at 617

⁷⁸ *Id.* at 617.

⁷⁹ *Id.* at 618–19 (applying the concept that one of the reasons for the per se doctrine is to avoid lengthy and burdensome inquiries into the operation of the industry in question).

⁸⁰ “The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.” *Id.* at 620.

⁸¹ *Id.* at 622.

⁸² *Id.* at 620–22.

⁸³ *Id.* at 623.

⁸⁴ *Id.*

⁸⁵ *Powell*, 930 F.2d 1293 at 1295.

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agreement at issue in this case had a provision for a “Right of First Refusal/Compensation.”⁸⁶ That collective bargaining agreement expired in August 1987 and, after several unsuccessful attempts at negotiations on the issue, the players went on strike.⁸⁷ Following the strike, the players filed an antitrust action challenging the owners’ “continued adherence to the expired [] agreement” and moved for partial summary judgment to determine whether the free agency provision was still protected by the labor exemption or was a violation of sections 1 and 2 of the Sherman Act.⁸⁸ The district court granted the motion for summary judgment based on a finding by the National Labor Relations Board that the owners and players had reached a bargaining impasse.⁸⁹

Under the *Mackey* analysis, the free agency provision disputed in this case was certainly protected under the nonstatutory labor exemption because it primarily affected only the parties to the collective bargaining relationship, concerned a mandatory subject of collective bargaining, and was a product of bona-fide arm’s length negotiation.⁹⁰ The problem facing the court on appeal was whether the exemption continued to apply following the expiration of the collective bargaining agreement,⁹¹ an issue the *Mackey* decision declined to address.⁹² Previous cases related to professional sports disputes allowed for the exemption to continue past the point of impasse “only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement.”⁹³

Labor law principles continue to govern the relationship between the employers and employees following the expiration of a collective bargaining agreement, including a continuing obligation to bargain.⁹⁴ The employers are required to maintain the status quo prior to reaching an impasse to promote collective bargaining⁹⁵ as well as stable, peaceful labor

⁸⁶ *Id.* at 1293-95

⁸⁷ *Id.* at 1296.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 1298-99.

⁹¹ *Id.* at 1299.

⁹² *Mackey*, 543 F.2d at 616, n. 18.

⁹³ *Powell*, 930 F.2d at 1299-1300 (quoting *Bridgeman v. National Basketball Association*, 675 F. Supp. 960, 967 (D.N.J.1987)).

⁹⁴ *Id.* at 1300 (citing the National Labor Relations Act 29 U.S.C. § 158(a)(5), (d) (1982)).

⁹⁵ *Id.* at 1300 (citing *Producers Dairy Delivery Co. v. Western Conference of Teamsters Trust*



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relations.⁹⁶ Following an impasse, the employers are authorized to maintain the status quo or implement new employment terms that are “reasonably contemplated within the scope of their pre-impasse proposals.”⁹⁷ If the employers violate these principles, the employees may seek a full range of remedies under labor laws.⁹⁸ These disputes are not the central focus of Sherman Act because there is a separate body of law to resolve these issues.⁹⁹

Looking to several decisions by the Supreme Court and the circuit courts, the court in *Powell* held that the NFL and its players had not yet reached a point where an action under the Sherman Act should be permitted.¹⁰⁰ The district court was incorrect to conclude that a labor impasse marks the point where the players could bring an antitrust claim because it conflicted with the lawful labor practice of continuing to implement the status quo after the parties reached a bargaining impasse.¹⁰¹ The *Powell* court limited its holding to the specific facts of the case, refusing to allow the antitrust challenge because the “Right of First Refusal/Compensation” was twice included in collective bargaining agreements that satisfied the labor law requirements.¹⁰² Importantly, the court noted that the employers would not be forever exempt from antitrust challenges but refused to determine when that future termination point might be reached.¹⁰³

C. *McNeil v. National Football League*

Shortly after the *Powell* ruling, players again brought suit against the NFL, this time as eight individuals rather than collectively under the NFLPA.¹⁰⁴ This strategy successfully circumvented the nonstatutory labor exemption that protected the NFL in *Powell* and this time the players successfully challenged the “Right of First Refusal/Compensation” as a violation of the Sherman Act.¹⁰⁵ The jury was provided with a special

Fund, 654 F.2d 625, 627 (9th Cir.1981) (quoting *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981).

⁹⁶ *Id.* at 1300-01 (citing *Laborers Health & Welfare Trust Fund*, 484 U.S. at 543 n.5).

⁹⁷ *Id.*

⁹⁸ *Id.* at 1301.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1301-02.

¹⁰¹ *Id.* at 1302.

¹⁰² *Id.* at 1303.

¹⁰³ *Id.*

¹⁰⁴ See, *McNeil v. National Football League*, 1992 WL 315292 (D. Minn. Sept. 10, 1992).

¹⁰⁵ *Id.* at 1354

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verdict form to apply the Rule of Reason analysis and they determined the restriction was more restrictive than necessary to promote the competitive balance necessary for league functionality.¹⁰⁶ The success of these eight players resulted in a flurry of individual player challenges to the various league imposed restraints.¹⁰⁷

D. White v. National Football League

Finally, in 1993, all of the outstanding lawsuits against the NFL were resolved in *White v. National Football League* when the players and owners entered into a tentative “Stipulation and Settlement Agreement”.¹⁰⁸ The parties agreed that NFLPA would again seek to become the collective bargaining agent for the player and the NFLPA began collecting authorization cards in January 1993.¹⁰⁹ After the American Arbitration Association certified the authenticity of the authorizations, the NFL officially recognized the NFLPA as the exclusive bargaining agent of the players and the two parties entered into negotiations for a new collective bargaining agreement.¹¹⁰ The new agreement was ratified in June 1993, incorporating almost verbatim the terms of the amended Settlement and Stipulation Agreement.¹¹¹ This settlement agreement has governed the collective bargaining relationship between the NFL and NFLPA ever since.¹¹²

E. Brown v. Pro Football, Inc.

The labor dispute in *Brown v. Pro Football, Inc.*¹¹³ took the issue of when the nonstatutory labor exemption expires one step further than *Powell v. National Football League*.¹¹⁴ The players and owners negotiated wage issues until they reached an impasse, at which point the owners unilaterally implemented the terms of their last bargaining offer.¹¹⁵ In *Powell*, the owners had merely continued to implement the terms of the

¹⁰⁶ *Id.* at 1

¹⁰⁷ *See generally*, Jackson v. National Football League, 802 F. Supp. 226 (D. Minn. 1992), White v. National Football League, 836 F. Supp. 1458 (D. Minn. 1993).

¹⁰⁸ White, 836 F. Supp. at 1462.

¹⁰⁹ *Id.* at 1465.

¹¹⁰ *Id.* at 1462.

¹¹¹ *Id.* at 1467

¹¹² Brady v. National Football League, 640 F. 3d 787-88 (8th Cir. 2011).

¹¹³ Brown v. Pro Football, Inc., 518 U.S. 231, 233-35 (1996).

¹¹⁴ *See*, Powell v. Nat'l Football League, 930 F.2d 1293 (8th Cir. 1989).

¹¹⁵ *Brown*, 518 U.S. at 234.

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expired collective bargaining agreement as the status quo.¹¹⁶ However, that decision indicated that it might also be a valid labor practice for the employers to unilaterally implement new, reasonable terms based on the employer's last offer before the impasse.¹¹⁷ The Supreme Court squarely addressed the issue in *Brown*.¹¹⁸

During negotiations to implement a new collective bargaining agreement, the owners adopted a resolution to allow each team to create a developmental squad of a few players that did not make the regular roster.¹¹⁹ When negotiations over salaries for the developmental squad players broke down, the owners unilaterally implemented a \$1,000 weekly salary.¹²⁰ The developmental squad players challenged the salary as a restraint of trade under the Sherman Act.¹²¹ The district court allowed the issue to reach a jury, which returned a \$30 million verdict for the players.¹²² The district court held that the nonstatutory labor exemption expired with the expiration of the collective bargaining agreement because allowing the exemption to continue would deprive the players of an important economic bargaining tool: treble damages in an antitrust suit.¹²³ The owners appealed and the court of appeals reversed in favor of the owners.¹²⁴

Following an impasse in labor negotiations, labor law allows employers to implement changes unilaterally as long as those changes meet specific conditions, the most important being that the change was reasonably comprehended.¹²⁵ Were labor law to allow antitrust claims following an impasse, employers would be subject to liability for merely continuing to operate under the old collective bargaining agreement because of their identical behavior.¹²⁶ Imposing new and different terms following an impasse would subject the employers to unfair labor practice charges under the antitrust laws.¹²⁷ These potential antitrust challenges

¹¹⁶ *Powell*, 930 F.2d at 1302.

¹¹⁷ *Id.* at 1301-02.

¹¹⁸ *Brown*, 518 U.S. at 234.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 234-35.

¹²¹ *Id.* at 235.

¹²² *Id.*

¹²³ *Brown v. Pro Football, Inc.* 782 F. Supp. 125, 133 (D.D.C. 1991), rev'd, 50 F.3d 1041 (1995), aff'd 518 U.S. 231 (1996).

¹²⁴ *Id.* at 235.

¹²⁵ *Id.* at 238.

¹²⁶ *Id.* at 241.

¹²⁷ *Id.* at 241-42.

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would undermine the collective bargaining process and the goals labor law hopes to achieve.¹²⁸

Following the principles of labor law, the Supreme Court rejected the players' antitrust challenges on several grounds.¹²⁹ The players first proposed that the unilateral implementation of the developmental squad salary was not subject to the nonstatutory exemption because that exemption only applied to agreements between the employers and employees.¹³⁰ This rationale was rejected because negotiation and concerted actions are necessarily required to reach an agreement in the first place and to reach a new one in the wake of an agreement expiring.¹³¹

The Court then rejected the argument that the exemption should terminate at the point of impasse in negotiations.¹³² This argument was rejected because, despite contrary contentions, employers are not completely free to act independently once an impasse is reached.¹³³ Furthermore, labor law expressly allows for employers to continue joint behaviors, such as lockouts and replacement hiring, following an impasse.¹³⁴ The impasse problem was further compounded by the fact that oftentimes, several impasses occur during one negotiation process in reaching a new agreement.¹³⁵

The players then tried to argue that the unique position of a professional sports league and its players called for different rules than the typical bargaining relationship.¹³⁶ The Court rejected these contentions as well.¹³⁷ Although in some respects, the individual owners did not act like typical independent economic competitors, those circumstances made the league more like a single bargaining employer and would make the issue of unilateral implementation irrelevant.¹³⁸ Furthermore, the fact that most players negotiated their salaries individually, rather than as a whole, might actually have given them more bargaining power than a typical union.¹³⁹

¹²⁸ *Id.* at 242.

¹²⁹ *Id.* at 243.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 244.

¹³³ *Id.*

¹³⁴ *Id.* at 245.

¹³⁵ *Id.* at 245-46.

¹³⁶ *Id.* at 248.

¹³⁷ *Id.*

¹³⁸ *Id.* at 248-49.

¹³⁹ *Id.* at 249.

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Although the Court held that the nonstatutory exemption once again applied, it also declined to determine the precise line where the exemption might expire.¹⁴⁰

V. BRADY V. NATIONAL FOOTBALL LEAGUE

A. *The District Court Enjoins the Lockout in a Clear Misinterpretation of Labor Law*

At the conclusion of the *White* litigation, the players and owners entered a Stipulation and Settlement Agreement and a new collective bargaining agreement in 1993.¹⁴¹ This settlement agreement and the collective bargaining agreement required the players to recertify their union and, in exchange, the owners agreed to disclaim any right to assert the nonstatutory labor exemption in future litigation on the grounds that player decertification was a sham.¹⁴² The collective bargaining agreement that resulted from the *White* litigation has continuously governed the NFL labor relations, with some amendments, since it was signed into force in 1993.¹⁴³ In 2008, the owners decided to opt-out of the last two years of the collective bargaining agreement to seek greater revenue shares and impose new restraints, such as the rookie wage scale.¹⁴⁴ The negotiations were unsuccessful and the owners warned the players that a lockout might be instituted if a new agreement was not reached before the collective bargaining agreement expired.¹⁴⁵ With the collective bargaining agreement set to expire on March 11, 2011, the players decided to decertify the NFLPA and the required majority of the players voted to decertify.¹⁴⁶ The NFLPA then also filed notice with the NFL, the Department of Labor, and the IRS disclaiming interest in representing the players, terminating its status as a labor organization and reclassifying itself as a professional association.¹⁴⁷ The players also filed this lawsuit charging the owners with violating the Sherman Act and sought a preliminary

¹⁴⁰ *Id.* at 250.

¹⁴¹ *Brady v. National Football League*, 779 F. Supp. 2d 992, 1002 (D.Minn. 2011), *vacated* 644 F.3d 661 (8th Cir. 2011).

¹⁴² *Id.* at 1002

¹⁴³ *Id.*

¹⁴⁴ Class Action Complaint at ¶ 49, at 20, *Brady v. National Football League*, 779 F. Supp. 2d 992, (D.Minn. March 11, 2011) No. 11CV00639.

¹⁴⁵ *Brady*, 779 F. Supp. 2d at 1002.

¹⁴⁶ Class Action Complaint, *supra* note 143, at ¶¶ 50-51, 54-56.

¹⁴⁷ Class Action Complaint, *supra* note 143, at ¶¶ 57-60.

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injunction to enjoin the NFL from enforcing the lockout instituted the following day on March 12, 2011.¹⁴⁸

The owners argued that the Norris-LaGuardia Act precluded injunctive relief and that the district court should defer the case to the National Labor Relations Board.¹⁴⁹ The question of whether the National Labor Relations Act and Norris-LaGuardia Acts precluded the player's antitrust suit rested on whether the players had effectively disclaimed their union representation.¹⁵⁰ The district court determine that, because federal antitrust and state contract disputes did not fall under the disputes over which only the National Labor Relations Board could exercise jurisdiction, it had the authority to determine whether the player's decertification allowed them to file their antitrust suit.¹⁵¹ It also held that the owners incorrectly relied on prior labor law that preempts federal courts from deciding issues squarely within the statutory jurisdiction of the National Labor Relations Board because the decertification issue was "embedded in the larger framework of this antitrust suit."¹⁵²

Although the court could have referred the issue to the National Labor Relations Board for a determination on the validity of the players' decertification, it declined to do so because the substantial delay in the resolution would cause further irreparable harm to the players.¹⁵³ For the disclaimer to have been effective, it must have been unequivocal and made in good faith.¹⁵⁴ According to the court, the decertification was consistent with other behavior indicating that the players no longer wished to be represented by a union to allow the antitrust action to proceed.¹⁵⁵ Although the court acknowledged actions by both parties might have partly been for litigation strategy, the unequivocal disclaimer and the rights sacrificed along with that disclaimer made such strategies irrelevant.¹⁵⁶ The court then differentiated the circumstances of the labor impasse in *Brown* from the present case because, although the parties had reached a labor impasse in both cases, in *Brady*, the players were no longer represented by a union as they were in *Brown*.¹⁵⁷

¹⁴⁸ *Brady*, 779 F. Supp. 2d at 1004.

¹⁴⁹ *Id.* at 1005.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1010.

¹⁵² *Id.* at 1013; *see*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

¹⁵³ *Id.* at 1013-14.

¹⁵⁴ *Id.* at 1014 (quoting *In re Int'l Bd. Of Elec. Workers*, 119 N.L.R.B. 1792 (Feb. 28, 1958)).

¹⁵⁵ *Id.* at 1015-17.

¹⁵⁶ *Id.* at 1017-18.

¹⁵⁷ *Id.* at 1019-20; *cf.* *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

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After determining that labor law did not preempt the court from hearing the players' claims, it then addressed whether the Norris-LaGuardia Act deprived the court of jurisdiction to grant injunctive relief.¹⁵⁸ The court held that it was not barred from granting injunctive relief because, although it was clear that the Act barred federal court interference with the employees' right to strike, it was not clear whether the Act applied to the employers' right to lock out employees.¹⁵⁹ The essential purpose of the Norris-LaGuardia Act was to protect employees from improper actions of their employers, not the other way around.¹⁶⁰ However, since the NFLPA disclaimed its interest in representing the players, the Norris-LaGuardia Act did not even apply to this case.¹⁶¹

The court also rejected the NFL's contention that, despite the broad interpretation of the Norris-LaGuardia Act, this was a "labor dispute."¹⁶² The court was concerned with extending labor law indefinitely past the point of union disclaimer.¹⁶³ The purpose of the broad interpretation was not to extend labor law indefinitely, but to govern third parties that may become involved in a dispute between management and a union.¹⁶⁴ Because the Players chose to no longer be represented by a union, their dispute with the NFL was no longer subject to the jurisdiction of the NLRB.¹⁶⁵

Turning to the issue of injunctive relief, the court noted the unusual circumstances of the Players' request. The Players did not request an injunction on all the restrictions imposed against them, only the lockout.¹⁶⁶ There were four factors for the court to consider in deciding whether to grant the injunction: "the threat of irreparable harm to the moving party, (2) balancing this harm with any injury an injunction

¹⁵⁸ *Brady*, 779 F. Supp. 2d at 1022.

¹⁵⁹ *Id.* at 1024-25.

¹⁶⁰ *Id.* at 1026; see *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 233 (D. Minn. 1992) ("It would be ironic if a statute that had been enacted to protect the rights of individual employees from improper actions by employers and the courts were turned against those employees and used to justify the continued application of a system found illegal under the Sherman Act."). See also 29 U.S.C. § 52 (2012) (laying out statutory restrictions on injunctive relief in labor disputes).

¹⁶¹ *Brady*, 779 F. Supp. 2d at 1026.

¹⁶² "[L]abor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer or employee." 29 U.S.C. § 113(c).

¹⁶³ *Brady*, 779 F. Supp. 2d at 1027.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1032.

¹⁶⁶ *Id.* at 1033.

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would inflict on other interested parties, (3) the probability that the moving party would succeed on the merits, and (4) the effect on the public interest.¹⁶⁷ The court looked to all the prior litigation between the NFL and its players that these Players would, and were currently, suffering from irreparable harm, despite the NFL's contentions that they players would receive monetary compensation if they won the lawsuit as well as avoid injuries during the time they weren't playing.¹⁶⁸ The court's decision to side with the Players on the issue of irreparable harm was based on various factors regarding player contracts and free agency as many players were restricted and forced to take a lesser salary when the NFL opted out of the last two years of the CBA.¹⁶⁹ The contention that the NFL would suffer great harm as a result of the injunction was also rejected because issuing a preliminary injunction had no relevance as to the merits of the Players' antitrust claims, nor whether those claims would even pass the nonstatutory labor exemption.¹⁷⁰ Furthermore, because the injunction request only addressed the issue of whether the NFL could continue to lock out the Players as a labor practice after the NFLPA disclaimed its role as a collective bargaining agent, the court did not need to address whether those other antitrust claims held merit as a part of its four factored analysis.¹⁷¹ The only issue the court needed to address was whether there was a "fair chance" the lockout would be considered a "concerted action" under Section 1 of the Sherman Act.¹⁷² Finally, the court held that public interest did not favor the lockout due to the widespread economic impact far beyond the NFL in isolation.¹⁷³ For those reasons, the district court granted the Players' request for an injunction against the lockout.¹⁷⁴

B. The Eighth Circuit Reinstates the Lockout, Forcing the Parties Back to the Bargaining Table

Shortly after the district court issued its order enjoining the owners' lockout, the Eighth Circuit issued a stay on the injunction while it considered the owners' appeal on the authority of the district court to

¹⁶⁷ *Id.* (citing *Planned Parenthood Minnesota v. Rounds*, 530 F.3d 724, 729 (8th Cir. 2008)).

¹⁶⁸ *Brady*, 779 F. Supp. 2d at 1034-35.

¹⁶⁹ *Id.* at 1036-38.

¹⁷⁰ *Id.* at 1038.

¹⁷¹ *Id.* at 1039-40.

¹⁷² *Id.*

¹⁷³ *Id.* at 1041-42.

¹⁷⁴ *Id.* at 1042.

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grant the injunction under the Norris-LaGuardia Act.¹⁷⁵ The broad language of the Norris-LaGuardia Act prohibits the courts from entering injunctions not only in cases “involving” a labor dispute, but in cases “growing out of” a labor dispute as well.¹⁷⁶ Based on the temporal proximity and the substantive relationship “linking this case with the labor dispute between the League and the Players’ union” the Court found that the case was one “growing out of a labor dispute” and under the purview of the Norris-LaGuardia Act.¹⁷⁷ The players and owners unsuccessfully engaged in collective bargaining for over two years until the agreement expired on March 11, 2011.¹⁷⁸ On that same day, the players decertified their union and filed this lawsuit against the NFL.¹⁷⁹ The Court also found that the NFL’s bargaining position would likely be irreparably harmed without the stay of the injunction.¹⁸⁰ Thus, the players were once again locked out while the Eighth Circuit fully addressed the validity of the District Court’s injunction.¹⁸¹

On full consideration, the Eighth Circuit first addressed the issue of whether the Norris-LaGuardia Act deprived the district court of jurisdiction to enjoin the lockout.¹⁸² Although the impetus of the Act was to prevent courts from issuing injunctions against workers, an injunction against employers must conform to the Act as well.¹⁸³ The Court held that the players’ lawsuit involved a controversy concerning the terms and conditions of employment and thus fell within the definition of a labor dispute in section 13(c) of the Act, rejecting the players’ argument that the definition extended only to disputes involving organized labor.¹⁸⁴ The plain language of the Act also plainly states that “a case ‘shall be held to involve or grow out of a labor dispute’ when ‘such dispute is . . . between one or more employers or associations of employers and one or more employees or associations of employees.’”¹⁸⁵ The Eighth Circuit held that the district court erred in finding that section of the statute to require the

¹⁷⁵ Brady v. Nat’l Football League, 640 F.3d 785 (8th Cir. 2011).

¹⁷⁶ *Id.* at 791.

¹⁷⁷ *Id.* at 791-92.

¹⁷⁸ *Id.* at 791.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 793.

¹⁸¹ *Id.* at 794.

¹⁸² Brady v. Nat’l Football League, 644 F.3d 661, 669 (8th Cir. 2011).

¹⁸³ *Id.* at 670.

¹⁸⁴ *Id.* at 670-71; *see also* 29 U.S.C. § 113(c) (2012).

¹⁸⁵ Brady, 644 F.3d at 671 (quoting 29 U.S.C. § 113(a)).

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employees to be unionized.¹⁸⁶ Even accepting the players' argument that the public policy section of the Norris-LaGuardia Act,¹⁸⁷ requiring concerted action were to apply in this case, the Eighth Circuit held that "a lawsuit filed in good faith by a group of employees to achieve more favorable terms of employment is concerted activity under section 7 of the National Labor Relations Act."¹⁸⁸ The Court was careful to distinguish that no matter what effect the decertification might have on the NFL's antitrust immunity, decertification certainly did not suddenly cause the labor dispute to disappear.¹⁸⁹

The Court then addressed the players' contention that, even if this controversy was a "labor dispute" under § 13, an employer lockout does not fall within the specific enumerated categories not subject to restraining orders or injunctions under Section 4 of the Norris-LaGuardia Act.¹⁹⁰ The NFL argued that section 4(a) applies to prevent the injunction because a lockout can be defined as "ceasing or refusing to perform any work or to remain in any relation of employment."¹⁹¹ Furthermore, the NFL argued that Section 5 further prohibited issuance of the injunction by shielding concerted Section 4 actions from antitrust scrutiny.¹⁹² The Eighth Circuit's textual analysis of Section 4 rejected the players' contention that section 4(a) could only apply to employee actions.¹⁹³ To hold that section 4(a) prohibits injunctions against strikes but not lockouts would frustrate the purpose of the Norris-LaGuardia Act "to allow free play of economic forces" to resolve labor disputes, not the federal court system.¹⁹⁴ This provision, and its substantial equivalent in section 20 of the Clayton Act, was intended to apply equally to employer and employee actions.¹⁹⁵ For those reasons, the Eighth Circuit held that § 4(a) prohibited the District Court from entering an injunction against the owners.¹⁹⁶

¹⁸⁶ The Eighth Circuit relied on *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) and *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) in holding that the Norris-LaGuardia Act clearly applies in labor controversies, even when there is not a union in place. *Brady*, 644 F.3d at 671.

¹⁸⁷ 29 U.S.C. § 102 (2012).

¹⁸⁸ *Brady*, 644 F.3d at 673.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 673-74.

¹⁹¹ *Id.* at 674 (quoting 29 U.S.C. § 104(a)).

¹⁹² *Brady*, 644 F.3d at 674.

¹⁹³ *Id.* at 675-76.

¹⁹⁴ *Id.* at 678-79.

¹⁹⁵ *Id.* at 680.

¹⁹⁶ *Id.* at 680-81.

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However, section 4(a) only protected the owners' actions with respect to those players currently under contract.¹⁹⁷ It does not apply to free agents and prospective players because the owners cannot refuse "to remain in any relation of employment" because an employment relationship did not exist between those groups of players and the owners.¹⁹⁸ A valid injunction against locking out these two groups therefore required strict conformity to Section 7 of the Norris-LaGuardia Act, which provides that "a court has no authority to issue an injunction except after hearing the testimony of witnesses in open court (with an opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto."¹⁹⁹ Because the District Court did not provide the NFL an opportunity to contest the credibility of the players' evidence or to address concerns about forcing the league to deal with these two groups only to immediately lock them out once under contract, the injunction was invalid as a whole and vacated.²⁰⁰

VI. ARGUMENT

While the Eighth Circuit certainly made the right decision when it reinstated the lockout, the court declined to address the substantive issue in the case, whether the owners were still shielded from antitrust scrutiny once the players decertified, and lost its chance to do so when the parties settled on July 25, 2011.²⁰¹ Courts and commentators alike have not found much agreement on almost any of the issues sports labor disputes present. It is clear that the courts have not found harmony in deciding on a test to lower the antitrust shield.²⁰² Commentators on this issue are split on almost all facets of the debate: whether an antitrust lawsuit or negotiation is the better forum to resolve these disputes, when the nonstatutory labor exemption should end, and what test should be applied to determine if the nonstatutory labor exemption has ended.²⁰³ This

¹⁹⁷ *Id.* at 681.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (quoting 29 U.S.C. § 107 (2012)) (internal quotation marks omitted).

²⁰⁰ *Brady*, 644 F.3d at 681-82.

²⁰¹ CNN Wire Staff, *Players, Owners Sign Deal to End Lockout*, (July 25, 2011), CNN <http://edition.cnn.com/2011/SPORT/07/25/nfl.deal/index.html>. See also Posser, *supra* note 8, at 607-08.

²⁰² See, *supra* Parts IV, V.

²⁰³ See, e.g., Corcoran, *supra* note 10, at 1047; Feldman, *supra* note 9, at 1123-24; LeRoy, *supra* note 9, at 870-71; Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 340 (1989); Kimberly A. Colmey, Comment, *Unnecessary Roughness: Why the NFL Should Not Be Flagged for Antitrust Scrutiny*

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article does not attempt to propose yet another new test for the nonstatutory labor exemption. Instead it explains why the players did not deserve to be in court at all and why the Eighth Circuit should have rejected the merits of the players' claims had it been given the opportunity to do so.

When players can threaten the league with antitrust litigation during the bargaining process, it not only creates an unfair advantage for the players but also gives them a reason to avoid bargaining in good faith.²⁰⁴ It became painfully obvious that the players never intended to reach an agreement at the bargaining table when, at the most dire moment of negotiation, they decertified and the owners then found themselves facing the "former" union officers not at the bargaining table, but in the courtroom.²⁰⁵ The federal labor laws were designed to provide both employers and employees with economic weapons to resolve their disputes; antitrust litigation was not the weapon of choice Congress intended.²⁰⁶ Nevertheless, players have continually threatened the owners with antitrust litigation to resolve labor disputes and gain more favorable bargaining terms.²⁰⁷ As the owners are continually faced with the threat of treble damages if they lose in court, the players have been able to demand increasingly favorable terms each time the collective bargaining agreement is renewed.²⁰⁸ Finally, the owners had enough of caving to player demands and sought more favorable terms at the bargaining table.²⁰⁹ As the expiration of the collective bargaining agreement crept ever closer with no settlement in sight, the owners threatened to "lock out" the players if an agreement was not reached by the time the current collective bargaining agreement expired.²¹⁰ A lockout is one of the expressly approved economic weapons for employers in a labor dispute.²¹¹ Rather than try to reach a resolution after the owners informed the players of

in Labor Relations, 5 J. MARSHALL L.J. 231, 239 (2011); Timothy J. Bucher, Comment, *Inside the Huddle: Analyzing the Mediation Efforts in the NFL's Brady Settlement and Its Effectiveness for Future Professional Sports Disputes*, 22 MARQ. SPORTS L. REV. 211, 219 (2011); Posser, *supra* note 8, at 644; Smith, *supra* note 17, at 1195.

²⁰⁴ When the players can fall back on antitrust litigation, there is less incentive for the parties to come to terms on their own because there is less of a need to make concessions and the parties move farther apart and they anticipate an impasse. LeRoy, *supra* note 9, at 877-78.

²⁰⁵ LeRoy, *supra* note 9, at 897.

²⁰⁶ *Id.* at 897 n.229.

²⁰⁷ See, *infra* Part IV; Posser, *supra* note 8, at 605.

²⁰⁸ Posser, *supra* note 8, at 605.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 609 (citing *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965)).

their intention to institute a lockout, the players responded by decertifying and filing their antitrust suit within hours of the collective bargaining agreement expiring, a much more powerful weapon than a lockout due to the potential damages and the length and cost associated with litigation.²¹²

To allow such a claim to proceed would essentially give the players “two bites at the apple” in trying to achieve a favorable collective bargaining agreement.²¹³ The players are willing to engage in collective bargaining for as long as it suits their purposes but then decertify and resort to antitrust litigation as soon as they find themselves in an inferior bargaining position.²¹⁴ This practice completely subverts the purpose of federal labor law by miscasting labor disputes as antitrust disputes.²¹⁵ If the players want union representation they should be subject to the same principles as every other union when attempting to resolve their labor disputes: the right to collectively bargain and strike or to lobby Congress.²¹⁶ Federal labor law should be seen as completely distinct from antitrust law because antitrust is not concerned with competition amongst laborers or the price and supply of labor.²¹⁷ Allowing the players to challenge labor practices they previously agreed to severely disrupts the equality of bargaining power between the two parties.²¹⁸ Furthermore, there is no longer a need for the players to bargain in good faith to come to an agreement with the owners knowing that, if the players don’t get their way, they can merely decertify and file an antitrust lawsuit.²¹⁹

The players’ actions leading up to filing the *Brady* lawsuit clearly demonstrate that they planned all along to file an antitrust lawsuit to ensure the most favorable agreement.²²⁰ The *White* settlement agreement and the collective bargaining agreement were modified and extended in 2006, providing both sides with an option to opt out of the agreement two years early, an option the owners exercised in 2008.²²¹ Under the opt-out clause, the 2010-2011 football season would be the last covered under the collective bargaining agreement unless a new agreement could

²¹² Posser, *supra* note 8, at 611-12.

²¹³ LeRoy, *supra* note 9, at 874.

²¹⁴ *Id.*

²¹⁵ *Id.* at 873-75.

²¹⁶ *Id.* at 873-74.

²¹⁷ *Id.* at 874; *see also* 15 U.S.C. § 17 (2012).

²¹⁸ LeRoy, *supra* note 9, at 875.

²¹⁹ *Id.*

²²⁰ *See, supra* Part V.

²²¹ Smith, *supra* note 17, at 1191.

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be reached before the March 11, 2011 expiration date.²²² In September 2010, with an entire football season to play and having already had two years to reach a new agreement, the players initiated proceedings to decertify their union.²²³ In the weeks leading up to the March 11 deadline, the owners indicated that they would lockout the players if an agreement could not be reached.²²⁴ This was an attempt to gain some bargaining leverage in the final hours in an effort to break the cycle of increasingly player-friendly agreements.²²⁵ The owners also filed an unfair labor practice charge against the union, asserting that it failed to confer in good faith, a bargaining requirement under federal labor law.²²⁶ When the union decertified at 4:00 p.m. on March 11, with seven hours remaining until the midnight expiration, the owners modified their unfair labor practices charge to that date and insisted that the decertification was a “sham” and an “unlawful subversion of the collective bargaining process.”²²⁷ The players filed their complaint with the district court within hours of their decertification.²²⁸ They also countered the owners’ “sham” contention based on a memorandum from the NLRB in *Pittsburgh Steelers, Inc.*,²²⁹ that it “was ‘irrelevant’ whether the disclaimer was motivated by ‘litigation strategy,’ so long as the disclaimer was ‘otherwise unequivocal and adhered to.’”²³⁰ However, the players’ assertion ignores that the memorandum went on to note that it was still required that the disclaimer be made in good faith.²³¹ The assertion also ignores the fact that, following the original *White* settlement, the players insisted on a stipulation that the owners could not challenge any future decertification as a sham,²³² clearly anticipating that the players would use this tactic again in the future. The players attempted to ensure that, when the time came, the owners would have one less method of defense at the bargaining table. Finally, the only players for whom it actually makes economic sense to decertify and negotiate individually and without

²²² *Id.*

²²³ *Id.* at 1191-92.

²²⁴ Posser, *supra* note 8, at 603.

²²⁵ *Id.*

²²⁶ Brady v. Nat’l Football League, 644 F.3d 661, 667 (8th Cir. 2011).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ No. 6-CA-23143, 1991 WL 144468 (NLRB G.C. June 26, 1991).

²³⁰ Brady, 644 F.3d at 667.

²³¹ Pittsburgh Steelers, Inc., No. 6-CA-23143, 1991 WL 144468, at *2 n.8 (NLRB G.C. June 26, 1991).

²³² Brady v. Nat’l Football League, 779 F. Supp. 2d 992, 1002 (D. Minn. 2011).



restraints are the star players such as those individually named in the *Brady* lawsuit.²³³ Tom Brady, Peyton Manning, Drew Brees, Mike Vrabel, and other star athletes could command a salary far beyond what they are currently paid but for salary cap restraints. However, those higher salaries would be to the detriment of all the other players, especially those at the bottom of the depth chart or on the developmental squad. For the those players lower on the depth chart, it makes sense to have a salary cap and certain minimum salary requirement along with all the other benefits the players as a whole receive through collective bargaining.²³⁴

Although there are certainly times when a player's union might legitimately consider decertifying their union when the bargaining process becomes an utter failure, the players in *Brady* failed to make even a minimal showing of a good faith effort to reach an agreement.²³⁵ Instead of focusing their efforts on reaching an agreement with the owners, the players focused their energy on the decertification process to ensure that when the collective bargaining agreement inevitably expired, the path would be cleared for an antitrust lawsuit.²³⁶ The proper outlet for their grievances is the National Labor Relations Board because the dispute clearly arose out of a labor dispute and decertifying the union before the collective bargaining agreement even officially expires cannot be found by any court to have effectively ended the collective bargaining relationship.

CONCLUSION

The legal quagmire surrounding the nonstatutory labor exemption in professional sports certainly makes it difficult for either side to anticipate exactly what its rights and liabilities are under antitrust law. As the courts continue to pass on the opportunity to provide clarity to this law and the parties inevitably resolve their differences rather than lose an entire season of play, it is likely that this issue will remain unresolved for years to come. Both sides need to keep in mind that antitrust litigation will have uncertain outcomes but will certainly be costly, time consuming, and damaging to the reputation of the sport as a whole when fans become frustrated as the millionaires battle the billionaires for treble damages.

²³³ SZYMANSKI, *supra* note 16, at 84.

²³⁴ *See, id.*; Smith, *supra* note 17, at 1193.

²³⁵ *Cf.* The Canadian Press, *NHL Offers 50/50 Split on HRR in Proposal for NHLPA*, TSN (Oct. 16, 2012, 6:37 PM), <http://www.tsn.ca/nhl/story/?id=407490> (discussing the NHL owners' second offer moving from 47% of hockey related revenue being paid to the players to 50% of those revenues being paid to the players).

²³⁶ *See, supra* Part II (discussing the good faith negotiation requirement of the National Labor Relations Act).

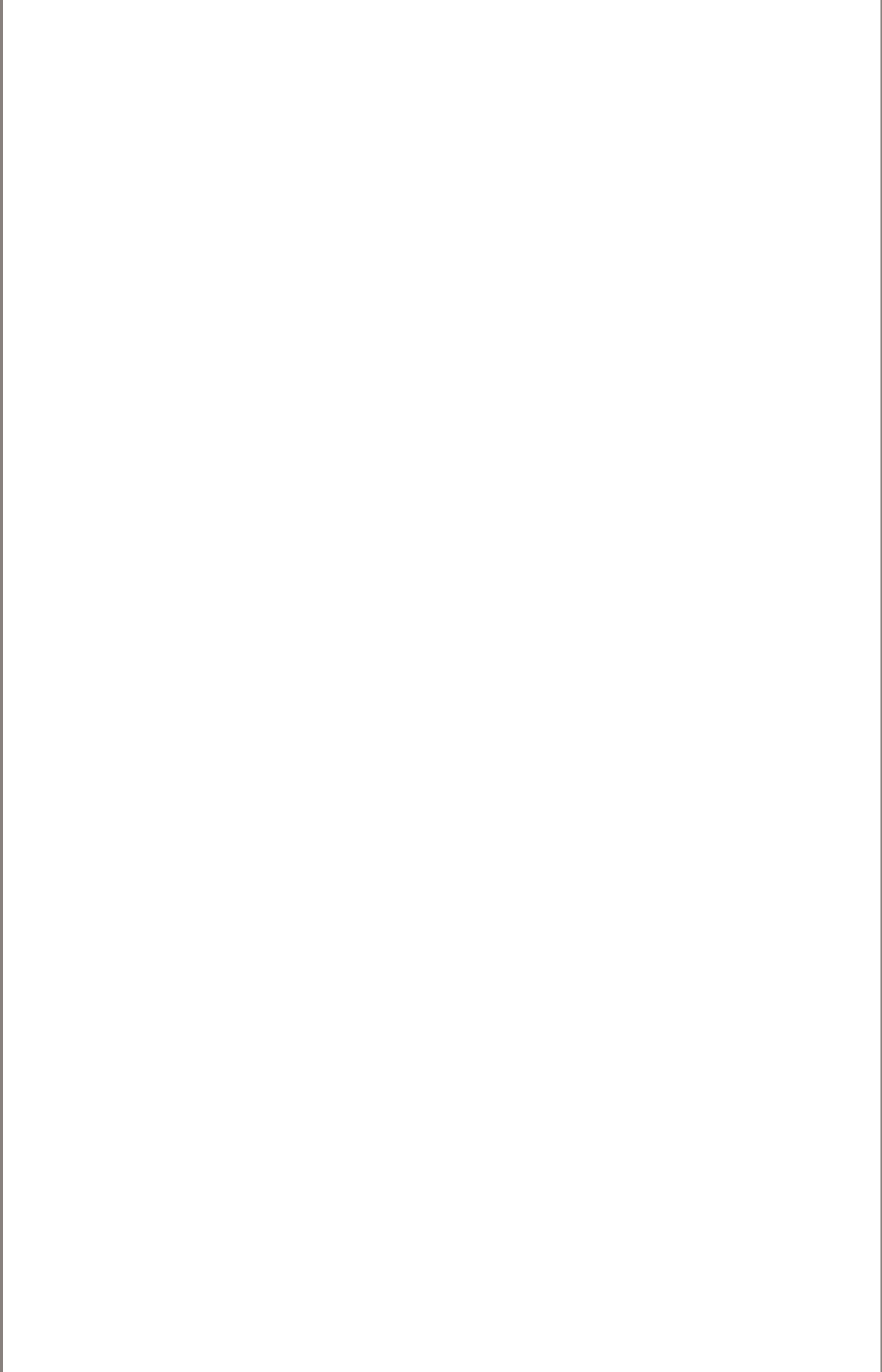
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Committing to the negotiating process will result in a speedier resolution for a fraction of the cost. Players need to keep that in mind to resist the temptation of taking their chances in court because, by focusing efforts on circumventing the nonstatutory labor exemption, they are likely hurting their chances of successful litigation.





HOW GROWING LEGISLATION GEARED TOWARDS RESTRICTING AMERICA'S EXPANDING WAIST LINES IS RESTRICTING CONSUMER CHOICE

RACHAEL WILLIAMS

I. INTRODUCTION

This note serves as a commentary on the evolution of government involvement in traditionally private consumer choice decisions in the government's efforts to battle the obesity epidemic. For adults, obesity is defined as having a body mass index (BMI) of 30 or higher.¹ Currently more than 33% of adults and 17% of children are considered obese.² Heightened regulations on food services implemented by city, state, and federal governments in order to combat obesity are creating an increasingly complex regulatory environment, potentially harming business, commerce, and consumer choice.

In this commentary, Part II will discuss how the government has historically addressed the dietary health of its citizens and how past regulations have formed the legal basis for more restrictive government food regulations today. Part III will focus on one of the most modern and controversial pieces of proposed health legislation, the New York City soda ban, and analyze the constitutional arguments for and against the ban that will impact future government action across the country. Part IV will discuss additional legal, economic, and social consequences of food regulations restricting citizens' dietary choices at the federal, state, and local levels. Finally, Part V concludes by addressing the potential impact the New York City soda ban decision will have on the future regulatory environment in combatting the obesity epidemic.

II. NOTEWORTHY BACKGROUND CASES AND LEGISLATION

A. *The Pelman Case*

Pelman v. McDonald's Corp. is best known as the catalyst for McDonald's removing "Supersize" meals from its menu in order to prevent against future lawsuits.³ *Pelman* was a landmark case because it

¹ See, Defining Overweight and Obesity, cdc (Apr. 27, 2012), <http://www.cdc.gov/obesity/adult/defining.html>.

² See, Morgan Korn, *Has the "War on Obesity" Gone Too Far?*, CNBC (Nov. 13, 2012, 4:45PM), http://www.cnbc.com/id/49810996/Has_the_039War_on_Obesity039_Gone_Too_Far.

³ See, Jacob Mattis, *Pelman v. McDonald's and the Fast Food Craze: Sending a Court to do a Man's Job*,

took on issues of “personal responsibility, consumer knowledge, public health, and the role of society in regulating the fast-food industry.”⁴ The case was filed in 2003 and was the first lawsuit in which consumers challenged the healthfulness of fast food companies’ products and its effect on consumer health.⁵

The plaintiffs in *Pelman* were two young girls whose parents asserted on their behalf that the girls’ obesity, diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake, and other problems were directly correlated to their intake of McDonald’s fast food.⁶ The plaintiffs’ legal arguments were largely rooted in state law, but certain legal theories could be widely applied across state lines in future similar lawsuits. The plaintiffs filed five counts against McDonald’s, with Counts I and II based on New York Consumer Fraud Protection statutory provisions and Counts III, IV, and V founded on common law tort liability doctrine. Generally, the parents claimed that their minor children sustained injuries in the form of health problems as a result of McDonald’s deceiving the public regarding the healthiness of its products.⁷

Count I alleged McDonald’s violated New York’s Consumer Fraud Protection statutory provisions⁸ by “misrepresenting—affirmatively and by omission—how healthy (or unhealthy) its products are.”⁹ The plaintiffs pointed to McDonald’s ads and statements as evidence of this misrepresentation.¹⁰ Count II, also citing consumer fraud provisions, asserted “that McDonald’s directed its marketing at children, falsely promoting its food as nutritious and failing to disclose the food’s adverse health effects.”¹¹ Count III stated that McDonald’s was negligent “in selling food products that are high in cholesterol, fat, salt and sugar when studies show that such foods cause obesity and detrimental health

UNIVERSITY OF HOUSTON LAW CENTER (March 22, 2004), <http://www.law.uh.edu/healthlaw/perspectives/Obesity/040322Pelman.html>.

⁴ *Id.*; see also, *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 518 (S.D.N.Y. 2003).

⁵ See generally, *Pelman* 237 F. Supp. 2d 512.

⁶ See, Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153, 174 (2004).

⁷ See, *Pelman*, 237 F. Supp. 2d at 520.

⁸ See, Jonathan Benloulou, *Pelman v. McDonald’s: An In-depth Case Study of Fast Food - Obesity Lawsuit*, Digital Access to Scholarship at Harvard, page 9, (April 2005), available at <http://dash.harvard.edu/bitstream/handle/1/8852143/Benloulou05.pdf?sequence=1>.

⁹ *Id.*; see also, Consumer Protection Act, N.Y. Bus. Corp. Law §§ 349-50 (LexisAdvance 2014); N.Y. City Admin. Codes, Ch. 5, §20-700 et seq. (2014).

¹⁰ See, Benloulou, *supra* note 8.

¹¹ *Id.* at 10.

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effects.”¹² Count IV, also grounded in tort law theory, alleged that “McDonald’s failed to warn the consumers of McDonalds’ products [that] a diet high in fat, salt, sugar and cholesterol could lead to obesity and health problems.”¹³ Lastly, Count V claimed that McDonald’s “negligently, recklessly, carelessly, and/or intentionally” distributed and marketed “food products that were physically and psychologically addictive.”¹⁴

In response to the plaintiffs’ complaint, McDonald’s refuted their claims under the following theories: (1) Count I fails because the plaintiffs did not “plead with sufficient specificity” and McDonald’s “acts or practices ‘cannot be deceptive if the consuming public is already aware of the ‘concealed’ characteristics’”¹⁵; (2) Count II fails because its ads directed towards children were mere “product puffery” that could not reasonably mislead minor consumers¹⁶; and (3) Counts III, IV, and V fail because McDonald’s owes no duty towards the plaintiffs and there exists no “proximate causal link between [McDonald’s] act and the plaintiff’s injury.”¹⁷ McDonald’s also stated that the “claims are pre-empted by federal law” under the Federal Nutritional Labeling and Education Act¹⁸ because McDonald’s satisfied the federal requirements for disclosing the nutritional value of its products.

Ultimately, the court found for McDonald’s due to the plaintiffs’ lack of specificity regarding the frequency that the girls consumed McDonald’s and the plaintiffs’ failure to demonstrate that “a McDiet is a substantial factor [in the girls’ health problems and weight gain] despite other variables.”¹⁹ However, the *Pelman* decision is important because it established that “the federal courts do not consider obesity lawsuits to be as frivolous” as the fast food industry and consumers may have believed.²⁰ It paved the way for future legislation restricting otherwise lawful food products on the basis of protecting consumers from making unhealthy diet

¹² *NY Dismisses First Fast Food Lawsuit*, The Law, Science, and Public Health Law Cite, http://biotech.law.lsu.edu/cases/food/Pelman_v_McDonalds_SDNY_brief.htm [hereinafter *NY Dismisses*].

¹³ *Id.*

¹⁴ *See*, Benloulou, *supra* note 8, at 13.

¹⁵ *See*, *NY Dismisses*, *supra* note 12.

¹⁶ *See*, Benloulou, *supra* note 8 at 10.

¹⁷ *Id.* at 12.

¹⁸ *See*, *NY Dismisses*, *supra* note 12 at 175; *see also*, Federal Nutritional Labeling and Education Act, 21 U.S.C. § 343(q).

¹⁹ *See*, Andrews, *supra* note 6, at 175.

²⁰ *Id.*

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decisions. From the *Pelman*²¹ court's language, it was clear that courts could potentially hold restaurants responsible for the long-term weight and health problems of their consumers, so long as future plaintiffs could prove the link between eating at a certain establishment and their health problems. Eventually, *Pelman* served as the legal basis for courts and government bodies to further restrict the fast food industry's products and marketing.

B. San Francisco v. McDonald's Happy Meal Toys

Prior to the pending New York City soda ban attempting to ban large sizes of sugary drinks for all consumers, discussed in Part III, arguments for similar bans relied on the inability of children in particular to choose healthy foods in the face of marketing ploys from companies selling unhealthy products geared towards children.

In 2010, consumer advocacy group, Center for Science in the Public Interest, and mother, Monet Parham, filed suit against McDonald's to stop the business from selling toys in Happy Meals and prohibit McDonald's from marketing its Happy Meals to children in the State of California.²² The plaintiffs originally filed suit in the Superior Court of California in the county of San Francisco.²³ McDonald's fought to remove the case to federal court because federal courts are "generally viewed by corporate defendants as friendlier than state court."²⁴ However, the district court judge sent the case back to state court because, "McDonald's had not met the standard to defend the case in federal court."²⁵

Similarly to the *Pelman* case in New York, the plaintiffs argued that McDonald's marketing of Happy Meals violated California's consumer protection laws and sought declaratory and injunctive relief to prevent McDonald's from engaging in marketing practices directed towards children. The plaintiffs alleged that McDonald's "engage[d] in the unfair, unlawful, deceptive, and fraudulent practice of promoting and advertising McDonald's Happy Meal products to very young California children, using the inducement of various toys."²⁶ The plaintiffs further supported

²¹ *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 538 (S.D.N.Y. 2003).

²² *UPDATE 2-McDonald's loses bid to move Happy Meal lawsuit-judge*, REUTERS, (July 20, 2011, 3:08PM), <http://www.reuters.com/article/2011/07/20/mcdonalds-lawsuit-idUSN1E76J0XM20110720>.

²³ *See*, *Parham v. McDonald's Amended Class Action Complaint* 2011 WL 162213 (Cal. Superior (Trial Pleading)).

²⁴ *See*, *UPDATE 2*, *supra* note 22.

²⁵ *Id.*; *see also*, *Parham*, CGC-10-506178.

²⁶ *See*, *Parham*, *supra* note 23.

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their arguments with long-established federal law that “advertising that is not understood to be advertising is misleading to consumers . . . and the public is entitled to know when and by whom it is being persuaded.”²⁷ McDonald’s subsequently filed a motion to dismiss the lawsuit for failure to state a claim upon which relief could be granted. On April 4, 2012, Superior Court Judge Richard Kramer dismissed the suit.²⁸

Following dismissal, on November 2, 2010 the San Francisco Board of Supervisors enacted an ordinance banning companies within the city limits from putting toys in kids meals unless the meals met certain nutritional requirements:²⁹ the meals must not exceed a predetermined amount of fat, sodium, and calories, and must also include a serving of fruit or vegetables.³⁰ According to the Board’s website, ordinances are defined as “legislation which amend municipals codes and make laws.”³¹ Therefore, the toy ban has the same effect as law within the city. The San Francisco Board of Supervisors, elected by district, voted eight to five to implement the ordinance.

C. The Federal Nutritional Labeling and Education Act & Patient Protection and Affordable Health Care Act

The 1990 Federal Nutritional Labeling and Education Act (NELA) amended the Food, Drug, and Cosmetic Act (FD&CA) by establishing more detailed requirements for nutrition labeling and information on food products.³² Because NELA is a federal law, it “preempts state food labeling laws . . . [and] prohibits states from establishing or enforcing labeling requirements that are different from federal law.”³³ In addition, NELA further supersedes state nutrition law by “prohibit[ing], subject to exception, a state from establishing or enforcing any requirement for a food that is subject of a standard of identity or a labeling requirement that is not identical to the federal act.”³⁴ While NELA insures food companies

²⁷ *Id.*

²⁸ Complaint, *Monet Parham v. McDonalds Corp., et al.*, 2012 WL 1129911 (Cal. Superior 2012).

²⁹ See, Sharon Bernstein, *San Francisco bans Happy Meals*, L.A. TIMES, Nov. 2, 2010, available at <http://articles.latimes.com/2010/nov/02/business/la-fi-happy-meals-20101103>.

³⁰ See, *San Francisco Bans the Happy Meal*, HUFFINGTON POST Nov. 2, 2010, http://www.huffingtonpost.com/2010/11/02/san-francisco-happy-meal-ban-mcdonalds_n_777939.html.

³¹ Legislation Passed, City and County of San Francisco Board of Supervisors, available at <http://www.sfbos.org/index.aspx?page=2285>.

³² See, Daniel Duffy, *INGREDIENT LABELING LAWS*, OLR RESEARCH REPORT, June 5, 2008, available at <http://www.cga.ct.gov/2008/rpt/2008-R-0334.htm>.

³³ *Id.*

³⁴ *Id.*

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must place Federal Drug Administration (FDA) approved nutrition labels on their products, current federal legislation has upped the standard for companies to provide nutritional information to consumers through Section 4205 of the Patient Protection and Affordable Health Care Act (Health Care Act).

On March 23, 2010, President Obama signed into law the Health Care Act.³⁵ Following legal challenges, the Supreme Court ruled the Health Care Act constitutional on June 28, 2012.³⁶ Section 4205 of the Health Care Act goes beyond the Federal Nutritional Labeling and Education Act by extensively regulating the location and manner in which nutritional information must be presented on food establishments' properties, whereas previously the FDA only required nutrition labels on food products. The federal government implemented Section 4205 of the Health Care Act in the effort to combat rising obesity rates in the United States.

Section 4205 is momentous because it enables the government to dictate to private businesses on private property certain nutritional information requirements that must be displayed on menu boards and menus.³⁷ Specifically, Section 4205 gives the federal government the power to dictate the required type size, color, and location of calorie content and nutrition information on menu boards³⁸ of "pizzeria, grocery, or convenience store[s] with more than 20 locations."³⁹ The Federal Drug Administration (FDA) is responsible for proposing specific regulations arising under Section 4205. The FDA proposed regulations in April 2012 and will begin enforcing the new regulations after it allows enough time for Citizens to submit comments and suggestions.⁴⁰ However, certain companies, such as McDonald's, have already taken the initiative to post calorie content on its menu boards before the FDA

³⁵ Sheryl Gay Stolberg and Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish, Money and Policy*, N.Y. TIMES, March 23, 2010, available at http://www.nytimes.com/2010/03/24/health/policy/24health.html?_r=0.

³⁶ Adam Liptak, *Supreme Court Upholds Health Care Law, 5-4, in Victory for Obama*, N.Y. TIMES, June 28, 2012, available at <http://www.nytimes.com/2012/06/29/us/supreme-court-lets-health-law-largely-stand.html?pagewanted=all>.

³⁷ *Proposed FDA Regulations to Require "Chain Restaurants" to Post Nutrition Information*, JONES DAY, Sept. 26, 2012, available at http://www.jonesday.com/proposed_fda_regulations/.

³⁸ FDA U.S., *New Menu and Vending Machines Labeling Requirements*, June 28 2012, www.fda.gov/food/labelingnutrition/ucm217762.htm [hereinafter *Labeling Requirements*].

³⁹ *Nanny State: Obamacare Now Regulating Pizza*, MINORITY REPORT, Nov. 19, 2012, <http://www.theminorityreportblog.com/2012/11/19/nanny-state-obamacare-now-regulating-pizza/>.

⁴⁰ See, *Labeling Requirements*, *supra* note 38.

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begins enforcing the regulations, although these menu boards will likely need to be altered after the FDA sets specific standards.⁴¹

Section 4205 is significant because it demonstrates that the federal government will begin taking a more active role in establishing regulations aimed towards battling the obesity epidemic, and new regulation is sure to go beyond local and state bans on “unhealthy” products. Perhaps most importantly, because federal law preempts state law and city ordinances, Section 4205 will preempt state and city regulations that already regulate menu-labeling requirements because “[s]tates and their subdivisions are now precluded from establishing ‘any requirement for nutrition labeling of food that is not identical to the [federal] requirement[.]’”⁴² The country is moving towards increased local, state, and federal regulation of the nutritional value of food products and is placing new importance on measuring the impact, if any, new regulations will have on consumer diets. However, if calorie posting does not impact the healthiness of consumer choices and slow the rise in obesity, the federal government will likely increase pressure on businesses by implementing restrictions on the volume of products sold and prohibiting persuasive marketing⁴³ of “unhealthy” food products to particular target segments, such as children.

The Health Care Act and NELA have further implications in lawsuits against the food industry based on consumer health issues and corporate marketing ploys, because the Acts raise federalism issues. For example, it is unclear whether consumers filing future suits citing obesity problems from food products, similar to *Pelman*, will be successful as long as the companies abide by federal laws. While the federal government’s approach so far has been to require increased transparency of food nutritional content, localities have implemented blanket bans on items restricting private consumer choice and impeding certain marketing tactics of otherwise lawful products. If food establishments are in compliance with the new detailed federal requirements on nutrition information availability for the customer at the time of purchase, can consumers still claim that they did not have enough information regarding the healthfulness of the food they were consuming, or the corporations deceived them into unhealthy eating practices through marketing?

⁴¹ See, Marion Nestle, *McDonald's will post calorie info on menus. Won't it have to anyway?*, FOOD POLITICS, Sept. 13, 2012, <http://www.foodpolitics.com/tag/calorie-labeling/>; see also, Proposed FDA, *supra* note 37.

⁴² Proposed FDA, *supra* note 37.

⁴³ Stephanie Rosenbloom, *Calorie Data to Be Posted at Most Chains*, N.Y. TIMES, March 23, 2010, available at http://www.nytimes.com/2010/03/24/business/24menu.html?_r=0.

D. Current Federal USDA Regulations in Schools

While certain cities are restricting the volume of portions sold and governing how companies market their food products within the city limits, the federal government is directly focusing on children through federally funded school food programs. In an effort to combat childhood obesity, the United States Department of Agriculture (USDA), along with First Lady Michelle Obama and Agricultural Secretary Tom Vilsak, announced on November 21, 2012 that the USDA established new nutritional requirements for school lunches funded with federal dollars.⁴⁴ The new meal requirements, expected to cost \$3.2 billion over the next five years,⁴⁵ are part of the Healthy, Hunger-Free Kids Act that President Obama signed into law on December 13, 2010.⁴⁶ The new revisions impose per meal calorie limits for the first time in the federal school lunch program's history⁴⁷ and are the first major modifications of the program in nearly fifteen years.⁴⁸ The regulations mandate that schools serve younger students meals containing no more than 650 calories and limit high school students to 850 calories per serving.⁴⁹

However, opponents of the new regulations, such as Representatives Steve King (R-Iowa) and Tim Huelskamp (R-Kansas), have "introduced a bill that would repeal the age-aligned calorie maximums imposed by [the] new USDA school lunch guidelines."⁵⁰ Rep. King explained that while "[t]he goal of the school lunch program was — and is — to ensure students receive enough nutrition to be healthy and to learn,"⁵¹ the new guidelines wrongly put every child on a diet when not all children need to

⁴⁴ United States Department of Agriculture Food and Nutrition Service, *USDA Unveils Historic Improvements to Meals Served in America's Schools*, Jan 25, 2012, <http://www.fns.usda.gov/cga/pressreleases/2012/0023.htm>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Students, staff struggle with new school lunch regulations*, REDWOOD FALLS GAZETTE, Nov. 22, 2012, <http://www.redwoodfallsgazette.com/article/20121122/NEWS/121129943/1001/NEWS>.

⁴⁸ *Id.*

⁴⁹ *Id.*; see also, *New School Lunch Guidelines Take Effect This Fall*, FOOD MANUFACTURING (Aug. 21, 2012), <http://www.foodmanufacturing.com/news/2012/08/new-school-lunch-guidelines-take-effect-fall> (last visited Mar. 24, 2014).

⁵⁰ See, *School Lunch Calorie Maximums Protested By Students As House Republicans Introduce Bill To Repeal USDA Rules*, HUFFINGTON POST EDUCATION (Sept. 18, 2012), http://www.huffingtonpost.com/2012/09/18/house-republicans-introdu_n_1893936.html (Students protest against calorie restrictions by bringing food from home).

⁵¹ *Id.*

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be on a diet.⁵² Also, strict calorie restrictions are not appropriate for every student because under the USDA regulations, portions must be the same “whether served to a six foot, 200-pound athlete or a 120-pound professional student.” Although fruits and vegetables are unlimited, students cannot ask for second servings of any other food group.⁵³

The new USDA mandates have unintended economic consequences for schools, manufacturers, and food distributors providing school lunches. The schools risk losing federal funding if they fail to meet even the smallest of goals, as schools must “serve each student one cup of potato a week — whether the student wants it or not” and guarantee “each lunch include half a cup of fruits and vegetables per day for elementary students, three quarters cup for students in grades six through eight, and a full cup for high-school students.”⁵⁴ These stringent regulations result in unnecessary “increased expense and waste.”⁵⁵ In order to combat waste problems from students throwing mandatory healthy food away and bypass the restrictive mandates without losing federal funding, some schools are serving an “a-la-carte” section in which students pay directly out of pocket, and the food servings are not subject to the same regulations.⁵⁶

The USDA regulations have a profound economic impact on food manufacturers and distributors. For example, the new National School Lunch Program regulations will have a negative impact on companies that had already been providing schools with nutritional lunches. These companies are finding the mandates extremely difficult to meet and discovering the inflexible nutritional requirements can have the exact opposite effect on the quality of food. For example, Choicelunch is a private service that allows schools and parents to choose a lunch made with fresh ingredients and have the lunch delivered directly to the school. Choicelunch’s founder, Justin Gagnon, stated that the new USDA regulations “simply do not support programs that offer choices. Menu planning when you’re using fresh, real ingredients is hard enough.” He explains how in practice “it is nearly impossible to actually execute on a solid menu with real choices and still nail every single one of [the federal

⁵² *Id.*

⁵³ *Students, staff struggle, supra note 47.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

government's] requirements."⁵⁷

Choicelunch's founder also details ways in which other companies will cut corners in order to steady rising costs incurred as a result of the new regulations. He explains that in order to "hit the increased calorie requirements for the older [student] grades without increasing the maximums of grain and proteins commensurately," companies will turn to fat, even though "the impact of adding a 9-calorie gram of fat is over double that of a 4-calorie gram of protein or carb." He says, "What the maximums are really going to do is force the manufacturers to add more additives and fillers, ala Taco Bell and its 35% beef lawsuit."⁵⁸ Subsequently, the students are "stuck with whatever menu configuration the school can get to check off all the boxes with the regulations," resulting in those districts following the National School Lunch Program wondering "why they can't get better participation from their paid students."⁵⁹ Essentially, the USDA regulations are too difficult for the schools and the students to follow, and participation is declining while food waste is increasing.

If students are not buying school lunches because they do not like what is being served to them, the school districts will end up bearing the expense.⁶⁰ For example, in some districts "as many as half the students stopped buying [school] meals . . . creat[ing] tens of thousands of dollars in deficits."⁶¹ Some school districts could no longer afford to waste money on food that students would not purchase or eat and have opted out of the school lunch program. However, schools in poverty stricken areas cannot afford to opt out of federal subsidies because for many students school lunch is their only meal of the day.⁶² For schools in areas with high poverty levels, hitting lofty nutritional requirements is far less important than being able to afford to serve children food at all—yet low-income

⁵⁷ Dana Woldow, *New USDA School Lunch Rules Limit Even Healthy Choices*, BEYOND CHRON (Aug. 7, 2012), <http://www.beyondchron.org/news/index.php?itemId=10381#more>.

⁵⁸ Sophia Johnson, *Choicelunch founder explains new USDA school lunch rules*, CHOICELUNCH (Aug. 13, 2012), <http://www.choicelunch.com/kids-nutrition/justins-interview-on-the-new-usda-school-lunch-rules>.

⁵⁹ *Id.*; see also, *School Lunch Calorie Maximums Protested By Students As House Republicans Introduce Bill To Repeal USDA Rules*, HUFFINGTON POST EDUCATION, Sept. 18, 2012, http://www.huffingtonpost.com/2012/09/18/house-republicans-introdu_n_1893936.html.

⁶⁰ See, *Some School Districts Opt Out Of National School Lunch Program*, FOX PHILLY, (Feb. 18, 2013), <http://www.myfoxphilly.com/story/21235211/some-school-districts-opting-out-of-national-school-lunch-program>.

⁶¹ *Id.*

⁶² *Id.*

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neighborhood schools must find a way to reach nutritional goals or risk losing funding.

It is likely only a matter of time before the USDA publishes a “national menu”⁶³ or forces schools to ban students from bringing in lunch from home in order for the school to receive federal funding. Some schools have already banned students from bringing food from home,⁶⁴ and it is not a stretch to think the federal government could require the same. After all, excluding the food stamp program, which costs the government \$27 billion, the federal school lunch program is the most expensive federal food program, costing \$9.8 billion dollars when totaling school lunch, breakfast, and food commodities programs.⁶⁵

Originally, the federal government created programs providing meals to schools in order to feed hungry school children from struggling families.⁶⁶ The school lunch program, while previously accused by critics of helping spread obesity, “is now being called on to cure obesity.”⁶⁷ Using federal school lunch programs to help eradicate obesity in children is ironic “given that the original goal of child nutrition programs was to ensure that poor children received enough to eat”⁶⁸ Considering that students’ “preference for foods that are bound to make them fatter is [likely] established outside the school system,”⁶⁹ schools have an uphill battle ahead of them as they continue to share the blame with fast food companies for contributing to unhealthy children.

III. THE NEW YORK CITY SODA BAN

A. *Facts And Procedural History*

On September 13, 2012, in an effort to “reduce runaway obesity rates,”⁷⁰ Mayor Bloomberg of New York City with the New York City

⁶³ See, Dana Woldow, *Choicelunch founder explains new USDA school lunch rules*, BEYOND CHRON (Aug. 13, 2012), http://www.beyondchron.org/articles/Choicelunch_founder_explains_new_USDA_school_lunch_rules_10397.html.

⁶⁴ See, Ethan A. Huff, *Public school bans students from bringing lunches from home, forces them to eat cafeteria food*, NATURAL NEWS (April 12, 2012), http://www.naturalnews.com/032047_public_schools_cafeteria_food.html.

⁶⁵ Ron Haskins, *The School Lunch Lobby*, EDUCATION NEXT, Summer 2005, Vol. 5, No. 3, <http://educationnext.org/the-school-lunch-lobby/>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Michael N. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES,

Board of Health passed a new regulation banning the sale of large sodas and other drinks full of sugar in “restaurants, fast-food chains, theaters, delis and office cafeterias.”⁷¹ Specifically, the drinks may no longer be sold in containers larger than sixteen ounces.⁷² The American Beverage Association (ABA) pushed back by running ads telling consumers to “make their own choices” concerning their diet, as the ABA stands to “lose millions of dollars in revenue” if the law is upheld.⁷³ On October 12, 2012, the soda industry, represented by the American Beverage Association and others, sued the New York City Department of Health and Hygiene in the Supreme Court of New York, seeking the judge to block the ban from going into effect.⁷⁴ Opponents of the ban were particularly angered because “the vote by the Board of Health was the only regulatory approval needed to make the ban binding in the city,”⁷⁵ as the Mayor did not put the proposal before the elected New York City Council for vote.

The regulation, deemed the “soda ban,” was set to take effect on March 12, 2013.⁷⁶ However, on March 11, 2013, one day before the ban would have gone into effect, Judge Milton Tingling ruled in favor of the ABA, invalidating the law as “fraught with arbitrary and capricious consequences.”⁷⁷ Judge Tingling held that the law not only violated the separation of powers doctrine but also “eviscerated” it, as Mayor Bloomberg failed to bring the law before City Council and held the issue for vote before the city’s Board of Health, whose members the Mayor appointed himself.⁷⁸ On July 30, 2013, the mid-level state appeals court

(Sept. 13, 2012), available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>.

⁷¹ James Joyner, *Bloomberg Big Soda Ban Dumber Than We Thought*, OUTSIDE THE BELTWAY (Feb. 25, 2013), <http://www.outsidethebeltway.com/bloomberg-big-soda-ban-dumber-than-we-thought/>.

⁷² haffajee, *Soda Industry Sues to Block NYC Ban on Sugar-Sweetened Beverage Sales*, HARVARD LAW PETRIE-FLOM CENTER (Oct. 15, 2012), <http://blogs.law.harvard.edu/billofhealth/2012/10/15/soda-industry-sues-to-block-nyc-ban-on-soda-sales/>.

⁷³ Michael M. Grynbaum, *60% in City Oppose Bloomberg’s Soda Ban, Poll Finds*, N.Y. TIMES, Aug. 22, 2012, available at http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html?_r=1&.

⁷⁴ Harvard Law Blog, *supra* note 72.

⁷⁵ See, Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>.

⁷⁶ *Id.*

⁷⁷ See Michael Howard Saul, *Judge Cans Soda Ban*, N.Y. TIMES, March 11, 2013, available at, <http://online.wsj.com/news/articles/SB10001424127887323826704578354543929974394>

⁷⁸ *Id.*

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affirmed Judge Tingling's ruling, reiterating that that ban violated the separation of powers doctrine.⁷⁹ The appeals court stated that the ban's inconsistencies go "beyond health concerns, in that it manipulates choices to try to change consumer norms"⁸⁰ and loopholes would have exempted grocery stores and convenience stores, rendering the ban arbitrary under a rational basis review. The highest court of New York, the Court of Appeals, will hear the city's appeal later in 2014.⁸¹

The ABA's specific causes of action are the following: (1) The New York City Charter "does not delegate the necessary enumerated powers to the DOH [Department of Health] to implement such a ban"; (2) Even if the Charter does delegate to the DOH the power to enact the ban, "such delegation [by the legislative branch to the executive branch] is unconstitutional as in violation of the separation-of-powers doctrine (i.e., the legislature cannot cede its fundamental policy-making responsibility to an administrative agency)"; and (3) The ban fails under a "rational basis review given its arbitrary features that are unrelated to [its] stated purpose (e.g., cutoff at 16 oz size, exclusion of alcohol, and application to certain food establishments but not grocery or conveniences stores)."⁸²

B. *Future Implications*

The significance of Mayor Bloomberg's pending soda ban reaches far beyond the City of New York, as the ban has received widespread publicity in the news media. The ban has increased concern among consumers and the food industry that city mayors and health boards will follow New York's lead by imposing burdensome legislation in efforts to combat obesity. As previously discussed, cities such as San Francisco have already taken steps to control consumer diet choices and restrict business marketing practices through city boards. Certain proponents of holding the fast food industry accountable for consumer health problems, such as Forrest Lee Andrews in his commentary entitled "Small Bites: Obesity

⁷⁹ Julia Marsh, *Appeals court upholds ruling slapping down Mayor Bloomberg's soda ban*, July 30, 2013, N.Y. POST, available at <http://nypost.com/2013/07/30/appeals-court-upholds-ruling-slapping-down-mayor-bloombergs-soda-ban/>.

⁸⁰ *Id.*

⁸¹ Daniel Wiessner, *New York court to hear Bloomberg's appeal to restore soda ban*, REUTERS, Oct. 17, 2013, <http://www.reuters.com/article/2013/10/17/us-nycsodaban-appeal-idUSBRE99G0T620131017>.

⁸² See, Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>; see also, Notice of Verified Petition, N.Y. Statewide Coal. Of Hispanic Chambers of Commerce v. N.Y. Dep't of Health and Hygiene, 970 N.Y.S.2d 200 (N.Y. App. Div. 2013).

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Lawsuit Prepare to Take on the Fast Food Industry,” assert that “lawsuits which place the responsibility of products safety in the hands of the industry that creates these products are a sign that our government is responsive to the masses.”⁸³ However, in most cases a limited city board is hardly representative of the will of the masses. For example, the New York Times conducted a poll on the New York City soda ban, where “[s]ix in 10 residents said the mayor’s soda plan was a bad idea, compared with 36 percent who called it a good idea” and “[a] majority in every borough was opposed.”⁸⁴

Following New York City’s large public outcry over the ban and the ongoing contentious litigation, “[p]ublic health experts around the nation - and the restaurant and soft-drink industry - will be watching closely to see whether the new restrictions will make a difference and lead to changes in the way New Yorkers eat and drink.”⁸⁵ Particularly, if the ban is eventually implemented and fails to curb obesity, one major fear is that the government will impose taxes on unhealthy foods as a means of compelling people to make healthier choices. Although not a tax, bans like the soda ban can still have a substantial negative impact on the local economy because, according to the spokesperson for the New York State Restaurant Association, bans “discourage new business and hurt [New York City’s] reputation as the dining capital of the world.”⁸⁶ Excessive regulations place increased economic burdens on businesses and create greater complexity, “making it harder for businesses to function.”⁸⁷

While the ABA in the New York soda ban lawsuit cites specifically to New York law, the ban also raises general constitutional law principles under which state restrictions on consumer choices may be analyzed. In Part II, this commentary dealt with arguments based in consumer protection laws, tort common law, and preemptive federal laws restricting the sale of lawful food products. Now, this commentary will explore constitutional law arguments against excessive consumer restrictions in detail below.

⁸³ See, Forrest Lee Andrews, *Small Bites: Obesity Lawsuits Prepare to Take on the Fast Food Industry*, 15 ALB. L.J. SCI. & TECH. 153 (2004).

⁸⁴ See, Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Bloomberg’s Soda Ban, Poll Finds*, N.Y. TIMES, Aug. 22, 2012, available at <http://www.nytimes.com/2012/08/23/nyregion/most-new-yorkers-oppose-bloombergs-soda-ban.html>.

⁸⁵ See, *New York City’s Sugar Drink Limits: What’s Next?* CBSNEWS.COM, Sept. 14, 2012, http://www.cbsnews.com/8301-504763_162-57513268-10391704/new-york-citys-sugary-drink-limits-whats-next/.

⁸⁶ *Id.*

⁸⁷ *Id.*

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C. Constitutional Arguments

i. The Commerce Clause

An important potential argument against the soda ban and similar regulations that can be applied across state lines is that the ban is unconstitutional under the Commerce Clause.⁸⁸ Under Article 1, Section 8 of the Constitution, Congress has the right “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁸⁹ City governments cannot “pass laws that . . . impose [excessive] burdens on the free flow of commerce between states . . . Only Congress can impose burdens on commerce.”⁹⁰ Opponents of Mayor Bloomberg argue that the ban violates the Commerce Clause because the volume restrictions on the soda containers “would require manufacturers to make different size servings and distribution methods,”⁹¹ resulting in undue burdens on the free flow of commerce between the states.

However, raising the Commerce Clause could fail “because states clearly have the ability to regulate what [its citizens] consume . . . That [is] why states can be dry and not allow alcohol. [States] can have different drug laws and different speed limits.”⁹² The soda ban has also been equated to city laws banning cigarette smoking in public places,⁹³ requiring chain restaurants to post calorie counts on their menus, and requiring restaurants to display their health grade in plain view for consumers.⁹⁴ All three of the aforementioned laws survived legal challenges and are generally accepted by the public as within the scope of municipalities’ legal power, although Mayor Bloomberg and the New York Board of Health did previously “[loose] a legal battle over [requiring] graphic signs designed to show the health effects of smoking”

⁸⁸ Victoria Bekiempis, *Is Mayor Michael Bloomberg’s Supersized Soda Ban Unconstitutional?*, VILLAGE VOICE BLOGS (June 14, 2012, 4:29 PM), http://blogs.villagevoice.com/runninscared/2012/06/mayor_michael_bloomberg_supersize_soda_ban.php.

⁸⁹ U.S. CONST. art. I, § 8, cl. 3.

⁹⁰ Bekiempis, *supra* note 88.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Paul Samakow, *Soda ban sense and nonsense*, WASH. TIMES, Sept. 15, 2012, <http://communities.washingtontimes.com/neighborhood/leading-edge-legal-advice-everyday-matters/2012/sep/15/soda-ban-sense-and-nonsense/>; *see also*, *The NYC Ban From a Legal Perspective*, RES IPSA BLOGGER (June 8, 2012), <http://resipsablogger.wordpress.com/2012/06/08/the-nyc-soda-ban-from-a-legal-perspective/>.

⁹⁴ *See*, *The NYC Ban From a Legal Perspective*, RES IPSA BLOGGER (June 8, 2012), <http://resipsablogger.wordpress.com/2012/06/08/the-nyc-soda-ban-from-a-legal-perspective/>.

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to be displayed in all tobacco retailers.⁹⁵

While “[t]he Supreme Court has interpreted the [Commerce] clause to mean that states cannot take actions that harm interstate commerce,” proponents of the ban believe the ban does not hinder interstate commerce.⁹⁶ However, “interstate commerce is defined as the free exchange of commodities among citizens of different states across state lines,” and “soda industry representatives could argue that the soda ban unduly harms producers that ship soda syrup and cups from other states into New York.”⁹⁷

ii. Equal Protection and Substantive Due Process

The second viable legal claim against regulations such as New York City’s soda ban is a Fourteenth Amendment Equal Protection⁹⁸ and substantive due process claim.⁹⁹ The Fourteenth Amendment of the Constitution prohibits state governments from “depriving any individual of ‘life, liberty, or property, without due process of law.’”¹⁰⁰ Under a Fourteenth Amendment claim asserting that the government has imposed excessive restrictions on the sale of consumer goods under the guise of public health, the court will use a rational basis test. In order to succeed on a rational basis standard, the plaintiffs would need to prove that “the legislation has no reasonable connection to a legitimate and constitutionally sound objective.”¹⁰¹ The burden of proof is on the plaintiffs because under a rational basis review, the burden lies on the parties challenging the legality of the legislation.¹⁰² Courts have long

⁹⁵ David Howard King & Nina Goldman, *Beverage Industry Fight Against Soda Ban Just Beginning*, GOTHAM GAZETTE, July 24, 2012, available at <http://www.gothamgazette.com/index.php/topics/health-1420-soda-ban-war>; see also *Mayor Bloomberg, Deputy Mayor Gibbs And Health Commissioner Farley Celebrate Local, National And Global Impact Of Smoke-free Air Act On 10th Anniversary*, The Official Website of the City of New York, March 27, 2013, <http://www1.nyc.gov/office-of-the-mayor/news/114-13/mayor-bloomberg-deputy-mayor-gibbs-health-commissioner-farley-celebrate-local-national-and>.

⁹⁶ Samakow, *supra* note 93.

⁹⁷ See, Res Ipsa Blogger, *supra* note 94.

⁹⁸ Katie Booth, *Are There Any Good Legal Arguments to Overturn the NYC “Soda Ban”?*, HARVARD LAW BLOGS (Sept. 19, 2012), <http://blogs.law.harvard.edu/billofhealth/2012/09/19/are-there-any-good-legal-arguments-to-overturn-the-nyc-soda-ban/>.

⁹⁹ See, Alexis M. Etow, *No Toy For You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?*, 61 AM. U. L. REV. 1503 (2012).

¹⁰⁰ *Id.* at 1519.

¹⁰¹ Res Ipsa Blogger, *supra* note 94.

¹⁰² Etow, *supra* note 99, at 1520.

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established that “protecting the public health is a legitimate interest,”¹⁰³ and proponents of the ban would only be required to “cite a rational reason for the ban”¹⁰⁴ and would not need to “prove that the ban would lower consumption of soft drinks and consequently reduce obesity among New Yorkers.”¹⁰⁵

Although rational basis review is a low standard for the government to meet, bans that target only certain types of establishments may not survive under this review because of the very minimal impact such “underinclusive”¹⁰⁶ regulations have on public health. For example, the New York soda ban prohibits the sale of extra large soft drinks in certain businesses while allowing the sale of large drinks in arguably more convenient establishments such as convenience stores and supermarkets. Specifically, “[o]nly establishments that receive inspection grades from the health department, including movie theaters and stadium concession stands” are subject to the ban, while supermarkets, vending machines, newsstands, and “convenience stores, including 7-Eleven and its king-size Big Gulp drinks” are exempt.¹⁰⁷ Therefore, opponents of the ban contend that because the ban does not apply to arguably the biggest offenders of selling super size drinks, it will have no effect on soda consumption and fails to have a reasonable connection to the ban’s objective in curbing obesity.¹⁰⁸

IV. ANALYSIS OF UNDERLYING THEMES IN FOOD REGULATION

A. *Demonizing The Food Industry*

New regulations further restricting the sale of lawful products and limiting consumer freedom of choice in the name of public health are often justified using the case of the tobacco industry. Historically, the success of one government battle waged against a targeted industry (e.g. tobacco) serves as justification for increasing regulation on newly targeted

¹⁰³ Res Ipsa Blogger, *supra* note 94.

¹⁰⁴ Booth, *supra* note 98.

¹⁰⁵ Res Ipsa Blogger, *supra* note 94.

¹⁰⁶ Booth, *supra* note 98.

¹⁰⁷ See, Michael N. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES, Sept. 13, 2012, available at <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>.

¹⁰⁸ Res Ipsa Blogger, *supra* note 94.

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industries.¹⁰⁹ Even today, the bans, taxes, and limitations on tobacco have a large effect on current food regulations because “[f]or years, public health advocates have openly — and selectively — tried to demonize soda companies in language that compares them to cigarette companies.”¹¹⁰ Local prohibitions and federal regulations restricting businesses’ marketing and sale of alleged “unhealthy” foods must be closely evaluated, as overhauling the food industry has become the government’s most recent public health project.

For example, referring to “how people eventually embraced smoking bans,” New York City’s Health Commissioner stated, “If we can do that for . . . tobacco, we can certainly do that for obesity as well.”¹¹¹ The Mayor of Philadelphia, in agreement with the Commissioner, said, “The [food] industry needs to at least acknowledge that they are part of the problem.”¹¹² It has become increasingly apparent that businesses in the food industry selling unhealthy food and sugary drinks are being compared to tobacco companies selling cigarettes.¹¹³ Using the war on tobacco strategy in the fight against obesity is troublesome because it creates the perception that no industry is safe from being targeted as the latest “health hazard” by the government and other public officials:

Public health officials are consciously comparing their strategy of rules, regulations, and taxes on soda to those used against tobacco addiction; New York City’s [Board] vote today is one result. Papers and essays linking anti-tobacco strategies to obesity are all too common, yet few provide evidence that these strategies will work against a different target.¹¹⁴

However, the food and beverage industry, by providing what people want to eat in the sizes consumers find most convenient, should not be attacked as in the case of the tobacco companies. Unlike practicing cigarettes in moderation, most would agree that consumers might occasionally indulge in fast foods and soft drinks without serious health repercussions.

¹⁰⁹ David Gratzer, *Why Bloomberg’s War on Soda Will Fail*, HUFFINGTON POST, Sept. 13, 2012, available at http://www.huffingtonpost.com/david-gratzer/new-york-soda-ban_b_1880846.html.

¹¹⁰ *Id.*

¹¹¹ Susan Heavey, *New York City officials defend “supersize” drink ban*, REUTERS, June 7, 2012, <http://www.reuters.com/article/2012/06/08/us-usa-sugarban-IdUSBRE85703O20120608>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Gratzer, *supra* note 109; see also, Carolyn L. Engelhard et al., *REDUCING OBESITY: POLICY STRATEGIES FROM THE TOBACCO WARS*, STAN DORN URBAN INSTITUTE, July 2009, http://www.urban.org/UploadedPDF/411926_reducing_obesity.pdf.

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Further linking the war on obesity with the war on tobacco, the author of a scholarly article titled “Reducing Obesity: Policy Strategies From the Tobacco Wars” outlines specific strategies unique to the war on tobacco that should be employed to combat obesity. It is frightening that the author proposes the following strategies and laws for restricting business in the name of reducing obesity: “imposing excise or sales taxes on fattening food of little nutritional value,” “banning advertising and limiting the marketing of fattening food,” “limiting the sale of fattening food at schools, workplaces, and supermarket checkout counters,” and “identify[ing] the foods that may not be advertised to children and adolescents.”¹¹⁵ Because obesity is now considered a disease, it is preferable to target food industries as the root of the problem because criticizing the obese person for personal choices would be seen as insensitive.¹¹⁶ The path to sin taxes ultimately begins with the government and public “demonizing an industry,” as seen in the case of tobacco, by accusing the industry of “seeking profits by peddling poison” and “lur[ing] children into destructive habits.”¹¹⁷

B. Food Bans: Paving the Way for Future Taxes

The government generally has four legal options in limiting intake of certain foods:

- (1) “controlling the conditions of sale through direct restrictions or limits (especially aimed at youth);
- (2) raising prices through ‘sin taxes’;
- (3) government litigation against producers of unhealthy substances with damage awards earmarked for health care or healthy alternatives; and
- (4) regulating marketing and advertising.”¹¹⁸

While the soda ban is not a sin tax, the ban in practice costs consumers and businesses more money by forcing consumers to purchase additional smaller size containers and requiring businesses to purchase new legal size cups and modify marketing and distribution plans. If state and federal

¹¹⁵ See, Carolyn L. Engelhard et al., *REDUCING OBESITY: POLICY STRATEGIES FROM THE TOBACCO WARS*, Stan Dorn Urban Institute, July 2009, 4-5, http://www.urban.org/UploadedPDF/411926_reducing_obesity.pdf.

¹¹⁶ Rohan Kersh and James Monroe, *The Politics of Obesity: Seven Steps to Government Action*, *Health Affairs*, <http://content.healthaffairs.org/content/21/6/142.full>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

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governments continue to ban certain portion sizes of “unhealthy” food products and intervene in companies’ marketing of “unhealthy” foods, a sin tax does not seem too far away.

Sin taxes are already being discussed as a more effective way of curbing obesity. The reality behind taxing a product because one group has demonized it is that “[e]very sin tax makes sense to someone. In theory, we could craft millions of tiny little taxes to compensate for every ‘market failure’ we manage to uncover. But that’s impractical, so instead we pick and choose a few sin taxes that we find especially appealing.”¹¹⁹ Currently, many people working to fight obesity in the public health sector “have long argued that a tax on sugar-sweetened beverages would be one of the most effective measures the government could take to reduce calorie intake in the public.”¹²⁰

Yet advocates of sin taxes on certain food items should consider what occurred in Denmark. Denmark previously implemented a tax on certain fatty foods such as butter, cream, and cheese, and it was abolished because “authorities said the tax had inflated food prices and put Danish jobs at risk.”¹²¹ The Danish tax ministry stated, “The fat tax and the extension of the chocolate tax, the so-called sugar tax, has been criticized for increasing prices for consumers, increasing companies’ administrative costs and putting Danish jobs at risk.”¹²² According to the Danish Food Workers Union, the tax “led to a loss of 1,300 retail and manufacturing jobs” in Denmark.¹²³

Denmark’s tax was “the world’s first so-called ‘fat tax,’”¹²⁴ although France, Hungary, Israel, and other countries have considered or are in the process of considering taxes on fat or sugar.¹²⁵ France is discussing implementing a “Nutella Tax” because “[French] lawmakers argue that

¹¹⁹ Joseph J. Thorndike, *Tax.com*, Nov. 5, 2012, <http://www.tax.com/taxcom/taxblog.nsf/Permalink/JTHE-8ZRNAS?OpenDocument>.

¹²⁰ Joe Satran, *Soda Taxes Shot Down By Voters In Two California Towns*, THE HUFFINGTON POST, Nov. 8, 2012, http://www.huffingtonpost.com/2012/11/07/soda-taxes_n_2088170.html.

¹²¹ *Denmark to abolish tax on high-fat foods*, BB NEWS EUROPE, Nov. 10, 2012, <http://bbc.co.uk/news/world-europe-20280863>.

¹²² Olga Khazan, *What the world can learn from Denmark’s failed fat tax*, WASH. POST WORLD VIEWS, Nov. 11, 2012, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/11/what-the-world-can-learn-from-denmarks-failed-fat-tax/>.

¹²³ *Id.*

¹²⁴ Denmark, *supra* note 121.

¹²⁵ Khazan, *supra* note 122.

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palm oil, which is high in saturated fats, poses a threat to public health.”¹²⁶ However, when a country levies a small tax out of public health concerns for its citizens, the tax has unanticipated economic consequences in other countries. For example, the “Nutella Tax” would not only impact French citizens, but “the levy would quadruple — to 400 euros from 100 euros — (to \$509 from \$127) the import tax on Malaysian palm oil,”¹²⁷ crushing Malaysia’s palm oil industry.

One of the most important consequences of raising taxes, even temporarily, to solve a problem is “how long-term policy can be affected by the short-term state of the economy.”¹²⁸ For example, although Denmark repealed the fat tax, the very fact that it was implemented in the first place had lasting effects. The fat tax generated “an estimated _170 million (\$216 million) in 2012 in new revenue” for the government.¹²⁹ Therefore, when Denmark citizens voted to repeal the tax the government felt it was within its power to “slightly raise income taxes and reduce personal tax deductions to offset the lost revenue.”¹³⁰ Now, because the tax was once implemented, the people of Denmark are paying a higher income tax and the price of items such as butter, oil, sausage, cheese and cream increased 9%.¹³¹ Denmark demonstrates that sin taxes have long-term repercussions and lasting affects on the future economy that cannot always be predicted.

In California, voters in two midsized cities voted against a proposed “fat tax” that would have been levied citywide on soda sales.¹³² However, the news media blamed soda companies’ lobbying strategies and accused the companies of purposefully deceiving the constituents because “[t]he taxes would have been applied as a complicated tax on businesses instead of being levied directly on consumers at the point of sale.”¹³³ Typically when a business is taxed, the expense is passed down to consumers

¹²⁶ ‘Nutella Tax’ Could Raise Price Of Chocolate-Hazelnut Spread In France, HUFFINGTON POST, Nov. 12, 2012, available at http://www.huffingtonpost.com/2012/11/12/nutella-tax-france_n_2117272.html.

¹²⁷ Scott Johnson, *Bittersweet Chocolate News in Europe*, INTERNATIONAL HERALD TRIBUNE, Nov. 14, 2012, available at <http://rendezvous.blogs.nytimes.com/2012/11/14/bittersweet-chocolate-news-in-europe/>.

¹²⁸ Stephen J. Dubner, *Fans of a “Fat Tax” Will Be Saddened by the News From Denmark*, FREAKONOMICS.COM, Nov. 13, 2012, <http://www.freakonomics.com/2012/11/13/fans-of-a-fat-tax-will-be-saddened-by-the-news-from-denmark/>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Joe Satran, *Soda Taxes Shot Down By Voters In Two California Towns*, THE HUFFINGTON POST, Nov. 8, 2012, available at http://www.huffingtonpost.com/2012/11/07/soda-taxes_n_2088170.html.

¹³³ *Id.*

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through increases in the price of its products. The business will not simply absorb the cost typically because margins, particularly in the food industry, are already razor thin. Accordingly, “[t]he effect of any tax depends on the responses of both the consumer and producer. The burden of the tax will typically fall on the side of the market less-sensitive to price changes. In most cases, both parties will invariably absorb some portion of the tax.”¹³⁴ Although the soda ban is not an outright tax, it would pass the cost down to consumers in the form of a price increase in the product. The increase in price is necessary to accommodate the additional expenses the company generates in order to bring itself in compliance with the new standard.

If the New York Court of Appeals determines the New York City soda ban to be valid, consumers will be forced to pay more for smaller containers than for large containers. For example, consumers “would have to buy six 12-ounce cans at an average cost of \$7.50 to get an equivalent amount of a \$3 2-liter bottle.”¹³⁵ Also, businesses such as bowling alleys and nightclubs will no longer be able to serve soda or mixers in large pitches and carafes, creating unnecessary inconvenience and hurting sales.¹³⁶ Movie theatres will also take an economic hit, with certain independent theaters grossing “\$20,000 to \$30,000 less per year in beverage sales.”¹³⁷ Many local chains are waiting for the New York Court of Appeals decision in the pending lawsuit before implementing changes in soda sales, because the requirements are “very, very expensive from the printing, to the glassware to the server tips, everything [is] a trickle down when you make a decision like that.”¹³⁸ The environmental consequences of the ban have yet to be fully understood as well: consumers will buy more small containers to total one large container, creating waste from additional packaging and increased recycling and disposal costs.

¹³⁴ Brian Bass, *Effects of Taxes in Price Elasticity*, HOUSTON CHRONICLE, available at <http://smallbusiness.chron.com/effects-taxes-price-elasticity-22323.html>.

¹³⁵ Jessica Chasmar, *N.Y. Mayor Bloomberg bans 2-liter sodas with pizza delivery: report*, WASH. TIMES, Feb. 24, 2013, available at <http://www.washingtontimes.com/news/2013/feb/24/report-ny-mayor-bloomberg-bans-2-liter-sodas-pizza/#ixzz2Mged1mTB>.

¹³⁶ *Id.*

¹³⁷ Sandra Bookman, *Soda ban set to take effect on March 12*, ABCNEWS, March 4, 2013, http://abclocal.go.com/wabc/story?section=news/local/new_york&Id=9015439.

¹³⁸ *Id.*

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C. Conflicting Government Health Initiatives and Federal Farmer Subsidies

Ironically, “[t]he federal government has financed a multi-million dollar ad campaign in New York City and elsewhere attacking sugary soft drinks. But legislation passed [in June] continues subsidizing sugar producers, and allows food stamp recipients to buy soda and other supposedly unhealthy foods with taxpayer money.”¹³⁹ The excerpt below further describes the disparity between federal subsidies to farmers and government campaigns warning against the very products it is financially supporting. According to a report in the New York Times:

The U.S. Senate approved the 2012 “farm bill” last week with a few minor cuts to agriculture subsidies. But the sugar industry managed to preserve tariffs on the importation of sugar and domestic quotas that keep prices artificially high [in] an effort to maintain American sugar farmers’ profit margins. But while the federal government supports the production of sugar and the consumption of sugary foods, it has also spent tens of millions of dollars marked for economic recovery programs to attack the soda industry and discourage consumers from buying their products. In New York City, which [banned] soft drinks larger than 16 oz., the federal government has financed 87% of a \$2.8 million ad campaign linking soda to obesity.¹⁴⁰

While local, state, and federal governments are spending millions in efforts to get consumers to reduce their consumption of unhealthy products such as soda, government health efforts are in direct conflict with federal subsidies being given to the very farmers whose livelihoods depend on soda consumption.

Interestingly, “the federal government subsidizes sugar farmers to the tune of \$2 billion per year”¹⁴¹ and subsidizes corn that is later “made into high-fructose corn syrup.”¹⁴² Not to mention, “the three primary sources of fat in the typical American diet are red meat, plant oils, and dairy products. Producers of all three are subsidized or otherwise aided by

¹³⁹ Lachlan Markay, *Uncle Sam Simultaneously Attacks and Subsidizes Soda Consumption*, THE FOUNDRY, (July 2, 2012), <http://blog.heritage.org/2012/07/02/federal-government-attacks-and-subsidizes-soda-consumption/>.

¹⁴⁰ *Id.*

¹⁴¹ See, Betsy McKay, *What Role Should Government Play in Combatting Obesity*, N.Y. TIMES, Sept. 18, 2012, available at <http://online.wsj.com/article/SB10000872396390444812704577609482961870876.html> (quoting Michael D. Tanner).

¹⁴² *Id.*

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federal, state, and local authorities.”¹⁴³ Yet the government targets junk food and soda companies because these very industries have not historically received subsidies. Government bodies and public health officials also do not want to receive the public backlash of hurting demand for American farmers’ products, such as in the instance of California’s “Meatless Mondays” where senators and the National Cattleman’s Beef Association alike “called the move a ‘slap in the face’ to people who work hard everyday to raise livestock for human consumption.”¹⁴⁴

Finally, “[w]hen it comes to food, people don’t behave like we expect.”¹⁴⁵ Consumers do not tend to respond directly to taxes on products that have easily available alternatives. For example, Dr. Wansick’s of Cornell University “From Coke to Coors” study demonstrated that in Utica, New York, citizens bought less soda and more Coors beer in response to a six-month tax on soft drinks.¹⁴⁶

D. Freedom of Choice v. Public Good

In the frenzy to combat obesity, certain commentators are rushing to blame targeted food industries with statements such as the following: “The soda manufacturers can try to change the subject to a distorted view of what counts as freedom of choice, but the public should not be fooled. This is about disease and death, and about reining in the companies that profit from pretending otherwise.”¹⁴⁷ This opinion accuses soda companies from profiting from a product that the companies are aware is causing death among consumers and compares soda to a product as dangerous as tobacco or even alcohol. The author’s inflammatory language actually accuses soda companies of manipulating the public to purchase their products that will surely result in disease and death. However, the author fails to provide examples of soda companies encouraging consumers to obtain 100% of their nutrition from sodas. Just as milk or orange juice, consuming too much of any one food or beverage

¹⁴³ See, Rohan Kersh and James Monroe, *The Politics of Obesity: Seven Steps to Government Action*, *Health Affairs*, <http://content.healthaffairs.org/content/21/6/142.full>.

¹⁴⁴ See, James Johnson, *USDA Calls For “Meatless Monday” And Receives Backlash From Meat Producers*, *THE INQUISITR*, July 26, 2012, available at <http://www.inquisitr.com/285625/usda-calls-for-meatless-monday-and-receives-backlash-from-meat-producers/>.

¹⁴⁵ McKay, *supra* note 140 (quoting Dr. Wansick).

¹⁴⁶ *Id.*

¹⁴⁷ See, Neil H. Buchanon, *Soft Drinks, Taxes, and Regulation: Why the Attacks on Mayor Bloomberg’s Proposed Size Restrictions on Soda Servings Are Misplaced*, *JUSTIA.COM*, July 12, 2012, <http://verdict.justia.com/2012/07/12/soft-drinks-taxes-and-regulation>.

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can have harmful consequences. However, it would be politically incorrect to attack the companies that obtain their products from dairy or orange groves farmers, although the author is essentially waging a war on the sugarcane farmers whose livelihoods depend on soda companies.

Another author who wrote the legal article, “Why New York’s (and Other Jurisdictions’) Food Regulations Do Not Violate Freedom of Choice: The False Notion That Our Tastes Are of Our Own Making,” claims the government has the right to limit consumer choices of lawful products.¹⁴⁸ The author explains, “Currently, we are being manipulated into eating unhealthy foods. Thus, governmental efforts to change our eating habits are not a violation of our freedom, but rather an important way to push back against all of the ways in which people are manipulated and harmed by industrial food production.”¹⁴⁹ Essentially, the author asserts that it is irrelevant if the government limits what consumers eat because corporations already limit people’s choices.¹⁵⁰ He continues, “A person who objects to the government telling him what to do in this area of his life is, in essence, saying: ‘Don’t let Big Brother tell me what to eat. I do what the Pillsbury Dough Boy tells me.’”¹⁵¹

However, the author’s assertions do not truly encompass the current food industry environment. In fact, because of business and corporate competition, a consumer has access to thousands of different types of products suited to individual preference, and a single company such as Pillsbury does not have an enormous influence over a person’s power of choice. Consumers are empowered to make healthy decisions because competition offers choices, not because the government limits consumer choice to counteract the perceived inability of its citizens to exercise self-control and individual restraint.

In the case of obesity, public health entities, including the government, are largely in conflict with consumers because they value “the health and safety of populations rather than the health of individual patients,” “prevention of injury and disease rather than treatment and care,” “and relationships between the government and the community

¹⁴⁸ See, Neil H. Buchanan, *Why New York’s (and Other Jurisdictions’) Food Regulations Do Not Violate Freedom of Choice: The False Notion That Our Tastes Are of Our Own Making*, JUSTIA.COM, May 20, 2010, <http://writ.news.findlaw.com/buchanan/20100520.html>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

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rather than the physician and the patient.”¹⁵² Therefore, the government is inclined to implement regulations combatting obesity that it believes will do the greatest good for the most people, rather than preserving consumer freedom of choice or protecting against “potential infringement on companies’ commercial” rights.”¹⁵³

For example, “the rationale for [the] public health approach to obesity lies partly in the argument that efforts to reduce obesity rates are hobbled by a collective action problem.”¹⁵⁴ This collective action problem occurs because “individuals acting in their own self-interest will not effectively address the problem [of obesity], because they do not internalize some of the major costs and benefits of action or nonaction.”¹⁵⁵ Some believe obesity is not a personal problem but rather the government’s responsibility to correct, because obesity indirectly impacts the public system through increased costs in healthcare.¹⁵⁶ However, illnesses that occur as a result of poor eating habits “only increase insurance costs to the degree that [the government] prohibit[s] insurers from charging actuarially appropriate premiums.”¹⁵⁷ Ultimately, the government is so pervasive that it somehow touches every aspect of citizens’ everyday lives, and “[t]o suggest that the mere existence of some societal cost grants government the power to regulate [citizens’] decisions is to open the door to government intervention pretty wide.”¹⁵⁸ The collective action argument could likely be used as justification in nearly every instance of increased government involvement in previously private decisions.

VI. CONCLUSION

From the local to federal level, government legislation geared towards curbing the obesity epidemic by seeking to limit consumer choice is becoming increasingly pervasive, despite the minimal impact regulations

¹⁵² Lauren B. Jacques, *The Federal Government’s Role in Combating Obesity: A Matter of Personal Responsibility or Public Health?*, THE HEALTH LAW AND PUBLIC POLICY FORUM, at 5.

¹⁵³ Etow, *supra* note 99 at 1503.

¹⁵⁴ Lauren B. Jacques, *The Federal Government’s Role in Combating Obesity: A Matter of Personal Responsibility or Public Health?*, THE HEALTH LAW AND PUBLIC POLICY FORUM, at 6.

¹⁵⁵ *Id.*

¹⁵⁶ Etow, *supra* note 99 at 1531.

¹⁵⁷ See, Betsy McKay, *What Role Should Government Play in Combatting Obesity*, N.Y. TIMES, Sept. 18, 2012, available at <http://online.wsj.com/article/SB10000872396390444812704577609482961870876.html> (quoting Michael D. Tanner).

¹⁵⁸ *Id.*

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will have on public health. In the pending decision on the validity of the New York soda ban, the New York Court of Appeals will likely find the ban to be arbitrary. The ban will have little to no impact in combatting the obesity problem as it “applies to restaurants, fast-food chains, theaters, delis and office cafeterias”¹⁵⁹ but exempts convenience stores, supermarkets, and even 7-11 Big Gulps, the very products the ban intended to prohibit. However, the Court of Appeals decision will have a major impact on whether other city boards across the nation will implement similar laws under the pretense of bearing a rational relation to public health objectives in lowering obesity rates.

In addition, the regulatory environment in food regulation is growing increasingly complex, as local and federal health initiatives raise questions under state consumer protection laws, common law tort liability doctrine, and constitutional law. If consumers continue to allow the government to determine which industries to target next, there is no telling the degree of intrusion and detriment to business that will result. America’s perception of consumer responsibility must first begin to change before consumers begin taking their health back into their own hands and out of the courtroom. Ultimately, consumers may begin taking control of their health by first taking control of their government.

¹⁵⁹ James Joyner, *Bloomberg Big Soda Ban Dumber Than We Thought*, *OUTSIDE THE BELTWAY* (Feb. 25, 2013), <http://www.outsidethebeltway.com/bloomberg-big-soda-ban-dumber-than-we-thought/>.



