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National Collegiate Athletic Association's Certification Requirement: A Section 1 Violation of the Sherman Antitrust Act

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S CERTIFICATION REQUIREMENT: A SECTION 1 VIOLATION OF THE SHERMAN ANTITRUST ACT

INTRODUCTION

Collegiate track and field athletes were denied the privilege of participating in the 1965 San Diego trials for the U.S.A.-U.S.S.R. track meet.[1] This meet was sponsored by the Amateur Athletic Union (AAU), the sole governing power in the realm of international track and field.[2] Pursuant to Article 2 of the National Collegiate Athletic Association (NCAA) bylaws, the meet constituted an extra event[3] and consequently required certification by the NCAA.[4] Certification was not granted, resulting in the prohibition of all NCAA athlete participation. The certification requirement put the NCAA in an imperious position, by conferring upon it the authority to determine whether or not United States collegiate track and field athletes could compete against the Soviet Union.[5]

Fred Samara[6] participated in the 1973 Soviet Union-United States track and field meet—an extra event that required, but did

1. The San Diego meet was sponsored by the AAU and served the purpose of selecting the United States team that would compete against the Soviet Union. The NCAA refused certification, but nevertheless some athletes participated. This is discussed in *Hearings Before the Committee on Commerce of the United States Senate on the Controversy in Administration of Track and Field Events in the United States*, 89th Cong., 1st Sess., ser. 89-40, at 58-66, 27-30 (August 16, 1965) [hereinafter cited as *1965 Hearings*].

2. Note, *The Government of Amateur Athletics: The NCAA-AAU Dispute*, 41 S. CAL. L. REV. 464 (1968).

3. The pertinent part of the BYLAWS OF THE NCAA art. 2, § 1 (1973) provides:

> The functions of the Extra Events Committee shall include the certification of the following extra events . . . postseason football contests, college all-star football and basketball contests, track and field meets and gymnastics meets.

4. The section of the CONST. OF THE NCAA art. 3, § 9(g) (1973) that calls for certification states:

> [The athlete] shall be denied eligibility for intercollegiate track and field competition, if, while a candidate for the intercollegiate team in track and field, he participates in track and field competition which is subject to the certification program specified in Bylaw 2, but which has not been certified.

5. Such great track and field athletes as Gerry Lingren and Tom Farrell risked their future eligibility and competed in the event. *1965 Hearings, supra* note 1, at 27, 58.

6. There was another athlete from Adelphi University who was a co-plaintiff in the action.

not obtain, NCAA certification. Samara participated nonetheless. His participation in the meet invoked the threat of NCAA ineligibility in any future NCAA event.[7]

Two DePaul University basketball players participated in a post-season tournament which required certification pursuant to NCAA bylaw 3-9-c.[8] The tournament was given for the benefit of underprivileged children as part of a city-wide youth foundation program.[9] The event was not certified. Consequently, the two athletes faced the NCAA sanction of one year ineligibility in NCAA athletic competition.[10]

These instances exemplify the domineering position the NCAA commands over collegiate athletics. The oppressive certification requirement is the instrumentality used to retain this position. If certification is denied and a NCAA athlete participates in defiance of the order, he risks his future collegiate eligibility in his particular sport.[11] Part of the problem stems from the AAU requirement prohibiting dual-sanctioning of any AAU sponsored meet.[12] But this technicality does not make the NCAA's position any less commanding or the requirement any less oppressive. There have been various

7. Frederick A. Samara v. National Collegiate Athletic Association, Civil No. 104-72-A (D. Va., May 1, 1973).

8. CONST. OF THE NCAA art. 3, § 9(c) (1973). This section provides:

> [The athlete] must not participate in any organized, outside basketball competition except during the permissible playing season specified in Bylaw 3.

This section does not specifically require certification but the effect is the same.

9. Chicago Tribune, Nov. 9, 1973, § 3 (Sports) at 1.

10. *Id.*

11. The CONST. OF THE NCAA art. 3, § 9(c-f) (1973) enumerate the events that require certification. For example 3(9)(f) provides:

> [The athlete] shall be denied further intercollegiate athletic eligibility in all sports if he engages as a member of a squad in any college all-star football or basketball contest which is not certified by the Association's Extra Events Committee.

Also, the Bylaws provide the specifics of each event. It also adds postseason football contests to the events that must be certified. *See* BYLAWS OF THE NCAA art. 2, §§ 1-5 (1973).

12. AMATEUR ATHLETIC UNION BYLAWS art. 1, § 2(b) (1962).

> [As] condition to the granting of an AAU sanction, the organization applying therefor must confirm that the AAU is the sole U.S. governing body in the sport for which sanction is applied, and must further agree that as further condition to the granting of such sanction, such organization will neither seek nor accept sanction from any other group or body claiming jurisdiction in such sport, nor permit athletes who are not eligible to compete under AAU rules to compete in such sanctioned event. Penalty for violation of such conditions, or any of them, shall be forfeiture of sanction if granted.

proposals propounded to alleviate its force.[13] All have evidently failed or remained sterile suggestions because the force of the requirement remains, as exemplified by the recent Samara and DePaul University cases. The contention of this note is that the certification requirements of the NCAA are violative of the Sherman Antitrust Act. Such a determination would terminate its forceful and indiscriminate application to various amateur athletic events. To support such an allegation it is necessary to show that: (1) the NCAA involves or affects interstate commerce; (2) the Sherman Antitrust Act's application encompasses noncommercial activities; (3) the certification requirement results in a restraint of interstate trade or commerce; (4) the restraint either violates the rule of reason or is a per se violation; and (5) there exists an injury.[14]

NCAA Involves or Affects Interstate Commerce

The Sherman Antitrust Act was passed pursuant to Congress' plenary power under the commerce clause. It provides:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.[15]

The application of the Antitrust Act is restricted to activities which involve[16] or affect[17] interstate commerce.[18] Although there has been

13. Four solutions were: (1) voluntary agreement by both parties; (2) arbitration; (3) judicial intervention; and (4) legislation. Note, *The Government of Amateur Athletics: The NCAA-AAU Dispute*, 41 S. Cal. L. Rev. 464, 481-90 (1968). The *1965 Hearings* proposed a moratorium between the NCAA and AAU. There also has been a bill introduced into Congress that would alleviate the dispute.

14. Nawalanic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 Clev. St. L. Rev. 97, 111 (1972).

15. Sherman Antitrust Act, 15 U.S.C. § 1 (1890). Throughout this note reference is made to this Act as the Sherman Antitrust Act. Unless otherwise stipulated, this use refers only to Section 1 of the Sherman Antitrust Act.

16. *See, e.g.*, United States v. Central States Theatre Corp., 187 F. Supp. 114 (D.Neb. 1960) (leasing of motion pictures was involved in interstate commerce).

17. *See, e.g.*, Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959) (effect upon interstate commerce must be substantial and direct to come within purview of Sherman Act); Motel Phillips, Inc. v. Journeymen Barbers, 195 F. Supp. 664 (W.D. Miss. 1961), *aff'd*, 301 F.2d 443 (8th Cir. 1962) (Sherman Act applies to activities that have direct effect upon interstate commerce).

18. Nawalnic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 Clev. St. L. Rev. 97 (1972).

a great amount of litigation and discussion of the applicability of the Act to professional sports,[19] little has been devoted to its application to amateur sports.[20] Such a dearth of comment in no way betokens an inapplicability of the Act to the NCAA.

That the Act should be applicable to the NCAA can be established by comparing the similarity between certain activites carried on by collegiate and professional sports alike, and observing that such activities have been held to warrant the application of the Act to professional athletes. Thus, in *Radovich v. National Football League*,[21] the Supreme Court was confronted with the question of whether professional football sufficiently involved or affected interstate commerce as to subject it to the provisions of the Sherman Antitrust Act. Prior to this decision, the Court had decided that professional baseball was not within the purview of the Act.[22] The National Football League argued that since their activities were similiar to professional baseball, they should likewise be immune from the Act's application. The Court rejected this argument and found that professional football acquired a "significant portion of gross receipts . . . from the transmission of the game over radio and television into nearly every State of the Union."[23] This activity of professional football so affected interstate commerce as to bring it within the purview of the Antitrust Act. Prior to this decision in *United States v. International Boxing Club*,[24] the Court held the

19. *See, e.g.*, Radovich v. National Football League, 352 U.S. 445 (1957) (professional football); Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (professional basketball); U.S. v. International Boxing Club, 348 U.S. 236 (1955) (boxing exhibitions); Deesen v. Professional Golf Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966), *rehearing denied*, 385 U.S. 1032 (1967) (professional golf); Peto v. Madison Square Garden Corp., 1958 Trade Cas., ¶ 69,106 (S.D.N.Y. 1958) (professional hockey).

20. *See, e.g.*, Amateur Softball Ass'n v. United States, 467 F.2d 312 (10th Cir. 1972).

> . . . no authority exists which absolutely determines the question of antitrust exemption from coverage of Amateur Athletics . . . and that no court decision or legislation is known to cover Amateur Athletics.

Id. at 315.

21. 352 U.S. 445 (1957).

22. Federal Baseball Club v. Nat'l League, 259 U.S. 200 (1922). The antitrust exemption for professional baseball was again affirmed in Flood v. Kuhn, 407 U.S. 258 (1972), but on different grounds. It was decided that there was a legislative intent to have a special exemption for professional baseball. This is anamolous to all case authority on other professional sports.

23. 352 U.S. 445, 449 (1957).

24. 348 U.S. 236 (1955).

Sherman Act applicable to professional boxing. Twenty-five percent of the total revenue of professional boxing was derived from the interstate sale of television, radio and film rights.[25] These sales were held to involve professional boxing in interstate commerce, thereby making the Antitrust Act applicable.

The NCAA enjoys a substantially similar amount of revenue from the interstate sale of television and radio rights. Every two years the NCAA releases a proposed television schedule of the members' various athletic events. The proposal is submitted to the member schools for ratification and is subsequently bid upon by the television networks. Of the income from the accepted bid the NCAA retains 6% — the remaining 94% being allocated to the schools participating in the televised events.[26] In 1964, the NCAA received 4% (or $260,880) of the income from the sale of interstate television rights.[27] Although the percentage is not as great as that of boxing, the amount is clearly significant. Further, this amount and percentage did not include the revenue from sale of film or radio rights. Combinedly, the sales activites of the NCAA must surely affect interstate commerce. Therefore, the NCAA, like professional boxing and football, should fall under the aegis of the Sherman Antitrust Act by virtue of the revenue derived from the interstate sale of television and radio rights. This is so particularly in light of the fact that the Supreme Court in *International Boxing* stated that the percentage of total revenue from the sale of interstate television, radio and film rights was in itself enough to so involve professional boxing in interstate commerce as to make the Sherman Antitrust Act applicable.[28]

But it is not necessary to rest the NCAA's interstate activities solely on this basis. Interstate transportation of athletes sponsored by the NCAA reinforces its affect upon interstate commerce. It was

25. *Id.* at 554. Television, radio and motion pictures have been held to involve or affect interstate commerce. *See* Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266 (1933) (radio); United States v. Paramount Pictures, 334 U.S. 131 (1948) (motion pictures); Dumont Laboratories v. Carroll, 184 F.2d 153 (3d Cir. 1950), *cert. denied*, 340 U.S. 929 (1951) (television).

26. Interview with Richard Koenig, Secretary-Treasurer of the NCAA, September 26, 1973.

27. *1965 Hearings, supra* note 1, at 387.

28. 348 U.S. 236, 241 (1955).

held in *Yonker's Raceway v. Standardbred Owner's Association*,[29] that the interstate transportation of race horses was sufficient to involve the activity of harness racing in interstate commerce.[30] Horses had been transported across state lines to compete in events conducted and sponsored by Yonker's Raceway. It is crucial to note that the import of *Yonker's* is that it is not who uses the interstate commerce lanes but the mere fact of such use that is sufficient for a finding of interstate commerce. The NCAA conducts and sponsors, by itself and through its members, numerous athletic events which incidentally and directly use these same lanes of interstate transportation. There are 769 members of the NCAA,[31] including all fifty states, with at least thirty-one interstate collegiate athletic conferences[32] that compete on a regularly scheduled basis. The athletes travel across state lines to compete in athletic events conducted and sponsored by the NCAA or its members. Just as harness racing caused the interstate transportation of race horses, the NCAA and its members cause the interstate transportation of athletes. Analogous to the decision in *Yonker's*, this employment of interstate transportation is adequate to involve the NCAA in interstate commerce.

Blalock v. Ladies Professional Golf Association[33] reinforced the notion that sponsorship of activities which necessitate interstate travel constitutes interstate commerce. In that case the Ladies Professional Golf Association (LPGA) was adjudged to have conducted its business in such a manner as to involve it in interstate commerce. The LPGA sponsored multi-state golf tournaments, selling the rights for the interstate television and radio broadcasts of these tournaments. These interstate activities were sufficient to place the LPGA in the realm of interstate commerce.[34] The NCAA engages in the same interstate activities as the LPGA. The NCAA sponsors multi-state athletic events[35] and sells the rights for interstate radio

29. 153 F. Supp. 552 (S.D.N.Y. 1957) (alleged group boycott by owners of race horses to force increase in amount of prize money).

30. *Id.* at 554.

31. MANUAL OF THE NCAA, 123 (1973).

32. *Id.* at 152-63. This was derived from a manual count. These are in constant flux because of schools changing various conferences. But to be sure, there are about thirty-one.

33. 359 F. Supp. 1260 (N.D. Ga. 1973).

34. *Id.* at 1263.

35. For example, the 1974 NCAA basketball finals are in North Carolina and the wrestling finals are in Iowa. MANUAL OF THE NCAA, 176 (1973).

and television broadcasts. Following the precedent of *Blalock*, these interstate activities of the NCAA are sufficient to place it within the purview of the Sherman Antitrust Act.

The activities of selling television and radio rights, employing interstate travel, and sponsoring multi-state events clearly involve the NCAA in interstate commerce. The NCAA has consequently satisfied the interstate commerce requirement of the Antitrust Act.

NONCOMMERCIAL LIMITATION

The Sherman Antitrust Act has traditionally been applied only to commercial enterprises.[36] In *Eastern Railroad Conference v. Noerr Motor Freight*,[37] the Supreme Court implicitly stated that the Sherman Act was tailored for the business world.[38] This notion was recently reiterated in *Marjorie Webster Junior College v. Middle States Association C.& S.S.*,[39] where a noncommercial college accreditation service was allegedly in violation of the Antitrust Act. The District of Columbia Circuit Court stated that the thrust of the Sherman Antitrust Act is in the commercial arena and that noncommercial activities and organizations are outside the boundaries of the Act.[40] However, even if the NCAA is deemed to be a noncommercial organization,[41] it should not automatically be removed

36. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

37. 365 U.S. 127 (1961).

38. *Id.* at 141.

39. 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

40. The court stated:

> [Absent] such motives, however, the process of accreditation is an activity distinct from the sphere of commerce, it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by the policies underlying the Sherman Act.

Id. at 655.

41. An argument could be made that even though the NCAA is clothed with a noncommercial title, they are in fact a commercial organization. Such a determination would extend to the colleges and universities that comprise the membership of the NCAA. This argument would necessarily depend on the definition of commercial contemplated by the Sherman Act. One commentator said:

> The commercialization that the court pointed to in the activities of Marjorie Webster exists in the majority of non-profit colleges. Therefore, many hitherto unchallenged combinations in the educational area such as athletic conferences and even the Ivy League could conceivably come under antitrust scrutiny.

Comment, *Accreditation Association's Exclusion of Profit-Making College Held to be Unreasonable Restraint of Trade, Denial of Due Process, and Unlawful Conduct under Common Law of Voluntary Associations*, 44 N.Y.U.L. REV. 1015, 1023 (1969).

from the application of the Antitrust Act. Because of the current proliferous expansion of service and noncommercial activities, the trend is to bring such activities within the purview of the Act.

The purpose and effect of the Sherman Antitrust Act is to strike at restrictions on the free competitive market.

> In general, the Sherman Act embraces acts, conducts, conspiracies, combinations, or practices which operate to the prejudice of the public interest by unduly restricting competition or unduly restricting the due course of trade. . . . The principal guide for determining whether an activity or practice comes within the reach of the law is whether it has or may have this prejudicial effect.[42]

The prime consideration is therefore the effect upon the market, rather than a determination of the commercial complexion of the activity.[43]

> [Any] limitations that exempt activities categorized as "traditionally noncommercial" or not "trade or commerce" seriously undermine this policy.[44]

The NCAA is a noncommercial, nonprofit organization. But from a pure policy standpoint, this should not protect it from the applicability of the Sherman Antitrust Act. If the NCAA has a restrictive and deleterious effect upon competition or trade, it should be within the purview of the Sherman Act.

The extension of the Sherman Antitrust Act to noncommercial activity not only has a solid policy foundation, but the recent trend

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42. 1 Trade Reg. Rep. ¶ 620, at 1251 (FTC 1972).

43. The consideration is whether the effect upon the market is a restraint of trade or commerce. For such a determination, it is sometimes pertinent to inquire if the plaintiff is engaged in commerce and his trade is restrained. In Friends of Animals, Inc. v. American Veterinary Medical Ass'n, 310 F. Supp. 1016 (S.D.N.Y. 1970), the plaintiff's interstate trade or commerce stemming from the care of homeless and unwanted pets was restrained by a state and local professional society of veterinarians. Further, in State of Maryland v. Wirtz, 269 F. Supp. 826 (D. Md. 1967), *prob. juris. noted*, 389 U.S. 1031 (1968), *aff'd*, 392 U.S. 183 (1968), the court held that commerce is not confined to "business" activity but may encompass nonprofit, non-business activities. *Wirtz* specifically dealt with schools. Therefore, a noncommercial organization cannot only restrain trade, but it may be a noncommercial organization that is being restrained.

44. Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities*, 82 YALE L.J. 313, 314 (1972).

of case law also demands the extension. *Amateur Softball Association of America v. United States*[45] held that since there was such a dearth of decisions applying the Sherman Act to noncommercial amateur athletic associations, the case should be remanded for further investigation of this issue. The court said,

> Any exemption claimed for amateur sports is, in short, one of the issues "wholly inappropriate for this Court's determination. . . ." (citing govt. brief) . . . As to an exemption granted to amateur athletics, if any, we conclude that many activities not within the minds of those legislators who drafted the Sherman Act of 1890 have more recently been held violative.[46]

Prior to this decision, there were cases that applied the Sherman Act to noncommercial activities.[47] The court in *Amateur Softball* did not follow these cases because of an unresolved interstate commerce issue.[48] But subsequent to *Amateur Softball*, there have been decisions that have applied the Act to noncommercial activities. In *Heldman v. United States Lawn and Tennis Association*[49] and *Blalock v. Ladies Professional Golf Association*[50] the Sherman Antitrust Act was applied to noncommercial governing and rule-making associations. The two athletic associations involved in these cases were noncommercial associations that sponsored and governed their own events. Particularly noteworthy is the fact that the United States Lawn and Tennis Association had a certification requirement similar to that of the NCAA.[51] It also had similar penalties for its

45. 467 F.2d 312 (10th Cir. 1972).

46. *Id.* at 314. The argument by the Amateur Softball Association was that since there was an antitrust exemption for professional baseball, then the same exemption should apply to all baseball, amateur as well as professional.

47. *See, e.g.*, Deesen v. Professional Golf Ass'n, 358 F.2d 165 (9th Cir. 1966), *cert. denied*, 385 U.S. 846 (1966), *rehearing denied*, 385 U.S. 1032 (1967) (nonprofit, rule-making, sanctioning organization of professional golfers); Bridge Corp. of America v. American Contract B.L., Inc., 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971) (rule-making, general governing organization of contract bridge); STP Corp. v. United States Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968) (rule-making, sanctioning and governing organization of auto races).

48. 467 F.2d 312, 315 (10th Cir. 1972).

49. 354 F. Supp. 1241 (S.D.N.Y. 1973) (alleged group boycott against United States Lawn and Tennis Association because of a sanctioning requirement).

50. 359 F. Supp. 1260 (N.D. Ga. 1973) (alleged group boycott by the Ladies Professional Golf Association).

51. The rule stated:

violation. There are other decisions both prior and subsequent to *Amateur Softball* that apply the Sherman Antitrust Act to noncommercial activities. Following the trend of *Blalock* and *Heldman*, the NCAA should not be granted immunity from the Sherman Antitrust Act solely on the determination of its noncommercial character. The application of the Act should depend upon detrimental effects on interstate trade or commerce, not upon mere appellation.

RESTRAINT OF TRADE

The force of the Sherman Antitrust Act is to prohibit the restraint of competition in the use of interstate avenues.[52] If there is no restraint or the restraint is solely upon intrastate commerce, there is no violation of the Antitrust Act.[53] The restraint must also be direct and immediate. Incidental restrictions on interstate trade or commerce will not result in a violation of the Act.[54] The ultimate issue is whether, in fact, there was any direct restraint upon interstate commerce.[55] By requiring certification of extra events, the

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Pursuant to the standing rules and regulations of the USLTA, a Professional Player is eligible to participate in sanctioned USLTA tournaments if that player has played *only* in tournaments sanctioned by the USLTA. Should that player participate in a non-sanctioned event, in which prize money is awarded, that player *may* be assigned the status of pro contract . . . .

354 F. Supp. 1241, 1244 (S.D.N.Y. 1973).

52. The section that deals with individuals states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sherman Antitrust Act, 15 U.S.C. § 2 (1890).

53. Spears Free Clinic and Hosp. for Poor Children v. Cleere, 197 F.2d 125 (10th Cir. 1952) (the practice of the healing arts is wholly local; restraint of this activity by failure to license did not place the licensing agency within the Antitrust Act).

54. *See, e.g.*, United States v. Swift & Co., 46 F. Supp. 848 (D. Colo. 1942) (agreement to refrain from purchasing fat lambs at or close to point of production did not directly affect interstate commerce; there was no change in movement of the lambs or change in their prices); Brosious v. Pepsi-Cola Co., 59 F. Supp. 429 (M.D. Pa. 1945), *aff'd*, 155 F.2d 99 (3d Cir. 1946) (bottler's refusal to sell to retailer until he met specified conditions had no direct effect upon interstate commerce or the prices of soft drinks).

55. Martson v. Ann Arbor Property Management Ass'n, 302 F. Supp. 1276 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir. 1970) (landlord who allegedly conspired to exclude others from the market of student housing and allegedly fixed prices did not conduct business of an interstate character to place it within the Sherman Act). This case is particularly interesting because it has all the aspects of the interstate commerce argument, *e.g.*, direct versus indirect, intrastate versus interstate, price-fixing and restraint of competition market.

NCAA restricts interstate commerce by imposing restraints upon: (1) interstate transportation; (2) interstate promotion and advertising; and (3) interstate ticket sales.

In *Standardbred Owner's Association v. Yonker's Raceway*,[56] an alleged price-fixing arrangement caused a restraint on the interstate transportation of race horses. This restraint on interstate transportation was sufficient to satisfy the restraint requirements of the Antitrust Act.[57] Similarly, the withholding of certification by the NCAA restricts the interstate transportation of athletes. Events that require certification are conducted in states other than where the athletes train or reside.[58] If certification is withheld, the athletes are forbidden to compete in these events and interstate transportation of the athletes is consequently restricted. The NCAA has therefore caused a direct and immediate restraint upon interstate commerce. Just as Yonker's Raceway restricted the interstate transportation of horses,[59] the NCAA's certification requirement is restricting the interstate transportation of athletes.

The non-certification of events has a second restrictive impact on interstate commerce. The court in *STP Corp. v. United States Auto Club, Inc.*[60] noticed that businesses advertise and promote their products in connection with particular sporting events. No distinction was made between amateur and professional sporting events.[61] A chill upon such interstate advertising and promotion directly ensues from a denial of certification.

Most of the nation's top amateur athletes attend schools which are members of the NCAA.[62] If an extra event is not certified by the

56. 232 N.Y.S.2d 346 (1962).

57. *Id.* at 351. The court decided there was no price-fixing by the arrangement of purse money. Harness racing was the type of activity that required scrutinized regulation. It was determined that competitive market was detrimental to harness racing and public interest. If the court decided harness racing to be applicable to a competitive market there would have been a violation of the Sherman Act.

58. For example, athletes from various states travel to compete in NCAA certified events such as the Drake Relays (Iowa), Kansas Relays, and Texas Relays.

59. 232 N.Y.S.2d 346 (1962).

60. 286 F. Supp. 146 (S.D. Ind. 1968).

61. *Id.* at 168.

62. The NCAA athletes are different than the independent amateur athletes generally associated with the AAU. Athletes themselves are not actually members of the NCAA. The

NCAA, the top amateur athletes are excluded from competition. The caliber of competition is greatly reduced and, consequently, spectator interest in the event vanishes.

> This control [the NCAA certification requirement], has caused a number of well-known and long-established track meets in California and other areas of the west coast to lose much spectator interest and prestige.[63]

This loss of interest and prestige is a direct result of the NCAA's boycott (through its certification requirement) of various athletic events.[64] As spectator interest decreases, ticket sales fall below profitable levels. When these two factors occur, sound business practice demands a decrease in interstate and intrastate advertising and promotion. An event may eventually fold for lack of interest and promotion.[65] The sports editor of the *Nashville Banner* said he would assign more space and people to an event if the top athletes could participate. He further added that he believed *every* newspaper would follow in this manner.[66] By its veritable monopoly on the top amateur athletes, the NCAA effectively determines the quantity of interstate advertising and promotion. Non-certification restricts interstate advertising and promotion of business commodities. It would further restrain interstate television and radio coverage.

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schools they attend are the members. The superiority of NCAA athletes and the tremendous problems of non-certification is discussed in detail in the entire *1965 Hearings* and Note, *The Government of Amateur Athletics: The NCAA-AAU Dispute*, 41 S. CAL. L. REV. 464 (1968).

63. *1965 Hearings, supra* note 1, at 68.

64. *See* notes 4 and 11 *supra* and accompanying text.

65. Research has not uncovered any particular event folding because of non-participation by NCAA athletes. But with the decreased interest in some meets, this is the logical extension.

66. Mr. Fred Russell, Vice President and Sports Editor of the *Nashville Banner*, responded to a pointed question:

> SENATOR BASS. There is one question I want to ask you. Wouldn't you say, as a sports editor, you would give much more space to a sporting event, assign more people to it, if you knew it was an event that was sponsored, cosponsored, or sanctioned by every organization so that all of the top athletes would be there, instead of merely a meet that was sponsored by one group of people for its own athletes?
>
> MR. RUSSELL. Sir, certainly we would give more space to a meet where there were more athletes and more prominent athletes.
>
> SENATOR BASS. And you knew that every top athlete had an opportunity to be there?
>
> MR. RUSSELL. Yes, sir. I think that would be true with every newspaper, the more names, the more great stars competing, certainly the bigger the story.

1965 Hearings, supra note 1, at 149.

A third restraint on interstate commerce relates to the decrease in total ticket sales precipitated by non-certification of an event. In major events, ticket sales certainly cross interstate lines.[67] If the NCAA refuses certification, spectator interest decreases. Reduced spectator interest manifests itself in reduced ticket sales. A sponsor of the 1965 Wichita track and field meet stated that one of the reasons for lagging ticket sales could have been the NCAA's refusal to allow a top athlete to participate.[68] Ticket sales to the Los Angeles Coliseum Relays decreased by 12,000 because of the exclusion of the top amateur athletes.[69] The diminution of ticket sales has a direct and immediate effect upon interstate travel and lodging. Since fewer spectators travel to see the event, less motel and hotel business is generated.[70] The decreased spectator interest in the event may even deter the athletes themselves from participating, which would have a corresponding effect on interstate travel and lodging.

In summary, the NCAA's denial of certification restricts interstate travel of athletes and spectators, restrains interstate advertising and promotion, and causes a decrease in interstate ticket sales. These factors are sufficient to fulfill the restraint of interstate trade or commerce requirement of the Sherman Act.

PER SE VIOLATION: GROUP BOYCOTT

Violations of the Sherman Antitrust Act can occur under either

67. One only has to look at the numerous postseason football contests to see an example of the impact of interstate ticket sales on a particular event.

68. *1965 Hearings, supra* note 1, at 67.

69. William M. Henry, President of the Southern California Committee for the Olympic Games stated in 1965:

> This year, because of the dispute, and our inability to stage our usual meet in which both college and club, as well as foreign, athletes compete, our paid attendance fell to some 18,800 who came to see a meet in which, because this is and always has been primarily a meet between college relay teams, only college athletes participated. A month later a similar meet in the same coliseum, which attracted not only our country's best AAU athletes but also some of the finest and best publicized foreign athletes, drew only slightly more than 12,000 spectators. It is my firm opinion that, had we and the other meet enjoyed the usual combination of college and AAU and foreign participants, each of the meets would have drawn 30,000 to 40,000 spectators, with benefit to all concerned.

1965 Hearings, supra note 1, at 72.

70. The motel business affects interstate commerce sufficiently to subject it to the commerce power of Congress. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

of two substantive theories: (1) per se violation, and (2) rule of reason.[71] There can be no violation of the Act apart from these theories.[72] The former theory will be analyzed in the present section, and the latter in the next section.

There are a variety of activities that may result in a per se violation of the Sherman Antitrust Act. Individuals as well as group activities that chill the competitive market will be a per se violation of the Sherman Act.[73] But most of the per se violations are group activities. A special type of group per se violation is a group boycott. A group boycott is

> an implicit or explicit agreement between two or more persons on one or more levels which coerces a third party to conform to conduct desired by the combination or removes such party from competition.[74]

The effect of the group's action, rather than the intent of the group, is the determining issue.[75] Thus, the key inquiry is the effect the group boycott has on interstate commerce. "It is the effect of group boycotts, not the purpose, that makes them illegal per se."[76] Because of a group boycott's relative economic control over the market,[77] their very existence creates a per se violation of the Sherman

71. Nawalnic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 CLEV. ST. L. REV. 97 (1972).

72. This is only in relation to the Sherman Antitrust Act, 15 U.S.C. § 1, § 2 (1890) and does not include other antitrust legislation.

73. This would include individual price-fixing and individual monopolies. This assumes the individual has enough economic market power to effectively restrain interstate trade or commerce. Application of the Sherman Act to the individual is encompassed in the Sherman Antitrust Act, 15 U.S.C. § 2 (1890).

74. Spitz, *A Return to the Rule of Reason in Group Boycott Cases?*, 42 U. COLO. L. REV. 467, 468 (1971).

75. The scope of this note does not deal with the complicated field of when or where there is an explicit or implicit agreement to form a contract, conspiracy or trust. Recent cases like *Blalock*, *Deesen* and *Heldman* show by analogy that the NCAA, through its institutional membership, has an implicit agreement that forms a contract, conspiracy or trust. For further investigation in this field, see Silver v. New York Stock Exch., 373 U.S. 341 (1963) (members & consensus); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951) (subsidiary); United States v. Gen. Motors Corp., 121 F.2d 376 (7th Cir. 1941), *cert. denied*, 314 U.S. 579 (1941) (implied agreement); Beacon Fruit & Prod. Co. v. H. Harris & Co., 152 F. Supp. 702 (D. Mass. 1957), *aff'd*, 260 F.2d 958 (5th Cir. 1958), *cert. denied sub nom.* Goldman v. M. Harris & Co., 359 U.S. 984 (1959) (company officers); Am. TCP Corp. v. Shell Oil Co., 127 F. Supp. 208 (S.D.N.Y. 1955) (subsidiary).

76. *See* note 74 *supra* at 472.

77. There are many theories on how the per se violation should be differentiated from

Antitrust Act.[78] Two cases clarifying the group boycott concept are *Klor's v. Broadway-Hale*[79] and *Radiant Burners, Inc. v. People*.[80] In *Klor's*, a group of appliance distributors collectively refused to sell certain appliances to the plaintiff. Their action prohibited Klor's from competing in the appliance market. The United States Supreme Court deemed this action a group boycott and consequently a per se violation of the Sherman Act. *Radiant Burners* dealt with an association that approved the marketability of gas burners. Without this approval, sale of a gas burner was impossible. The association arbitrarily refused to approve a new burner developed by Radiant Burners, Inc. The Court found that the association's refusal constituted a group boycott and, therefore, a per se violation of the Sherman Antitrust Act.[81]

By requiring certification of extra events, the NCAA should be held to constitute, in effect, a group boycott.[82] The essence of the group boycott in *Klor's*[83] and *Radiant Burners*[84] was a group refusal to deal, the consequences of which restrained interstate commerce and detrimentally affected the free market. These group boycotts either coerced third parties to conform to conduct desired by the group or secured the third parties' removal from competition.[85] The essential impact of the certification requirement is to dictate the actions of amateur athletes. The certification requirement is used to coerce the athletes to conform to the desires of the NCAA.[86] If the

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the rule of reason case. One is Justice Black's view in *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959), that group concerted refusals to deal are, without any further consideration, a per se violation. The majority view is that a group boycott is illegal per se if there is a dominance in market power over a particular activity or industry. *See*, Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division*, 75 YALE L.J. 373 (1966).

78. *Id.*

79. 359 U.S. 207 (1959).

80. 364 U.S. 656 (1961).

81. Another illuminating case on group boycotts as a per se violation is Fashion Originators Guild v. Fed. Trade Comm'n, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1940) (dressmakers guild activity of preventing design "piracy" was illegal per se).

82. The group or combination here is the 769 members of the NCAA. *See* note 75 *supra* and accompanying text.

83. 359 U.S. 207 (1959).

84. 364 U.S. 656 (1961).

85. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 875 (1955).

86. An ulterior motive for requiring certification may be to boycott all AAU events. The certification requirement would then be used to obtain dominance in the area of amateur

NCAA does not want one of its athletes to compete in an AAU track and field meet, it simply refuses to certify the event.[87] Just as the groups in *Klor's* and *Radiant Burners*, the NCAA coerces third parties to act in a prescribed manner.

The NCAA also has unfettered domination in the area of certification[88] and national amateur athletics.[89] The combination of this overbearing market power[90] and coercion of third party conduct demands a finding of a group boycott. This group boycott cannot be legitimized on a theory of promotion or review of amateur sports.[91] It is the existence of the group boycott that is a per se violation of the Sherman Antitrust Act, and the purpose or intent of the group is of no consequence.

Klor's, Radiant Burners and most other group boycott cases involve commercial organizations,[92] although not all group boycotts are comprised of commercial enterprises. They sometimes include noncommercial organizations. *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.*[93] involved a group boycott by a nonprofit, noncommercial bowling association. The association used the sanctioning of its bowling tournaments to restrict bowling in non-member establishments. Only those bowlers who bowled in member establishments could bowl in association sponsored tourna-

athletics. This is attempted at the expense of the eligibility of the athlete. For a thorough discussion of this conflict *see generally 1965 Hearings, supra* note 1.

87. This was exactly the case in the San Diego, Wichita and United States-Soviet Union track meets.

88. BYLAWS OF THE NCAA art. 2, § 1 (1973).

89. Note, *The Government of Amateur Athletics: The NCAA-AAU Dispute*, 41 S. CAL. L. REV. 464 (1968).

90. *See, e.g.*, Apex Hoisery Co. v. Leader, 310 U.S. 469 (1940); Johnson v. J.H. Yost Lumber Co., 117 F.2d 53 (8th Cir. 1941).

91. Courts do not look to the purpose of the activity of the associations. *See, e.g.*, Fashion Originators Guild v. Fed. Trade Comm'n, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1940) (association's purpose to prevent stealing of original designs did not remove it from purview of the Sherman Act); Truxes v. Rolan Elec. Corp., 314 F. Supp. 752 (D.P.R. 1970) (association's refusal to deliver wire to plaintiffs cannot be saved from the Sherman Act by allegations that it is reasonable under specific conditions).

92. For cases dealing with group boycotts, *see, e.g.*, Mandeville Farms v. Sugar Co., 334 U.S. 219 (1948) (refiner of beet sugar by its price-fixing was a group boycott); United States v. Women's Sportswear Ass'n, 336 U.S. 460 (1949) (association's agreement to employ only those contractors who were unionized or members of a specified trade association was a group boycott).

93. 356 F.2d 371 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966).

ments. The association contended that their actions were necessary to insure proper bowling conditions.[94] The association was found to have engaged in a group boycott. *Blalock v. Ladies Professional Golf Association*[95] dealt with a group boycott conducted by a noncommercial, rule-making association.[96] *Heldman v. United States Lawn and Tennis Association*[97] also applied the group boycott concept to a noncommercial organization that engaged in sanctioning non-association tennis events. Application of group boycotts should not be confined to commercial organizations, but should extend to any activity that evidences the characteristics of a group boycott. Since the NCAA has the characteristics of a group boycott, they should be held to constitute a per se violation of the Sherman Antitrust Act.

Rule of Reason: Violation of Antitrust Act

The rule of reason, being an alternative approach to the group boycott, the absence of a group boycott violation does not preclude the possibility of a rule of reason violation. A rule of reason violation of the Antitrust Act involves a determination as to the reasonableness of a restraint on commerce.[98] To determine the reasonableness of the restraint, a court will look to the intent of the organization's activities and their ultimate effect upon interstate trade or commerce.[99] This is the basic difference between the rule of reason and

94. *Id.* at 376.

95. 359 F. Supp. 1260 (N.D. Ga. 1973).

96. The case may be distinguished because part of the organization that expelled Blalock was comprised of her own competitors. This was one of the determining factors of the case. But the case remains to exemplify that group boycotts as per se violations are applicable to noncommercial organizations.

97. 354 F. Supp. 1241 (S.D.N.Y. 1973). The court never got to the question of group boycotts because the plaintiff failed to show the essential elements for injunctive relief. The dispositive issue was not application of group boycotts to a noncommercial organization, but inferentially the court made this application.

98. An extensive look into the multi-faceted rule of reason is beyond the scope of this note. For a more involved study of this concept, see Chicago Board of Trade v. United States, 246 U.S. 231 (1918) (rule of reason applied to the grain market); United States v. Standard Oil Co. of New Jersey, 221 U.S. 1 (1911) (rule of reason first propounded); Molinas v. Nat'l Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961); STP Corp. v. United States Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968) (auto racing association's rules of type of car were not unreasonable); Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market* Division, 75 Yale L.J. 373 (1966).

99. Nawalanic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 Clev. St. L. Rev. 97 (1972).

the group boycott approaches; the court will go beyond the effect and look to intent in the former, but not in the latter. If the intent of the organization is not to restrain commerce and there is a justifiable reason for the corresponding restriction, then under the rule of reason theory there is no violation of the Sherman Antitrust Act.

> The decisive question is whether the restraint is an unreasonable restraint. This depends, in essence, on the significance of the restraint in relation to a particular industry.[100]

For example, in *Bounds v. Eastern College Athletic Conference*,[101] a conference requirement that a student transferring from a junior college have at least forty-eight transferrable credit hours of work to compete in athletics was not considered arbitrary. Although there may have been a restraint on trade by such a regulation,[102] the court declined to subject the athletic conference to the Antitrust Act. It felt that there were justifiable and compelling reasons for the existence of the rule, which made the rule unarbitrary and the corresponding restraint reasonable.

Application of the rule of reason to the NCAA presumes the absence of a group boycott,[103] since its presence obviates an investigation into the reasonableness of the restraint of trade. To apply the rule of reason theory to the NCAA, the pertinent inquiry is whether the certification requirement causes an unreasonable restraint upon interstate commerce. This inquiry narrows itself to determining the reasonableness of the certification requirement. If the certification requirement fails in its objectives, then clearly it is unreasonable. There are four general reasons why the NCAA feels it necessary to maintain the certification requirement: (1) to insure proper conditions of events or meets for the athlete's physical and mental well-being;[104] (2) to insure and protect the amateur status of the event

100. Associated Press v. United States, 326 U.S. 1 (1945) (newspaper wireservice violation of Sherman Act).

101. 330 N.Y.S.2d 453 (1972).

102. *Id.* at 455. The court never addressed itself to the issue of restraint of trade, but was satisfied with its determination of the reasonableness of the rules.

103. This is presumed only for the purpose of discussion. The NCAA is clearly a group boycott and therefore a per se violation of the Sherman Antitrust Act.

104. Senator Dominick stated:

> My point is that the reason, as I understand it, for the objection by the NCAA to a sole sanctioning of a meet by AAU is that the NCAA is not sure that the AAU will

and the athlete himself;[105] (3) to insure that the athletes are "in shape;"[106] and (4) to prohibit economic exploitation through use of the athlete's talents.[107]

It is one of the functions of the NCAA Extra Events Committee to certify specified events prescribed in the bylaws of the NCAA.[108] It is, however, important to observe that not all amateur athletic events demand certification. Certification is required only for postseason football contests, college all-star football and basketball contests, track and field, and gymnastics.[109] In addition, the NCAA Council predetermines the number of postseason football contests that will be granted certification.[110] This number is determined without any real concern for the expressed purposes of the certification requirement. These two limitations mitigate, if not totally defeat, the fulfillment of the objectives of requiring certification. Complete satisfaction of the objectives requires certification of all extra events in all sports. The preservation of amateur status for a colle-

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maintain proper conditions for college athletes—that is preserve their amateur status, protect their academic interests, and promote their physical well-being.

1965 Hearings, supra note 1, at 23.

105. *Id.*

106. The 1965 Athletic Director of the University of Southern California stated in response to a question from the Commerce Committee:

> Because during the summer months the boys are competing in track meets, the coach, his track coach is not around, he competes in meets over which we have no control whatever, the types of competition, the dangers involved with competing in events sometimes that he is not in condition to compete in.
>
> I have known of occasions, not specifically, where boys were injured in the summer months competing in events when they were not in shape to do it. And we feel that during the summer months that if we have some control, some type of situation where we do have the surveillance of them during the summer months, that we can eliminate their competition in meets, let's say, that are privately promoted, that are not properly conducted, that are not properly managed, not properly officiated at times.

1965 Hearings, supra note 1, at 114.

107. This is the objective the NCAA stressed the most. They want to prevent financial gain by promoters at the expense of the athletes. This was a particularly pervasive problem with a Michigan basketball player. Interview with Richard Koenig, Secretary-Treasurer of the NCAA, September 26, 1973.

108. BYLAWS OF THE NCAA art. 2 § 1 (1973).

109. *Id.* CONST. OF THE NCAA art. 3 § 9(c)(D) adds outside, organized basketball competition and soccer to the events that require certification.

110. The pertinent section provides, "The number of contests to be certified each year by the Association shall be determined and announced by the NCAA Council." BYLAWS OF THE NCAA art. 2 § 2(m) (1973).

giate baseball player is certainly as important as a track and field athlete. The economic exploitation of collegiate wrestlers is no less important than collegiate basketball players. Yet the NCAA does not require certification for outside baseball and wrestling events.[111] The unreasonableness of the certification requirement manifests itself more clearly with regard to the athletes' physical condition. A legitimate concern for the physical condition of amateur athletes would demand certification in all extra events. The physical condition of a postseason football player is certainly no more important than that of a wrestler or baseball player, yet the NCAA does not require certification for extra events in wrestling and baseball.[112]

The limited number of events requiring certification only serve to defeat the objectives of the certification requirement. The ultimate purposes of certification have no peculiar application to those particular events which necessitate certification. Rather, the purposes apply with equal weight to all amateur sporting events. Since the requirement of certification is arbitrary, the goals of certification given by the NCAA seem little more than excuses to exert unreasonable control over college athletes.

The unreasonableness of the certification requirement manifests itself upon a closer look at some of the particular objectives. One purpose for requiring certification is to insure that events are conducted under proper conditions.[113] This would include such things as timing mechanisms in track and field, acceptable training and medical facilities, and the protection of academic interests.[114] Theoretically, certification would be denied if conditions fail to meet the NCAA's minimum standards, but in practice this is not always true. Certification was not granted to the San Diego, Wichita[115] or United States-Soviet Union[116] track meets despite their reputation for maintaining adequate conditions.[117] If the certification

111. BYLAWS OF THE NCAA art. 2 § 1 (1973).

112. *Id.*

113. *See* note 104 *supra* and accompanying text.

114. *1965 Hearings, supra* note 1, at 104.

115. *See generally 1965 Hearings, supra* note 1.

116. Frederick A. Samara v. Nat'l Collegiate Athletic Ass'n, Civil No. 104-72-A (D. Va., May 1, 1973).

117. The San Diego meet was conducted by the AAU to qualify to compete against the Russians in Kiev. The Wichita meet was a general meet sponsored by Station KTVH of Wichita. Track meets of this importance had to maintain adequate conditions to be recognized in the important capacity they were acting.

requirement was in fact based upon the goals espoused by the NCAA, all of those events would have been certified. Instead, certification was denied *only* because the AAU prohibits the dual-sanctioning of events it sponsors.[118] In the above instance, therefore, the NCAA's certification requirement did not meet the objective of insuring adequate conditions.

Another purpose for requiring certification is the legitimate need to preclude economic exploitation of amateur athletic talents by unscrupulous promoters,[119] who would exploit college athletes for their own pecuniary gain. This exploitation may even manifest itself in the possibility of the athletes accepting money for participating in an event. But in practice, certification is withheld for arbitrary reasons other than the prevention of economic exploitation.[120] There was no vestige of economic exploitation in a Gary, Indiana basketball tournament that was conducted for underprivileged children. Nonetheless, the NCAA refused certification[121] even though no evidence of illegal financial gain was ever presented. Similarly, the NCAA withheld certification for the San Diego and Wichita track meets[122] despite the absence of financial gain by unscrupulous promoters. Since certification is withheld from events where economic exploitation is clearly absent, the application of the certification requirement is unreasonable and arbitrary.

The NCAA's certification requirement is a violation of the rule

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118. *See* note 12 *supra* and accompanying text.

119. Everett D. Barnes, President of the National Collegiate Athletic Association and Athletic Director, Colgate University in 1965, expounded this objective to the Commerce Committee.

> QUESTION 9. Why does the NCAA and/or the USTFF feel that it is necessary to sanction competition conducted by other than its own constituency (AAU or any other private or outside promotional source)?
>
> ANSWER. Because, traditionally, the schools and colleges have always felt and met the responsibility and obligation to examine the conditions of competition of their enrolled student-athletes in order to prevent improper exploitation by individuals or groups primarily interested in financial gain for themselves and to guarantee as nearly as possible standards of competition equal to those conducted by the schools and colleges themselves.

1965 Hearings, supra note 1, at 396.

120. Certification is sometimes withheld not because of the pursuit of any of the proposed objectives, but because of the AAU restriction on dual-sanctioning. *See* note 12 *supra* and accompanying text.

121. Chicago Tribune, Nov. 9, 1973, § 3 (Sports) at 1.

122. *See generally 1965 Hearings, supra* note 1.

of reason theory. The requirement does not act to prevent economic exploitation or insure the maintenance of proper event conditions. Nor can it be justified, as shown above, by the objectives of preserving amateur status and insuring that the athletes are "in shape." The decisive question for the rule of reason test is "whether the restraint is an unreasonable restraint."[123] Since the objectives for the requirement are not fulfilled, its application is unreasonable and arbitrary. The restraint of trade effectuated by the certification is therefore unreasonable.

INJURY

The final component in an antitrust action is proof of damages. There are two possible remedies that involve such proof, treble damages[124] and injunctive relief.[125] Recovery of treble damages requires some proof of pecuniary loss or damage, whereas injunctive relief requires proof of irreparable harm,[126] which does not necessarily consist of monetary damages.

Proof to a mathematical certainty of the actual damages is not required for treble damage recovery,[127] but there must at least be a showing of some injury in fact.[128] Purely speculative monetary dam-

123. Associated Press v. United States, 326 U.S. 1 (1944).

124. The pertinent section provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1914).

125. The pertinent section provides in part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . .

15 U.S.C. § 26 (1914).

126. There are other requirements that must be satisfied for the granting of injunctive relief. Proof of irreparable harm is not the sole criterion. *See* note 136 *infra.*

127. Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138 (6th Cir. 1972).

128. Image and Sound Serv. Corp. v. Altec Serv. Corp., 148 F. Supp. 237 (D. Mass. 1956).

> . . . There must nevertheless be some basis for computing the amount of damages which the plaintiff claims to have sustained. He cannot recover on the strength only of his allegations of hypothetical losses of speculative and anticipatory earnings . . .

Id. at 239.

ages will not sustain an antitrust action. New issues increasingly arise in antitrust litigation which give rise to novel sources of injury, which consequently broaden the avenues of the proof required to show injury. "A court . . . should utilize a more liberal approach because of the relation between antitrust laws and possible new sources of injury."[129] Pollution was one such area that expanded the damage concept.[130] In a California case, the plaintiffs contended that their business and property would be damaged by the automobile manufacturer's failure to comply with requirements for installation of pollution control devices. This was a class action — the class being composed of the general public and individual homeowners who had no particular commercial connection with the automobile manufacturer. Rather than dismissing the action because of speculative damages, a California District Court allowed the plaintiffs the opportunity to prove their damages in court. Damage to the homeowner's business and property from automobile pollution is clearly speculative, yet the court recognized the liberalization of the proof requirements.

Monetary damages to collegiate athletes by imposition of the certification requirement is broad and speculative. This pecuniary damage would diminish the opportunity for a professional contract. College athletics entails big business.[131] Maximum public exposure and notoriety is essential for the college athlete to acquire adequate opportunity for a professional contract. The certification requirement seriously restricts the athlete's exposure, since he can participate in only those extra events that are certified. Since this restriction "injures amateur athletes by limiting their opportunities to compete, gain exposure, and bargain for professional contract,"[132]

129. Comment, *Private Antitrust Actions Against Air Pollutors-Commercial Relationship Between Litigants Not Necessary to Maintain an Action for Violation of Section 1 of Sherman Act*, 24 VAND. L. REV. 126, 129 (1970). This article deems that a class action without any commercial relationship is a new era in private antitrust suits. It further contends this will be an effective enforcement of the Sherman Antitrust Act.

130. In re Multi-District Private Civil Treble Damage Antitrust Litigation Involving Motor Vehicle Air Pollution Control Equipment, 5 Trade Reg. Rep. (1970 Trade Cas.)¶ 73,317, at 89,254 (C.D. Cal. Sept. 4, 1970) (court allowed a private class action for alleged injury to business and property from delay in installation in pollution control devices in cars).

131. Behagen v. Intercollegiate Conference, 346 F. Supp. 602 (D. Minn. 1971) (the big business of collegiate athletics is noted).

132. Note, *The Applicability of the Sherman Act to Legal Practice and other "Non-Commercial Activities"*, 82 YALE L.J. 313, 330 (1972).

the court should recognize this monetary damage. There is no assurance that a collegiate athlete will obtain a large professional contract. Indeed, only a small minority of the collegiate athletes attain this time-honored goal. Yet this loss is no more speculative than the monetary damage to a homeowner's property from pollution. The basis for both are elusive and speculative. Yet, following the reasoning of the pollution case, the courts should at least allow the athlete the opportunity to prove his damages.

Admittedly, the opportunity of the collegiate athletes for recovering treble damages is a remote remedy and may not be accepted by the less progressive courts. But the athlete is not confined to obtaining monetary relief, for he may obtain injunctive relief.[133] Injunctive relief "is to be used to protect the private plaintiffs against future conduct threatening them with loss or damage."[134]

To obtain injunctive relief, the athlete must show that he (1) has a clear right to relief; (2) damage to him is irreparable; and (3) the remedy at law is inadequate to prevent a failure of justice.[135] The clear right to relief is satisfied by a violation of the Sherman Antitrust Act. The irreparable harm and inadequate remedy at law are interdependent factors. "Irreparable damage is suffered when monetary damages are difficult to ascertain or are inadequate."[136] Inadequate remedy at law is also satisfied when monetary compensation is insufficient to compensate the party for the inflicted injuries. Both factors are satisfied if the monetary damages are inadequate or incalculable. If the court fails to grant treble damages because they are too speculative, the athlete is led to injunctive relief. A court will consider the speculativeness of monetary damages in its determination of whether the harm is irreparable.[137]

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133. 15 U.S.C. § 26 (1914).

134. Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Laws*, 1967 UTAH L. REV. 344, 362 (1967).

135. Czarrich v. Loup Riou Public Power District, 190 Neb. 521 (1973), 209 N.W.2d 595 (1973). The court said:

> It is fundamental that an injunction will not be granted unless the (1) right is clear; (2) the damage is irreparable, and; (3) the remedy at law is inadequate to prevent a failure of justice.

Id. at 526, N.W.2d at 598.

136. Danielson v. Local 275, Laborers Int'l Union of North America, 479 F.2d 1033, 1037 (2nd Cir. 1973).

137. *Id.*

By imposing the ineligibility sanction of the certification requirement, injury to the amateur athlete is not confined to inadequate opportunity for professional contracts. It also includes the loss of prestige, honor, glory, and most importantly the thwarting of his athletic talents and even partial loss of the benefits of years of training. Adequate monetary compensation for the loss of these intangibles is impossible, for one cannot determine the value of athletic talents, the honor and glory of collegiate athletics, and the years of training. Since the athlete cannot adequately be compensated with monetary damages, he should be granted a permanent injunction.[138] An example of the application of the requirements for injunctive relief is *Flood v. Kuhn*,[139] where an injunction was denied because of the failure to show irreparable harm. The court reasoned that there was no threat of immediate injury to Flood. Rather the harm to Flood was inflicted by Flood himself, since it was his choice not to play baseball and not the dictate of the baseball league. The NCAA certification requirement poses the converse situation, for irreparable harm to the collegiate athlete is definitely present. Unlike the *Flood* case where the injury was self-inflicted, the athletes are forced by the NCAA to refrain from competing in non-certified events. If they defy the order, they face future ineligibility in their particular sport. Since the athletes are forced not to compete in non-certified events, irreparable harm is present, and a permanent injunction should be granted.[140]

If the amateur athlete cannot sustain a treble damages action against the NCAA because of a judicial belief in the inherent speculativeness of monetary damages, he should definitely be granted a

138. There is a procedural difference between the granting of a preliminary and a permanent injunction. A preliminary injunction is to preserve the status quo pending a trial for a permanent injunction. It is granted on the sufficiency of the pleadings. A permanent injunction is granted only after a trial on the merits of the case. The granting of a permanent injunction requires a preponderance of the evidence. *See* Cloud v. Dyers, 277 Ala. 508, 512, 172 So.2d 528, 513 (1965).

139. 309 F. Supp. 793 (1970), *aff'd* 407 U.S. 258 (1972).

140. It is important to note that injunctions are generally granted where there is an established personal or property right. *See* Orloff v. Los Angeles Turf Club, 30 Cal. 2d 110, 180 P.2d 321 (1947). In other words, there must be an established right that is being threatened or infringed in order for equity to grant relief. A discussion of the legal right of the collegiate athlete is beyond the scope of this topic. But it is established that the athlete would be deprived of his right to association and his right to interstate travel would also be infringed by the imposition of the certification requirement.

permanent injunction enjoining the NCAA from imposing both the certification requirement and any disciplinary action that may have been dictated for violation of an NCAA non-certification order. For the athlete, injunctive relief would be the more desirable remedy. Practically, he is more concerned with competing in the athletic events than obtaining pecuniary gain at the expense of the NCAA.

CONCLUSION: A REVISED RULE

By requiring certification, the NCAA has satisfied the five requirements for an antitrust violation, but the certification requirement should not be abolished in its entirety. While it may be seriously questioned whether there is any need for a *parens patriae* organization to insure adequate conditions in an event, it is certainly not necessary to have an organization determine whether an athlete's physical condition is or is not satisfactory. There is a definite need to have an organization that would prevent economic exploitation and to protect the amateur status of athletes.

The ultimate purpose behind any certification program should be to attain the greatest possible benefit to the athlete. This goal could not be accomplished by indiscriminate and arbitrary denial of certification.[141] Nor can it be accomplished if certification is used as a tool to retain dominance over competing amateur athletic groups.[142] The ultimate objective must be the athlete's welfare. Collegiate athletes are mature enough to determine whether they are "in shape." Further, although the assurance of adequate event conditions is a somewhat worthy goal, the decision to compete should be left to the individual athlete. More often than not, from his close

141. The arbitrary application of the certification requirement is most clearly exemplified in the De Paul University basketball player case. The tournament satisfied all the requirements in order to avoid the imposition of the NCAA sanction. Yet the players were threatened with ineligibility. The particular rule that applied to the De Paul case did not expressly require certification, but the NCAA treats the situations in the exact same way. Chicago Tribune, Nov. 9, 1973 § 3 (Sports), at 1,3.

142. It is suggested that one of the motives for invoking the certification requirement is to boycott all AAU sponsored events in an effort to gain dominance of government of amateur athletics. The AAU has a sanctioning requirement refusing to allow dual-sanctioning of any AAU sponsored event. The obvious import of the AAU rule is to exclude the NCAA from any AAU sponsored event. This insures that the NCAA does not encroach on the AAU's area of amateur athletics. The NCAA in turn may use the certification requirement to boycott all AAU events that may encroach on their field of amateur athletics. *See generally 1965 Hearings, supra* note 1.

association with the event, the athlete has greater knowledge of the event's conditions. Maximum welfare and benefit to the athlete would be obtained by an organization that insures the amateur standing of the event and protects the athlete from economic exploitation by unscrupulous promoters. Only for these latter two reasons should the NCAA require and enforce a certification requirement.

In today's era of large professional contracts and the thriving of collegiate sports,[143] there is a definite need for some overview and policing of amateur events. The individual athletes do not have the facilities necessary to investigate each event. The NCAA with its virtual dominance in national amateur athletics is adequately equipped to perform this investigatory function. However, investigation should not be confined to a specified few events.[144] Rather the NCAA should investigate *all* extra events. A program that would prevent the participation of athletes in *any* event that would injure amateur status or lead to economic exploitation would protect the athletes and collegiate sports in general. The NCAA should therefore have a certification program that would insure this result. They should especially refrain from denying certification based on the physical condition of the athlete or the conditions of the event. These latter two criteria should be left to the athlete's determination.

This revised certification requirement would fulfill two important objectives. First, athletes would not be restricted from participating in events. They would be able to gain greater exposure to increase the possibility of large professional contracts while maintaining the worthy goals of amateurism. It would further increase the development of athletic talents by allowing greater experience in competitive situations. Secondly, this would be an effective and thorough check on the amateur standing and economic exploitation of the athlete. The suggested revision would comply with the dictates of the Sherman Antitrust Act[145] and allow the greatest possible development of the athletic talents with a minimum amount of restrictions.

143. Behagen v. Intercollegiate Conference, 346 F. Supp. 602 (D. Minn. 1971).

144. For the specific events see, CONST. OF THE NCAA art. 3, § 9 (1973).

145. Since the NCAA would only indirectly restrain trade because of the limited scope of the certification requirement, they would not come within the purview of the Sherman Antitrust Act, 15 U.S.C. § 1 (1890). Even if they did restrain trade, the rules would be reasonable so as to bypass the test of the rule of reason.