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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION STRIKES OUT ALUMINUM BAT MANUFACTURER

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION STRIKES OUT ALUMINUM BAT MANUFACTURER

> Yesterday's home runs do not win today's games.
> It is time to step up to the plate again.
>
> Babe Ruth

I. INTRODUCTION

On August 12, 1998, the National Collegiate Athletic Association's (NCAA or Association) Executive Committee approved a rule that changes the specifications and performance standards for baseball bats used in NCAA sanctioned baseball games.[1] The NCAA's stated purpose for the new legislation is "to make metal bats perform more like wood bats."[2] The rule is designed to cut the performance of aluminum bats and "take some of the firepower out of the home run derbies of recent years."[3]

The NCAA Executive Committee approved the recommended rule changes despite the fact that two baseball bat manufacturers filed anti-trust suits against the NCAA.[4] On July 13, 1998, Baum Research and Development Co., a manufacturer of wood-composite bats, filed an anti-trust suit against the NCAA, Easton Sports Inc. (Easton), and other metal bat manufacturers, accusing the bat manufacturers of manipulating the NCAA to encourage players to use metal bats.[5] Additionally, Easton, a major aluminum bat manufacturer, filed a $267 million pre-emptive law-suit in the District of Kansas on August 7, 1998.[6] Easton alleges that the

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1. *See Changes Seen for Metal Bats*, N.Y. TIMES, Aug. 13, 1998, at C2.

2. Wallace I. Renfro, *NCAA Executive Committee Approves Baseball Bat Change-savailable at* http://www.ncaa.org/releases/divi/1998081201d1.htm (Aug. 12, 1998).

3. Lon Eubanks, *NCAA Mutes the Bats; College Baseball: Changes in Specifications Will Limit Home Run Potential Beginning with the 2000 Season*, L.A. TIMES, Aug. 13, 1998, at C1.

4. *See id.*; *see also* David Josar, *Bat Manufacturer Sues Over Trade Restraint: Traverse City Company Accuses 3 Firms, NCAA of Anti-trust Violation*, DET. NEWS, July 14, 1998, at D2.

5. *See* Josar, *supra* note 4.

6. *See* Eubanks, *supra* note 3.

NCAA's actions constitute an unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C.§ 1.[7]

The NCAA Executive Committee did not adopt the new bat rule for the purpose of driving high tech bat manufacturers out of business.[8] Rather, the NCAA's stated objectives for the rule change are to achieve a better competitive balance between offense and defense and to make the college game "safer for all participants."[9]

The NCAA's status as a non-profit self-regulating association does not shield the association from antitrust liability.[10] Over the past three decades, student-athletes, coaches, and universities have sued the NCAA alleging that a particular NCAA rule or NCAA activity violates federal antitrust law.[11] Although, there are no reported cases in which a NCAA rule was the subject of an equipment manufacturer's antitrust challenge, other self-regulating athletic associations have successfully defended against antitrust challenges by athletic equipment manufacturers.[12]

One year later, when the Executive Committee modified one of the three standards approved in August 1998, Easton agreed to drop its lawsuit against the Association.[13] Although the District of Kansas did not

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7. *See* Amended Complaint for Damages and Preliminary Injunctive Relief at 10, Easton Sports, Inc. v. National Collegiate Athletic Ass'n (D. Kan. 1998) (No. 98-2351-KHV).

8. *See infra* pp. 17-27.

9. David Wharton, *Aluminum Bat Maker Files Suit,* L.A. TIMES, August 8, 1998, at C4 (quoting Bill Rowe Jr., Chairman of the Baseball Rules Committee).

10. *See* Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1148-49 (5th Cir. 1977) (relying on Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), to support the view that a blanket exclusion from antitrust liability cannot be accepted); *see also* National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984) (Supreme Court did Rule of Reason analysis and found against NCAA).

11. *See* Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990) (challenging the NCAA "no agent" and "no draft" eligibility rules); Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998) (challenging an NCAA rule which placed a limit on coaches' annual compensation); National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984) (challenging NCAA control over college football game telecasts).

12. *See* Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc., 665 F.2d 222 (8th Cir. 1981); Weight Rite Golf Corp. v. United States Golf Ass'n., 1990-2 Trade Cas. (CCH) ¶ 69,181 (M.D. Fla. Sept. 12, 1990); M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984).

13. NCAA NEWS, *Executive Committee Agreement Brings Closure to Baseball Bat Issue at* http://www.ncaa.org/news/19991011/active/3621n01.html (Oct. 11, 1999).

decide the issue, this note considers whether the new NCAA baseball bat specifications and performance standards constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. This note is divided into an introduction and five parts. Part II explores the NCAA and the history of athletic associations and antitrust liability. Additionally, Part II highlights the NCAA rules that are frequently challenged under federal antitrust law. Part III focuses on the history and development of aluminum baseball bats in college baseball. Part IV presents Section 1 of the Sherman Act. Part V analyzes the three standards for aluminum bats approved in August 1998 under a traditional rule of reason analysis. In particular, Part V explains how the NCAA baseball bat standards may have an incidental anticompetitive effect on bat manufacturers. Part V also illustrates why the NCAA's pro-competitive objectives for the change in rule outweigh any incidental anticompetitive effect.[14] Part V explains why the new bat standards are reasonably related to the NCAA's objective to maintain both the integrity and safety of college baseball.[15]

This note concludes with a discussion of the potential challenges which equipment manufacturers present to athletic associations. As high-tech athletic equipment manufacturers continue to develop new equipment, non-profit, self-regulating athletic associations like the NCAA will increasingly need to reconsider how state of the art athletic equipment affects both the integrity and safety of the game. Will a court of law allow the athletic associations to control the limits of technology in a million or perhaps billion dollar industry where the athletic associations do not have a direct economic stake in the manufacture and sale of athletic equipment?[16]

II. SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1

Section 1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby

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14. *See infra* notes 106-119 and accompanying text.

15. *See infra* notes 157-182 and accompanying text.

16. *See* Stefan Fatsis, *Mettle Test: NCAA Puts Aluminum Bats to Test of Fire,* ST. LOUIS POST-DISPATCH, May 6, 1996, at 18.

declared to be illegal."[17] The Supreme Court has limited the restrictions stated in Section 1 to bar only "unreasonable restraints of trade" because almost every contract that binds the parties to an agreed course of conduct "is a restraint of trade" of some form.[18]

Courts apply either "per se" or "rule of reason" analysis in determining whether a particular rule may be adjudged unreasonable.[19] The Supreme Court stated in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc,.*[20] that a restraint could be considered per se illegal if the practice "facially appears to be one that would always or almost always tend to restrict competition and decrease output..."[21] Horizontal price fixing[22], group boycotts[23], and tying arrangements[24] are examples of per se violations of the Sherman Act.[25] When a practice is identified as illegal per se, a court's inquiry does not reach the practice's impact on the market or the defendant's pro-competitive justifications for the practice.[26]

Under "rule of reason" analysis, on the other hand, the court examines the restraint's effect on competition.[27] The test of legality is whether the restraint is one that "merely regulates and perhaps thereby promotes competition or whether it...suppress[es] or even destroy[s] competition."[28] Rule of reason analysis requires a court to make three determina-

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17. 15 U.S.C.A. § 1 (West Supp. 1997).

18. Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998) (citing National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984); *see also* Standard Oil Co. v. United States, 221 U.S. 1, 52-60 (1911).

19. *See Law*, 134 F.3d at 1016 (citing SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994)).

20. 441 U.S. 1 (1979) (alleging that blanket license arrangements constituted a form of price fixing that was a per se violation under the Sherman Act).

21. *Id.* at 19-20.

22. *See* Susan Marie Kozik, Note, *National Collegiate Athletic Ass'n v. Board of Regents,* 61 CHI.-KENT. L. REV. 593, 595 n.20 (1985).

23. *See id.* at 596 n.23.

24. *See id.* at 596 n.24.

25. *See id.* at 595 n.20.

26. *See Law* ,134 F.3d 1010, 1016.

27. *See id.* at 1016-17; *see also* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

28. Weight Rite Golf Corp. v. United States Golf Ass'n., 1990-2 Trade Cas. (CCH) ¶ 69,181 (M.D. Fla. Sept. 12, 1990).

tions. The court must decide first whether the challenged restraint has a substantially adverse effect on competition;[29] second, whether the pro-competitive rationale of the alleged wrongful conduct justifies the otherwise anticompetitive impacts;[30] and third, whether the challenged restraint is reasonably necessary to achieve the pro-competitive objectives.[31]

Since 1950, courts have held that the NCAA and other non-profit self-regulating sports associations are not exempt from antitrust challenges.[32] Sports associations do not have unlimited discretion in adopting rules and regulations.[33] In recent years courts have been increasingly willing to subject NCAA rules to a detailed rule of reason inquiry.[34] Furthermore, courts have also evaluated equipment regulations adopted by athletic associations other than the NCAA, under rule of reason analysis.[35] Since courts have previously judged both NCAA regulations and equipment limitations under rule of reason analysis, it is logical that the NCAA's new baseball bat regulations should also be subjected to rule of reason analysis.

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29. *See Law*, 134 F.3d at 1017. *See also* SCFC ILC v. Visa USA, Inc., 36 F.3d 958, 965 (10 Cir. 1994); United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993).

30. *See Law*, 134 F.3d at 1017. *See also Brown Univ.*, 5 F.3d at 669.

31. *Antitrust Law Developments*, 1 A.B.A. SEC. ANTITRUST L. 53 (1997).

32. *See supra* text accompanying notes 10-12.

33. *See* Justice v. National Collegiate Athletic Ass'n, 577 F.Supp. 356, 380 (D. Ariz. 1983).

34. *See id. See also* National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 99-103 (1984) (applying rule of reason analysis to an NCAA plan for televising college football that involved both limits on output and price fixing); Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1015-24 (10th Cir. 1998) (evaluating NCAA regulation limiting coaches' annual compensation under rule of reason analysis); Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1088-94 (7th Cir. 1992) (upholding no-agent and no-draft student-athlete eligibility rules under rule of reason analysis).

35. *See* Bauer, *infra* note 42, at 287 & n.95.

III. THE NCAA, ATHLETIC ASSOCIATIONS AND ANTITRUST LIABILITY

A. *The NCAA*

The NCAA is a non-profit, self-regulating, voluntary association of more than 1,200 colleges and universities.[36] In general, the NCAA is the national governing body for intercollegiate athletics. The NCAA is the organization through which member institutions "speak and act on athletics matters at the national level."[37] The Association coordinates athletic programs of its member institutions by adopting and promulgating playing rules, standards of amateurism, standards for academic eligibility, and regulations for recruitment of athletes.[38] Through television and licensing fees, the NCAA generates $283 million in annual revenue.[39] Although the NCAA does not manufacture or sell commercial goods, its rules may substantially influence the commercial marketplace for athletic equipment used in college sports.[40]

B. *Athletic Associations and Antitrust Liability*

In 1922, the United States Supreme Court held that the business of organized baseball was completely exempt from antitrust laws.[41] Professional baseball's antitrust exemption has been narrowed over the past 70 years, but the central holding that the "business of baseball" is immune from antitrust liability is still good law.[42] In light of professional baseball's exemption, all sports were initially considered immune from anti-

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36. *See What is the NCAA?*, *at* http://www.ncaa.org/about/.

37. *Id.*

38. *See* Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1012 (10th Cir. 1998).

39. Darryl Van Duch, *NCAA's Lawyer is Tops on the Court*, NAT. L. J., May 24, 1999, at B1.

40. *See* Gunter Harz Sports, Inc. v. United States Tennis Ass'n, Inc., 665 F.2d 222, 223 (8th Cir. 1981). The NCAA, like the USTA, does not manufacture or sell commercial goods. Both associations' actions, however, "may substantially influence the marketplace for products used in the sport". *Id.* at 223 n.3.

41. *See* Federal Baseball Club of Baltimore, Inc. v. National League of Prof'l Baseball Clubs, 259 U.S. 200, 208 (1922).

42. *See* Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 265-66 (1993).

trust challenges.[43] In the late 1950's, however, the United States Supreme Court expressly stated in *International Boxing Club v. United States,*[44] and *Radovich v. National Football League,*[45] that federal antitrust laws apply to professional boxing and professional football, respectively.[46] The court found that there was nothing inherent in a sports organization that merits a complete exemption from antitrust liability.[47]

While federal courts were applying antitrust laws to professional sports organizations, the NCAA was enjoying an exemption.[48] Federal courts were reluctant to analyze NCAA regulations under antitrust laws because of the NCAA's status as a non-profit self-regulating association which promotes amateur competition, rather than commercial activity typically regulated by the Sherman Act.[49] However, in 1977, the Fifth Circuit held in *Hennessey v. National Collegiate Athletic Ass'n,*[50] that the NCAA was not exempt from federal antitrust liability.[51] Consequently, since *Hennessey*, students, coaches, and universities have vigorously challenged NCAA regulations under the federal antitrust laws.[52] In many cases, while not enjoying immunity, the NCAA has prevailed under Rule of Reason analysis, and the challenged rule has survived antitrust scrutiny.[53]

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43. *See* Thomas Scully, Note, *NCAA v. Board of Regents of the University of Oklahoma: The NCAA's Television Plan Is Sacked By The Sherman Act,* 34 CATH. U. L. REV. 857 (1985).

44. 358 U.S. 242 (1959).

45. 352 U.S. 445 (1957).

46. *See International Boxing,* 358 U.S. at 252; *Radovich,* 352 U.S. at 447-48; Scully, *supra* note 43, at 857; Bauer, *supra* note 42, at 267.

47. *See* Scully, *supra* note 43, at 857 (citing Int'l Boxing Club v. United States, 358 U.S. 242 (1959)).

48. *See id.* at 857.

49. *See id.*

50. 564 F.2d 1136

51. *See id.* at 1148-49.

52. *See* Wharton, *supra* note 9.

53. *See e.g.*, Smith v. National Collegiate Athletic Ass'n, 139 F.3d 180, 187 (3rd Cir. 1998) (holding that the prohibition of graduate students from participating in athletics at schools other than their undergraduate institutions is a reasonable restraint on trade which is pro-competitive and furthers the legitimate NCAA goals of promoting fair competition and ensuring the survival of intercollegiate athletics); Banks v. National Collegiate Athletic Ass'n, 977 F.2d 1081, 1087-94 (7th Cir. 1992) (holding that the NCAA's "no-agent" and "no-draft" rules do not have an anti-competitive impact on a discernible market); Justice v. National Collegiate Athletic Ass'n, 577 F. Supp 356, 379 (D. Ariz.

C. *NCAA Laws Frequently Challenged*

There are three distinct types of NCAA regulations that have been challenged under Section 1 of the Sherman Act: broadcast restrictions,[54] student-athlete eligibility rules,[55] and rules limiting coaches' annual compensation.[56]

Broadcast restrictions are a form of "off-the-field" activity that the NCAA attempts to regulate.[57] For several decades, the NCAA placed limits on both the total number of live televised college football games and on the number of games that any one college could televise.[58] NCAA member institutions were prohibited from selling television rights individually, unless they were in compliance with the NCAA's television plan.[59] After several universities brought suit against the NCAA, the Supreme Court held in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma,*[60] that the NCAA's plan restricting television coverage of college football games violated Section 1 of the Sherman Act.[61] In determining that the television plan violated Section 1 of the Sherman Act, the Court compared the anticompetitive nature of the television plan to the pro-competitive nature of NCAA student-athlete eligibility rules.[62] When activities reflect an economic motive as broadcast restrictions do, and are likely to increase prices or decrease output, they have been held to violate federal antitrust laws.[63]

NCAA student-athlete eligibility rules, unlike broadcast agreements,

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1983) (holding that NCAA sanctions rendering a college team ineligible for post-season play and for television appearances for violating NCAA rule prohibiting compensation to student athletes did not violate federal antitrust laws because the sanctions were reasonably related to the NCAA's goals of preserving amateurism and promoting fair competition).

54. *See* Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984).
55. *See Smith*, 139 F.3d at 185-187.
56. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).
57. *See* Bauer, *supra* note 42, at 288.
58. *See id.* at 289.
59. *See id.*
60. 468 U.S. 85 (1984).
61. *See id.* at 119.
62. *See id.* at 117.
63. See Bauer, *supra* note 42, at 291.

are void of an underlying economic motive.[64] NCAA eligibility rules exemplify the NCAA's goals of promoting amateurism and fair competition in college athletics.[65] No court of appeals has expressly addressed the issue of whether antitrust laws apply to NCAA eligibility rules;[66] however, some courts assume that the rules are subject to antitrust scrutiny without analyzing the issue.[67] When courts have analyzed NCAA eligibility rules under federal antitrust laws, they have given considerable deference to the NCAA's "arguments of justification or absence of actual injury to competition."[68] Often courts upheld NCAA eligibility rules because they are reasonable restrictions on student-athletes. Unlike broadcast agreements, eligibility rules are pro-competitive, and are unrelated to the NCAA's business or commercial activities.[69]

Conversely, NCAA rules that limit the annual compensation of college basketball coaches are distinguishable from player eligibility rules because they are designed to promote "competitive balance" among NCAA member institutions.[70] The Tenth Circuit recently held in *Law v. National Collegiate Athletic Ass'n*[71] that the NCAA by-law that restricted entry-level coaches' annual compensation was a horizontal price restraint.[72] The "restricted-earnings coach"[73] rule at issue in *Law* unlawfully restrained trade in violation of Section 1 of the Sherman Act because the NCAA's stated pro-competitive objective was outweighed by its anticompetitive effect.[74]

The new baseball bat regulations differ significantly from NCAA regulations that have been previously challenged under Section 1 of the Sherman Act. The NCAA's new baseball bat regulations and perform-

64. *See* Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 383 (D. Ariz. 1983).

65. *See id.*

66. *See* Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 185 (3rd Cir. 1998) (comparing McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988)).

67. *See* McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1343 (5th Cir. 1988).

68. Bauer, *supra* note 42, at 291. *See infra* note.111.

69. *See Smith*, 139 F.3d at 187.

70. Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1024 (10th Cir. 1998).

71. 134 F.3d 1010 (10th Cir. 1998).

72. *See id.* at 1017-18.

73. *Id.* at 1013.

74. *See id.* at 1019-24.

ance standards do not have an underlying economic motive. The NCAA's objective of preserving the integrity and safety of college baseball makes the new bat rule unique among NCAA regulations.[75] Undoubtedly, the NCAA's justifications for the change in rule will be critical in determining whether the regulation constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 USC § 1.

IV. ALUMINUM BATS

Aluminum bats were first manufactured in the early 1970s.[76] Although, Major League Baseball has never allowed professional baseball players to use aluminum bats, the NCAA allowed their use since 1974.[77] At first, baseball players at all levels preferred wooden bats to the new aluminum bats. The early generations of aluminum bats were very heavy and awkward, and cost more than wooden bats.[78] The manufacturers marketed these bats on the basis of their durability.[79] However, once the aluminum bat manufacturers started competing against each other instead of against the wood manufacturers, the market for aluminum bats quickly changed.[80] The aluminum bats became lighter and more powerful as manufacturers started using more durable metal, stretched more thinly. Consequently, aluminum bats enabled batters to swing faster and make more precise contact with the baseball.[81] With aluminum bats, hitters can generate greater bat speed, "and bat speed is what determines power."[82]

The power which hitters are able to generate with lighter aluminum bats has dramatically changed the college game. While swinging with high-tech aluminum bats, college players have rewritten the record books.[83] College players are posting higher hitting statistics than profes-

75. *See* Wallace I. Renfro, *NCAA Executive Committee Approves Baseball Bat Changes*, at <http://www.ncaa.org/releases/divi/1998081201d1.htm> (Aug. 12, 1998).

76. *See* Fatsis, *supra* note 16.

77. *See* Eubanks, *supra* note 3.

78. *See* Steven Ashley, *High Tech Up at Bat,* POPULAR SCI., May 1992, at 108.

79. *See id.*

80. *See id.* at 19 (quoting Dennis Laughrey, former bat products manager for Easton Aluminum).

81. *See* Fatsis, *supra* note 16.

82. *See* Ashley, *supra* note 78 (quoting Merv Rettenmund, hitting coach for the Oakland Athletics).

83. *See* Fatsis, *supra* note 16.

sional players.[84] In the 1998 College World Series, a record sixty-two home runs were hit, and the score of the championship game was a "football-like" 21-14.[85]

The impact of aluminum bats on the college game reaches far beyond increased batting averages. College players swinging with aluminum bats have influenced the very nature of the game. With the lighter metal bats, hitters are able to catch up to fastballs that they otherwise would have not been able to hit.[86] As a result, second basemen and shortstops position themselves four feet deeper in the outfield.[87] The nonwood bats have also "changed the nature of the pitcher-batter duel."[88] With light weight aluminum bats having larger "sweet spots,"[89] batters are better able to hit balls that are thrown inside the baseline, which has eliminated one of the best striking areas for a pitcher.[90] To compensate for the batters' ability to hit both inside pitches and their ability to catch up to fastballs, pitchers are forced to throw more curve balls.[91] Throwing an excessive number of curve balls often causes college pitchers to endure shoulder and arm injuries early in their careers.[92] Furthermore, when a ball is struck with a high performance aluminum bat, pitchers must be ready to react to a ball that is traveling with an exit velocity as high as 113 mph.[93]

Aluminum bats, then, have revolutionized college baseball and consequently have sparked debate over both the integrity of the game and player safety. The NCAA Baseball Rules Committee believes that the recommended rule change will provide for a better competitive balance between offense and defense and will make the game safer for all participants.[94] On August 12, 1998, the NCAA Executive Committee acted

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84. *See id.*

85. *See* Eubanks, *supra* note 3.

86. *See* Fatsis, *supra* note 16.

87. *See id.*

88. *See* Ashley, *supra* note 78.

89. "Sweet spot" is the area on the bat which enables a batter to hit a ball harder and farther than any other point on the bat. The main distinction between bats is based on their performance off the sweet spot.

90. *See* Fatsis, *supra* note 16

91. *See id.*

92. *See id.*

93. *See* Eubanks, *supra* note 3.

94. *See id.*

on similar concerns when it approved three changes that were originally scheduled to take effect in August 1999.[95] Under the new NCAA standards, a bat cannot produce a batted-ball speed greater than 93 mph.[96] Previously, there was no such speed limit.[97] Additionally, the new regulations limit a bat's diameter to a maximum of 2 5/8 inches.[98] This represents a decrease of 1/8 inch from the previous allowable diameter.[99] Finally, according to the new regulations a bat may not weigh numerically more than three units less than the length of the bat.[100] Formerly, bats could not weigh more than five units less than its length.[101]

However, after the NCAA Executive Committee adopted the new baseball bat regulations and performance standards, the debate escalated over the effective date of the change. In November 1998, the NCAA Division I Baseball Committee voted to recommend a requirement that bats used in the 1999 NCAA Championship satisfy the three specifications that were scheduled to go into effect in August 1999.[102] On January 15, 1999, the NCAA Executive Committee announced its agreement.[103] Aluminum bats used in the 1999 NCAA Championship must comply with the two physical characteristics: the diameter, and length to weight requirements.[104] Although the Executive Committee did not adopt the 93-mph exit speed restriction for 1999 post-season play, it did not table the issue. Because the 93-mph exit speed restriction was a rough estimate of the time a pitcher needs to react to a line drive, the NCAA believed further research was necessary before it could enforce an exit speed restric-

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95. *See id.*

96. *See id.*

97. *See id*

98. *See id.*

99. *See id.*

100. *See* Wallace I. Renfro, *NCAA Executive Committee Approves Baseball Bat Changes,* at http://www.ncaa.org/releases/divi/19998081201d1.htm (Aug. 12, 1998). For example, a 34-inch bat without its grip cannot weigh less than 31 ounces without its grip.

101. *See id.*

102. *See Cabinet Approves New Bat Proposal,* NCAA NEWS (Dec. 21, 1998) available at http://www.ncaa.org/news/19981221/active/3539n04.html.

103. *See* Wallace I. Renfro, *NCAA Executive Committee Creates Panel to Study Baseball Bat Issues* (Jan. 15, 1999) at http://www.ncaa.org/releases/divi/1999011502d1.htm.

104. *See id.*

tion.[105] Therefore, in March 1999, the NCAA named the NCAA Baseball Research Panel, a group of seven independent scientists and experts to study risk issues in college baseball.[106]

Aluminum bat manufacturers have much at stake in decisions regarding specifications and performance standards for bats used in NCAA-sanctioned baseball games.[107] The market for state-of-the-art aluminum bats is very profitable. Today, some of the more sophisticated aluminum bats retail for more than $150.[108] These stricter limits will also make it more difficult for manufacturers to devise the next generation of lighter and more powerful aluminum bats.[109] As a result, some aluminum bat manufacturers are concerned because a number of their existing aluminum bats are not in compliance with the new standards.[110]

V. RULE OF REASON ANALYSIS

A. *Anticompetitive Effect.*

Under rule of reason analysis, the plaintiff bears the initial burden of showing that an agreement has a substantial adverse effect on competition.[111] Easton, or any other manufacturer who chooses to challenge the new bat rule, must prove that the new rule has an anticompetitive effect. Easton, in its amended complaint, attempted to indirectly establish anticompetitive effect by demonstrating that the NCAA possesses market

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105. *See* Alexandra Witze, *Physically, a Bat's a Bat, But Scientists Search for Harder Data to Soften Aluminum Backlash*, DALLAS MORNING NEWS, May 26, 1999, at 1B.

106. *NCAA Appoints Gordon To Chair Panel On Safety Issues In Baseball*, NCAA NEWS (March 1, 1999) at http://www.ncaa.org/news/19990301/active/3605n06.html.

107. *See* Fatsis, *supra* note 16.

108. *See id.*

109. *See* Wharton, *supra* note 9.

110. *See id.*

111. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998).

power within a defined market.[112]

In antitrust law, market analysis illustrates how a regulation effects competition. In most rule of reason cases, the plaintiff engages in market analysis to prove that the restraint will likely have a substantial adverse effect on competition.[113] Most significantly in a market analysis, the absence of barriers to entry by new companies or expansion by existing companies can deprive a defendant of market power despite the fact that its market share is substantial.[114]

Market analysis begins with a definition of the relevant market.[115] Easton defines the relevant market as "the purchase of high performance bats for use by college baseball players."[116] Easton perceives the NCAA to have dominant and substantial market power because the NCAA represents the majority of college baseball teams and, therefore, represents teams whose players purchase the majority of bats in the relevant market.[117] Additionally, through NCAA rules and regulations, the NCAA is able to control the quality of bats sold in the relevant market.[118] Furthermore, Easton believes that the new NCAA specifications and performance standards discriminate against the manufacturers of high performance aluminum bats, because the new bat regulations mandate that all bats possess the exact characteristics of bats produced by Baum Research and Development Co., which already conform to the exact diameter, weight and exit velocity characteristics required by the new rule.[119] According to Easton, enforcement of the new NCAA specifications and performance standards will not only reduce the quality of baseball bats in the relevant market, it will also deprive college players of the benefits of

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112. *See* Amended Complaint For Damages And Preliminary Injunctive Relief at 8-9, Easton Sports, Inc. v. National Collegiate Athletic Ass'n (D. Kan. 1998) (No. 98-2351-KHV).

113. *See Antitrust Law Developments, supra* note 31, at 59.

114. *See Antitrust Law Developments, supra* note 31, at 62, n.319.

115. *See Antitrust Law Developments, supra* note 31, at 59.

116. Amended Complaint at 3, *Easton Sports*, (No. 98-2351-KHV).

117. *See id.* at 4.

118. *See id.*

119. *See id.* at 7. Baum Research and Development Co., Inc. manufactures a wooden veneer bat. According to Easton, Baum's bats do not have the same advantages of aluminum bats and, as a result, Baum has been unable to sell a significant number of bats to college teams, making it an "[in]effective competitor in the relevant market." *Id.* at 4.

quality competition.[120]

The NCAA disagreed with Easton's allegations. The NCAA's position was that the new bat standards do not have an adverse effect on competition in the amateur baseball bat market.[121] Although the NCAA's new bat standards and performance specifications may harm only high performance manufacturers, the NCAA's express purpose in adopting the regulations was not to discipline high performance aluminum bat manufacturers or to drive them out of competition.[122] Unlike Major League Baseball, the NCAA is not prohibiting the use of aluminum bats. Instead, the NCAA is changing the standards for aluminum bats so that they "perform more like wood bats."[123] The NCAA is merely trying to control certain performance parameters of bats used in college games; the new regulations will not limit or control who may make or sell the bats.[124]

A manufacturer's economic loss is insufficient to establish an unreasonable restraint, absent further proof that the rule will substantially impair competition.[125] The antitrust laws are designed to protect overall competition, not to protect particular competitors.[126] Injury to one manufacturer is insufficient to establish an antitrust violation.[127] Moreover, healthy competition may only exist in a relevant market when there are both winners and losers.[128] Therefore, even if Easton and other high-performance aluminum bat manufacturers lose sales during the 1999 season because schools refuse to purchase bats that may soon become obsolete, this economic injury does not constitute an unreasonable restraint

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120. *See id.* at 8.

121. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint at 30, Easton Sports, Inc. v. National Collegiate Athletic Ass'n, (D. Kan. 1998) (No. 98-2351-KHV).

122. *See id.* at 31. Instead, the NCAA's stated purpose is to "maintain the integrity and safety of college baseball by defining the conditions in which college baseball contests are played." *Id.*

123. Wallace I. Renfro, *NCAA Executive Committee Approves Baseball Bat Changes* at <http://www.ncaa.org/releases/divi/1998081201d1.htm> (Aug. 12, 1998).

124. *See* Memorandum of Law at 30, *Easton Sports*, (No. 98-2351-KHV).

125. *See Antitrust Law Developments*, *supra* note 31, at 63, n.326.

126. *See* Memorandum of Law at 17, *Easton Sports* (No. 98-2351-KHV). *See also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

127. *See* Memorandum of Law at 17, *Easton Sports* (No. 98-2351-KHV).

128. *See id.*

of trade.[129]

Furthermore, in a sports self-regulation context, the First Circuit previously upheld equipment limitations that are much more restrictive than the NCAA's new baseball bat regulations.[130] The "single tire" rule at issue in *M&H Tire Co. v. Hoosier Racing Tire Corp.*,[131] was equally controversial, yet, more restrictive than the bat regulations because the "single tire" rule specified a single manufacturer's tire within specified price range, and prevented drivers from using another brand.[132] Ultimately, the First Circuit upheld the "single tire" rule under rule of reason analysis because the decreased competition between manufacturers was not so severe to warrant a finding that it was illegal.[133] In a footnote the court suggested that "if football teams and owners 'combine' to change the rules of the game to eliminate expensive equipment and generally to simplify the sport, we cannot conceive of an antitrust violation simply because of the economic impact on suppliers."[134] Essentially, the NCAA is doing exactly what the First Circuit alludes to in its footnote.[135] The NCAA is changing the rules of the game to eliminate equipment that threatens both the integrity and safety of college baseball, and in response to the NCAA's actions, Easton is trying to establish an antitrust violation simply because of the economic impact on suppliers.[136] Easton fails to realize that the three new specifications allow college players to continue to select bats from a variety of aluminum bat manufacturers including Easton, so long as the bats comply with the new performance standards.[137] Unlike the "single tire" rule, the new bat regulations do not expressly specify a single manufacturer's bat. Inevitably, the new NCAA

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129. *See id.* at 8.

130. *See* M & H Tire Co. v. Hoosier Racing Tire Corp., 773 F.2d 973 (1st Cir. 1984), in which a rule, adopted by several auto racing tracks, that limited drivers to a single manufacturer's tire for an entire season was upheld under rule of reason analysis because it was adopted for reasonable purposes unrelated to an intent to exclude competitors.

131. 773 F.2d 973 (1st Cir. 1984).

132. *See id.* at 985.

133. *See id.* at 989.

134. *Id.* at 985 & n.8.

135. *See id.*

136. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint at 8, Easton Sports, Inc. v. Nat'l Collegiate Athletic Ass'n, (D. Kan. 1998) (No. 98-2351-KHV).

137. *See supra* text accompanying notes 77-83.

bat regulations may have an incidental anticompetitive effect on high tech aluminum bat manufacturers. However, an incidental anticompetitive effect on a manufacturer's business does not, in itself, render the restraint unreasonable under the rule of reason analysis.[138]

B. *Non-economic Pro-competitive Justifications*

Under rule of reason analysis, if the plaintiff meets its burden of showing that an agreement has a substantial adverse effect on competition, the burden shifts to the defendant to show pro-competitive virtues of the alleged wrongful conduct.[139] In the unlikely event that Easton, or any other high-performance aluminum bat manufacturer, could demonstrate that the bat regulations have a substantial adverse effect on competition,[140] the NCAA's new regulations will survive if the NCAA demonstrates the pro-competitive justifications for the rule.[141]

The Supreme Court has previously recognized the pro-competitive nature of many NCAA rules.[142] In *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma,*[143] the Court referred to rules that define the conditions of the contest and further stated that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore pro-competitive because they enhance public interest in intercollegiate athletics."[144] Since the new bat regulations simply define the conditions for bats used in NCAA sanctioned games, a reviewing court may find that the change in rule is presumptively pro-

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138. *See* Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 382 (D. Ariz. 1983) (stating "[t]he fact that the sanctions might have an incidental anticompetitive effect on coaches or athletes does not in itself render them unreasonable under the rule of reason .").

139. *See* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998).

140. *See supra* text section IV.

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

142. *See* Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 186 (3rd Cir. 1998); *see also* Nat'l Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984).

143. 468 U.S. 85 (1984).

144. 468 U.S. at 117.

competitive.[145] As noted above, the new baseball bat specifications are unique among NCAA regulations because the NCAA's stated purpose for adopting the three stricter limits for aluminum bats is to establish a better competitive balance between offense and defense and make the game safer for the college players.[146]

1. Better Competitive Balance

Better competitive balance, or more commonly referred to as "preserving the integrity of the game," is not a novel justification for regulations that are designed to limit the performance of athletic equipment.[147] In *Gunter Harz Sports Inc. v. United States Tennis Ass'n,*[148] the Eighth Circuit recognized that the United States Tennis Association's (USTA) purpose for adopting a rule that effectively prohibited the use of a certain manufacturer's racket in sanctioned tournaments was to maintain the essential character of the sport.[149] The Eighth Circuit affirmed the district court's application of a thorough rule of reason analysis, and further held that the USTA did not violate federal antitrust laws when the association decided to ban the use of double-strung tennis rackets in USTA sanctioned tournaments.[150] Similarly, in *Weight-Rite Golf Corp., Inc. v. United States Golf Ass'n,* a Florida District Court acknowledged that the United States Golf Association's (USGA) purpose for a rule that effectively banned the use of a manufacturer's golf shoe at major amateur and professional golf tournaments was to "preserve the traditions of the game, and to insure that a player's score is a product of his skill, rather

145. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint at 31, Easton Sports, Inc. v. National Collegiate Athletic Ass'n, (D. Kan. 1998) (No. 98-2351-KHV).

146. *See supra,* Section IIC; *see also* Wharton, *supra* note 9.

147. *See* Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 665 F.2d 222, 223 (8th Cir. 1981) (recognizing that a rule prohibiting the use of double string tennis rackets was designed to preserve the essential character of the game); *see also* Weight Rite Golf Corp. v. United States Golf Ass'n., 1990-2 Trade Cas. (CCH) ¶ 69,181 (M.D. Fla. Sept. 12, 1990) (recognizing that the purpose of a rule prohibiting the use of a particular shoe in tournament play was intended to preserve the traditions of the game and to ensure that a player's score is a product of his skill rather than his equipment).

148. 665 F.2d 222 (8th Cir. 1981).

149. *See id.* at 223.

150. *See id.*

than his equipment."[151] The district court applied a rule of reason analysis and ultimately dismissed the golf shoe manufacturer's motion for a preliminary injunction because the manufacturer did not establish that the USGA's regulation had substantially restrained the operations of a free market in the golf shoe industry.[152] The district court also acknowledged that evidence that a single manufacturer has been removed from the relevant product market, in and of itself, is insufficient to establish that the governing body violated federal antitrust laws.[153]

Of all the aluminum bat manufacturers, Easton, in particular refused to acknowledge that high performance aluminum bats are "harming the integrity of the game."[154] Easton claims that 66% of the coaches recently surveyed believe there is good balance between offense and defense in college baseball.[155] However, there is substantial evidence to the contrary. As noted above, high performance aluminum bats have changed the way the game is played.[156] Today, college baseball games are referred to as "home run derbies."[157] Dave Snow, head coach at Long Beach State, believes that "wanting to get more balance in the game is a legitimate thing."[158] Additionally, Dean Kreiner, head coach at the University of Central Michigan, feels that modern aluminum bats "[have] destroyed the game of baseball."[159] Evidently, the NCAA Baseball Rules Committee and NCAA Executive Committee acted on similar concerns when the committees respectively proposed and adopted the new bat specifications.[160] The new baseball bat standards approved in August

151. 1990-2 Trade Cas. (CCH) ¶ 69,181 (M.D. Fla. Sept. 12, 1990). The manufacturer's golf shoe apparently assisted golfers in distributing their weight so as to better resist the tendency to push away from the ball while swinging the golf club.

152. *See id.*

153. *See id.*; *see also* L.A. Draper & Sons Wheelabrator-Frye, Inc., 735 F.2d 414, 421 (11th Cir. 1984).

154. Amended Complaint for Damages and Preliminary Injunctive Relief at 4, Easton Sports, Inc. v. National Collegiate Athletic Ass'n, (D. Kan. 1998) (No. 98-2351-KHV).

155. *See id.* at 5.

156. *See supra* text accompanying notes 63-75.

157. Eubanks, *supra* note 3.

158. *Id.* (quoting Dave Snow, baseball coach at Long Beach State).

159. Fatsis *supra,* note 16 (quoting Dean Kreiner, head coach at Central Michigan University).

160. *See* Wallace I. Renfro, *NCAA Executive Committee Approves Baseball Bat Changes* at <http:// www.ncaa. org/ releases/ divi/ 19998081201d1.htm> (Aug. 12, 1998).

1998 were not written in stone. The naming of a special panel of independent scientists and experts to study bat specifications and their impact on the game demonstrates that the NCAA was committed to making an informed decision about integrity issues in college baseball.[161] The panel was required to assess the integrity of the game in terms of balance between offense and defense.[162] Therefore, based on the NCAA's actions subsequent to August 1998, the NCAA's concern for maintaining the competitive balance between offense and defense is neither capricious nor unfounded.

2. Safety

Safety is the second of the NCAA's two non-economic justifications for the new bat specifications and performance standards.[163] It is well established that rules adopted by many sports organizations are designed to protect the athlete's health and safety, and such non-economic factors are relevant in any antitrust analysis.[164] The Ninth Circuit held in *Neeld v. National Hockey League*[165] that the direct effect and primary purpose of a hockey league's by-law which prevented a one-eyed hockey player from playing for a member club, was not anticompetitive but rather an interest in player safety.[166] The Ninth Circuit also recognized that any anticompetitive effect attributable to the challenged by-law was *de minimis*[167] and incidental to the primary purpose of promoting the safety of both the one-eyed player and all players who played with or against him.[168] As in *Neeld*, the NCAA's motivation for changing the specifications and performance standards for baseball bats is safety, and any anti-

161. *See* Wallace I. Renfro, *NCAA Baseball Research Panel Named* at <http://www.ncaa.org/releases/makepage.cgi/research/1999021701re.htm> (Feb. 17, 1999).

162. *See id.*

163. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint at 31, Easton Sports, Inc. v. Nat'l Collegiate Athletic Ass'n, (D. Kan. 1998) (No. 98-2351-KHV).

164. Wendy T. Kirby and T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Non-economic Values,* 61 IND. L.J. 31, 32 (1985).

165. 594 F.2d 1297 (9th Cir. 1979).

166. *See id* at 1300.

167. *See id*; *see also* Gough v. Rossmoor Corp., 585 F.2d 381, 386, 389 (9th Cir. 1978).

168. *See Neeld*, 594 F.2d at 1300.

competive effect on high performance aluminum bat manufacturers is incidental to the NCAA's primary purpose of making the game safer for all participants.[169]

Although the NCAA data shows that college baseball has the lowest injury rate of all sports surveyed,[170] there is a perception that the injury rate is increasing.[171] As a follow-up to the Executive Committee's August 1998 decision to adopt the three changes, the NCAA released a memorandum to its members encouraging them to "take all necessary steps to enhance the safety of your collegiate baseball players during the 1998-1999 season."[172]

However, Easton believes that there is no safety issue and that the NCAA used safety in order to rally support for the new standards.[173] Despite Easton's position, preliminary studies show that a pitcher caught off-balance after throwing a pitch, does not have time to react to a ball hit directly at him with an aluminum bat.[174] Coaches agree that high performance aluminum bats jeopardize player safety. Jerry Kendall, head coach at the University of Arizona, Tucson, stated that "injuries are more likely with hot aluminum bats because the ball just comes off the bat faster."[175] Kendall, although under contract with Easton, believes it is time to "go back to the wooden bat."[176] Steve Heon, assistant baseball coach at the University of Virginia, feels that the injury concerns are legitimate.[177] Additionally, Bill Thurston, head coach at Amherst College

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169. *See id.*

170. NCAA NEWS, *Baseball, softball injury rates still among NCAA's lowest* (Sept. 1, 1997) at <http://www.ncaa.org/news/19970901/active/3431no9.html>.

171. *See* Amended Complaint for Damages and Preliminary Injunctive Relief at 5, Easton Sports, Inc. v. National Collegiate Athletic Ass'n, (D. Kan.1998) (No. 98-2351-KHV).

172. *See* Stephen R. Hagwell, *Bat Issue Goes Extra Innings in Division II and III,* NCAA NEWS (Feb. 1, 1999) at http:// www. ncaa. org /news/19990201/active/3603n01.html.

173. Dylan R. Tomlinson, *Colleges Playing "A Screwey Baseball Season,"* DENVER POST, May 9, 1999, at C15.

174. *See* Craig Horst, *NCAA Adopts Some Restrictions on Aluminum Bats for 1999 Championships* at http/ www.fansonly.com/ channels/ news/ sports/m-basebol/stories/011699aaa.html (Jan. 15, 1999)

175. Fatsis, *supra* note 16.

176. *Id.*

177. Telephone Interview with Steve Heon, Assistant Baseball Coach, University of Virginia (January 22, 1999).

and editor of the NCAA rules committee, relies on tests sponsored by the NCAA and National Trainers Association that demonstrate how a ball hit with an aluminum bat can travel up to 115 MPH.[178] An exit speed velocity of 115 MPH only allows a pitcher a mere three-tenths of a second to react, and is 15-20 MPH faster than a ball hit off a wood bat.[179]

To illustrate this risk, consider the seventeen-year-old Australian pitcher playing in the Australian Baseball League who now has eleven metal plates and twenty-two screws in his head because he was hit by a ball with an exit speed velocity of 100 MPH. In Japan, two batting-practice pitchers were killed by balls hit off of Easton Red Line Bats. Japan is now requiring high school pitchers to wear helmets as a result of a very serious injury in the 1998 high-school championship game. Unquestionably, when safety is an issue helmets are always an option. Baseball, unlike football, is not a contact sport. Protective equipment combined with high performance aluminum bats is inconsistent with the nature of the sport. Even though aluminum bat manufacturers do not support strict performance standards, the NCAA believes the new rules are a step in the right direction. The NCAA does not want the college game to get to a point where exit speeds are so high that players will have no choice other than to wear protective gear to field their positions.[180]

Due to a number of unanswered questions regarding liability and player safety, the New Jersey Athletic Conference, a Division III conference, banned the use of aluminum bats before the 1998-1999 season began.[181] Norm Shonig, head coach at Montclair State University, understood the NCAA's August 1998 memorandum encouraging member institutions "to take all necessary steps" to enhance player safety to mean that coaches and universities were liable for any future injuries caused by aluminum bats.[182] Coach Shonig believes that player safety is most important, and he doubts his team will go back to using aluminum bats. Although Coach Shonig acknowledges that wood bats may also cause injuries, he feels the ban is in the best interest of the student-athletes and allows his team to play the game safely.

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178. *See* Tomlinson, *supra* note 173.

179. *See id.*

180. *See* Andy Bernstein, *Vendors: NCAA Bat Proposals Straight Out of Left Field*, Vol. 29 SPORTING GOODS BUS., Sept. 1996, at 24.

181. *See Goin Deep Report* (Fox News Sports Channel broadcast, Mar. 24, 1999).

182. *Id.*

The Executive Committee also responded to the perceived threat to player safety when it agreed to adopt the two physical characteristics[183] for bats used in the 1999 NCAA Championships. Yet, the Executive Committee's decision was contingent on the NCAA obtaining indemnification from aluminum bat manufacturers.[184] In March 1999, Easton agreed to indemnify NCAA members and conferences against litigation involving player injuries and Easton metal bats.[185] By requiring indemnification, the NCAA forced the aluminum bat manufacturers to share in the risk of injury.[186]

As mentioned above, the NCAA's stated objective to maintain the integrity of college baseball is a legitimate goal. Comparatively, college baseball coaches' outspoken concern for player safety is a compelling justification for NCAA action. Because non-economic factors are relevant in an antitrust analysis, the aluminum bats' perceived threat to player safety will be weighed heavily in a reviewing court's antitrust analysis.

3. Restraint is Reasonably Necessary to Achieve Non-Economic Objectives

Rule of reason analysis also requires the plaintiff to prove that the challenged restraint is not reasonably necessary to achieve the procompetitive objective.[187] Because the NCAA appears to have stated legitimate objectives in support of its rule, the bat manufacturers have the burden of showing that the new bat standards are unreasonable or more restrictive than necessary.

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183. *See supra* text accompanying notes 80-83.

184. *See* Wallace I. Renfro, *NCAA Championships Bodies Divided on Baseball Bat Standards* at http:// www.ncaa.org/releases/divi/1998121501d1.htm (Dec. 15, 1998).

185. NCAA NEWS, *NCAA, Easton Reach Indemnification Pact* (March 29, 1999) at <http://www.ncaa.org/news/19990329/active/3607n02.html>.

186. Telephone Interview with Jean Lenti Ponsetto, Chair of the NCAA Division I Championships/Competition Cabinet and Senior Associate Athletics Director at DePaul University, (March 2, 1999).

187. *See* Law v. National Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998); *see also* Clorox Co. v. Sterling Winthrop Inc., 117 F.3d 50, 56 (2nd Cir. 1997). *See also* Harriston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3rd Cir. 1996); United States v. Brown Univ., 5 F.3d 658, 669 (3rd Cir. 1993); *Antitrust Law Developments,* 1 A.B.A. SEC. ANTITRUST L. 53 (1997).

The new restrictions for aluminum bats are not a knee-jerk reaction to the record number of home-runs scored in the 1998 NCAA Championship Game.[188] Prior to August 1998, the NCAA expressed concern about the safety and integrity issues surrounding the use of aluminum bats in college games. In 1994, the NCAA and the manufacturers entered into a gentlemen's agreement whereby the manufacturers agreed from that time forward not to make any bats that perform faster than those made for the 1994 season.[189] Between 1995 and 1997 the NCAA again voiced its concern that bat performance was increasing; yet the manufacturers denied these allegations.[190] In the fall of 1997, the NCAA learned that the "Brandt test", which the manufacturers were allegedly using to measure metal bat performance, was not accurately measuring bat speed.[191] Consequently, the NCAA hired Trey Crisco, the cofounder of the National Institute of Sport Science and Safety.[192]

The NCAA asked Crisco to attempt to more accurately test metal bats, but the manufacturers were reluctant to supply him with information about their bat testing. On May 29, 1998, the NCAA announced it would join other governing bodies, in conjunction with the Sporting Goods Manufacturers Association, in an extensive research program to measure bat and ball performance and select a method for testing equipment.[193] Contemporaneously, the NCAA also announced that it hoped to have the benefit of further research before it decided to take further action and adopt new bat standards. At that time, the NCAA was deliberately positioning itself to legislate new standards. Bill Rowe, Chairman of the Baseball Rules Committee, cautioned the manufacturers of the NCAA's intentions when he expressly stated that "we reserve the right to intercede whenever we believe" circumstances dictate legislating new

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188. *See* Eubanks, *supra* note 3.

189. *See* Hagwell, *supra* note 172. At that time, manufacturers also agreed to use the "Brandt test," developed for measuring softball batted balls, to measure metal-bat performance.

190. *See id.*

191. The "Brandt test" was originally developed for measuring the speed of softball batted balls. Brandt, himself, informed the NCAA that the test does not accurately measure hardball bat speed.

192. *See* Ted Breidenthal, *NCAA Joins SGMA Baseball Testing Procedure,* at http://www.ncaa.org/releases/research/ 1998052901re.htm (May 29, 1998). Trey Crisco is the director of the Bioengineering Laboratory at Brown University-Rhode Island Hospital.

193. *See id.*

definitions of allowable bat performance.[194]

Easton believes the standards adopted in August 1998 were recommended and adopted absent the benefit of further research, which the NCAA admitted was necessary.[195] Easton strongly objected to the new bat standards and immediately hit the NCAA with a line-drive, a $267 million lawsuit. Easton responded before the NCAA reached an agreement on the effective date. On August 12, 1998, the Executive Committee announced the three new bat standards and moved the effective date from January 1999 to August 1, 1999. [196] Aware of the bat manufacturers compliance concerns and the need for more accurate testing, the Executive Committee delayed the effective date to ensure that the new restrictions affected the 2000 baseball season rather than the 1999 season.[197]

Meanwhile, in an attempt to make aluminum bats perform like wood bats, the Executive Committee agreed in January 1999, to adopt the bat diameter and length/weight difference restrictions for bats used in the 1999 NCAA Championships. The Executive Committee deliberately did not adopt the controversial exit speed restriction. The NCAA was concerned whether a sufficient number of bats meeting the 93 MPH exit-speed specification would be available for the post season.[198] Although the interim rule only governed bats used in the post season, many college teams played the 1999 regular season with the restricted aluminum bats.[199]

However, where there is a will, there is a way. According to Jim McKay, a former Louisville Slugger employee, the interim standards are not enough.[200] Recently, McKay studied one manufacturer's bat and found that the manufacturer was able to meet the interim standards as well as maintain the speed of the bat. The manufacturer manipulated the

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194. Wallace I. Renfro, *NCAA Executive Committee Approves Baseball Bat Changes* at <http://www.ncaa. org/releases/divi/1998081201d1.htm> (Aug. 12, 1998).

195. *See* Amended Complaint for Damages and Preliminary Injunctive Relief at 6, Easton Sports, Inc. v. Nat'l Collegiate Athletic Ass'n, (D. Kan. 1998) (No. 98-2351-KHV).

196. *See* Renfro, *supra* note 194.

197. *See* Eubanks, *supra* note 3.

198. *See* Wallace I. Renfro, *NCAA Championships Bodies Divided On Baseball Bat Standards at* http://www.ncaa.org/releases/divi/1998121501d1.htm (last visited Dec. 15, 1998).

199. *See* Tim Korte, *NCAA Recommends Aluminum Bat Changes* http://www.ncaabaseball.com/1999/news/bats612.html (last visited April 6, 2000).

200. *See supra* note 181.

bat so that all the mandated weight was in the butt of the bat, making the bat easier to swing. The manufacturer added steel ball bearings in the knob of the bat and covered them up with urethane, in order to meet the three unit length/weight ratio. By adding the weight to the butt of the bat, the manufacturer effectively moved the bat's center of gravity back and made the bat "far easier to swing."[201] McKay believes this manufacturer's bat will probably hit faster than bats used in the 1998 College World Series.

As most college teams played with the restricted aluminum bats, the NCAA Baseball Research Panel searched for a permanent solution to the exit-speed issue. The panel met on three occasions and finally announced its recommendations at a June 12 news conference at the NCAA College World Series.[202] The panel recommended continued implementation of the interim standards for nonwood bats, as well as changes to the batted-ball exit velocity standard. The panel wanted the 93 MPH exit speed to be adjusted for nonwood bats to one that simulated the "highest average exit speed using Major League Baseball quality, 34-inch, solid wood bats."[203] The panel also recommended delaying the effective date of the three wood-like standards until January 1, 2000 so further testing could be performed.[204]

The panel agreed to set a limit on the risk of injury and recommended "that a standard tied to the performance of wooden bats will result in risk levels acceptable to the sport."[205] The panel also concluded that standards "that attempt to keep the performance level of all bats as similar to wood as possible would best preserve the integrity of the game."[206]

Finally, in late September 1999, the Executive Committee reaffirmed the diameter and length/weight restrictions and approved a batted-ball

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201 *Id.*

202. *See Panel seeks wood-based bat standard,* (Jun. 21, 1999), at http://www.ncaa.org/news/1990621/active/3613n02.html .

203. *Id.*

204. Tim Korte, *NCAA Recommends Aluminum Bat Changes,* at http://www.ncaabaseball.com/1999/news/bats612.html (last visited Oct. 22, 2000).

205. "Panel seeks wood-based bat standard," quoting Milton A. Gordon, Chair of the research panel and president of California State University, Fullerton, at http://www.ncaa.org/news/19990621/active/3613n02.html (last visited Oct. 22, 2000).

206. *Id.*

exit speed standard of less than 97 MPH.[207] The Executive Committee also approved January 1, 2000, "as the implementation date for the standard and declared a three-year moratorium on changes."[208] The purpose of the moratorium is to give the manufacturers and players time to adjust to the new standards and give the panel time to conduct further research.[209] The Executive Committee also approved a protocol developed by the panel for testing and certification of bats.[210]

Before the NCAA Executive Committee adopted the new performance standards in August 1998, Jim Easton, chairman of Easton Sports, Inc., explained that any changes in the bat-making process takes about one year.[211] From a mechanical perspective, the new performance standards are not substantial deviations from the existing standards.[212] The new limitation on bat diameter only calls for a reduction of an inch.[213] Because the aluminum process allows bat manufacturers to design almost any kind of bat, the new standards are reasonable.[214] Dave Ottman, Vice President for Operations and Chief Designer for Ten Pro, makers of the aluminum Bombat, stated that manufacturers "can also make an aluminum bat that performs almost exactly like a wood bat."[215] The resulting difference between the authentic wood bat and the wood-like aluminum bat is the mere fact that the two bats will break differently.[216]

It is not uncommon for an industry to resist change. Change, however, is inevitable. Unquestionably, the game of college baseball has changed significantly since aluminum bats were first introduced in 1974. The rules and regulations of the game have not kept pace with modern technology. Scores are no longer indicative of a traditional baseball

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207. *NCAA Executive Committee Approves Bat Standards*, NCAA News Release, www.ncaa.org/releases/miscellaneous/1999092801ms.html.

208. *Id.*

209. *See id.*, quoting Charles Wethington, president of the University of Kentucky and chair of the NCAA Executive Committee.

210. *See id.*

211. *See* Ed Guzman, *New Rules for Metal Bats Alarm a Maker,* N.Y. TIMES, Aug. 8, 1998, at C3.

212. *See supra* text accompanying notes 80-82.

213. *See supra* text accompanying notes 80 & 81.

214. *See* Ashley *supra* note 78, at 108.

215. *Id.*

216. *See id.*

game, and the increased likelihood for injury is a legitimate concern.[217] The new bat regulations and performance standards adopted by the NCAA are not unduly restrictive. The restrictions are both fair and reasonable in light of the safety and integrity issues that are implicated.

VI. CONCLUSION

The NCAA is undoubtedly a unique entity. Although the NCAA is not involved in manufacturing and selling athletic equipment, and NCAA rules only govern college sports, NCAA activities can have a significant impact in the marketplace.[218] The NCAA is a formidable opponent to Easton or any other bat manufacturer who chooses to step up to the plate and challenges the NCAA's new baseball bat regulations.

The restriction's potential incidental anticompetitive effect on certain manufacturers does not, in itself, render the performance standards unreasonable under rule of reason analysis.[219] The NCAA has offered legitimate non-economic pro-competitive justifications for the stricter limits, and there is sufficient evidence showing that the regulations are reasonably related to the NCAA's objectives.

Throughout the past three decades, technological growth and development has had a direct impact on the sports equipment industry. Manufacturers vigorously compete against one another to devise the next great advance. Undoubtedly, this trend will continue into the millennium, as manufacturers continue to use materials such as graphite, titanium, and Kevlar, among others, in the manufacture and development of athletic equipment. Sports equipment will become more high-tech, and will inevitably change the nature of the game. Strict NCAA regulations limiting athletic equipment have the potential to stifle innovation.[220] Manufacturers will continue to challenge the NCAA to determine who will "control the limits of technology"[221] in a multimillion-dollar industry where the NCAA does not have an economic stake. The present suit against the NCAA should be illustrative of the standard of review to be applied in future antitrust challenges that involve restrictions on high-tech athletic equipment. Courts will have to weigh the NCAA's legitimate interest in

217. *See* Fatsis, *supra* note 16; *see also supra* section V.B.

218. *See supra* text accompanying note 21.

219. *See supra* section V.A.

220. *See* Fatsis, *supra* note 16 at 18.

221. *Id.*

maintaining integrity and safety in college sports against any incidental anticompetitive effect on equipment manufacturers. Furthermore, courts must continue to recognize that self-governing athletic associations like the NCAA must be given sufficient latitude to carry out their duty to preserve the integrity and safety of intercollegiate athletics.[222]

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222. *See* Mem. of Law in Supp. of Def.'s Mot. to Dismiss the Compl. at 8 & n.6, Easton Sports, Inc. v. Nat'l Collegiate Athletic Ass'n, (D. Kan. 1998) (No. 98-2351-KHV).